

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 174 OF 2005

1. Shri Santosh Raghu Raikar
son of Raghu Surya Raikar
aged 34 yrs, businessman,
resident of House No.240/D
Ghantamorod, Aquem Baixo
Navelim, Salcete-Goa.

2. Shri Kisan Raghu Raikar
son of Roghu Surya Raikar
aged 30 yrs, businessman,
resident of House No.240/D
Ghantamorod, Aquem Baixo
Navelim, Salcete-Goa.

**.... Appellants
Original Plaintiffs**

Versus

1. Smt. Sitabai Ramchandra Azgaonkar
widow of Ramchandra V. Azgaonkar
of major age,
resident of House No.234
Ghantamorod, Aquem Baixo
Navelim, Salcete-Goa.

2. Shri. Anant Ramchandra Azgaonkar
widow of Ramchandra V. Azgaonkar
of major age,
resident of House No.234
Ghantamorod, Aquem Baixo
Navelim, Salcete-Goa.

3. Kum. Savita Ramchandra Azgaonkar
widow of Ramchandra V. Azgaonkar
of major age,
resident of House No.234
Ghantamorod, Aquem Baixo
Navelim, Salcete-Goa.

.... Respondents
Original Defendants

Mr. Sudesh Usgaonkar with Ms. Rosette Pereira, Advocates for the Appellants.

Mr. Parag Rao, Advocate for the Respondents.

Coram :- BHARATI H. DANGRE, J.

Reserved on: 11.02.2021

Pronounced on: 26.02.2021

JUDGMENT:

1. The discord between the parties pertain to an access road from the property of the appellants, and an attempt was made to resolve the said discord, when the appellant on instructions submitted that the appellants are not averse to providing access of 1.5meter abutting the compound wall. The respondent, who has a decree in his favour claimed his entitlement for 2mts, so as to enable the vehicles to pass. Accepting the stand of the appellant to be reasonable, the parties and the Advocates were directed to hold a joint meeting for working out the modalities. When the matter is

listed before me after a lapse of more than 2 years, once again an attempt to reconcile is made but when the parties could not have consensus on the width of the access road to be made available, they chose to argue the Second Appeal on merits.

2. The Second Appeal came to be admitted on 4 substantial questions of law to the following effect:

- a) *Whether the finding recorded by the Appellate Court that the suit access was used by the Respondents/Ori. plaintiffs for twenty three years is perverse ?*
- b) *Whether the Courts below ignored the material requirement to establish the right of way by way of easement was that the use of right of way must be peaceably and openly enjoyed as an easement and as of right without interruption for twenty years and proving mere existence of way was not at all sufficient to establish the right in terms of Section 15 of the Indian Easements Act, 1882 ?*
- c) *Whether in the light of facts as pleaded in the plaint, in a suit which is instituted on 24/09/1997, the required period of user of twenty years was not complete from 11/11/1978, the date of coming into force of the Indian Easement Act in the Union territory of Goa, Daman and Diu and therefore the Respondents suit could not at all have been decreed holding that the right of way as an easement is established ?*
- d) *Whether the Appellate Court was right in re-opening the issue no.1 which was answered against the Respondents by the Trial Court holding that the Respondents have failed to establish the continuous*

use of the suit access for twenty years, when the Respondents had not challenged the same either by way of appeal or by filing cross-objections to the decree, holding that issue no.1 is wide open before the Appellate Court for re-hearing ?

3. A brief plunge in the backdrop would be necessary before deliberating on the aforesaid question of law.

4. The defendants in this Appeal are the original plaintiffs who instituted the suit for declaration and permanent injunction, thereby restraining the defendants from interfering with the suit access or by closing the suit access by construction of a building or by any other means or causing obstruction to the suit access available to the plaintiffs or their family members in any manner. Mandatory injunction was sought to close the opening created by the appellants on the southern side of the compound wall towards the western end and to demolish the suit construction/building restricting the suit access. With the aforesaid relief the suit was instituted on 24.09.1997. An alternative relief was claimed on 16.02.2000 and the plaint came to be amended in light of the order passed on temporary injunction application on 08.01.1998 and the alternative relief prayed was to the effect that the defendants be restrained by way of permanent injunction from interfering with the

access of 2 mts width kept on the extreme western side of the plot no.1 and survey no.17/6 belonging to the appellants from Margao-Quepem road in the South-North directions to the plot of the plaintiffs bearing Survey No.17/3 in terms of the Order passed on 08.01.1998. In the suit the plaintiffs claim that they are residents of a house constructed on plot surveyed as Survey No.17/3 of Aquem. A sale deed dated 27.02.1973 registered before the Sub-Registrar of Salcete is pleaded to be the origin of title of the plaintiffs. The claim of the plaintiffs is that the said suit property is landlocked and the only access available to the main road is through the plot surveyed under Survey No.17/6 in North-South direction and the plaintiff's property is located on the southern side of the said plot. It is pleaded that access is about 2 mts in width and 32mts in length and is a clear beaten track. The plaintiffs plead that they are enjoying the suit access for over 23 years and prior to them it was enjoyed by their vendors and thus they have the easementary right over the suit access which has been crystallized in their favour by way of prescription. It is also averred that the plaintiffs are enjoying the suit access peacefully and continuously and without any obstruction for last 23 years. The plaintiffs also claim a right of preemption to purchase the said plots wherein the suit access lies. The cause of action arose when the defendants started filling work and making markings on the plot in the month of August 1997 for the purpose

of laying foundation on the suit access. When the defendants started filling RCC to the standing steel bars to raise RCC pillars apprehending that the suit access of the plaintiffs could be lost, the suit came to be filed.

The defendants denied the claim and pleaded about an access being available through the property under Survey No.17/4 on the eastern side which was claimed to have been connected to the access road to Fuslabhat and passing around the southern boundary of survey No.17/4. In the written statement, the defendants specifically plead that since occupants of Survey No.17/4 were creating impediment in use of the said access, he had opened up an access of 1mt by keeping an opening in the newly constructed southern side boundary wall. On the plaintiff's prayer for allowing the said access of 1mt., the defendants showed reluctance to avail the said access since it was almost in the centre of the 2 plots of the defendants. It was further settled that the defendants would allow the plaintiffs to pass through a strip of 1 mt alongside the westernmost boundary of Survey No.17/6 and the plaintiffs would shift existing opening of 1mt to the southern side of the wall and make an opening there. Compensation to be paid by the plaintiffs for 1mt use of access was settled at ₹5,000/- per year with an understanding that they would not park any vehicle or store any substance in the said pathway. In view of this adjustment of making

available the strip on the extreme western side of the plot of Survey No.17/6 and since the defendants did not propose to disturb the same till the pendency of the suit an application for temporary injunction came to be decided by a reasoned order on 08.01.1998. The order recording the statement contained in the written statement and taking note of the fact that the plaintiffs are using the property of the defendants but whether it is 2mt road or 1 mt road at the extreme end of the western side, it would be determined at an appropriate stage, the application for temporary injunction was granted.

5. In view of the undertaking given by the appellants in paragraph no.22 of the written statement that the 1 mt strip on the extreme western side is been used by the plaintiff and since it was the contention of the plaintiffs that there is more than 2mt setback towards western side of the plot of survey No.17/6, recording that no prejudice would be caused to either side if 2 mt strip of access is made available on the western portion of the plot till disposal of the suit, the injunction was granted. This however was made subject to the plaintiffs succeeding in proving the suit access. The said aspect was accorded due significance by the Trial Court when it decided the suit. While dealing with the issue framed during the course of trial, whether the plaintiffs prove that they are residing in the

residential house since 1973, on evaluation and appreciation of the evidence brought before it, the said issue was answered in the negative. As regards the point where the plaintiffs prove their access to the main road, i.e. PWD road is through the plot of the defendant about 2 mt in width and 32 mts in length, the issue has been answered partly in the affirmative since it was coupled with the issue as to whether the said suit access was being availed for last 23 years. The existence of the suit access for the plaintiffs through survey No.17/6 was accepted by recording the findings of fact. The third issue determined by the Trial Court was whether the plaintiffs prove that the defendants demolished the southern side compound wall and dug on the suit access. This issue has been answered in favour of the plaintiffs alongwith the issue whether the plaintiffs had proved that the defendants had created an opening on the southern side of the boundary wall towards its western end and created a block on suit access.

6. While determining the issues framed, the first fora, i.e. Civil Judge Senior Division recorded that the construction of the defendants on the suit access is complete in all respect and in terms of the order passed on 08.01.1998 on the miscellaneous application, the defendants were restrained from obstructing the plaintiffs from

making use of the access along the western boundary of plot no.1 of Survey No.17/6, which was a strip of 2mts running in North-South direction from the suit property upto to the main road. Since there was no restrain order on construction being undertaken by the defendants on the suit access, a clear finding is returned to the effect that the defendants evidence establish earlier existence of suit access and the present reservation of an access on the western side of the property. As a result, the suit was absolutely decreed in terms of alternative prayer thereby restraining the defendants from interfering with the access of 2mt width kept on the extreme western side in plot no.1 in Survey No.17/6 of defendants property.

6. On an appeal being carried by the appellant (the original defendant) in the Sessions Court, the appeal was dismissed by upholding the judgment and order passed by the Civil Judge Senior Division. While appreciating the findings rendered by the lower court on whether the plaintiffs have proved that they have been residing in Survey No.17/3 since 1973 and whether they have been enjoying the suit access for over 20 years as an easementary right, the issue was answered in the affirmative. The finding of the Appellate court on the said issue resulted in reversing of the finding recorded by the first court. Relying upon the principle that if the

appraisal of the evidence by the Trial Court suffer from material irregularity or is based on inadmissible evidence or on presumptions and surmises, the appellate court is entitled to interfere with the finding of facts, in absence of the respondents filing any cross objection or an appeal against finding of the Civil Judge Senior Division, considering that the issue is open in an appeal filed by the appellant the same was dismissed.

7. On appreciation and evaluation of the evidence that the sale deed recorded that the vendors had transferred absolutely to the purchaser, the property, a dwelling house and since the vendors undertook to vacate the dwelling house on or before 30.09.1973, as recorded in the sale deed, to which the plaintiffs track their title, the appellate court recorded that from the date of sale deed, i.e. 27.02.1973 the plaintiffs had become absolute owners in lawful possession of the property and house. On appreciation of the evidence of the PW-1 and relying upon the declaration receipts dated 02.03.1979 under Exhibit PW-1/B by which the landlord acknowledged that the purchaser had already paid an amount of ₹2000/- to him in full and final settlement, and since this was not indicative that the amounts was paid only in 1979 and not in 1973 and on evaluating the evidence of PW1 that the receipt was

obtained subsequently for enabling the plaintiffs to obtain loan for their laundry, which has not been challenged, the findings rendered by the Civil Judge Senior Division that since the receipt was obtained in 1979 the vendors had continued in possession of the house till 1979, came to be reversed. The tax receipts which have been placed on record by the plaintiffs reflecting the house tax being paid by Ramchandra Azgaonkar. i.e. the plaintiff for the year 1974-75 and arrears from 1972-73 established that the vendors had lost the possession of the house and the plaintiffs were put in possession and that is why they had discharged the tax liability. The first appellate court on re-appreciation and re-evaluation of the evidence and which was legally permissible for it, reversed the finding of the first court on the said point. While doing so it based its findings on the evidence of plaintiffs witnesses and the defence witnesses and the plaintiffs were held to be residing in the suit property since 1973.

8. As regards the issue of suit access being availed by the plaintiffs from Survey No.17/6, since the question was not addressed to by the Civil Judge from the point of view of law on the subject of easement and the plaintiff was claiming easementary right, recording that the plaint clearly spelt out easementary right of prescription for over 20 years and Survey No.17/3 is a dominant heritage and Survey No.17/6 is servient heritage over which the

easementary right is claimed, the appellate court on appreciation of the evidence of PW-1, PW-2 and PW-3 concluded that the plaintiffs have established that they have been enjoying easementary right of the suit access through Survey No.17/6 from the centre of the opening in the compound wall leading to the main road. This was also the findings of the first court but since the first court held that the plaintiffs did not prove that they were residing in the Survey No.17/3 since the last 23 years, the continuous use of the said access for last 23 years was negated. By taking into account the subsequent events that the defendants by this time had constructed a building where the suit access was earlier existing, and since the Civil Judge had acted equitably by ensuring that the plaintiffs continue enjoying an access through Survey No.17/6 towards extreme western boundary of Survey No.17/6, no ground for interference was made out and therefore the appeal was dismissed.

9. Since an attempt was made by the parties to reconcile the issue I had asked the parties to make their submissions about the existing factual scenario and both the learned counsel had placed on record the photographs reflecting the clear cut position of the way of access. On the western side of the house of the defendants, there lies setback area which is demarcated by a retention wall. The said

access presently existing is the one which is granted in view of the undertaking given by the defendants in his written statement before the first fora opposing the relief in the suit, to the effect that they are making available the strip of 1mt on the extreme western side of the plot. The said concession formed the basis of the order passed on the temporary injunction application and accepting the concession of the defendants to let the plaintiffs avail the strip of 1mt on the extreme side of the plot and the finding rendered by the court that if 2mts strip of access is made available since more than 2mts of land is available beyond the extreme western line of the boundary, the 2mt strip of access was permitted to be availed till disposal of the suit. This order passed on 08.01.1998 merged in the judgment and order dated 05.10.2006. The suit of the plaintiffs was partly decreed in terms of alternate prayer (b) and the defendants were restrained from interfering with the access of 2mts width on the extreme western side in plot no.1 of Survey No.17/6. The appellate court confirmed the said judgment and order and it is thus clear that from 08.10.1998 the plaintiffs are availing the said access of 2mts in the setback area belonging to the defendants and it is high time that the dispute be buried forever.

10. The submission of the learned counsel Mr. Usgaonkar

while questioning the appellate order is that the interim relief granted by the first court has not yet attained finality and though it has subsumed into a decree, it is still an interim order and in the present proceedings which is a continuation of the original proceedings, it cannot be taken as a conclusive verdict. Mr. Usgaonkar urged that while granting the said relief, the court had kept the issue about the way of access being claimed by way of right, they would be entitled to acquire the said right of way on the western side which was reserved while granting injunction.

The scope for interference in findings of fact at the stage of hearing of the second appeal is very limited. It is settled position of law that while hearing the appeal under Section 100 of the Code of Civil Procedure, High Court has no jurisdiction to entertain the same on findings of fact even if the findings are erroneous. The scope for interference is restricted when the finding is either perverse or based on no evidence and unless there exist a sufficient and cogent reason, the findings of fact arrived at by the Court below are binding on High Court and the High Court would refuse to exercise its appellate powers. The first court has comprehensively re-evaluated and examined the entire evidence and while considering the Appeal from the decree passed by the court below, the first appellate court has reversed the finding of the Trial Court on the point of easementary right available to the plaintiffs and the

appellate court had the power to pass or make such further or rather other decree or order and this power is permitted to be exercised by the Court notwithstanding that appeal is only to a part of the decree and it may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The submissions of Mr. Usgaonkar that the appellate court had rendered a finding in favour of the plaintiffs even though the refusal of the original court to recognise his easementary right was not challenged by him and the situation is that taking advantage of the appeal filed by the defendants, the easementary right of the plaintiffs received a recognition. His submission is if the plaintiff was aggrieved, he ought to have filed a cross appeal.

Shri Usgaonkar has placed reliance on the judgment of the apex court in ***Banarsi And Others v/s. Ram Phal***¹ which is clearly distinguishable since it was a case where the first appellate court, while dismissing the appeal filed by the defendants/appellants before it, modified the decree in favour of the respondents, in absence of a cross appeal or cross objection. The inference by the first appellate court resulted in a situation for the appellants worse than in what they would have been if they had not appealed. The apex court held that the High Court ought to have noticed this

1 (2003) 9 SCC 606

position of law and should have interfered to correct the error of law committed by the first appellate court. The position which emanate from Order 41 Rule 33 of the Code of Civil Procedure is to the effect that the said power of the appellate court conferred under Rule 33 should be read with Rule 4. The appellate court is empowered to pass any decree and make any order which ought to have been passed or made and to pass or make such further or thater decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may where they have been decrees in suits order or where 2 or more decrees are cast in one of suit, the exercise in respect of all or in any of the decrees, although an appeal may not have been filed against such decrees. The judgment in Banarasi (supra) deal with a situation where in a suit for specific performance of contract for sale, relief or compensation or refund of money was also sought by the plaintiffs and the court while refusing the relief of specific performance granted relief of compensation or refund and the plaintiffs who should have been aggrieved by the decree but failed to do so. In an appeal filed by the defendant against grant of relief of compensation or refund, the plaintiffs can seek relief of specific performance only

by taking cross objection or by filing a separate appeal. In absence of the same, modification of the decree and grant of relief of specific performance by the appellate court was held to be without jurisdiction, the underlying principle of being appellant cannot be reduced to a position worse then if he had not appealed.

11. It is settled position of law that an appeal lie against a decree and not against any findings. A person who is aggrieved by the decree is entitled to file an appeal. The plaintiff was given a decree in terms of the alternative prayer, in a suit of a permanent injunction against the defendants restraining them from interfering with the access of 2mt width kept on the extreme western side of plot no.1 of Survey No.17/6, i.e. the defendants property. Being satisfied with the said decree, which granted him a way of access, the plaintiffs did not challenge the said decree. The decree came to be challenged in appeal by the appellant and the appellate court reversed some finding of facts by the Civil Judge, maintaining the decree. In my considered opinion the course adopted by the courts below do not call for any interference, specifically when the appellate court was perfectly within its powers to reverse a finding of fact, though it refused to interfere in the decree. On finding being recorded that the plaintiffs were peacefully and openly enjoying the

right of way without interruption for 20 years, the decree was maintained.

12. Mr. Parag Rao, learned Counsel has rightly placed reliance on a judgment of the Constitution Bench of the Apex Court in case of ***Bhau Ram v/s. Baij Nath Singh & Ors.***² wherein the Apex Court quoted with approval a decision of Madras High Court in case of ***Venkatarayudu v/s. Chinna***³ which rely upon the English decision in ***Tinkler v/s Hilder*** (154 ELR 1176) to the following effect:

'3. "What is the principle underlying these decisions? When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposing party, there is no intention to benefit the latter, except on the terms mentioned in the order itself. If the party receives the costs, his act is tantamount to adopting the order... According to Halsbury this rule is an application of the doctrine 'that a person may not approbate and reprobate' (Halsbury, para 508) ... In other words, to allow a party, who takes a benefit under such an order, to complain against it, would be to permit a breach of faith."

It is not permissible for the appellant to approbate and reprobate meaning thereby that no party can accept and reject the

² AIR 1961 SC 1327

³ AIR 1930 Madras 268

same instruments, a principle embodied in the English Doctrine of Election (*per Scrutton, L.J. In Verschures Creameries Ltd. v. Hull and Neitherlands Steamship Co. Ltd.*)⁴

13. I have before me an appellant who has consented to a right of way being availed by the plaintiffs being taken to one corner of his plot and all the while by making such concession, completed the construction in his property, which was the location of the opening gate of the plaintiffs, midway in the property at Survey No.17/6. It was the defendant who in the written statement graciously stated that they are making available a strip of one meter on the extreme western side of the plot no.1 of Survey No.17/6 which was a beaten track and while considering the issue of balance of convenience and irreparable loss, the court acted on the said concession made by the defendants, while modifying the same from 1mt to 2mt and holding that comparative loss and injury caused to the defendants would be more since they had invested money in undertaking construction on the plot, the application for temporary injunction was partly granted. While the civil suit was being heard, note was taken of the fact that the construction is now being complete, there is no question of granting an access as claimed by the plaintiff and since the plaintiff had already made an alternate

4 (1916) 21 CWN 232

prayer of enjoying his way of access through the extreme western portion of the property of the defendants, the decree was granted in the said terms. Since both the courts below have recorded finding of fact to the effect that the plaintiffs were enjoying the suit access through plot no. 17/6, their property being landlocked and the defendants subsequently purchased the said plot no.1 and 2 of Survey No.17/6 somewhere in the year 1997 attempted to create obstruction, resulting into disturbance of the suit access. The defendants had deposed that the plaintiffs are given access to their suit property through the opening made by demolition of the western end of the boundary wall lying on the southern side of the suit property bearing Survey No.17/3. The defendants in cross examination had admitted the sketch map as well as the photographs showing the opening of wooden gate. On completion of construction of the defendants, holding that the plaintiffs have the right of way as an easementary right and now they cannot be given an access as what is claimed by them, the relief sought in the alternative is granted.

14. In light of the aforesaid discussions, the questions of law framed in the second appeal are answered in the negative and finding no fault with the judgment and order passed by the

Appellate Court, reversing the finding by the Trial Court as far as the easementary right is concerned, the second appeal deserves a dismissal and is accordingly dismissed.

BHARATI H. DANGRE, J.

msr.