

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 284 OF 2002

1. Sk. Khalil s/o Sk. Munir,
Age: 45 years, Occupation Business,
R/o Chote Takiya, Ajabnagar,
Aurangabad

2. Sk. Saleem s/o Sk. Munner,
Age: 46 years, Occupation Business,
R/o as above

... Appellants

[Original Defendants 1 and 1A]

Versus

1. Mohammad Naeem s/o Mohammad Ishaq
Major, Occupation Service,
R/o Ajabnagar, Aurangabad

2. Mohd. Zaheeruddin s/o Mohd Ishaq
Major, Occupation Service
R/o Samtanagar, Aurangabad

[R-2 Abated as per
Registrar Judicial's
Order dtd.12.06.2019]

... Respondents

[Original Plaintiff and Deft.No.2]

....

Mr. S. V. Adwant, Advocate for appellants

Mr. Ajinkya Kale, Advocate h/f Mr. A. D. Kasliwal, Advocate for
respondent No.1

....

WITH

SECOND APPEAL NO. 546 OF 2014

Mohammad Naeem S/o Mohammad Isaq
Age: 53 yrs, Occ: Retired Govt. Servant,
R/o. Ajab Nagar,
Tal & Dist: Aurangabad

... Appellant

[Original Plaintiff]

Versus

1. Shaikh Khalil s/o Shaikh Muneer
Age: 58 Yrs, Occu: Business,
R/o Ajab Nagar,
Tal & Dist: Aurangabad
2. Shaikh Saleem s/o Shaikh Muneer
Age: 60 yrs, Occ: Business,
R/o: Ajab Nagar,
Tal & Dist: Aurangabad
3. The Aurangabad Municipal Corporation,
Through its Commissioner,
Aurangabad

... Respondents
[Orig. Defendants]

....
Mr. Ajinkya Kale, Advocate i/b M/s Talekar & Associates for
appellant
Mr. S. V. Adwant, Advocate for respondent Nos. 1 and 2
Mrs. Manjusha Deshpande a/w Mr. S. V. Kshirsagar, Advocates for
respondent No.3

....

CORAM : R. G. AVACHAT, J.

RESERVED ON : 20th JUNE, 2022

PRONOUNCED ON : 01st AUGUST, 2022

J U D G M E N T :-

. Both these Second Appeals are taken up together, since the substantial questions of law involved therein are common. The parties to both these appeals are same. For the sake of convenience, the parties and the evidence in the suit where-from Second Appeal No.284 of 2002 arises, are referred to as per their status in the suit.

2. Second Appeal No.284 of 2002 has been preferred by the original defendants in the suit, being R.C.S. No.770 of 1990. It is a suit for declaration of right of way by easement of necessity and consequential relief of perpetual injunction restraining the defendants from obstructing user of the way. The trial Court dismissed the suit with a finding that there exists alternative way onto North of the suit property. The original plaintiff, therefore, preferred First Appeal (R.C.A. No.79 of 1994). The first appellate Court allowed the appeal. During hearing of miscellaneous appeal arising from order on application for temporary injunction, the concerned defendants gave an undertaking that if the plaintiff succeeds in the suit, they would remove the construction and make out a way of admeasuring 4 feet in width, North – South direction for the user of the plaintiff.

3. Second Appeal No. 284 of 2002 came to be admitted for deciding the following three substantial questions of law (Ground Nos. IV, VI and VII).

(i) Whether the first appellate Court was right in arriving at the conclusion that respondent No.1 plaintiff is having easementary right of necessity over the suit portion, having regard to the facts and documents on record?

(ii) Has not the first appellate Court committed grave error in not taking into account that respondent No.1 is estopped from claiming easement over the suit portion, particularly having regard to the fact that map forming part and parcel of compromise entered into in Regular Civil Suit No. 433 of 1979 namely showing the existence of land and on which the portion allotted to respondent No.1 has a door on the Northern side opening over the land and further that map also shows door opening over the lane from the portion belonging to the appellants?

(iii) The Court below ought to have held that in the face of map filed forming part and parcel of Regular Civil Suit No.433/1979 establishes the fact of availability of lane for the use of respondent No.1 ?

Moreover, the learned Advocate for the defendants furnished additional substantial questions of law for being addressed in this Second Appeal. The gist of those substantial questions of law, is regarding failure of the first appellate Court to comply with Order 20 Rule 4(2) of the Code of Civil Procedure. In substance, according to the learned Advocate for the defendants, the first appellate Court did not frame points for consideration. It also failed to take into consideration certain documentary evidence. Had such evidence been taken into consideration, the first appeal would have been dismissed. The learned Advocate impliedly suggested for remand of the first appeal for deciding it on its own merits after considering the entire evidence placed on record.

4. Facts giving rise to the present appeals are as follows:

Initially, it was a house property bearing C.T.S. No.14248. The plaintiff and his brother had filed suit for partition and separate possession of the suit property. It was a suit, being R.C.S. No.433 of 1979. A compromise was arrived at between the parties to the said suit on 09.10.1984. The portion admeasuring 22 ft. x 18 ft. was given to the share of the plaintiff and his brother. A sketch delineating division of the property in terms of the compromise was made part and parcel of the compromise decree. As a result of the compromise, the property C.T.S. No.14248 came to be divided in city survey record as C.T.S. No.14248 and 14248/1. The later number of property went to the share of the defendant in the said suit. The appellants herein (contesting defendants in R.C.S. No.770 of 1990) purchased the property C.T.S. No.14248/1. The plaintiff claims to have right of way by easement over C.T.S. No.14248/1.

5. The contention of learned Advocate for the contesting defendants is that there exists a public lane onto North of the suit property. The plaintiffs have been making use of the said bylane as an access to their property C.T.S. No. 14248. Had the plaintiff really

right of way over the property of the defendant, in a compromise decree and the sketch attached thereto, the same would have been specifically mentioned and delineated as well.

6. The learned Advocate for the defendants (appellants herein) was heard at length. He has also placed on record written notes of his submissions and copies of documents relied on before the trial Court and first appellate Court, as well. In his written notes of arguments the substantial questions of law for decision on which the Second Appeal came to be admitted, have been reproduced. Then, it has been brought to the notice of this Court that vide order dated 29.08.2002, execution of decree dated 14.08.2001 passed in R.C.A. No.79 of 1994 has been stayed. The learned Advocate relying on the judgment of the Hon'ble Apex Court in the case of ***Sree Swayam Prakash Ashramam & Anr. Vs V. Anandavally Amma and others – (2010) 2 SCC 689***, would submit that if there exists any other way, then there could be no easement of necessity. Relying on another judgment of the Apex Court in the case of ***Mariyayi Ammal vs Arunachala Pandaram – 1955 SCC Online Mad 281***, the learned Advocate would submit that it must be shown that without user of the alleged way, enjoyment of the property would be impossible. The

learned Advocate meant to say that the plaintiff ought to have made out a case of the dominant heritage to have become landlocked.

7. Relying on another judgment in the case of ***Sri Rajah Vyricherla Narayana Gajapatiraju Bahadur Guru vs Sree Rani Janaki Ratnayyammaji Garu Rane Saheba of Ganngapur – The Law Weekly, 1930 (455)***, the learned Advocate would submit that in case of a transfer of property, the deed of transfer must disclose intention to grant right of easement by necessity. According to him, the terms of compromise decree are silent to grant easementary right of way.

The learned Advocate would further submit that the plaintiff on the date of institution of the suit had an alternate way from the Northern side of his property. The suit was, therefore, rightly dismissed by the trial Court. The learned Advocate, then referred to certain documents in the nature of sale-deeds (Exhs.53, 54, 67 and 114), besides, Court Commissioner's report Exh.107 and map drawn by him Exh.108. He would further submit that local authority i.e. Municipal Corporation granted the defendants, permission for construction (Exh.68). The map of proposed construction Exh.69 was also relied on. The learned Advocate would further submit that the plaintiff did not take exception with the

construction permission, relying on the provisions of M.R.T.P. and/or Mumbai Municipal Corporation Act, 1949.

8. The learned Advocate, then, relied on so called admissions given by the plaintiff. According to him, the plaintiff admitted that the suit (R.C.S. No.433/1979) was disposed of in terms of compromise with a sketch forming part of compromise decree.

9. The following part of oral evidence of the plaintiff was also relied on.

“....I have no document to show ownership of my father to the suit property....

.... It is true that compromise in RCS No.433/79 was on 4.10.1984 it is true that on that basis I recorded space of 18’x22’....

.... It is true that I was not given any way as per compromise deed. It is also not mentioned in map or compromise deed also. It is true that portion marked A in compromise Exh-52 was given to me and portion B was given to my uncle. It is true that in map Exh.52A behind portion mark ‘A’ shown private lane admeasuring 4’3’ in breath. It is true that I was given two rooms with open space, in compromise....

.... It is true that 4’ 3’ Lane towards my Northern side approached to Ajabnagar round Southern side and to main road towards Paithan Gate to Kranti Chowk towards western side. It is true that doors windows 8 columns at Exh.34 are shown correct....

.... I have no map to show that there is any approach road from house of defendant No.1 to the main road, either of municipality or city survey record....

.... The document of Exh.53 is the sale deed now shown to me is the same. Its contents are correct and its annexed transaction....

.... it is true that both of them obtained Municipal permission, now shown to me is the same document. These are at Exh.68 and 69. I have not filed any objection, appeal or Revision against Exh.68 and Exh.69,...."

Then, the admissions given by the plaintiffs' witnesses were relied on. The said evidence is nothing but admission regarding existence of a lane onto South of dominant heritage.

10. The learned Advocate relying on certain sale-deeds would submit that those are very much relevant although those were not executed between the parties to the suit. The learned Advocate referred to Section 11, 13 and 32(3) of the Evidence Act. Taking exception to the judgment of the first appellate Court, the learned Advocate referred to the observations therein, namely,

"....We need not discuss other evidence being totally unreliable, uncalled for and against the City Survey record...."

11. According to him, the first appellate Court unwarrantedly observed that the Southern bylane was closed on one side, meaning thereby it was a private property of the owner of

C.T.S. No.14248. According to him, the first appellate Court had been swayed away by the city survey record prepared in 1971. It ignored other evidence on record that falsifies the city survey map.

12. On the question of undertaking given by the defendants in miscellaneous appeal arising from the suit, R.C.S. No.770 of 1990 is concerned, the learned Advocate would submit that the undertaking and its efficacy came to an end when the suit was dismissed on merits. The undertaking was not continued nor was effective till the finality of the proceedings between the parties. The learned Advocate relying on the judgment of the Apex Court in the case of ***Rekha Mukharjee vs Ashish Kumar Das - 2004(1) SCC 482***, would submit that:

"For the purpose of interpretation of such an undertaking, the golden rule of literal meaning shall be applied. Application of the doctrine of merger or for that matter the principle that appeal is a continuation of the suit will have no application"

"An undertaking of this nature furthermore must be construed in favour of the person giving such undertaking. It should not be stretched too far..."

13. The learned Advocate would further submit that the first appellate Court has not discharged its obligation. It failed to comply with the provisions of Order 41 Rule 31 CPC. The learned Advocate has relied on the following authorities:

- (a) AIR 1963 SC 698 - (Hari Shankar and others v. Rao Girdhari Lal Chowdhury);
- (b) 2001 (3) SCC 179 - (Santosh Hazari vs Purushottam Tiwari (Dead) By Lrs) ;
- (c) (2015)11 SCC 269 - (Shasidhar and Others v. Ashwini Uma Mathad and another);
- (d) (2015) 1 SCC 391 - (Vinod Kumar v. Gangadhar).

According to him, the first appellate Court did not give concise statement of the case. Points for consideration were not framed. Necessarily, there is no decision thereon. The learned Advocate then made certain observations regarding the suit filed by the defendants against Jaiswals and Nehari. According to him, although the decree passed therein was not taken exception to in Second Appeal, the appellate Court while deciding R.C.A. No.66 of 2014 gave a finding of fact about existences of bylane onto the North of the suit property. The learned Advocate, then tried to distinguish the authorities relied on by the learned Advocate for the plaintiff.

14. Considered the submissions advanced. Perused the evidence relied on. Gone through the citations placed into service.

Section 13 of the Indian Easements Act, 1882 speaks of easement of necessity and quasi-easements. Easements mentioned in Clause (a), (c) and (e) of Section 13 are called easements of

necessity. For better appreciation, those three clauses are reproduced below:

“(a) if an easement in other immovable property of the transfer or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement;

(b)

(c) if an easement in the subject of the transfer or bequest is necessary, for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement;

(d)

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement.”

15. An easement of necessity is extinguished when the necessity comes to an end. Necessity must be an absolute necessity.

16. Admittedly, initially it was one house property, being C.T.S. No.14248. By virtue of a compromise decree passed in Regular Civil Suit No.433 of 1979, a division thereof was made into two parts. Those two parts came to be recognised in city survey record as 14248 and 14248/1. The property that came to the share of the plaintiff and his brother was numbered as 14248. The one retained by the defendant in the said suit was numbered as 14248/1, servient heritage. The defendants herein claimed through the owner of C.T.S. No.14248/1, being owner of servient heritage. It is true that neither the terms of compromise decree (Exh.101) nor the sketch attached

thereto suggest the owner of the servient heritage to have granted the plaintiff right of way. Had there been such a grant, it would have been a case as easementary right by specific grant. Then there would have been no difficulty for trial Court to decree the suit. A question is whether there exists a bylane onto the North of the dominant heritage. If 'Yes', whether the owner of the dominant heritage (plaintiff) can make use thereof as of right to have an access to his property. The city survey maps (Exh.95 & 96) do not disclose the existence of bylane. The scheme of city survey was implemented in 1971.

17. The Court Commissioner was appointed to pay visit to the site and report. Accordingly, the Court Commissioner did his job and submitted his report (Exh.107) with a sketch. The Court Commissioner's report indicates the existence of a bylane onto the North of C.T.S. No.14248 and 14248/1. The Court Commissioner has, however, reported that one end of the bylane is closed. It is also true that the parties to the suit (old suit) in the suit, in which the compromise decree (Exh.101) was passed, the description of the property has been given. In the said description, onto the North of the property described therein a bylane was stated to have been in

existence. The sale-deeds (Exh.53, 54, 67 and 114) and documents relied on by the learned Advocate for the defendants (appellants herein), namely Exh.53, undoubtedly suggests that there exists the bylane. No doubt, the defendants - appellants have undoubtedly made out a case of existence of a bylane onto the North of the suit property.

18. The question is whether the plaintiff - respondent has a right to use the said bylane for negotiating with his property (dominant heritage). The answer would be 'No'. In the cross examination of the plaintiff himself, it was suggested on behalf of the defendants that the said bylane is a private property. This is an admission. Admittedly, when some construction was being initiated in the said bylane, the defendants herein had filed the suit, being R.C.S. No.80 of 2010 for the relief of mandatory injunction. The relevant pleadings in the said suit are as under:

"2) Plaintiffs say that, previously, there was only one C.T.S. No.14248, but after the Compromise in R.C.S. No.433/1979 filed by Mohd. Naeem s/o Mohd. Ishaq against Mohd. Gaus and Mohd. Khaja, C.T.S. No.14248 was sub-divided into Portion-A and Portion-B. Portion-A is given CTS No.14248 and Portion-B is given CTS No.14248/1. That, in the said compromise, portion-A came into the share of Mohd. Naeem and portion-B came into the share of Mohd. Gaus and Mohd. Khaja and from Mohd. Gaus and Mohd. Khaja, the plaintiffs have purchased the property C.T.S. No.14248/1.

Copies of the documents are filed herewith. That, after purchase of the property, plaintiffs along with other persons were using the lane.

3) Plaintiffs say that, to the north side of C.T.S. No.14248/1, there is a 4'5" of public lane, which is used by the public and this is between the property CTS No.14245, which was owned by defendant no.3 from whom defendants 1 and 2 have purchased, and there was a wall also running from east to west making 4.5 ft. of lane. Even in the map annexed to the Sale-Deed executed by Muqibuddin Nehri on dated 27-2-1975 in favour of the defendant no.3, the lane of 4.5 fts. is shown. This fact itself is sufficient to show that, in between the property of the plaintiffs and defendants, there is old lane of 4.5 fts., and defendants are having knowledge about the same."

19. The defendants (appellants herein) were unsuccessful in the said suit and even in the first appeal (R.C.A. No.66 of 2014) as well. They did not prefer second appeal. As such, the judgment and decree passed in the said suit (R.C.S. No.80 of 2010) attained finality. The appellants-defendants failed to prove that the Northern lane was a public lane and therefore, available for being used by public or at least by the owners of the property abutting the lane on either side. The defendants - appellants, therefore, could not be heard now to say that the said bylane is available for the plaintiff - respondent herein for being used as of right as access to his property.

20. The record indicates that a suit property, dominant heritage has, in fact, become landlocked. It has remained unoccupied

for years together. The defendants - appellants had furnished an undertaking in M.C.A. No.141 of 1990. The undertaking is in following terms:

"I, Khalil s/o Sk. Munir, R/o Chota Takiya, Ajabnagar, Aurangabad / Appellant undertaks that I will allow the respondent No.1 to use 4' wide space from his house to approach towards southern side road from his property till the disposal of the suit R.C.S. No.980/90. In case the respondent No.1 succeeds in his case and he establishes his rights of way from western side of the property of appellant, the appellant will demolish the structure to the extent of way on his cost."

21. Needless to mention that, appeal is a continuation of a suit. The suit (R.C.S. No.770 of 1990) is the subject matter of the present Second Appeal. The said suit has not yet been finally decided. It would, therefore, be not palatable to hear the learned Advocate for the defendants - appellants that the said undertaking came to an end with the dismissal of the suit.

The facts in *Rekha Mukharjee's case (supra)* were altogether different. The landlord therein had given an undertaking to the effect that the decree shall not be executed till the judgment of the lis relating to specific performance of agreement. The Hon'ble Apex Court held that expression, "decision" in the aforementioned situation, in our opinion, cannot be held to be a decision till it attains finality.

It is reiterated that the appellants gave an undertaking as stated herein above. The lis in which the said undertaking was given, has not attained finality. The present appeal is arising out of the proceedings in which the undertaking has been given.

22. It is true that the first appellate Court has not framed the points for determination. It is also true that it did not take into consideration all the sale-deeds (Exh. 53 & Exh.54), wherein existence of bylane is evident, relied on by the learned Advocate for the defendants before the trial Court. Close reading of the judgment of the first appellate Court would, however, indicate him to have rightly come to the conclusion about the plaintiff respondent to have easementary right of a way by a necessity. Non observance of the certain procedural rules in the facts and circumstances of the case would not outweigh the evidence in the case. This Court finds the first appellate Court's judgment to be well reasoned. Even the documents which are said to have not been referred to, not been taken into consideration by the first appellate Court, are considered here. It will not change the fate of the suit.

23. The Hon'ble Apex Court, in the case of ***G. Amalorpavam and others vs R. C. Diocese of Madurai and others – (2006) 3 SCC 224*** has observed thus:

“Civil Procedure Code, 1908 – Or. 41 R. 31 – Nature of Substantial compliance with, if enough – Framing of points for determination – Nature of requirement of – Substantial compliance with said requirement, what amounts to – Held, if it is possible to make out from the judgment of appellate court that there is substantial compliance with requirements of Or. 41 R. 31 and that justice has not thereby suffered, that would be sufficient – Where entire evidence has been considered and discussed in detail, and conclusions and findings are supported by reasons even though no point has been framed, there is substantial compliance with provisions of Or. 41 R. 31 – Reason for framing of such points, explained.”

24. On appreciating the entire evidence (the one not referred to by the appellate Court as well) this Court finds the first appellate Court to have not made any error in allowing the appeal. It is reiterated that the defendants - appellants by virtue of judgment and decree passed in R.C.S. No.80 of 2010, in view of principle of estoppel by record cannot be heard to say that Northern bylane is a public lane, very much available for the plaintiff-respondent herein as an access to his property and therefore, there is no case of easement of necessity to have been made out by the plaintiff - respondent.

25. For all the aforesaid reasons, the substantial questions of law are answered accordingly. Second Appeal No.284 of 2002 stands dismissed.

In view of dismissal of Second Appeal No.284 of 2002, the Second Appeal No.546 of 2014 is disposed of.

26. All pending civil applications are disposed of.

27. Since the interim order is continued till the decision of Second Appeals, the same to continue for next four weeks.

[R. G. AVACHAT, J.]

SMS