

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

9 SECOND APPEAL NO.260 OF 1993

1. Balkrushna Bhagwan Shelke,
Age 48 years, Occu. Service,
(Dismissed as per order dt.
28.8.15 & 9.10.15).
2. Arjun Bhagwan Shelke,
Age 45 years, Occu. Service,
(Appeal abated as against A.No.2
vide Registrar's order dtd.
20.7.2011 & 25.7.2011).
3. Arvind Bhagwan Shelke,
Age 32 years, Occu. Service,
(DECEASED BY L.RS.)
 - A) Sunanda w/o. Arvind Shelke,
Age 25 years, Occu. Household,
 - B) Milind Arvind Shelke,
Age 8, Minor, Education.
 - C) Mohind Arvind Shelke, Age 9,
Minor, Occu. Nil.
 - D) Sachin Arvind Shelke, Age 2 years,
 - E) Arvind Shelke, Age 25 days.

All r/o. Shevgaon, Taluka-Shevgaon,
District- Ahmednagar.
4. Shaligram Bhagwan Shelke, Age 38,
Occupation Service.

Appellant Nos. 1 to 4 R/o. Shevgaon,
Tal. Shevgaon, Dist. Ahmednagar.
5. Suman Pandurang Karkase,
Age 55 years, Occu. Household,
R/o. Pategoan, Tal. Paithan,
District Aurangabad.
(Deleted as per the Court's order
dated 17.7.2015)
6. Chitra Murlidhar Mhaske,
Age 40 years, Occu. Household,

R/o. Aurangpura, Opp. Police Chowky,
Aurangabad.

7. Mina Dnyaneshwar, Age 26 years,
Occu. Household, R/o. Jategaon,
Taluka Majalgaon, Dist. Beed.
8. Lata Babasaheb Hinge, Age 21 years,
Occu. Household, R/o. Paithan,
Near the Durgadevi Temple, Taluka
Paithan, District Aurangabad.
9. Rekha Chandrakant Hinge,
Age 24 years, Occu. Household,
R/o. Ratnapur, (Jayakwadi Camp),
Tal. Pathri, District Parbhani.

Versus

...APPELLANTS
(Ori. Deft. No. 1's heirs
& Deft. Nos. 2 to 5)

- 1A) Laxmikant Jagannath Shelke,
Age 48 years, Occu. Service,
- 1B) Narayan Jagannath Shelke,
Age 45 years, Occu. Service,
- 1C) Ashok Jagannath Shelke,
Age 41 years, Occu. Business,
- 1D) Subhash Jagannath Shelke,
deceased Through his L.Rs.
- 1D-1) Smt. Manda w/o. Subhash Shelke,
Age 53 years, Occu. Household,
- 1D-2) Jitendra s/o. Subhash Shelke,
Age 32 years, Occu. Bond Writer

Both R/o. Dhongaon Galli, Shevgaon,
Tq. Shevgaon, Dist. Ahmednagar.

- 1E. Saraswati Jagannath Shelke,
Age 70 years, Occu. Household,
(Deleted as per the court order
dt. 17.7.2011)
- 1F. Sou. Rajani Sudhakar Putane,
Age 38 years, Occu. Household,
- 1G. Sou. Sarojini Sheshrao Ghuge,
Age 28 years, Occu. Household,

Respondent Nos. 1A to 1E
R/o. Shevgaon, Respdt. No. 1F,
R/o. Parbhani and respdt. no. 1G
R/o. Aurangabad.

...Respondents.
(Original Plff's heirs)

...
Advocate for Appellants : Mr. V.S. Bedre
Advocate for Respondents 1A to 1C, 1E to 1G : Mr. N.N. Bhagwat h/f. Mr.
C.K. Shinde
...

CORAM : ARUN R. PEDNEKER, J.
DATED : 05/07/2023

JUDGMENT :

1. By order dated 22.7.1993, the second appeal is admitted on ground No. IX of the Memo of appeal, which is treated as substantial question of law. The order dated 22.7.1993 reads as under :-

"Heard Shri V.S. Bedre, learned Advocate for the appellants.

The Second Appeal is admitted vide ground No. IX only i.e. in respect of the disputed wall which is situated between the house Nos. 166 and 167, belonging to the parties.

Notice."

The issue formulated was only with respect to disputed wall which is situated between the house Nos. 166 and 167, belonging to the parties.

The question of law i.e. ground No. IX reads as under :-

"(IX) THAT the both the courts below erred in relying upon the court commissioner's report at Exh. 28 dated 29.11.1969. The lower appellate court also erred in relying upon court commissioner's report dt. 24.10.1983 vide Exh. 129. It is erred in observing the Court Commissioner has given detailed particulars of the Eastern well and therefore, it is erred in holding that the plaintiff acquired the right of prescription by easement.

However, the both the courts below should have held that the plaintiffs have failed to prove the easement by prescription independently. That the findings in respect of the court Commissioner's report in respect of easement are para 18 are inconsistent and therefore, the lower appellate court should have dismissed the suit of the plaintiffs."

2. The learned counsel for the appellant has taken me to the Appellate Court's judgment at para 10, the relevant part of which runs as under :-

"....Considering the abovementioned documentary evidence namely the mortgage-deed dt: 27-5-1936-Exh.39 of the plaintiff's H.No.166 and the sale-deed dt : 26-11-1979 Exh. 40 of the defendant's house, it becomes obvious that there is no common wall between the said two houses of the parties. It is pertinent to note that the said mortgage deed exh.39 shows that the house of the plaintiff is enclosed by four walls exclusively owned by him. Similarly, the certified copy of the sale deed dt : 26-11-1979 Exh. 40 shows that there is wada of Narayan Bhimaji Shelke on the northern side of the said house. It clearly falsified the version of the defendant that there is common wall running east-west between the said two houses i.e. on the Southern side of H.No. 166 and on the Northern side of H.no. 167."

3. From the above discussion, the Appellate Court has held that there is no common wall between the two houses of the parties, that the mortgage deed, Exh. 39 shows that the house of the plaintiff is enclosed by four walls is exclusively owned by him. Similarly, certified copy of the sale deed, Exh. 40 shows that there is Wada of Narayan Bhimaji Shelke on the northern side of the said house. Thus, the Appellate Court has rendered a finding that the version of the defendant that there is common wall running east-west between the said two houses i.e. on the southern side of House No. 166 and on the northern side of House No. 167 is not correct.

4. The Appellate Court has also relied on the Court Commissioner's Reports at Exhs. 129 and 28, which shows that defendants construction is adjacent to the disputed wall. This leads to the conclusion that the said disputed wall was not common. Based on the ample evidence on record, the Appellate Court has held that there is no common wall between the two houses.

5. On the basis of the above clear evidence in terms of the mortgage deed, sale deed and also the Court Commissioner's Report that there is no common wall between the two houses, the question of law raised would not arise in the facts of the case. In view of the same, no different finding can be rendered by this Court on the questions of facts. In the result, the appeal is dismissed.

[ARUN R. PEDNEKER J.]

ssc/