

JPC

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.851 OF 2012
WITH
CIVIL APPLICATION NO. 13463 OF 2013

Shri Sudhir Pandit Kulkarni, ... **Appellants**
Died through LRs.
Smt. Prtibha w/o Sudhir Kulkarni and
others

VERSUS

Kautik Totaram Farkhande ... **Respondents**
and another

Mr. S. B. Yawalkar, Advocate for Appellants
Mr. A. D. Shinde, Advocate for Respondents

....
CORAM : GAURI GODSE, J.
DATE : 10th February, 2023

PER COURT :

1. This appeal is preferred by the heirs and legal representatives of the original plaintiff for challenging the concurrent judgments and decrees, dismissing the suit for simplicitor injunction.
2. The Regular Civil Suit No. 71 of 1997 was filed praying for injunction restraining the respondents from disturbing the plaintiff's right of way on the ground that it passes through the respondents' field. The said suit was dismissed by a judgment and decree dated 19th April, 2004 passed by the learned Civil Judge, Junior Division,

Jamner. The suit was dismissed by holding that the plaintiff failed to prove that there was a right of way in existence as pleaded by him in paragraph no. 4 of the plaint.

3. The learned District Judge-4, Jalgaon, by judgment and decree dated 13th October, 2011 dismissed the Regular Civil Appeal No. 137 of 2004 preferred by the plaintiff. Both the courts have considered the case of plaintiff with respect to his easementary rights by prescription from the respondents' property. After considering the evidence on record, the Trial Court decided the said issue against the plaintiff. The first appellate court has confirmed the findings recorded by the trial court and dismissed the appeal.

4. The learned counsel for the appellant submits that vital piece of evidence in the form of admission in cross examination of the witness of the respondents was ignored by both the courts. He submits that the defendants' witness no.2 has specifically admitted in cross examination that the appellant was using right of way from the respondents' property. He therefore submits that ignoring vital piece of evidence is a substantial question of law and hence the second appeal is required to be admitted for decision on the said substantial question of law.

5. The learned counsel appearing for the respondents supported the impugned judgments and decrees on the ground that there was absolutely no evidence produced on record to show that the plaintiff had any easementary right with respect to the right of way as pleaded.

With respect to the admission given by the respondents' witness and relied upon by the appellant is concerned, the learned counsel for the respondents submit that one stray admission in cross examination cannot be taken into consideration. He submits that perusal of the cross examination would show that it is a simple admission given stating that the appellant goes from the property of the respondents. He submits that the same cannot be an admission to mean that the appellant has any easementary right for calming any injunction against the present respondents. The learned counsel therefore submits that there is no substantial question of law involved in the second appeal and the same is required to be dismissed.

6. I have perused the record of the second appeal as well as the paper book of the District Court.

7. The admission given in cross examination of witness no.2 of the respondents do not state with respect to the easementary rights of the plaintiff as claimed by him in the suit. There is only an answer given to the suggestion put to the said witness with respect to the plaintiff passing through the property of the respondents. The said admission cannot be treated as a vital piece of evidence to support the case that the plaintiff has right of way from the respondents' property. The suit as filed is a simplicitor suit for injunction on the ground that the plaintiff has a right of way. There is no specific declaration sought for in respect of easementary right claimed by the appellant. The right of way as claimed is in the form of easementary right which is required to be specifically pleaded and proved with support of documentary and oral evidence.

8. Both the courts have specifically framed issues for consideration of the case made out by the plaintiff. Both the courts, after appreciating the evidence on record, have come to a conclusion that the plaintiff failed to prove any easementary right by way of prescription to use the respondents' property. Hence, the suit filed for simplicitor injunction on the basis of right of way is rightly dismissed by the trial court and confirmed by the first appellate court. I do not find that the second appeal involves any substantial question of law and the same is dismissed.

9. In view of dismissal of the second appeal pending civil application does not survive and the same is disposed of.

[GAURI GODSE, J.]