

SA Pathan

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.743 OF 1996

Chand Co-operative Housing Society
Ltd.

... Appellant

V/s.

Narendra Kumar Jhamb and Ors.

... Respondents

Mr. Amogh Singh a/w Rahul Arora i/by Mr. Anil C.
Singh for the Appellant.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 21,2023

P.C.:

1. The Appeal is filed by the original Defendant challenging judgment and decree dated 22nd April, 1996 granting decree for injunction restraining to the Defendants from obstructing the access of the Plaintiff over the suit property.

2. The property admeasuring 2904 square yards used and reserved for the purpose of Dhobighat, out of plot of land of survey No.123, 123/1-7 Juhu Village, Mumbai is the suit property. According to the Plaintiffs, they were using the suit property i.e. 30 ft. access road as of right as easement openly, continuously and peaceably without interruption for a period of more than 20 years. In the alternative, easement by way of necessity was pressed into service.

3. The Defendants contested the suit by denying material averments in the Plaint. They denied existence of 30 ft. road. It is contended that the Plaintiffs have alternate road.

4. The trial Court, based on pleadings of the parties, framed nine issues. The trial Court allowed both sides to lead oral evidence and decreed the Suit. During pendency of Suit, there was no injunction in favour of the Plaintiffs restraining the Defendants from disturbing prescriptive rights pleaded. After the decree, this Court by order dated 14th August, 1996, granted interim relief in terms of prayer clauses (a) and (b). The effect of order passed by this Court is that during pendency of the Appeal, the injunction against the Defendants remained stayed. The Suit has been filed in the year 1994, and from 1994 till today, there is no injunction running against the Defendants/Appellants.

5. The Respondents are served with the notice of this Appeal. The Respondents initially appeared through Advocate, but thereafter none appeared for the Respondents. This Court on 10th January, 2020, issued fresh notice to the Respondents. Since, the office remark discloses that the original Plaintiffs have left their address, the Appellant published the notice in newspaper 'Free Press Journal' and 'Navshakti'. Copies of said notice are annexed along with affidavit of service filed on record. The service of notice through publication is accepted as valid service.

6. On perusal of the Plaint, it appears that essential relief sought by the Plaintiffs was for injunction based on easementary

rights of prescription. Law on the point of Suit for injunction enforcing easementary rights of prescription is well settled. The High Court of Karnataka in the case of **D. Ramanatha Gupta by his Power of Attorney Holder G. K. Krishnamurth vs. S. Razzaack**¹ held as under;

“11. It is, therefore, necessary that in a suit for injunction based on a prescriptive easement right, the plaintiff should seek for a declaration from the Court that he has so acquired the prescriptive right of easement. In the present suit, however, the plaintiff has not sought for declaration that he has acquired prescriptive right of easement with regard to the inflow of air and light through the windows and ventilator. Without more, therefore, the suit is liable to be dismissed. The Courts below have obviously missed this legal aspect.”

7. Single Judge of this Court in the case of **Jivanlal s/o Kannhaiyalal Paliwal vs. Krishnarao D. Sathone**², held as under:

“7. For acquiring an easement, there are three known modes; (1) express or implied grant; (2) user as of right for the statutory period of 20 years, i.e., by prescription; and (3) immemorial user upon the fiction of a lost grant. For the second mode, the period of 20 years or over must end within 2 years next before the suit's institution wherein claim to the easement is contested; it necessarily implies that the right of easement by prescription cannot become absolute unless contended and established in a suit. Thus, in a suit for injunction; based on a prescriptive easement, the

1 1982 SSC OnLine 579

2 AIR 2004 Bom 89

plaintiff must also seek a declaration that he has so acquired the prescriptive right of easement and this is what exactly has been done by the plaintiff while instituting the suit for declaration and injunction.”

8. Another Single Judge of this Court in the case of **Ratanlala s/o Girdharilal Agrawal vs. Shantabai w/o Lalchand Wasnik & Anr³**, in paragraph 10, referred to the judgment in the case of **D. Ramanatha Gupta (supra)**. After referring to the said judgment, the learned Single Judge held that it was incumbent for the Plaintiff to seek a declaration that the order of sanction dated 4th September, 1989 was illegal and thus, he was entitled for mandatory injunction. In the absence of such declaration being sought, Suit for mandatory injunction simplicitor could not have been decreed.

9. Apart from the maintainability of the Suit, on perusal of material, it appears that the Plaintiffs have failed to lead the evidence to prove the fact that they were using 30 ft. access road as of right openly and continuously without interruption for a period of more than 20 years. The trial Court in its judgment has not referred to either documentary evidence or oral statements to prove the said fact. In the absence of such material, the injunction granted by the trial Court was uncalled for.

10. For the aforesaid reasons, in my opinion, the trial Court, in absence of proof and legally enforceable right to claim relief, was not justified in passing the decree. The Appeal, therefore,

³ 2018(3) Mh.L.J. 194

succeeds. The impugned judgment and decree dated 22nd April, 1996 passed by the City Civil Court, Mumbai in S.C. Suit No.4121 of 1994 is quashed and set aside.

11. The Appeal is allowed in the above terms.

(AMIT BORKAR, J.)