



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 83 OF 1997
WITH CIVIL APPLICATION NO. 4468 OF 1994

DIGAMBARRAO LAXMANRAO BORAWAKE
VERSUS
JANAKSINGH IBAJI ASAR

Ms. Achal Y. Raghuwanshi, Advocate a/w Mr. Amardep Naiknaware,
Advocate h/f Mr. Deelip Patil Bankar, Advocate for the appellant

CORAM : R. M. JOSHI, J.

DATE : 13th FEBRUARY, 2024

P.C. :-

1. This Second Appeal under Section 100 of the Code of Civil Procedure takes exception to the judgment and decree dated 6th September, 1993 passed by the First Appellate Court in Regular Civil Appeal No. 258 of 1985 wherein the judgment and decree dated 26th March, 1985 dismissing Regular Civil Suit No. 481 of 1982 is reversed.
2. Parties are referred to by their nomenclature in original proceeding for the sake of convenience.
3. The Plaintiff filed suit for injunction against the Defendant restraining him from obstructing the use of way/road as specifically described in paragraph No. 1B of the plaint. It is the case of the Plaintiff that the father of the Defendant was owner of C.T.S. No. 1310 Municipal House No. 1515 situated at Shrirampur. It is further contended that open

space admeasuring 45x12 ft on the eastern side in CTS No. 1310 Municipal House No. 1015 was given to the Plaintiff by the Defendant on rent of Rs.75/- per annum, and Plaintiff was a monthly tenant. On the basis of rent note executed in favour of the Plaintiff on 7th June, 1971 the Defendant is said to have accepted the rent from the Plaintiff after death of his father. It is further case of the Plaintiff that 14 ft wide road is kept common on the eastern side in CS No. 1310. Plaintiff has further claimed about having purchased 4R land on the western side of CTS No. 861-B under sale deed dated 26th February, 1971 from the father of Defendant. According to him the suit way is a common way for the access to the property purchased by him as well as tenanted property. It is contended by the Plaintiff that the Defendant is likely to close the said way and which will make him difficult to run his shop. On these averments suit for injunction came to be filed.

4. Defendant filed written statement opposing the contentions raised by the Plaintiff. It is denied that the rent note dated 7th June, 1971 was issued by his father in favour of Plaintiff. The contentions of the Plaintiff with regard to the common way is also denied by the Defendant. It is in fact claimed that no such way is in existence as the same is not shown in the town planning scheme. It is further claimed that the alleged rent note is not properly stamped and hence it cannot be relied upon.

5. Learned Trial Court framed the issues at Exhibit 29 and recorded evidence of Plaintiff as well as Defendant. Plaintiff examined his constituted attorney whereas the Defendant examined himself before the Trial Court. Learned Trial Court has held that the Plaintiff has failed to prove the possession over the open space admeasuring 45x12 ft and existence of common way to approach the open space and dismissed the suit. Learned First Appellate Court after re-appreciating the evidence on record reversed the said finding in favour of the Plaintiff and decreed the suit.

6. Present Second Appeal is preferred specifically on the grounds that the First Appellate Court has committed error in relying upon Exhibits 40, 41 and 42 on the basis of statements of Defendant when those documents were not admissible in law. Issue is also raised with regard to the incorrect interpretation of these documents. It is also claimed that there was error committed by the Appellate Court in granting injunction in respect of the way in absence of the declaration of title of the Plaintiff.

7. Learned counsel for Defendant submits that in order to substantiate the case, Plaintiff ought to have proved that the open space as claimed by him is let out to him under the valid rent note. It is argued that since the rent note is not registered document nor adequately

stamped it ought not to have considered by the Appellate Court for the purpose of granting injunction. To support his submission reliance is placed on the judgment of the Hon'ble Apex Court in case of ***M/s Paul Rubber Industries Private Limited Versus Amit Chand Mitra and Anr., in Special Leave to Appeal (Civil) No. 15774 of 2022.*** It is further argued that even otherwise the contents of the rent note are not proved as the Plaintiff has not examined himself or any witness to the said rent note but has relied upon the testimony of his constituted attorney. It is submitted that the First Appellate Court has committed error in appreciating the oral evidence on record more particularly the cross-examination of Defendant. It is also sought to be argued that evidence of defendant has not been recorded correctly by the Trial Court. According to him the burden to prove the case was on Plaintiff and since the Plaintiff has failed to prove the same the suit ought not to have been decreed, on alleged admissions of defendant.

8. At the outset it needs to be recorded that the Plaintiff does not claim any title over the suit way. However, it is specifically averred that the either side of the way Plaintiff tenanted as well as ownership property situated. It is his claim that on the basis of rent note dated 7th June, 1971 the open space came in to his possession and that the over side portion of the property was sold by the father of the Defendant to

the Plaintiff by sale deed dated 26th June, 1971.

9. The Plaintiff therefore is required to prove that he is in possession of the open space admeasuring 45x12 ft so also in possession of the land sold by Defendant's father to him. In this regard it is pertinent to note that the Plaintiff has examined his constituted attorney and has relied upon the sale deed and rent note. Thus this is not the case where initial burden has not been discharged by the Plaintiff. It would be necessary to take note of the candid admissions given by Defendant in his evidence before the Trial Court. Defendant admits in no uncertain terms that sale deed (Exhibit 49) came to be executed by his father and he was signatory to the said sale deed as a witness. He further accepts that the Plaintiff has started his business in the said 4R land sold to him. Perusal of Exhibit 49 shows that there is specific mention in this document with regard to the existence of the tenancy between Plaintiff and father of the Defendant. Defendant further in his cross-examination has accepted that after the death of his father he is accepted rent from Plaintiff at the rate of Rs.75/- per annum and has issued receipt Exhibits 41 and 42. It is further candidly admitted that 14ft road is given to the Plaintiff from City Survey No. 1310. It is trite law that admissions of a party is best evidence. All these admissions given by the Defendant are more than sufficient to prove the case of the

Plaintiff with regard to the right of way as claimed.

10. Though it is sought to be argued on behalf of the Defendant that the recording of the evidence of the Defendant is incorrect and there is discrepancy in English and Marathi recording, however, no any motion is moved before the Trial Court for correcting the said evidence. Since the language of the Court is Marathi the recording of the Marathi will prevail over English recording. It is not open for this Court at this stage to hold that the Trial Court has not correctly recorded evidence. In any case when no specific dispute is made before Trial Court with regard to the correctness of the recording of the evidence, it is not open for the Defendant to make any grievance about the same at this belated stage.

11. In the aforestated circumstances having regard to the candid admissions of the Defendant with regard to the right of the Plaintiff over the suit property, it was not necessary for the First Appellate Court to go into the issue about the validity of rent note etc. As such no substantial question of law involves in this Appeal, as this Court finds no perversity in the findings recorded by First Appellate Court. Pending Civil Application, stands disposed of.

(R. M. JOSHI, J.)

ssp