



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 247 OF 2015
WITH CIVIL APPLICATION NO. 3853 OF 2015

1. Vithal s/o Ananda Kale
2. Manik s/o Vithal Kale

... APPELLANTS
(Ori. Plaintiffs)

VERSUS

Sanjay s/o Tejrao Kale

... RESPONDENT
(Ori. Defendant)

Mr. M. B. Pophale, Advocate for the appellants
Mr. P. F. Patni, Advocate for the respondent

CORAM : R. M. JOSHI, J.

DATE : 8th FEBRUARY, 2024

P.C. :-

1. By consent of both sides, heard finally at the admission stage.
2. The facts which led to the filing of this appeal can be narrated in short as under:
 - (i) Plaintiffs claim themselves to be owners of the suit property bearing Gut No.70 situated at Palshi Kd, Tq. Kannad, District Aurangabad. It is alleged that the defendant has been attempting to create the road therein. With these averments suit came to be filed seeking injunction against the defendant from obstructing the possession of the plaintiffs over the suit property and from creating any road

therefrom.

(ii) The defendant opposed the suit by filing written statement contending his right of way in respect of the land in question. It is denied of any obstruction being caused etc.

(iii) The learned Trial Court decreed the suit on the basis of evidence on record and granted injunction against the defendant from obstructing the peaceful possession of the plaintiffs over the suit property and also creating cart road and from causing obstruction any other manner whatsoever. Being aggrieved by the said judgment the defendant preferred appeal being RCA No. 96 of 2011. Though the learned First Appellate Court has confirmed the findings recorded by the Trial Court with regard to the possession as well as obstruction, the said Court found it fit to issue clarification with regard to the injunction granted and accordingly the clarification is included in the operative part of the judgment.

3. Learned counsel for the plaintiffs submits that the First Appellate Court has travelled beyond the scope of the suit and has modified the decree passed by the Trial court ignoring the evidence on record therein defendant himself had admitted in no uncertain terms that on humanitarian ground he was permitted to pass through the suit property.

4. Learned counsel for the defendant submits that the judgment and decree passed by the First Appellate Court giving the clarification to the decree passed by the Trial Court is not in consonance with the case sought to be made by both sides in particular defendant and evidence on record. It is his submission that if the decree is maintained passed by the Trial Court, even his right of way would get affected thereby.

5. The following substantial question of law arises in this case

(i) Whether the First Appellate Court is justified in issuing clarification as given for modification of decree passed by Trial Court in ignorance of the pleadings of the parties and evidence on record that too after confirming the findings with regard to the plaintiff having proved the ownership and possession over the suit property as well as obstructions caused thereto by the defendant?

6. Pleadings on record indicates that suit came to be filed by the plaintiffs against defendant for restraining him from causing obstruction on the plaintiffs over the suit property and creating road therefrom.

7. The evidence led by the plaintiffs shows that they have succeed in proving their possession over the suit property so also obstructions sought to be caused by the defendant. It is pertinent to note that the

defendant has not filed any counter claim seeking any injunction against plaintiffs for causing obstruction with regard to his alleged right of way over plaintiffs property. Apart from this in his evidence defendant has candidly admitted that on humanitarian grounds he was allowed to pass through the property of plaintiffs. Though it is sought to be argued by the learned counsel for the defendant that this is a stray admission and hence not sufficient to determine the issue but pertinently this admission is conscious and not by inadvertence. No attempt is made to explain the same by defendant. As observed earlier that there is no claim asserted coupled with any relief by the defendant of his right of way even on humanitarian ground for passing through the suit property and hence the said fact sought not to have been considered by First Appellate Court for clarification of the decree passed by Trial Court and to declare right of defendant without being sought.

8. Once it is held by the Trial Court that the obstruction has been caused by the defendant in the possession of the plaintiff over the suit property and attempt is made to create the road, the Trial court was fully justified in injuncting the defendant from doing so. It would be different thing that Appellate Court modifies the decree as done, if the defendant establishes any right over the suit property and claims any relief therefor, however, without filing any counter claim it was not open for the First

Appellate Court to recognize/bestow such right upon him by issuing clarification of the order and judgment and decree passed by the Trial Court. Though it may be open for defendant to substantiate his claim in appropriate proceedings as provided by law.

9. In view of above discussion substantial question of law is answered in negative. Resultantly, appeal stands allowed. The judgment and decree passed by First Appellate Court is set aside. Judgment and decree of Trial Court stands restored.

10. . Pending civil application, if any, stands disposed of.

(R. M. JOSHI, J.)

ssp