



Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.221 OF 2017

WITH

CIVIL APPLICATION NO.517 OF 2017

IN

SECOND APPEAL NO.221 OF 2017

Shri.Jinvandhar Padamanna Savale & Ors.

...Appellants/
Applicants

Versus

Jaysing Hirasing Rajaput

...Respondent

Mr. Vijay Killedar for the Appellants/Applicants.

Mr. Padmanabh D. Pise and Ms. Sejal A. Hariya for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : JANUARY 24, 2024

P. C. :

1. Heard.

2. Being dissatisfied with the Judgment dated 30th July, 2016 dismissing the Appeal thereby confirming the Judgment and Decree of the Trial Court dated 31st January, 2014 in Regular Civil Suit No. 28 of 1998, the original Defendants are before this Court.

3. Regular Civil Suit No. 28 of 1998 was instituted by the Plaintiff for perpetual injunction, declaration of easementary right and mandatory

injunction seeking removal of the obstruction obstructing the Plaintiff from use of the suit way. The case of the Plaintiff was that Gut No 288 was the ancestral property of the Plaintiff's predecessor Narsingh and the predecessor of the Defendant's vendor Hirasingh. That there was partition prior to 80 years and Narsingh was allotted 1 H.07 Are eastern portion of the property and Hirasingh was allotted 1H 22 Are western portion of the property. That subsequently the share allotted to Hirasingh was sold to the Defendants by Kisansingh – son of Hirasingh. That the Plaintiffs were using the road situated on western side of the property allotted to them since last 80 years and there is no other access road. That, after the suit was filed the Defendants for the purpose of erasing the existence of the road used by the Plaintiffs planted coconut trees and has constructed wall near the Well to obstruct the Plaintiff.

4. The Defendants resisted the suit denying the case of the Plaintiff that there was a 10 ft. road which was being used by the Plaintiff for accessing his property. It was contended that there was a partition between Plaintiffs predecessor and the Defendants vendor's predecessor. That in the year 1984, the Defendants have dug a Well in their property and on the southern side of the Well the Defendants have planted about 11 coconut trees and on the western side about 14 coconut trees in the year 1984 and the distance between the plantation and the well is about 4ft. to

5ft. The assertion of the Defendant was that, there was no road in existence as claimed by the Plaintiff.

5. The parties went to trial and the Trial Court answered the issues in the affirmative as regards the existence of the road and the declaration of easement of necessity. However, the relief of mandatory injunction as regards the removal of obstruction was rejected, as against which the Defendants preferred Appeal No. 20 of 2014 which came to be rejected.

6. Heard, Mr. Vijay Killedar, learned counsel for the Appellant and Mr. Padmanabh Pise, learned counsel for the Respondent.

7. Learned counsel for the Appellant would submit that the relief of mandatory injunction was rejected and as such, decree itself would be unexecutable. He would submit that there is perversity in findings of the Trial Court inasmuch as the witness of the Plaintiff has not supported the case of the Plaintiff. He would further submit that factual position at the site being admitted the decree in question at the most would be rendered a paper decree and would be unexecutable.

8. Considered the submissions and perused the record.

9. The Trial Court based on the evidence on record has held that the Plaintiff has established his case of easement of necessity. It is not disputed before this Court also that there was a partition of the property pursuant

to which predecessor of the Plaintiffs were put in possession of the eastern portion of the property and the predecessors of the Defendant's vendors were put in possession of western side of the property. It is also not disputed that for the purpose of access, the approach road to the Plaintiff's property through the Defendant's property. However, what is sought to be submitted that the Plaintiff's property can be accessed through the boundary of the Defendant's property. The Trial Court has rightly noted the ingredients of Section 13(e) and (f) of the Easements Act, which provides that where a partition is made of the joint property of several persons, if an easement over the share of one of the properties is necessary for enjoying the share of the other, the later is entitled to such easement. Section 13(f) provides that the dominant heritage is entitled to such easement as it was enjoyed when the partition took effect.

10. Based on the evidence which has come on record, the witnesses of the Plaintiff have supported the case of the Plaintiff as regards the existence of the prior road. It is only the witness No. 3 who in his cross examination has admitted that his deposition that since the year 1962 there exists a road is not correct. Despite the evidence of PW3, it needs to be noted that the other witnesses have supported the case of the Plaintiff and there is no material which is brought on record by the Defendants to indicate otherwise.

11. The Appellate Court has re-appreciated the evidence on record and has come to a finding that the partition between the parties was prior to 80 years and it is not the case of the Defendants that despite the Birnal road being adjacent to the land, the predecessor of the Plaintiffs was using any other way. The Appellate Court considered that the plantation of the Defendants are at a later stage in respect of which the relief was sought by the Plaintiff upon obstruction being caused by the Defendant. The Appellate Court has re-appreciated the evidence of witness of Plaintiffs and noted the variance in the deposition of PW3. The Appellate Court on re-appreciation of the evidence has confirmed the findings of the Trial Court.

12. The challenge to mere appreciation of evidence of the material on record would not raise any substantial question of law unless perversity is demonstrated. The issue as regards the executability of the decree is a matter to be considered by the executing Court and the denial of the relief of mandatory injunction cannot be said to raise a substantial question of law. The Trial Court as well as the Appellate Court has rightly appreciated the evidence and have rendered concurrent findings. There is no perversity in the findings pointed out by the learned counsel for the Appellant.

13. Having regards to the discussion above, no substantial question of

law arises in the Second Appeal.

14. Appeal stands dismissed.

15. In view of dismissal of Second Appeal, Civil Application does not survive for consideration and the same is disposed of as such.

(SHARMILA U. DESHMUKH, J.)