

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.7 OF 2017
WITH
CIVIL APPLICATION NO.19 OF 2017

Radhakrushna Mandir Vaishya Sanstha	...Appellant
<i>Versus</i>	
Krishna Parshuram Bhide	...Respondent

Mr. Sameer M. Tendulkar for the Appellant.

Mr. S. S. Patwardhan for Respondent Nos.1 and 2.

CORAM : SHARMILA U. DESHMUKH, J.
DATE : 12th MARCH, 2024.

P. C. :

1. The Appellant before this Court is the original defendant dissatisfied with the Judgment dated 17th September 2016 passed in Civil Appeal No 190 of 2012 restraining the defendant by way of perpetual injunction from obstructing the plaintiff's possession over the suit property and also from installing water pump on the disputed well.

2. The facts shorn of unnecessary details is that Regular Civil Suit No.208/2008 was filed for perpetual injunction restraining defendant from taking the water from the suit well and from fixing the water set pump on the Well. The suit property owned by the Plaintiffs is

described as old Survey No 68 Hissa No 6 new CTS No.2513/1 and 2513/2 and having Municipal House No.2541 and 2542 along with the Well. The Defendant's property is bearing old Survey No 68 Hissa No 2 new CTS No.2512 having temple of Radha-Krishna deity. The disputed Well is situated in an open plot on CTS No.2513 situated on the northern side of the temple and existing since prior to the year 1905. The contention was that the Defendant had encroached and expanded the construction of the temple. The Plaintiff had purchased the property i.e. CTS No. 2513/1 and 2513/2 on 26th July 2001 from the erstwhile owner Jagdish Chandra Lad by registered sale deed along with all structures including the Well situated on the said property. The erstwhile owner Mr. Lad had filed injunction suit against the defendant in respect of the encroachment which was decreed. Execution proceedings were initiated for execution of the decree of removal of water pump installed on the disputed Well pursuant to which the water pump was removed by the bailiff. The cause of action as pleaded in the plaint is on an apprehension that on 30th August 2008 some unknown persons had brought electric water pump and nylon rope near the disputed well and apprehending that the defendants would repeat the act of installing the water pump on the disputed Well, the suit was filed.

3. The suit came to be resisted by the defendants contending that the Well is common Well for Hissa No. 2 and 6 of Survey No 68. The right of the Plaintiffs in the Well is restricted to 2/3rd share. Since the year 1926, the Defendants are using water from the said Well for the temple and after the decision in the earlier RCS No.104/1998 the Defendants have installed their submersible pump in the Well. The Defendants had measured the land on 1st March, 2000 in presence of Plaintiff and it was clear in the measurement that some part of the Well is within the property of Defendants under the encroached construction. It was contended that in fact the plaintiff had encroached and obstructed the possession of the defendants and fixed his pipes on the wall of the temple and constructed a toilet adjacent to the temple. Counter claim was filed asking relief of removal of encroachment made by the plaintiff and for perpetual injunction and declaration in favour of the defendants.

4. The parties went to trial. The Trial Court by judgment dated 14th September 2012 dismissed the suit and partly decreed the counter claim to the extent of removal of pipeline fixed on the wall of the temple. As against this Civil Appeal No.190/2012 was preferred by the Plaintiff which came to be partly allowed to the extent of restraining the Defendants from obstructing the plaintiff's possession over the suit

property and also from installing the water pump on the disputed Well.

5. Heard Mr. Sameer M. Tendulkar, learned counsel for the appellant and Mr. S. S. Patwardhan, learned counsel for Respondent Nos.1 and 2.

6. Mr. Tendulkar, learned counsel for the appellant would submit that the substantial question of law arising is whether the suit for perpetual injunction from installing the water pump would be maintainable as the submersible water pump was already installed on the disputed Well prior to the filing of the suit. The other issue raised is that in view of Section 50 of the Public Trust Act without obtaining the consent of the Charity Commissioner the present suit seeking injunction against the Public Trust is not maintainable. He has taken this Court in detail through the findings of the Trial Court as well as the Appellate Court and would submit that the Trial Court has come to a finding that the plaintiff is not the exclusive owner of the suit well. He would submit that as regards the counter claim, the same was partly decreed to the extent of removal of pipeline. He would however submit that in fact the factum of installation of pipeline was in support of the submission made in the written statement that the submersible water pump has been

installed. He would further submit that once it is admitted that the defendants have committed an encroachment over CTS No.2513 by way of extending pathway and thereby encroached upon the part of the suit well without seeking relief of recovery of encroached portion, the suit was not maintainable.

7. *Per contra*, Mr. Patwardhan, learned counsel for respondents would submit that in the earlier round of litigation the erstwhile owner has filed a suit for removal of encroachment and for vacant possession which was decreed and at the time of execution of the decree the Court official had removed the water pump installed on the disputed well. He would further submit that subsequently the plaintiff noticed that some unknown persons had brought an electric water pump and a nylon rope near the disputed well and at that time the cause of action arose for the purpose of filing the present suit for injunction. He would further submit that in fact it was argued by the defendants before the Appellate Court that there was no cause of action for filing of the suit as there is no evidence to show that the present defendants have obstructed the plaintiff from use of the disputed well. He would further submit that that being the case it cannot be said that there was already a submersible water pump installed in the Well. He would further submit that the provisions

of Section 50 of the Public Trust Act does not apply in case of a third party seeking to enforce his civil right. He submits that the provisions of Section 50 would come into play where the Charity Commissioner or two or more interested persons seek to file a suit seeking any of the reliefs in Section 50 and in such an event without the consent of the Charity Commissioner, the suit is not maintainable. He submits that by the said provision, a special class of the plaintiffs is created for the purpose of filing suit in the District Court which is also a Special Court created by virtue of definition of "Court" under sub-clause 2(4). He would submit that it is settled position that party seeking to enforce his civil rights is not required to obtain the permission of the Charity Commissioner. In support, he relies upon the decision in the case of *Vidarbha Kshatriya Mali Shikshan Sanstha vs. Mahatma Fuley Shikshan Samiti, Amravati, 1986 SCC Online Bom 107*.

8. Considered the submissions and perused the record.
9. For the purpose of considering the prayer for injunction, the Plaintiff was required to establish the ownership of the Well. The Plaintiff claims that the Well is situated in City Survey No 2513 owned by him and for circumambulation pathway was constructed by encroaching upon

the suit property and thereafter defendants have started taking water from the Well. On the other hand the Defendants have come with a a case that the Plaintiffs are not the exclusive owner and half portion of the disputed Well is situated in City Survey No 2512 owned by the Defendants. The pleadings indicate that there is a dispute about the location of the Well. The Trial Court on consideration of evidence has held that the disputed Well is situated in City Survey No 2513 and the Defendant had encroached upon City Survey No 2513 and portion of the Well is under the encroached portion. The Trial Court held that the Plaintiff is entitled to 2/3rd share in Well and is not the exclusive owner. As regards the counter claim the Trial Court held that the Plaintiffs have not obtained the consent of the Defendants to fix the pipe line on the wall of the temple. The Trial Court further held that the Defendants are having right to use water from the Well but are not entitled to fix the motor set pump in the portion of property of Plaintiff and to take water from the Well.

10. The Appellate Court in the Appeal filed by the Plaintiffs in which cross objections were filed by the Defendant has re-appreciated the evidence on record. The Appellate Court held that the encroachment construction is covering some part of the disputed Well, however by reason thereof the Well cannot be said to be part of City Survey No.2512

belonging to the Defendants. The Appellate Court considered the survey records which showed the disputed Well situated in the property of the Plaintiffs. The Appellate Court upheld the finding that the Plaintiffs are 2/3rd owners of the suit property. The Appellate Court considered the decree passed in earlier round of litigation in RCS No.104/1998, in execution whereof the Defendants' water pump was removed from the disputed Well. The Appellate Court also considered the admission of the Defendants admitting that on 31st August, 2008 they had prepared to install the water pump on the disputed Well within the boundary of their own property. As regards the counter claim, the relief granted to the Defendants was upheld.

11. From the record as discussed above, the Courts on basis of the evidence has held that the Plaintiffs are owners of 2/3rd portion of the disputed Well. The said fact does not *ipso facto* give right to the Defendants to the remaining 1/3rd portion of the Well in the absence of any legal right especially considering the admitted position that there is encroachment by the Defendants in the Plaintiff's property. In the earlier round of litigation decree was passed in RCS NO 104/1998 directing the Defendants to remove the water pump from the Well which has attained finality.

12. The issue raised by the Defendants is that despite the execution of the decree in RCS No.104/1998, they had installed submersible water pump and hence the right of the Plaintiffs was already invaded and suit was not maintainable under Section 38 of Specific Relief Act., 1963. There is no evidence on record to demonstrate that the Defendants had installed the submersible water pump prior to the filing of the suit. On the contrary it appears from the admission of the Defendants that on 31st August, 2008 they had prepared to install the electric water pump on their portion of disputed Well. If the submersible water pump was already installed there was no necessity of preparing to install electric water pump on 31st August, 2008. It is clear from the judgment of the Trial Court that the installation of the submersible water pump was not an issue before the Trial Court and in fact reliance placed by the learned counsel for the defendant on the pipeline to indicate that the same was connected to the submersible water pump is contrary to the evidence which was led. There is specific finding of the Trial Court as regards the pipe lines being fixed by the plaintiff on wall on temple and the counter claim was partly decreed directing the plaintiff to remove pipe lines fixed on the wall of the temple.

13. The burden was upon the Defendants to plead and prove

that they had already installed the submersible water pump. The judgment of the trial Court and Appellate Court does not indicate any evidence being led in support of the said submission. In the absence of any evidence to demonstrate that the right of the Plaintiffs had already been invaded and the remedy was therefore not of perpetual injunction but of mandatory injunction seeking removal of the submersible water pump, the suit under Section 38 of the Specific Relief Act, 1963 was maintainable.

14. Hence no substantial question of law as regards the applicability of Section 38 of the Specific Relief Act, 1963 arises in the present case.

15. Now coming to the issue of maintainability of the suit by virtue of Section 50 of the Bombay Public Trust Act the decision in the case of *Vidarbha Kshatriya Mali Shikshan Sanstha vs. Mahatma Fuley Shikshan Samiti* relied upon by learned counsel for the respondent clearly answers the said submission. In that case learned Single Judge of this Court has considered the provisions of section 50 of the Act and in particular clauses (iv) and (p) of the Act and has held in paragraph Nos.7 and 8 as under:

“7. A perusal of the above provisions would show that in relation to the public trusts, a special right is created even in the third person like the "Charity Commissioner" or the "persons having interest" who may not have their own civil rights to enforce to institute a suit in respect of any matter covered by the said section which would not ordinarily be there if their own rights were not involved. It may be seen that such a special suit lies not in the normal forum where any suit under the Code lies but in the special forum of the District Court, as provided thereunder. In my view section 50 of the Act is a section analogous to section 92 of the Code although to a certain extent as regards the subject matter it may be wider than it. However, what is most important is that the definition of the expression "persons having interest" given in section 2(10) of the Act includes only certain classes of persons. The suit contemplated by section 50 can be instituted either by the "Charity Commissioner" or the "persons interested" with his consent. Since all persons who want to enforce their civil rights are not covered by the definition of the expression "persons having interest" they would be left to the mercy of the Charity Commissioner or

the persons having interest covered by the definition clause for enforcement of their private rights if the suit can be instituted only in the manner as provided in section 50. Even assuming that such persons are covered by the definition clause, they would still be at the mercy of the Charity Commissioner for enforcement of their personal rights. Such a consequence in my view is not contemplated by section 50 of the Act. The persons who have their own rights to enforce cannot, therefore, be compelled to follow the procedure laid down in the said section. A suit to enforce one's own civil right instituted under the Code in the ordinary forum provided for the same is thus competent.

8. *It is in this context and interpretation section 50 bars a civil suit in respect of any public trusts for claiming any of the reliefs specified in the said section except in conformity with the provisions of the said section. If the substantive provisions of section 50 of the Act do not contemplate a suit which is to be filed by a person for enforcing his own right, then in my view, such a suit cannot be barred by the first proviso to section 50 of the Act because in its contextual*

interpretation and read in the light of the substantive provision, it can only bar a suit which is contemplated by the substantive provision. The instant suit filed by the plaintiff for enforcing its own civil right cannot therefore, be said to be barred by section 50 of the Act.”

16. In view of the above, the issue is already settled by the decision of this Court and is no longer *res integra*.

17. By way of construction of circumambulation pathway, part of the Well is covered by the construction. The Plaintiff seek injunction from constructing the Plaintiff's possession over the Well as well as from installing water pump on the Well. The encroachment over part of the Well does not entitle the Defendants to claim any right over the Well situated underneath the construction. The Plaintiffs are well within their right to draw water from the Well despite the Defendants' encroachment. It is not necessary for the Plaintiff to seek recovery of possession of encroached portion for purpose of seeking injunction as prayed.

18. Having regard to the discussion above, no substantial question of law arises in the present case. Appeal stands dismissed. In

view of disposal of Second Appeal, Civil Application does not survive for consideration and the same is disposed of.

(SHARMILA U. DESHMUKH, J.)