

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.206 OF 2014
WITH
CIVIL APPLICATION NO.541 OF 2014

Raghunath Yeshwant Barge
(Decd. thr. Heirs) Indubai Raghunath Barge
and Ors. ...Appellants/Applicants

Versus

Ananda Ramchandra Jadhav and Ors.Respondents

Mr. Dhananjay Rananaware for the Appellants.
Mr. Nikhil Wadikar a/w. Ms. Shweta Pandey for Respondent No.1.

CORAM : SHARMILA U. DESHMUKH, J.
DATED : 20th MARCH, 2024.

P. C. :

1. The original Defendants Nos.1 to 4 are before this Court being dissatisfied by the concurrent findings of the Trial Court and the Appellate Court decreeing the Suit being RCS No.299/1989 directing the Defendants to remove the construction of latrine, bathroom and temporary shed from the portion of the suit lane and restoring its width to the original position of 8ft. and restraining the Defendants from causing obstruction to the right of the Plaintiffs to use the lane.

2. The factual matrix giving rise to the present Appeal is that

RCS Suit No.299/1989 was instituted by the Plaintiffs claiming to be the owner of house property bearing gram panchayat property No.243. Initially the Suit was filed for an order of mandatory injunction to remove the stones which were abutting his wall. It appears that subsequently, by way of an amendment, the Plaintiff sought order of perpetual and mandatory injunction directing the Defendants to remove the encroachment by the Defendants over the suit lane and from causing obstruction to the Plaintiffs from using the suit lane. The dispute is in respect of a lane situated to the South of the house of the Plaintiffs. The lane is stated to be the common lane of 8 ft. Width approaching from the main road of grampanchayat towards a stream in East West direction. The house of the Defendants are abutting the suit lane which is on the northern side of their houses. The Plaintiffs and others are using the suit lane as of right being public road. During city survey scheme, the suit lane was numbered as City Survey No. 102 which has been illegally encroached upon by the Defendants raising various constructions reducing the width of the suit land and obstructed the Plaintiffs from using the suit lane.

3. The Suit came to be resisted by Defendants No.1 to 5 by filing their written statements. It was contended that by way of gift deed

dated 13th November 1933 the Defendants are the owners of the property which included the suit lane which belonged exclusively to them and the Plaintiffs have no right over the suit lane.

4. The parties went to trial and the Plaintiffs examined himself and two witnesses whereas Defendants examined Defendants No.2 and two other witnesses. The original gift deed was produced on record as also copy of Appeal filed by the Defendants challenging the city survey scheme. In addition the parties also produced the assessment extract in respect of their respective properties. The Trial Court considered the oral and documentary evidence on record and decreed the Suit directing the Defendants to remove the encroachment and to restore the Suit length with original position of 8 ft. and also injuncted the Defendants from causing obstruction to right of the Plaintiffs to use the lane.

5. As against this, Appeal was preferred by original Defendants Nos.1 to 4. The Appellate Court re-appreciated the evidence on record. The Appellate Court considered the admissions of the Defendant No 2 that he was aware of the city survey scheme and that he was present at that time when the property got the city survey numbers. The Appellate Court also considered the admission of the Defendants that he has no objection

if the Suit lane is used by persons belonging to a certain community. The Appellate Court considered that as against the city survey scheme the Plaintiffs as well as Defendants had preferred an Appeal which came to be decided during pendency of the appellate proceedings vide order dated 18th December, 2010 and fresh inquiry was directed by the District Superintendent of Land Records. The Appellate Court considered the evidence of the TILR who came to be appointed at the instance of the Defendants and had prepared the map after measurements and deposed that CTS No.102 is common lane though not a government road. The Court Commissioner also admitted that the portion marked “ABCG” i.e. the alleged encroachment shown in the map is CTS No.102 as per city survey record. The Appellate Court on appreciation of evidence held that the Suit lane was a common road and the Defendants do not have any exclusive ownership right, title over the Suit lane and dismissed the Appeal confirming the judgment of the Trial Court.

6. Heard Mr. Dhananjay Rananaware, learned counsel for the Appellants and Mr. Nikhil Wadikar, learned counsel for Respondent No.1.

7. Learned counsel for the Appellants would submit that the

question of law arising in the present case is whether report of the Court Commissioner has been properly considered by the Courts below. He would further submit that as during the pendency of the Appellate Court proceedings, fresh inquiry was directed by the District Superintendent of Land Records and the Appellate Court ought to have remanded the matter to the Trial Court for fresh trial. He fairly tenders the fresh inquiry report dated 20th September, 2019 by the Deputy Superintendent of land records who has confirmed the city survey scheme of 27th May, 1992. He points out that in the fresh inquiry report, it is stated that the Plaintiff has no produced any evidence to show his right or ownership over the suit lane. He has taken this Court through the Court Commissioner's report and the map prepared by him and would submit that it is evident from the map that on the western side there was a stream let which is in the nature of dead end and therefore there was no occasion for the Plaintiffs to use the said road. He would further submit that under the gift deed of 1933 the property was gifted to the Defendants which include the encroached portion and certain portions of the property sold to the third party and it is only those parties who are entitled to use the said road. He submits that it is not the case of the Plaintiffs that for the purpose of access to his property the said road is used or that doors or windows open in the Suit property. He submits that road is not a public road but a

common road and the property belongs exclusively to the Defendants.

8. *Per contra*, learned counsel for the respondent would point out the specific findings in the order of the Trial Court as regards the gift deed where the Trial Court has observed the specific recital in the gift deed about the northern side road available for use of the property of the Defendants and has held that if the road was part and parcel of the same property then there was no necessity to mention the road. He would further point out that there is clear admission on part of the Defendants that members of a particular community are using the road and the road is also in use by the person whose house is situated behind the house of the Plaintiffs. He submits that based on the evidence the Trial Court has come to conclusion that road is common road and not exclusively belonging to the Defendants. He further points out the admissions given by Defendants that the width of the lane is 8ft. and that the City Survey officer has shown certain construction in the suit lane. He further points out that the city survey scheme was made applicable in the year 1992 and the Trial Court has therefore rightly inferred that the construction of the structures over the portion of the lane has resulted in minimizing the width thereof. He would further point out the evidence which has been led by the Plaintiffs through his witnesses who have deposed that by

reason of encroachment by the Defendants the width of lane has been reduced resulting in difficulty in using the said lane. He points out that it is specific deposition by DW-3 that the suit road was being used for the purpose of accessing the witness's house, which house is behind the house of the Plaintiff.

9. Considered the submissions and perused the records.

10. The dispute is whether the suit lane i.e. CTS No 102 is a common/public road which the Plaintiff is entitled to use and whether the Defendants have caused encroachment over the suit lane. The Trial Court and Appellate Court have rendered concurrent findings based on evidence that the suit lane bearing CTS No 102 is common lane and the Defendants have encroached upon the common road by raising construction. According to the learned Counsel for the Appellants, there is mis-appreciation of the evidence of the Court Commissioner and thus there is perversity in the findings. The Court Commissioner was appointed at the instance of the Appellants who has measured the properties and submitted a map. The Court Commissioner has deposed that the CTS No 102 is common road and not in possession of any particular person. He has further admitted that the encroached portion is

part of CTS No 102 which is as per city survey record. The Appellate Court has on basis of the evidence of Court Commissioner held that CTS NO 102 i.e. the suit lane is common road. Nothing has been pointed out from the evidence of the Court Commissioner to demonstrate that there is mis-reading of the evidence of the Court Commissioner. There are admissions on record that the Suit lane bearing CTS No.102 is a common road and therefore as the Defendants themselves have examined TILR before the Appellate Court, the non examination of Court Commissioner by the Trial Court does not have any bearing.

11. The next submission raised is about the necessity of the Appellate Court to remand the matter to the Trial Court in view of fresh inquiry directed by the District Superintendent of Land Record. It is not pointed out as to how the said issue raises a substantial question of law. In any event what is required to be considered is that there are specific admissions given by the Defendants about his presence in the village at the time of implementation of the city survey scheme as also his admission that the property was also numbered during the said scheme. Merely because there has been an order of fresh inquiry the same is not sufficient for the First Appellate Court to remand the matter to the Trial Court. Irrespective of the city survey scheme there is ample evidence in

the form of admission of the Defendants as well as the documentary evidence in the form of gift deed which has been examined by the Trial Court who has held that the gift deed mentions that there is northern side road available for use of the property. All the evidence on record demonstrates that the suit lane was common road bearing CTS N0 102 and the constructions by the Defendants are shown on CTS No 102. Appellate Court has rightly appreciated the evidence and in any event by order of 29th September 2019 pursuant to the inquiry, the city survey scheme of 27th May 1992 has been confirmed.

12. In that view of the matter no substantial question of law arises in the present Appeal. 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.)