



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.298 OF 2018

Rahmansha Muhinoddinshah,
Aged 60 years, Occ. Businessman,
R/o Risod, Tq. Risod,
District Washim.

..... **APPELLANT**
Ori. Defendant

...V E R S U S...

Vilas Pandurang Magar,
Aged 48 years, Occ. Businessman,
R/o Main Road, Near Hanuman Temple,
Risod, District Washim.

..... **RESPONDENT**
Ori. Plaintiff

Mr. V. K. Paliwal, Advocate for Appellant.
Mr. B. T. Parwe, Advocate for Respondent.

CORAM: **G. A. SANAP, J.**
DATE: **29th FEBRUARY, 2024.**

ORAL JUDGMENT:

Heard.

2. **Admit.**

3. Taken up for final disposal forthwith by consent of the
learned Advocate for the parties.

4. In this second appeal, challenge is to the judgment and decree dated 05.03.2018, passed by the learned District Judge-1, Washim whereby the appeal filed by the respondent against the dismissal of the suit was allowed and the decree for mandatory injunction has been granted in his favour.

FACTS:

5. The appellant is the original defendant. The respondent is the original plaintiff. It is the case of the plaintiff that he is the owner of plot No.11, admeasuring east-west 70 ft. and north-south 15 ft. He purchased the said plot on 10.07.1996 by registered sale-deed. He has constructed a house on the plot. There is approach way on the eastern side as well as on the southern side of the property. The defendant made construction of a permanent wall and closed his way on the southern side. This construction was made without permission of the Competent Authority. The land where construction of wall is made does not belong to the defendant.

6. The defendant filed his written statement and opposed the claim. According to him, the suit filed by the plaintiff

is false and frivolous. He contended that on 18.01.2000, he purchased the part of S.No.315 admeasuring 12 meters north-south and 15 meters east-west. His plot is in triangle. There is no way on the southern side of the plaintiff's plot. The suit filed is false and frivolous.

7. The parties adduced evidence before the trial court. The trial court on consideration of the evidence, dismissed the suit filed by the plaintiff. The plaintiff preferred an appeal before the learned District Judge-1, Washim, who by the impugned judgment and decree allowed the appeal and decreed the suit. The defendant has challenged judgment and order before this Court.

8. In this appeal, on the date of issuance of notice, following substantial question of law has been framed:

The trial court by relying upon the report of the Commissioner at Exhibit-46 and after recording a finding that the alleged wall was not in the plot of the plaintiff dismissed the suit as filed. Whether the appellate Court was legally justified in reversing that judgment without considering the report of the Commissioner at Exhibit-46?

9. Learned Advocate for the appellant – defendant submitted that a well reasoned judgment passed by the trial court has been reversed without recording cogent reasons by the appellate court. Learned Advocate submitted that a categorical finding has been recorded that the land on which the wall has been constructed by the appellant does not belong to the respondent. Learned Advocate submitted that the sale-deed relied upon by the respondent to establish his claim that there is right of way on southern side, is not reliable. The learned Advocate submitted that the corrections were made in the sale-deed later on by the respondent to show the way towards southern side of his plot. Learned Advocate submitted that the report of the Court Commissioner has not been properly appreciated by the appellate court. Learned Advocate submitted that the Court Commissioner's report has crystallized the factual situation. The learned Advocate submitted that the sale-deed Exh.23 is not believable.

10. The learned Advocate for the respondent – plaintiff submitted that the respondent has examined PW-4 Panjabrao Deshmukh, the erstwhile owner of the property and

on the basis of his evidence and the sale-deed, it has been proved that there is a road on the southern side of the property of the respondent. Learned Advocate further submitted that the sale-deed at Exh.23 clearly shows that on the southern side of the property of the respondent there is a public road. Learned Advocate further submitted that the plot where the wall has been constructed by the appellant does not belong to the appellant. Learned Advocate submitted that by leading cogent evidence the respondent has established existence of the road on the southern side of his plot and obstruction of his way due to the construction of wall by the appellant. Learned Advocate submitted that the appellate court has properly appreciated the evidence. Learned Advocate submitted that the report of the Court Commissioner at Exh.46 cannot be considered ignoring the sale-deed at Exh.23.

11. In order to appreciate the rival submissions, I have perused the record and proceedings. I have gone through the judgment and decree passed by the trial court as well as by the first appellate court. It is undisputed that the appellant has made construction of a wall on the southern

side of the property of the respondent. It has been established that on the southern side of the plot of the property of the respondent there is a public road. The respondent, by examining the erstwhile owner and by producing the sale-deed at Exh.23, has established that on the southern side of his property there is a public road. The appellant who has purchased the property from the same owner in 2000 was required to establish the property purchased by him pursuant to the sale-deed. The sale-deed has not been produced on record. No reason has been put-forth for non-production of the sale-deed. On the basis of the sale-deed at Exh.23, the respondent has established the measurement of his plot as well as the four boundaries of his plot. The owner of the property PW-4 has confirmed and reiterated the contents of the sale-deed. He has explained the corrections made in the boundaries later on. The evidence adduced by the respondent was found sufficient by the appellate court to decree the suit.

12. It is to be noted that the appellant was required to establish his right over the portion of the land, where he has constructed the wall. He was required to establish the measurement of his plot/property and the four boundaries of

his property by producing the sale-deed. It is evident that the complaints were made by the respondent to the police as well as to the Municipal Council, Chief Officer, Nagar Parishad, Risod with regard to the unauthorized construction of the wall by the appellant. The appellant has admitted in his evidence that he has made construction of the wall without prior permission of the Nagar Parishad.

13. In my view in the teeth of the sale-deed Exh.23 the appellant was required to adduce sufficient evidence to rebut the evidence adduced by the plaintiff. It is the contention of the appellant that the construction of the wall is not on the property of the respondent. The question is whether the construction of the wall has obstructed the right of way of the respondent or not. Similarly, the question is whether the construction of the wall was made on the property owned by the appellant. The appellant has miserably failed to establish his ownership over that portion of the land. The report of the Court Commissioner is silent about the actual measurement of the land in possession of the appellant. It is seen on perusal of the Court Commissioner's report that it depicts the existing position on the spot. In my

view, the report of the Court Commissioner could have assumed significance, provided the appellant had established his right over the property where the wall has been constructed.

14. On going through the record afresh, I am satisfied that the evidence on record has been properly appreciated. As such, I am of the view that the question has to be answered against the appellant and in favour of the respondent.

15. As a result of this, there is no substance in the appeal, the appeal is dismissed.

JUDGE