

MJ Jadhav

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL (ST) NO. 34787 OF 2024
WITH
INTERIM APPLICATION (ST) NO. 2364 OF 2025
IN
SECOND APPEAL (ST) NO. 34787 OF 2024**

Babu Appa Jugale Deceased Through ... Appellants/Applicants
Legal Heirs

vs.

Shital Gundappa Ullagadde ... Respondent

Mr. Akshay Kulkarni for the Appellants/Applicants.

CORAM : GAURI GODSE, J.

DATED : 21st FEBRUARY 2025

ORDER:

1. This application is for condonation of delay in filing the second appeal. There is a delay of 16 days in filing the second appeal.
2. I have called upon learned counsel for the appellants to point out, whether the second appeal raises any substantial question of law. I have heard learned counsel for the appellants on merits of the second appeal.
3. This second appeal is preferred by the original defendants to challenge the judgment and decree passed by the first appellate

court granting injunction restraining the defendants from obstructing plaintiff's possession over the suit land.

4. Learned counsel for the appellants submits that the defendants are using the road which passes through the plaintiff's property. He submits that in the absence of any declaration prayed by the plaintiff that defendants would not have any right to use the road, the first appellate court erred in granting an injunction. He submits that the defendants are adjoining landowners and to approach the defendant's land, they are entitled to use the road passing through the plaintiff's property. To support the defendant's contention that there is a road passing through plaintiff's property, learned counsel for the appellants relies upon the admission given by the witness examined by the plaintiff. He submits that the admission given by the plaintiff's witness indicates that there is a road in existence, which passes through the plaintiff's property and is being used by the defendants. He thus submits that aforesaid grounds raise substantial questions of law.

5. I have perused the papers of the second appeal. The suit is filed on the ground that plaintiff is co-owner of Gat No.283. The injunction is claimed in respect of 0.24 guntha out of Gat No.283. The suit property is described with boundaries in the plaint.

Defendants claimed ownership of Gat No.282. It is their contention that there is a road passing through Gat No.283 for approaching their land Gat No.282. Hence, the defendants' claim a right to use the road passing through Gat No.283. The first appellate court after examining the evidence on record including the Court Commissioner's map held that there were two roads as per the Court Commissioner's map. The first appellate court held that the trial Court while rejecting the suit ignored the factual aspects of existence of two roads. The right claimed by the defendants to use the plaintiff's property claiming existence of the road is disbelieved by the first appellate court for want of any supporting evidence. The first appellate court held that expect for oral evidence the defendants' claim to use the plaintiff's property is not supported by any documentary evidence. Hence, the first appellate court disbelieved the defendant's contention regarding existence of road from the plaintiff's property.

6. The first appellate court being the last finding court after examining the evidence on record held that there was no road in existence as claimed by the defendants. Thus, the defendants are restrained from obstructing plaintiff's possession over the suit property.

7. There is no dispute on the ownership of the plaintiff on the suit property i.e. Gat No.283. The defendants claimed right to use the suit land on the ground that it was a road, though had not pleaded and proved the nature of their right to use the plaintiff's property on the ground that it was a road. The defendants had not pleaded and proved, whether the road claimed by them is private road or whether the defendants have any easementary rights. In the absence of any declaration of rights claimed by the defendants they would not be entitled to use the plaintiff's property on the ground that there exist a road.

8. The first appellate court had also referred to the entries in the consolidation scheme, which divided the properties belonging to the parties. As recorded by the first appellate court that there is no road from the plaintiff's property as claimed by the defendants. Thus, in the absence of any right in favour of the defendants they would not be entitled to use the plaintiff's property. In a suit filed for injunction based on plaintiff's title, the defendants would not be entitled to seek a right of way from the plaintiff's property.

9. In view of the admitted fact of plaintiff's ownership over Gat No.283 no declaration is necessary for seeking injunction against the defendant, who is admittedly not concerned with the suit

property.

10. Hence, I do not find any substance in the ground raised on behalf of the appellants that the plaintiff would not be entitled to a decree for injunction. The reliance placed by the learned counsel for the appellants on the admissions given by plaintiff's witness would not assist the appellant's case of any right to use the plaintiff's property as a road.

11. I have perused the evidence relied upon by the learned counsel for the appellants. The admissions given by the plaintiff's witness would at the most mean that there existed a dispute between the parties on use of the plaintiff's property by defendants as a road.

12. Arguments based on the oral evidence of plaintiff's witness would amount to re-appreciating the evidence on record, which is not permissible under Section 100 of Civil Procedure Code. I do not find any illegality or perversity in the reasons recorded by the first appellate court, after examining the pleadings and evidence on record.

13. The second appeal does not raise any substantial question of law. Hence, I do not find it necessary to issue notice to the respondents in the application for condonation of delay.

14. In the facts and circumstances of the case, the delay is condoned and the application for delay condonation is allowed.

15. For the reasons recorded above, the second appeal is dismissed. In view of dismissal of the second appeal, interim application for interim relief is disposed of as infructuous.

(GAURI GODSE, J.)