



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

SECOND APPEAL NO.615 OF 2006

APPLICANTS : 1 **Bhagawandas Damodhar Agrawal,**
Aged about 38 years, Occupation : Trader
2 **Jaiprakash Damodhar Agrawal,**
Aged about 43 Years, Occupation : Trader
Both R/o. Raviwar Bazar area, Patni Chowk,
Washim, Tq. & Distt. Washim.

..VERSUS..

RESPONDENT : **Bansilal S/o. Hiralal Kale,**
Aged about 63 yrs., Occupation : Trader,
R/o. Patni Chowk, Raviwar Bazar, Tq. &
Distt. Washim.

Mr A. S. Mehadia, Advocate for Appellants.
Mr A. K. Chandak, Advocate for Respondent.

CORAM : **M. W. CHANDWANI, J.**
RESERVED ON : **12th FEBRUARY, 2025**
PRONOUNCED ON **7th MAY, 2025.**

JUDGMENT

1. Heard.

2. The appeal challenges the decree dated 19.11.2005 passed in Regular Civil Appeal No.179 of 2003 by the learned First Appellate Court, Washim, whereby the appeal came to be partly allowed confirming the injunction restraining the appellants from interfering with

the respondent's right to use, enjoy, repair and maintain the existing utilities including the water tank, windows, doors, sajjas and water pipeline abutting the eastern passage between the houses of the appellants and respondent.

3. This Court by order dated 30.10.2007 framed the following substantial question of law.

“Whether the extensions/constructions of the wall at the instance of the defendant within the area of the plaintiffs’ plot were legally liable to be held as encroachments?”

4. For deciding the substantial question of law framed by this Court, brief facts of the case are necessary.

The appellants/original plaintiffs filed a suit for declaration that they are the owners of the suit property measuring 115 feet in length from east-west and 34 feet in width from south-north, whereas the respondent/original defendant No.1 has a plot measuring 65 feet from east-west and 16.80 feet from north-south adjoining the southern boundary of the appellants’ plot. In the year 1983, respondent started construction of his house towards the southern side of the appellants’ plot. During construction, he encroached on the southern side of the appellants’ plot and created chhajjas as a part of the slab having length and width of 38 feet and 2 feet respectively. He also constructed chhajjas over the windows measuring 2 feet X 5 feet and over the door measuring

3^{1/2} feet X 2 feet. Apart from that, he constructed a water tank measuring 6 feet X 1^{1/2} feet by encroaching upon the plot of the appellants. In 1986, the respondent extended his water connection by laying two pipes through the southern portion of the appellants' plot. Similarly in 1990, he installed a waste discharge pipe in the southern side land of appellants which caused nuisance to the appellants. During pendency of Regular Civil Suit No.101 of 1995, respondent constructed a balcony on the chhajjas and fitted shutters to the windows in his northern side wall i.e. southern side of the appellant's plot. He started construction of the first floor and therefore, the suit came to be filed. Respondent denied the description of appellants' plot and contended that there is a lane admeasuring 6 feet between the plot of the appellants and the respondent. The length of the appellants' plot from north-south is only 28 feet. The respondent has been using the land as a customary way and his predecessors have used it since 1963 continuously without interruption without affecting the enjoyment of the appellants and their predecessors. Therefore, he sought dismissal of the suit and prayed that his counter claim be allowed.

The learned Trial Court after framing necessary issues, dismissed the suit and passed the decree for perpetual injunction against the appellants prohibiting them from obstructing the respondent from

using and enjoying the disputed land. Feeling aggrieved with the decree and findings recorded by the learned Trial Court, the appellants preferred an appeal before the learned Additional District Judge, Washim. The respondent also filed a cross-objection against the dismissal of his counter claim for declaration. The First Appellate Court partly allowed the appeal holding that the appellants are the owners of the open space between the houses of the respondent and the appellants. However, the First Appellate Court refused to pass a decree for mandatory injunction against the respondent for removal of water pipes, some portion of water tank, chhajjas of the wall, underground water pipeline and fitted pipeline in the wall of bathroom and latrine of the respondent adjoining the open space and the house of the appellants.

5. Heard the learned counsels appearing for the respective parties. Having gone through the judgments impugned, the record and proceedings of the case, it transpires that the First Appellate Court has held the appellants as owners of the plot having length of 115 feet towards east-west and north-south and width of 34 feet towards north-south. It also transpires that the appellants constructed a house by leaving a space of 6 feet towards the southern side. The respondent constructed the house on the ground and the first floor having his southern wall abutting to 6 feet open space left by the appellants. It is a matter of record

that in the said open space, the respondent constructed a water tank measuring 6 feet in length from east-west and 1.1^{1/2} in width from north-south. He also constructed chhajjas having east-west length 30 feet, erected second chhajjas on 5 feet east-west and 2 feet north-south on windows, third chhajjas on the door measuring size 3.6 feet east-west and 2 feet north-south. Now, the question that is to be addressed is, whether the learned Appellate Court was right in allowing the respondent to retain the extension of chhajjas on the air space over the plot of the appellants despite of holding the appellants as the owners of the open space without claiming any easementary right.

6. Concededly, the respondent has not come up with a case of any easementary right over the house of the appellants but his case is that there was a public lane between the houses of the appellants and the respondent. This stand came to be negated by the First Appellate Court by holding that the appellants are the owners of the open space having width of 6 feet towards the southern side which is towards northern side of the respondent. The said findings attended finality. However, the learned First Appellate Court did not grant the relief on the ground that the easementary right of the respondent will be affected.

7. Easement is defined under Section 4 and acquisition by prescription is defined under Section 15 of the Indian Easements Act,

1882 which reads as under:

4. Easement- *An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.*

8. Easement can be acquired by grant, by prescription and by way of necessity. Easement has to be pleaded specifically. For getting the relief to protect the easement, it has to be demonstrated that there exists a right of easement over the land of another. In the present case, the respondent has not come up with the case as to which type of easement he has acquired in the plot of the appellants. Rather, he has not come up to claim any type of easement mentioned above.

9. Notably, the owner of the property is the owner of the air space above it and there can be no ownership in the air space without property. It follows the principle that the space above land is a property. Therefore, by constructing Chhajjas, water tank and installing pipelines, the respondent cannot interfere with the full enjoyment and use of the surface/air space above the land of the appellants other than by way of easementary right on the servient owner. The case of the respondent is not of being a dominant owner claiming easementary right. Rather, it was also not pleaded at all by the respondent. The First Appellate Court was not justified in refusing mandatory injunction to remove chhajjas, water tank, underground pipes and water pipes from the open space by

recognizing the easementary right of the respondent which was not demonstrated to be acquired by him by any of the modes prescribed under the Indian Easements Act, 1882. Even the sale-deed of the appellants does not reveal any grant to the respondent to erect chhajjas in the air space of the land belonging to the appellants and to construct the water tank.

10. So far as the prayer for mandatory injunction asking the respondent to close the doors and windows is concerned, the same cannot be granted for the simple reason that these are constructed in the wall of the respondent in the area owned by him. It is his choice to construct the door and windows, therefore, the respondent cannot be asked to close the doors and windows. The prayer for mandatory injunction directing the respondent to close the doors and windows is refused. However, it is made clear that the respondent does not have an easementary over the space and even the right of light or air. Consequently, the appeal is partly allowed.

11. The respondent is directed to remove all water pipes, portion of water tank, Chhajjas of walls and underground pipeline which comes in the plot owned by appellants.

(M. W. CHANDWANI, J.)