



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

SECOND APPEAL NO.52 OF 2006

1. ~~Dhirajbai w/o Tilakehand Shah,~~
~~aged 85 years, occupation:~~
~~household work.~~

2. Navinchand s/o Tilakchand Shah,
aged 67 years, occupation : business.

3. Dwarkadas s/o Tilakchand Shah,
aged 56 years, occupation: business.

All residents of Paratwada, taluka
Achalpur, district Amravati.

..... **Appellants.**

:: VERSUS ::

1. Bhikulal Ramdulare Gupta,
aged 59 years, occupation:
teacher.

2. Mohanlal Ramdulare Gupta,
aged 55 years, occupation: service,
both residents of Paratwada,
taluka Achalpur, district Amravati.

(2-a) Mrs.Pushpa wd/o Mohanlal Gupta, aged
about 68 years, occupation: housewife.

(2-b) Ms.Anjali d/o Mohanlal Gupta, aged
about 44 years, occupation: teacher.

(2-c) Ms.Amruta d/o Mohanlal Gupta, aged
about 32 years, occupation: legal.

all R/o Suraksha Apartment, Hindustan

Colony, Amravati Road, Nagpur 440 033. **Respondents.**

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Shri Abhay Sambre, Counsel Appellants.
Shri Rohit Vaidya, Advocate h/f Shri R.L.Khapre, Senior
Counsel for Respondent Nos.1 and 2.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 11/12/2024

PRONOUNCED ON : 06/01/2025

JUDGMENT

1. By this appeal, appellants have challenged judgment and decree passed in RCA No.6/1994 by learned 2nd Ad Hoc Additional District Judge, Achalpur dated 29.9.2005 by which the appeal of respondents was allowed and the judgment and decree of the trial court to the extent of counter claim in respect of the injunction on user of JC door to go to the eastern service lane was set aside. It was further directed that the plaintiffs' claim to restrain the defendants permanently from interfering with their right to repair their southern wall by going through the door JC is decreed. The defendants were permanently restrained from interfering the plaintiffs to use JC door to repair their southern wall.

3

2. Brief facts of the plaintiffs case are as under:

3. The plaintiff Nos.1 and 2 are brothers and they are owners of house bearing municipal No.71, situated on nazul plot No.127, sheet No.19, in ward No.8, Paratwada. The original owner of the said house property was their grandfather Ramdhin who purchased it by registered sale deed dated 28.7.1975 and reconstructed it in the same year. The house of the defendants is situated on south of their house. As per contentions of the plaintiffs, the wall between both the houses belongs to them. One Shankarlal Agrawal was initially tenant in the house of the defendants. In the October 1984, the defendants took possession of their house from the tenant. In December 1984, the defendants raised the height of the room by two feet by lifting the curb roof. While lifting the height of room, the defendants removed and refixed beams and rafters two feet above in the middle wall unauthorizedly. The defendants also scratched the middle wall from southern side and there are scratches on the wall inside north-south. The plaintiffs have incurred the expenses

4

to repair the wall. As soon as the plaintiffs came to know about illegal and unauthorized act of the defendants, by issuing notice dated 2.1.1985 the defendants were called upon to maintain the *status quo* and also asked to repair the wall. Despite the service of notice on them, they neither repaired the wall nor maintained the *status quo*. It is further contended by the plaintiffs that there is a door on the east side of the middle wall which opened in the house of the defendants. The plaintiffs have right to use the door to go towards east to repair the southern side of the middle wall by entering into the defendants' house. But, the defendants by notice reply called the plaintiffs to close the door. As per the plaintiffs, they have an easementary right by prescription as well as by way of necessity to use the door and, therefore, they preferred the suit for declaration that the middle wall belongs to them exclusively and they have right to use the eastern door in the middle wall by way of easementary right and also claimed the compensation towards the repair of the southern side wall.

5

4. The defendants contested the suit with contention that the plaintiffs have no easementary right to enter into the house of the defendants to repair the wall. In fact, no damage is caused to the middle wall. The middle wall is common wall. The defendants have admitted that they have obtained the possession in October 1994 and raised the height of roof by two feet and prayed for dismissal of the suit. The defendants have also claimed by way of counter claim that the door which opens in their house be closed permanently and the plaintiffs are not entitled to have door on the south east corner and sought mandatory injunction against the plaintiffs.

5. Considering the rival contentions of the parties, necessary issues were framed by the trial court. In support of the contentions, the plaintiffs examined as many as five witnesses namely PW1 Ramkrishna Sahastrabuddhe Exh.43, PW2 Bhikulal Ramdulare Gupta plaintiff himself vide Exh.55, PW3 Shankarlal Agrawal vide Exh.64 the tenant of the defendants, PW4 Ramratan Gupta vide Exh.65 and PW5 Sham Deshpande vide Exh.66. DW1 defendant No.1(b) has also

6

examined himself vide Exh.81, DW2 Premshankar Sharma vide Exh.84, DW3 Pradip Bhansali vide Exh.107, and DW4 Keshav Bhide vide Exh.111.

6. On appreciating the evidence, learned Civil Judge Senior Division decreed the suit partly and it was declared that the suit wall belongs to the plaintiffs exclusively and the defendants are restrained by perpetual injunction from damaging the southern side of the suit wall. The defendants further by way of mandatory injunction are directed to restore the western side roof of their house to its original height and to cover scratches caused by removal of south-north wall embedded in the suit wall. The defendants were further directed to pay the costs of Rs.100/- which was incurred by the plaintiffs for repairing the said wall. The easementary right claimed by the plaintiffs to enter the defendants house by the JC door was denied and they are directed by mandatory injunction to close the said door.

7

7. Being aggrieved and dissatisfied with dismissal of the some of prayers, the original plaintiffs preferred an appeal bearing Regular Civil Appeal No.6/1994. While allowing the appeal, the appellate court set aside the judgment and decree to the extent of counter claim in respect of the injunction by which restrictions were imposed on the plaintiffs to use the JC door. The appellate court further restrained the defendants from interfering with their right to repair their southern wall by going through the door JC and the defendants are permanently restrained from interfering the plaintiffs to use JC door to repair their southern wall.

8. Being aggrieved with the same, the present appeal is preferred by the defendants.

9. The substantial questions of law involved in the appeal are as follows:

Whether the appellate court was justified in law in reversing the findings recorded by the trial court by relying on the testimony of PW3 Shankarlal Agrawal

8

which was disbelieved by the trial court for convincing reasons and disbelieved the evidence of DW4 Keshav Bhide whose testimony was believed by the trial court?

10. The parties hereinafter are referred as per their original nomenclature.

11. Heard learned counsel Shri Abhay Sambre for the defendants and Advocate Shri Rohit Vaidya h/f learned Senior Counsel Shri R.L.Khapre for the plaintiffs.

12. Learned counsel for the defendants submitted that by the suit for declaration and injunction the plaintiffs have claimed the easementary right by prescription and the suit was partly decreed by the trial court. The easementary right was denied by the trial court by observing that the plaintiffs failed to establish the easementary right by way of prescription as well as by way of necessity. The burden of proof of all ingredients of Section 15 of the Easements Acts was not discharged by the plaintiffs. The plaintiffs have to prove the acquisition of the said right and also have to prove

that they have enjoyed the said right peacefully and openly for a period of 20 years. The first appellate court without assigning any reason set aside the decree of the trial court by which the right of easement was denied to the plaintiffs. Thus, incorrect finding is recorded by the first appellate court and, therefore, the judgment of the first appellate court is perverse and liable to be quashed and set aside.

13. *Per contra*, learned counsel for the plaintiffs invited my attention towards the entire evidence and submitted that there is a pleading in para No.1A of the plaint as well as para No.5 as to the right of easement. Thus, requirement of law is satisfied by the pleading. The evidence of the plaintiffs is substantiated by the independent witness PW3 Shankarlal Agrawal. The case of the plaintiffs is also covered by right of easement by way of necessity. The requirement of Section 15 of the Easements Act are fulfilled. If the explanation given under Section 15 of the said Act is considered, there is no evidence to show that there was any obstruction to the use of the said door. The plaintiffs have enjoyed the said right

10

without interruption for more than 20 years and, therefore, the first appellate court rightly considered the same and set aside the decree to that extent and, therefore, there is no perversity in the judgment of the first appellate court. Moreover, no substantial question of law is involved. Therefore, the appeal deserves to be dismissed.

14. On appreciating the evidence on record, it is undisputed that the suit house belonging to the plaintiffs is East West in length and house belonging to the defendants situates on south and adjoining to the plaintiffs' house. It is also East West in length. Admittedly, there is a wall between both the houses which is a suit wall. There is no dispute that the plaintiffs' grandfather Rama purchased the house by registered sale deed dated 28.7.1995. The sale deed is at Exh.56. The deceased defendants purchased the southern house by way of registered sale deed on 31.5.1962 which is at Exh.80 in the name of Dwarkadas who is defendant No.1-C. The plaintiffs have not claimed any ownership or possession of the southern house. The contention of the plaintiffs is that

11

roofs of both the adjoining houses rest on middle East-West wall which is the suit wall. The said suit wall according to the plaintiffs exclusively owned and possessed by them. As far as contention of the plaintiffs is concerned, that the rooms of both houses rest on the middle wall, is undisputed fact. Whereas, ownership of the middle wall of the plaintiffs is denied by the defendants. As per the contention of the defendants, it is common wall of both of them. In support of his contentions, the plaintiffs and defendants both have placed reliance on survey record concerning both the houses and their measurements in order to locate the exact situation of the suit wall, but none of parties have adduced the evidence to establish the said fact.

15. In the light of the admitted facts, if the evidence is appreciated, it reveals that Exh.56 sale deed dated 28.7.1995 the plaintiffs house is bounded by defendants house on South which has walls on four sides. The sale deed Exh.80 in respect of the defendants' house nowhere reflects that there is a northern or southern wall. Though there is a reference to

12

the western door of wooden plants and eastern courtyard and the door to proceed towards east. This evidence as to the both the sale deeds were executed when the parties were not in dispute in respect of the middle wall which shows that in both the sale deeds the suit wall was shown to be part and parcel of the suit house. Even the pleading and the evidence of the defendants substantiates the same. The contentions of the defendants that the suit wall is common wall but the evidence of the defendants is not certain about the same. They rest their evidence on the fact that the roofs of their houses as well as of the houses of the plaintiffs are rest on the middle wall and, therefore, they claimed that it is common wall. The commissioner's report which is part and parcel of the evidence also shows that the rafters, beams, and south north inside walls of the defendants house have been embedded in the suit wall to support of their rooms. Besides the support taken from the middle wall to the defendants house, there are five cupboards without doors in the suit wall and the same opens in the defendants house. The defendants claimed that this facts itself is sufficient to show that it was a

13

common wall and placed reliance on the principle of *res ipsa loquitur* which means things speaks for itself and claimed that the suit wall is the common wall. Even accepting the same, the evidence of the plaintiffs is more cogent and convincing as in the sale deed at Exh.56 it is mentioned that the middle suit wall exclusively belongs to the plaintiffs. Whereas, Exh.80 the sale deed executed in favour of the defendants is silent as to the aspect of middle suit wall. It is nowhere mentioned in Exh.80 that it is common wall. If it would have been a common wall, there has to be mention about the same in the sale deed Exh.80 and, therefore, the contention of the plaintiffs that the suit wall is exclusively owned by them is not only supported by the oral evidence but also it is supported by Exh.56. Therefore, the contention of the defendants that the suit wall is a common wall has no substance. The defendants have only right to support from the said wall to their house.

16. The controversy arises between the parties when the defendants came into possession of the said suit house

14

from their tenants in October 1984 and thereafter in December 1984 they have raised the height of western roof by two feet after removing the woods beams and rafters and re-fixing them two feet above in the suit wall. Though the defendants denied the plaintiffs' case of raising heights of eastern room by removing eastern beams and rafters and revising them above in the suit wall, the plaintiffs have produced a map Exh.46. The defendants have also produced map Exh.108 and the Commissioner map is also on record. From the report of the commissioner, it reveals that the defendants house is of a curve room slanting on west and east. The defendants admitted during his cross examination that they have increased the height of western room by two feet after removing and re-fixing them above in the suit wall. The evidence of PW2 Bhikulal Gupta shows that the defendants removed eastern beams and rafters and re-fixed them above to raise the height of eastern rooms of the defendants by two feet. PW3 Shankarlal Agrawal who was tenant of the defendants has also substantiated the said fact. Thus, the evidence on record sufficiently shows that the

15

defendants have raised the height of western roof by two feet after removing the woods, beams, and rafter.

17. PW4 Ramratan Gupta who is cousin of Bhikulal also supports the said contentions. The photograph Exh.68 shows lifting of both the roofs. PW5 Sham Deshpande who was appointed as court commissioner has obtained photographs. Thus, as far as the evidence is concerned, the same shows that there was a lifting of western beam and room by two feet, but there was no evidence to show that there was lifting of the eastern beam and roof towards the eastern side.

18. Exh.68 is the photograph to show the lifting of roof of both the rooms. PW5 Sham Deshpande who was appointed as court commissioner had taken the photographs which are at Exh.68. As already observed, that as far a lifting of western beam is concerned, there is evidence, but there is no evidence to show that height of the eastern roof was also raised. Considering the same, the plaintiffs have proved lifting

16

of western beams but could not prove the lifting of eastern beam.

19. The plaintiffs have also claimed the damages towards the repairing of the suit wall. The evidence of defendant Naveenchandra shows that he obtained the possession from his tenant PW3 Shankarlal Agrawal in the year 1984. Learned Civil Judge Senior Division has considered the evidence and observed that the evidence on record shows that the house was renovated by removing south north inside wall which was embedded in the middle wall and there appeared to be scratch portion in the suit wall on southern side. He has also admitted as to the damages to the suit wall and the same was not repaired. The scratches are also apparent from photograph Exh.70. Thus, the suit wall belongs to the plaintiffs and the plaintiffs have to repair it and, therefore, the trial court rightly granted the relief as prayed by the plaintiffs that he is entitled to receive amount of Rs.100/- towards the repair.

17

20. The relief of the plaintiffs as to the easementary right by way of necessity and prescription was denied by the trial court and allowed by the first appellate court. The houses of the plaintiffs and defendants are facing towards the west. There is a service lane on east of both the houses. There is a door to the defendants house opening the service lane. There is also door in the east west suit wall situated between both the houses which was shown in the map. The door has been referred by the letters "JC" in the plaint map Exh.46. The plaintiffs have claimed an easementary right to way by prescription to enter into the defendants adjoining house to go to the eastern service lane and to repair the middle suit wall from south. It is well settled that the pleading in a case dealing with easement have to be very precise. In a book 'Law relating to easement in British India' by Peacock 3rd Edition, at page No.608, it is stated that "as an easement is not one of ordinary rights of ownership, it is necessary that either party claiming or relying on an easement should plead the nature of his title thereto as to clearly to show the origin of the right, whether it arises by statutory prescription or express or

18

implied grant, or the old common law method of a lost grant.”

It is required to be mentioned that easement of necessity must be an absolute necessity and not merely a convenient mode of enjoyment of property and an easement of necessity cannot be granted merely on the ground of convenience and advantage. It is solely depend upon absolute necessity. The necessity cannot be understood as mere rule of convenience. Whether there was absolute necessity or not, is to be determined with reference to the circumstances and environments of each case.

21. Easements are certain rights in the property of another (jura in re aliena). Section 13 of the Indian Easements Act reads thus:

13. Easements of necessity and quasi-easements. -
Where one person transfers or bequeaths immovable property to another, -

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the

19

transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

(c) if an easement in the subject of the transfer or bequest is necessary, for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

20

Where a partition is made of the joint property of several person,--

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

22. The easements mentioned in this section, clauses (a), (c), and (e) are called easements of necessity. Section 15 of the Indian Easements Act deals with acquisition by prescription which reads as under:

15. Section 15 of the Indian Easements Act reads thus.

21

15. Acquisition by prescription. - Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure or by things affixed thereto, as an easement, without interruption, and for twenty years, and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to such access and use of light or air, support or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next

22

before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I. - Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II. - Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after

23

the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III. - Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.- In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to the [Government], this section shall be read as if, for the words twenty years the words [thirty years] were substituted.

23. Combined reading of Sections 13 and 15 of the Act shows that they are independent provisions providing for
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24

easementary rights on different nature of rights. Section 13 of the Act provides for easements of necessity and quasi-easements, while Section 15 of the Act provides for easements by prescription. In other words, if a party has easementary right under Section 13 of the Act and also under Section 15 of the Act, it is can be claimed simultaneously. In view of Section 15, requirements necessary to be satisfied to claim right of way by easement of prescription are : (a) right must be certain, (b) it must have been enjoyed, (c) the enjoyment must be independent, and (d) it must be peaceably and openly as of right without any interruption for more than 20 years.

24. An easement can be acquired by prescription under Section 15 of the said Act. Every occupier of the land is prima facie entitled to the exclusive use and enjoyment thereof and of the natural advantages arising from its situation and environments without let or hindrance. Every right of easement claimed is a restriction on such exclusive right and is an evasion of it. Hence, the burden of proof of

25

the element constituting a right of easement lies on the person who asserts that right and thereby invades the natural right of the occupier of the land on which the right is claimed. The law is jealous of a claim to an easement, and the burden is on the party asserting such a claim to prove it clearly. Such right can be proved by showing a grant conferring an easement in express terms or by necessary implication or where an easement by prescription, he must prove the facts essential to the acquisition of the prescriptive title. Thus, party who claims easementary right must show that the user was open and it was with the knowledge and acquiescence of the owner of the servient tenement that the use was continuous and uninterrupted hostile and under a claim of right, exclusive and continued for the period requisite for the acquisition of an easement by prescription, without change or material variation. A right of way may be acquired by prescription where the same has been peaceably and properly enjoyed by any person claiming title thereto as an easement, and as of right, without any interruption and for 20 years.

26

25. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription. The pleading necessary to establish an easement by prescription and different pleading and proof is necessary for easement of necessity. As already observed that the party claiming right of easement is under obligation to prove the same.

26. Here, in the present case, the plaintiffs have claimed the right of easement by necessity as well as by way of prescription. Section 15 of the Easements Act determines two requirements; (i) the enjoyment must be upto within two years of the date of suit and (ii) that upto that time it must have been enjoyed for 20 years and without interruption.

27. In the light of the above well settled principles, the facts and evidence of the present case show that the plaintiffs'

grandfather purchased the house i.e. the servient heritage within the meaning of Section 4 of the Indian Easements Act on 28.7.1925 by way of registered sale deed Exh.56. Perusal of the sale deed shows that there is no reference as to existence of the door in the suit wall and opening of the same in the adjoining southern house in the sale deed. On the contrary, the sale deed by which the house was purchased shows that its own door opening on east sufficiently shows that the door allegedly shown by the plaintiffs to enter towards east from the house of defendants was not in existence in the year 1925. The evidence on record shows that when the house was purchased by the grandfather of the plaintiffs was single storey. Subsequently, it was constructed and made double storey. The oral evidence of the plaintiffs nowhere states that on actual what date the said door was fixed in the suit wall. As per the evidence of PW2 Bhikulal Ramdulare Gupta, the middle suit wall was reconstructed within a year after 1925. This fact itself is not sufficient as the requirement of law is that period to acquire right thereby putting some restrictions upon owner of the land to use and

enjoy it and, therefore, it is for the plaintiffs to specifically plead when the door was opened and whether it was by express or implied grant. The pleading of the plaintiffs nowhere shows that it was an express grant but it is the case of implied grant by way of prescription. The evidence of PW2 Bhikulal Gupta and PW4 Ramratan Gupta who have no knowledge as to exactly since when the door was fixed in the suit wall. Evidence of PW3 Shankarlal Agrawal is also silent about the same. The evidence of DW1 Navinchandra also shows his ignorance as to when the door was fixed. The subsequent sale deed in favour of the defendants dated 31.5.1962 is also silent about existence of the door on the suit wall. The enjoyment of the right through the said door and the time of fixing of the door is *sine qua non* as statutory period of 20 years is to be computed from the day of fixing of the door. There is no evidence that any permission was obtained from the defendants predecessors in title while fixing the door. Thus, absolutely, there is no material to show that since when the said door is in existence. The plaintiffs have claimed the easementary right by way of necessity. As far as

29

right of necessity is concerned, it reveals from the evidence that there is a door in the east west suit wall situated between both the houses. When the plaintiffs claimed the right of necessity, the plaintiffs have to show the right by showing that it is an absolute necessity and not merely a convenient mode of enjoyment of the property.

28. It is well settled that an easement of necessity cannot be granted merely on the ground of convenience and advantage. It solely dependent upon absolute necessity. The plaintiffs also claimed the easementary right by way of prescription. In order to acquire an easementary right by way prescription, the exercise of the right should be open so that the person against whom the right is claimed and that too as to right should know their about as the hostile act causes the statutory period to run. The plaintiffs have not adduced any such evidence to prove his right by way of easementary right either by prescription or by necessity.

30

29. In the present case, after going through the pleadings as well as the evidence of the witnesses, it is clear that the plaintiffs have failed to establish that they have been using the access peacefully, openly as the right for the last 20 years the material placed on record and especially the oral evidence as well as the documentary evidence which nowhere shows exactly when the said door was fixed and since when the plaintiffs are using the said door uninterruptedly. There is no evidence also that there is no other way available to the plaintiffs to enter into the eastern side and, therefore, easement by way of necessity is available to the plaintiffs. The pleading as to when such right was created is also absent in the present case. Therefore, on the basis of the evidence, the trial court rightly considered that the plaintiffs failed to establish his easementary right by way of prescription or by way of necessity. The first appellate court has ignored the requirement of law while granting such relief. The evidence on record shows that the suit wall belongs to the plaintiffs exclusively and the defendants have no title or possession over the suit wall. They have simply a right to take support to

31

the roof of their house without changing its structure and place for enjoyment. The defendants have no right to cause any damage to the southern side of the suit wall. The plaintiffs failed to establish their right to use the door shown in the map which has been fixed on the suit wall on east and thus the plaintiffs failed to establish the easementary right to sue the door to go to eastern service lane and to enter defendants' house to repair the southern side of the suit wall.

30. The scope of second appeal in view of Section 100 of the Civil Procedure Code is very limited. In numerous judgments, it has been held that concurrent finding of fact of the trial court and the first appellate cannot be interfered with by the High Court in exercise of its jurisdiction under Section 100 of the Code. It is not the principal of law that where the High Court finds that if there is a concurrent finding of two courts, such finding becomes unassailable in the second appeal. However, it has been laid down in several decisions that concurrent findings of fact is usually binding on this court while hearing the second appeals under the said Code. It is

32

trite law that in order to record any findings on facts, the trial court is required to appreciate the entire evidence oral as well as documentary in the light of the pleading of the parties. The appellate court has jurisdiction to appreciate the evidence while hearing the first appeals either affirming the findings of the trial court or reversing the same.

31. In the case of **Kondiba Dagadu Kadam vs. Savitkibai Sopan Gujar and ors**¹, the Hon'ble Apex Court held that from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court.

32. In the case of **State of Rajasthan vs. Shiv Dayal**², the Hon'ble Apex Court held that a concurrent finding of the fact is binding unless it is pointed out that it was recorded *de hors* the pleadings or it was based on no evidence or based on mis-reading of the material on records and documents. The Hon'ble Apex Court held that when any concurrent finding of fact is assailed in second appeal, the appellant is entitled to

¹ (1999)3 SCC 722

² (2019)8 SCC 636

33

point out that it is bad in law because it was recorded *de hors* the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached.

33. In view of the above, the judgment and decree passed by learned Civil Judge Senior Division at Achalpur is to be maintained and the judgment and decree passed by the first appellate court to the extent of counter claim giving right to the plaintiffs to use the JC door to go to eastern service lane is required to be set aside. The judgment and decree passed by the first appellate court restraining the defendants permanently from interfering with their right to repair their southern wall by going through the door JC is also set aside. The decree to the extent of restraining the defendants from interfering the plaintiffs use to the JC Door to repair their southern wall is also set aside. The decree passed by learned Civil Judge Senior Division declaring that the plaintiffs have

34

no right to enter the defendants' house by the door JC as shown in the plaint map to go to eastern service lane and to repair the southern side of the suit wall by entering into the defendants' house is maintained. The decree passed by learned Civil Judge Senior Division directing the plaintiffs by way of mandatory injunction to close the door is also maintained. The decree passed by learned Civil Judge Senior Division declaring that the suit wall belongs to the plaintiffs exclusively and the defendants are restrained by way of perpetual injunction to cause any damage to the southern side of the suit wall and by way of mandatory injunction directed the defendants to restore the western roof of their wall of their house to its original height by covering the holes in the suit wall and to cover the scratches caused by removal of south north wall embedded in the south wall is also maintained. The decree directing the defendants to restore the western side roof to its original position and height and to cover the scratches in the suit wall and on failure to do so declaring the entitlement of the plaintiffs to implement the

35

order of the court by executing the decree including the damages of Rs.100/- is hereby maintained.

34. With these directions, the appeal is allowed and the judgment and decree passed by the first appellate court is quashed and set aside.

(URMILA JOSHI-PHALKE, J.)

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