
(2003) 09 BOM CK 0035
In the Bombay High Court
Case No : Second Appeal No. 116 of 1989

Jiwanlal Motwani

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-09-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2

Citation : (2004) 1 CivCC 295 : (2004) 1 MhLj 265

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : D.G. Paunikar, for the Appellant; S. Doifode, A.G.P. and B.P. Dharmadhikari, for the Respondent

Judgement

S.A. Bobde, J.—Heard Shri Paunikar, the learned counsel for the Petitioner, Shri Doifode, the learned A.G.P. for the State and Shri Dharmadhikari, the learned counsel for the respondent Nos. 2 and 3.

2. This second appeal is preferred by the appellant-original plaintiff. His suit is for permanent and mandatory injunction directing the respondent Nos. 2 and 3 to remove the encroachment, which had been decreed by the Trial Court, and has been set aside by the lower Appellate Court. Hence, this second appeal.

3. The substantial question of law is formulated as under:--

"Whether in absence of special damages; the plaintiff is entitled to maintain a suit for mandatory and permanent injunction for removal of encroachment?"

4. The appellant and the respondents are the residents of Sindhi Colony, Desaiganj. This colony, which has been established for refugees, who migrated from Pakistan in the year 1948. The appellant claims to be an allottee of Plot No. 13, in that colony. The appellant Nos. 2 and 3 are brothers, who are in occupation of plot No. 9. The appellant filed a suit seeking a decree for permanent injunction restraining the defendants from making further construction by way of encroachment, and for mandatory injunction to remove

the existing construction, which is an encroachment.

5. According to appellant, the respondents have made an encroachment and constructed upon the public road, which is shown in red colour and demarcated by the alphabets A, B, C, D in the map filed along with the plaint. According to appellant, who is neighbour of the respondents, this encroachment made movement in the ward difficult. He therefore, sought mandatory injunction for removal of this encroachment. The Trial Court found that the appellant is not the owner of plot No. 13, as alleged by him. The learned Trial Judge however, found the appellant has proved that the defendant Nos. 2 and 3 have encroached upon the public road in carrying out the layout particularised by the alphabets A, B, C, D in the plaint map. The Trial Court however, found the appellant has not proved that the encroachment made his own movement difficult in the said ward. However, there is a clear finding on the basis of evidence on record that there is an encroachment. The evidence includes notices issued by the Naib Tahsildar, for removal of encroachment. The Trial Court found that the appellant is entitled to all the reliefs claimed by him.

6. Having regard to the fact that the plaintiff is resident of plot No. 16, the Trial Court granted relief of permanent as well as a mandatory injunction.

7. Aggrieved by the judgment and decree dated 7th March, 1983 of the Trial Court, respondent preferred an appeal before the Additional District Judge, Chandrapur. The learned lower Appellate Court agreed with the Trial Court that there was an encroachment by defendant Nos. 2 and 3 upon the public road in the colony layout particularised by alphabets by letters A, B, C, D. However, merely because the appellant has not proved any special damage to him, the appellate Court reversed the judgment and decree of the Trial Court granting permanent and mandatory injunction. The other reason as to why the appellate Court has reversed the judgment and decree of the Trial Court is that the plaintiff himself was found to have blocked the southern road by making construction thereon. Since the plaintiff himself was responsible for encroachment, the lower Appellate Court found him disentitled for injunction.

8. Having heard the learned counsel appearing for the respective parties, I find that the judgment of the lower appellate Court is wholly unsustainable in law. Though the lower appellate Court has not said in so many words, it found that the plaintiff has no locus to maintain the suit for removal of encroachment on public road, because he has not suffered special damages. In doing so, it appears that the lower Appellate Court has strayed from the law. In fact, the judgment virtually results in giving a charter to make an encroachment and simultaneously prevents a neighbour from challenging the encroachment on a public road unless he has suffered special damages. That cannot be the law. Where an encroachment is made on public road which is meant for free passage within a local area, inconvenience and wrong to the public including the plaintiff must be presumed. The moment, it is accepted that it is a public road, it must follow that no one has a right to make any encroachment or construction thereon. In fact,

such encroachments and constructions are invariably detrimental to the public. In such a suit the plaintiff, even though not suing any representative capacity need not show any special damages to him in order to obtain relief. This requirement has no application whatsoever where a citizen approaches the Court complaining of an encroachment by another citizen on a public road.

9. In fact, the right of such a citizen to approach the Court in such circumstances is no more *res intergra*. A Division Bench of this Court in *Fatima w/o Caetano Joao v. Village Panchayat of Mercedes and Anr.*, reported in 2000 (3) M. L. J. 624 has made the following observations :

"(a) Civil Procedure Code, Section 9 and Municipal Rules/Bye-laws -Suit for injunction - Violation of Municipal rules or bye-laws resulting in invasion of right to light, air, privacy or causing pollution or causing material injury by a neighbour furnishes the plaintiff a cause of action Civil suit to challenge the invasion of his rights maintainable."

10. It must follow as a necessary corollary to the aforesaid observation that the neighbour must be taken to have *locus standi* to maintain a suit for removal of encroachment.

11. In my view, when the issue is concerning encroachment on public road, the plaintiff is not bound to prove how he, in particular, was restricted in his movement by the encroachment. Individually, and as a member of the public, a citizen has a right to move on any or every part of the road at any time he chooses to do so. It is no answer for an encroacher to say that the plaintiff has alternate way, and no special damage is caused to the plaintiff. The requirement of proving special damages is wholly unnecessary where a grievance is made by a plaintiff about the encroachment made by the defendant in a public place such as road.

12. The other reason given by the learned lower Appellate Court for refusing a decree for permanent and mandatory injunction is that the plaintiff himself was found to have made some encroachment on the public road. It appears from the record vide para 4 of the judgment that the plaintiff has been directed to remove the said encroachment in Regular Civil Suit No. 337 of 1977. This being so, I see no reason why the respondents encroachment should be protected, merely because the plaintiff has suffered a decree directing him to remove certain encroachment. The approach of the lower Appellate Court almost seems to suggest that the plaintiff, who has been found to have committed some wrong is not entitled to make a grievance about the wrong done by another. This reasoning cannot be accepted either,

13. In the result, I find that the judgment and decree of the lower Appellate Court is wrong in law and unsustainable. Besides it results in perversity and miscarriage of justice. The judgment and decree is therefore, set aside and the appellant's suit is decreed with costs.