

(2014) 03 BOM CK 0070

In the Bombay High Court

Case No : Second Appeal No. 426 of 1999

Keshav Vithoba Khatdeo, Ashok Keshav Khatdeo and Vijay Keshav Khatdeo

APPELLANT

Vs

Gopal Sakharam Mundare (Deleted), Gumphabai Gopalrao Mundare, Ramesh Gopalrao Mundare and Ku. Chhaya

RESPONDENT

Date of Decision : 03-03-2014

Acts Referred:

Maharashtra Land Revenue Code, 1966 — Section 143 143(2) 143(4)

Citation : (2014) 4 ALLMR 170 : (2014) 4 BomCR 662 : (2014) 3 MhLj 612

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : S.W. Deshpande, for the Appellant; R.G. Kavimandan, Advocate for Respondent Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

A.B. Chaudhari, J.—This second appeal was not board. However, Appeal From Order No. 99/2013 is on today's admission board at Sr. No. 22. Mrs. Deshpande, learned counsel for the appellants, commenced her arguments on A.O. No. 99/2013 and during the course of hearing it was noticed that the result of this A.O. depends fully upon the result of Second Appeal No. 426/99. That being so, with the consent of learned counsel for both the parties, present A.O. as well as S.A. were posted for final hearing and disposal at 2.30 p.m. and accordingly both the appeals have been heard together. Since result of A.O. No. 99/2013 depends on the result of S.A. No. 426/1999, I have taken the said appeal for hearing and disposal first. Upon hearing learned counsel for the rival parties, I find that the following substantial questions of law will have to be reframed since the question of law framed on 20.12.2001 in the light of the arguments advanced before me do not arise. Hence, following substantial questions of law are reframed:

(i) Whether the suit of the plaintiffs for injunction from using Dhura to field No. 28 as way for the defendants, should be decreed in view of non existence of way

by Dhura of field survey no. 28 or non existence of any Government Pandhan or road through Dhura of field survey no. 28? YES.

(ii) Whether the defendants were entitled to use Dhura of field survey no. 28 belonging to the appellants-plaintiffs in the absence of any documentary proof from the revenue department for claiming such a right? NO.

(iii) Whether in the absence of any existing right of way over Dhura of survey no. 28 or in the absence of access to the defendants set out for claiming easement by prescription, the civil Court could have allowed the way over Dhura of field survey no. 28 as way for the defendants only on the ground that it was reasonable access for the defendants? NO.

2. Perused the impugned judgments recorded by the courts below. Heard learned counsel for the rival parties. It is not in dispute that none of the parties relied on any revenue documentary evidence for showing the way over Dhura of survey no. 28 belonging to the appellants-plaintiffs. Since according to the plaintiffs, there was no such right of way over Dhura there was no question of plaintiffs bringing on record any such revenue entries or revenue records but then the courts below have criticised the appellants-plaintiffs for claiming negative declaration. When it was the case of the plaintiffs that there was no way over Dhura of the plaintiffs, the plaintiffs obviously required an order of injunction against the defendants which cannot be described as "negative declaration". Be that as it may.

3. Upon perusal of the evidence and judgments of the courts below, it appears that they relied upon village map Exh.-50 and oral evidence of both the parties and the report of Commissioner-Lawyer appointed by the court. In my opinion, the said report of Commissioner-lawyer could not be a substitute for the authentic proof of right of way. However, the village map Exh.-50 having been perused by the courts below, both the courts felt sympathy for the defendants that they were required to approach their field by the alternate long way suggested by the plaintiffs from Ambada-Irur and Malkapur-Irur and C-Class land showed in the said map Exh.-50. No easementary right under Easement Act was even set up before the civil Court. In the absence of existing right of way or in the absence of legal right in respondents-defendants, even by way of prescription under Easement Act, merely because it was convenient for them to use the said way, I am afraid the Civil Court could not have converted sympathy into creation of way over Dhura of field no. 28 belonging to the appellants-plaintiffs. The courts below even have gone to the extent of saying that some witness stated that the said way from Dhura of survey no. 28 was being used for six years and some witness stated that it was being used for more than 20 years but the sale deed did not show the way on Dhura of field survey no. 28 at all. The vendor of the sale deed denied any such way. In such state of affairs, it was risky for the civil court to create an altogether new right of way for the defendants and thus allow the defendants to use Dhura of field survey no. 28 by destroying the crops or as the case may be, in the field of the plaintiffs. Suffice it to say, therefore,

that in the absence of any right of way to the defendants for the use of Dhura in field survey no. 28 of plaintiffs, the plaintiffs had a right to claim injunction against the erring defendants who, according to them, wanted to create a reasonable access over Dhura of field survey no. 28. Thus both the courts have erred in not decreeing the suit.

4. There is one more reason why the civil court should not have done so. The reason is that the job of finding out right of way in wajib-ul-arz or in any other manner or removal of obstruction from the existing right of way or for enquiring into and deciding the claims for right of way over the boundaries of other survey numbers or to decide such claims having regard to the needs of cultivators for reasonable access to their field is, in my opinion, an expert job and perhaps the Civil Court may not be equipped with such an expertise. That is the reason why, in my opinion, creation of such right and enquiring into such rights deciding such right or claims even for reasonable access or over the boundaries for that matter should be left to the land and survey and revenue officers who do have expertise in their working. It is, in this context, I quote section 143 of the Maharashtra Land Revenue Code, which reads thus:

143. Right of way over boundaries.

(1) The Tahsildar may inquire into and decide claims by persons holding land in a survey number to a right of way over the boundaries of other survey numbers.

(2) In deciding such claims, the Tahsildar shall have regard to the needs of cultivators for reasonable access to their field.

(3) The Tahsildar's decision under this section shall, subject to the provisions of subsections (4) and (5), be subject to appeal and revision in accordance with the provisions of this Code.

(4) Any person who is aggrieved by a decision of the Tahsildar under this section may, within a period of one year from the date of such decision, institute a civil suit to have it set aside or modified.

(5) Where a civil suit has been instituted under sub-section (4) against the Tahsildar's decision, such decisions shall not be subject to appeal or revision.

5. Perusal of the above provision, in particular sub section (1) and (2) shows a wide nature of power in Tahsildar or revenue department to find out a way or, as the case may be, reasonable access for the benefit of cultivators. If a party is aggrieved by his decision, appeals and revisions are also provided or even u/s 143(4) and (5) by filing a suit, for which a period of one year has been allowed. There must be some reason why Legislature has given a period of one year for filing a suit against such a decision and the reason appears to be that the cultivators can file appeals and revisions as per Section 143(2) and (3) supra before the revenue officers as per the hierarchy mentioned in Schedule "E" of the Maharashtra Land Revenue Code.

6. The net result of the above discussion is that the courts below erred in dismissing the suit. The question No. (i) is answered in the affirmative, while the question nos. (ii) and (iii) are answered in the negative. Apart from the above, I think, the defendants having not taken recourse to the proper legal remedy, cannot be prevented from doing so. Therefore, I am inclined to grant liberty in favour of the defendants, if they have any claim for reasonable access or, as the case may be, before such a forum as is permissible in law. Hence, I pass the following order:

ORDER

(i) Second Appeal No. 426/1999 is allowed.

(ii) The impugned judgment and decree passed by both the courts below are set aside.

(iii) Regular Civil Suit No. 31/1993 filed by the appellants is decreed and it is declared that the defendants do not have any right to pass through or use South-East Dhura of field survey No. 28 for approaching their field as their way save and except any enquiry and decision into any claim by competent authorities.

(iv) The defendants are restrained from using/utilizing the said South-East Dhura of survey no. 28 by decree of permanent injunction save and except any decision by a competent authority.

Decree be drawn up accordingly.

No order as to costs.