
(1912) 01 BOM CK 0015
In the Bombay High Court
Case No : Second Appeal No. 763 of 1910

Nathubhai Dhirajram

APPELLANT

Vs

Bai Hansgavri

RESPONDENT

Date of Decision : 25-01-1912

Acts Referred:

Citation : (1912) 14 BOMLR 418

Hon'ble Judges : N.G. Chandavarkar, J;Batchelor, J

Bench : Division Bench

Judgement

N.G. Chandavarkar, J.—The suit was brought by the present appellant for a perpetual injunction to restrain the respondent from interfering with his right of way over a certain passage.

2. The Subordinate Judge who tried the suit looked at the question of the plaintiff's right in two aspects, first, as a right by way of implied reservation, secondly, as a right by way either of easement or prescription. On both these points he came to the conclusion that the plaintiff had established his right to the passage in question. Accordingly a decree as prayed for was made.

3. But in appeal the learned District Judge has held that the appellant-plaintiff has failed to prove that he has used as of right the passage in dispute for the statutory period required for an easement or prescriptive right.

4. It is contended in support of this second appeal that the learned District Judge has not applied himself to the question of implied reservation to which the learned Subordinate Judge had very carefully addressed himself. That contention of the appellant's pleader must be allowed.

5. It is urged by Mr. Ratanlal, for the respondent, that the plaint and the pleadings did not raise a title based on implied reservation. The plaint and the pleadings show it is not so. The plaintiff's case all along has been that at one time the plaintiff's and defendant's houses were commonly enjoyed by them;

that this passage which is now in dispute was also a common way for the members of the family. It was upon that basis that the Subordinate Judge dealt with the case. And if the case of a right by way of implied reservation was distinctly raised by the parties, and dealt with by the Court of first instance, the appellate Court was bound to consider it and dispose of it unless the plaintiff had at the hearing of the appeal abandoned it, expressly or impliedly. There is nothing on the record of the lower appeal Court to show that it was abandoned.

6. No doubt from the fact that the District Judge has dealt with the plaintiff's case as it concerned the right of easement or prescription, it may be inferred that that was the only case relied upon by the appellant in resisting the appeal in the lower Court. But that inference would be obviously out of place here, because the main facts found by the learned District Judge of themselves are sufficient in law to raise the question of a right by way of implied reservation. And those facts must be presumed to have been found by the Judge on argument by both or either of the parties.

7. Now, what are those facts found by the Judge on the evidence?

8. He finds that the plaintiff's and defendant's houses belonged originally to a common owner, their grandfather Vasantraai, whose sons divided the properties; that the plaintiff admits that the right of way was not expressly reserved by his father when the partition was effected; and that the partition took place in Samvat 1914, A.D. 1858.

9. These facts are sufficient in law to raise the presumption that the passage in dispute was reserved as the common or joint property of the parties at the time of partition. That is a presumption of Hindu law. In the absence of anything to show that at the partition the passage was allotted to either one party or the other exclusively, the presumption is, that it continued joint and undivided even after the partition. That presumption of Hindu law must be rebutted by clear proof by the party who alleges that the passage was not reserved as joint but was divided and allotted to him exclusively as his share. This presumption of law has not been borne in mind by the learned District Judge in the Court below. Whether according to the Mitakshara or the Vyavahara Mayukha, rights of way and rights to wells and water belonging to a joint family are in-divisible; and if there is no evidence that at a partition of the family estate they were divided, the law will hold that they continued to retain the character of indivisibility attached to them by law, having regard to the nature of the rights in question (Vyavahara Mayukha: Mandlik's Edition, page 70, lines 13 to 15, and page 71, lines n and 12).

10. If that is so, then the burden of proof lay upon the respondent to show that the appellant plaintiff did not possess the right claimed, or having possessed at one time, i. e., at the time of partition, he has since lost it, either by the adverse possession of the respondent or in some other way recognized by law. So also under the Easements' Act the appellant's right is clear. If these two houses were

common, and the right of way belonged to the parties, and the passage was common, then it must be presumed, in the absence of any express agreement between the parties, that at the partition the passage was reserved for common enjoyment.

11. Therefore, from whichever point of view we look at the question, whether from the point of view of Hindu Law, or the law as laid down in the Easements" Act, the plaintiff's right is *prima facie* established. And the question is whether the respondent has discharged the onus which lay upon him. Now, under the new Code of Civil Procedure, where the appellate Court has omitted to decide any question of fact, which arises upon the appeal, and which is necessary for the settlement of the dispute between the parties, this Court sitting in t second appeal has jurisdiction to dispose of the question of fact for itself. Dealing with this question of fact, we think, the Subordinate Judge's conclusion must be accepted. He has pointed out circumstances which show that this passage has been used as a way and that both the defendant and the plaintiff have been enjoying the right. It is unnecessary to go into the reasons which the learned Subordinate Judge has given after considering the evidence upon the record, but it is sufficient to say that this Court accepts his appreciation of the evidence.

12. The District Judge's decree must be reversed and the Subordinate Judge's decree restored with costs both of this second appeal and of the appeal in the lower Court on the respondent.