

(1932) 10 BOM CK 0001

In the Bombay High Court

Case No : Second Appeal No. 445 of 1929

Tamanbhat Shankarbhat

APPELLANT

Vs

Krishtacharya Tamancharya

RESPONDENT

Date of Decision : 06-10-1932

Acts Referred:

Citation : AIR 1933 Bom 122 : (1933) 35 BOMLR 144

Hon'ble Judges : Rangnekar, J; John Beaumont, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Beaumont, C.J.—This is a second appeal from the decision of the Assistant Judge of Dharwar. The plaintiff is the owner of certain buildings including a court-yard, and the defendants are the owners of buildings which adjoin that court-yard. The plaintiff proposed to build a wall along the side of the court-yard adjacent to the defendants' buildings, and the defendants objected to the erection of such wall. Accordingly the plaintiff sued to restrain the defendants from obstructing the plaintiff in building the wall in question. The defendants pleaded that the yard in question was in the joint ownership of the plaintiff and the defendants, and in the alternative they claimed a right of way over the court-yard from their premises to the road. The two main issues raised in the trial Court were : First, whether the plaintiff proved that the yard to the north of the proposed wall belonged exclusively to the plaintiff, and that issue was answered in the affirmative. The second issue was, whether the defendants proved that they had acquired the right of entering through the gate "C" in the plaintiff's map and passing through the yard by prescription, and that issue was also answered in the affirmative. In the lower appellate Court the issues were framed a little differently, but in imbalance the decision of the trial Court was affirmed.

2. The ground on which it is suggested that the judgments of the two lower Courts were erroneous is, that the defendants, having failed to establish a right of ownership in respect of this court-yard, could not be allowed to prove an

easement over it. We have been referred to a good many cases on the subject, and the authorities were all discussed in a full bench decision of the Madras High Court in Subba Rao v. Lakshmana Rao ILR (1925) Mad. 820 and also by Mr. Justice Baker in this Court in Marghabhai Vallabhahai Vs. Motibhai Mithabhahai, , As I understand the decision of the Madras High Court, it comes to this, that there is no objection to a man pleading in the alternative that he is the owner of a piece of land, and that if he is not the owner, he is entitled to an easement over it. That point is clear, for pleadings in the alternative are permissible although the claims pleaded are mutually inconsistent. But the Madras Court took the view that if the acts of user relied upon to establish an easement were in fact exercised under a claim of ownership, then they could not be held to establish the easement. That I understand to have been the view of the Madras Court, and Mr. Justice Baker took the same view in Marghabhai's case. For the purposes of this case I will assume that that view of the law is correct, but I desire to guard myself against expressing a concluded opinion upon the point, because I think it is the sort of proposition on which it is dangerous to deliver an abstract opinion. Every case must turn on the particular evidence given in it, and I do not myself see why, if the owner of a piece of land proves that for twenty years he has in fact exercised a right of passing and re-passing over adjoining land *nee vi nee dam nee precario* he should be unable to establish an easement of way over such adjoining land merely because when he exercised that right he believed that he had a right of ownership in the adjoining land, which right he was unable to establish in a Court of law. However, for the purposes of this case I will assume as correct the law as found by the Madras High Court. Even on that assumption, I think, the appeal must fail. The first issue raised was one as to the plaintiff's title, and on that issue it would be unnecessary for the defendants to give any evidence. The second issue raised was not whether the defendants established ownership, but whether they established their right to an easement. That was the only issue raised on behalf of the defendants in both the Courts. I can see nothing to suggest that the evidence on which the lower Courts relied as sufficient to establish the defendants' claim to the easement was really referable to the defendants' claim which they made in their pleadings to the ownership of the yard. That being so, the case falls exactly within the decision of this Court in Dharamdas Kaushalyadas v. Ranchhodji Dayabhai ILR (1921) Bom. 200 23 Bom. L.R. 1009 Mr. Justice Shah says in that case (p. 204) :-

I only desire to add that in both the lower Courts the case has been tried on the footing that the plaintiffs claim by way of easement the right of way over a strip of land which, according to the defendant, forms part of his land. It is no doubt true that in the plaint the plaintiffs put forward the case of ownership over this land and generally speaking that would not be consistent with the case of their having acquired an easement over that land. But the case has been tried on the footing of an easement...

3. I think those observations apply here. The only issue was the issue as to easement, and the mere fact that the defendants claimed in their pleading

ownership of the land does not affect the question.

4. The appeal, therefore, must be dismissed with costs. Cross-objections are also dismissed with costs.