

Bombay High Court

Shri Jose Salvador Sacrafamilia ... vs Shri Antonio Julio Fernandes & ... on 27 January, 1998

Equivalent citations: 1998 (4) BomCR 232

Author: R Khandeparkar

Bench: R Khandeparkar

ORDER R.M.S. Khandeparkar, J.

1. The substantial question of law which arises for decision in the present appeal is as to whether the owner of 3 property is entitled to leave an access which is least onerous to the owner when the claim of right of easementary is made through such property which is an open land.

2. The facts in brief relevant for decision are that the respondents herein filed suit against the appellants for declaration that they are entitled for right of passage through the property of the appellants and for permanent injunction to restrain the appellants from blocking the right of way or access through the property of the appellants. The -claim of the respondents was denied by the appellants. On the basis of the evidence recorded by the trial Court, the suit was decreed and it was held that the respondents have right of passage through the appellants' property and, therefore, the appellants were restrained from interfering with the respondents' right of way and were further directed to remove the coconut sapplings planted in six pits in the suit access and fill up the said pits and to restore the access to its original position. The appellants being aggrieved preferred an appeal before the District Court which was dismissed by the impugned judgment dated 14th May 1992.

3. While assailing the impugned order, Shri Zeller D'Souza, learned advocate appearing for the appellants, submitted that the respondents herein had filed a suit claiming right of way through the property of the appellants and it was claimed as an easementary right acquired by prescription and this fact is clear from the pleadings in the plaint as well as the evidence adduced by the parties. However, according to the learned advocate for the appellants, the respondents had nowhere described the exact location of the suit access as well as the extent of the access alleged to be existing through the property of the appellants. While fairly conceding that the dispute as regards the rights of the respondents to pass through the property of the appellants is no more alive, the learned advocate for the appellants submitted that the respondents have not been able to establish the exact location of such access through the property of the appellants. He further submitted that neither the pleadings nor the evidence adduced by the respondents establish the exact location of the access As well as the length and width of such access. While taking me through the impugned judgment as well as the judgment of the trial Court, the learned advocate submitted that neither the trial Court nor the Appellate Court have arrived at any finding in that regard and rightly so, since there is no material on record to arrive at any finding in that respect. In these circumstances, according to the learned advocate, the appellants are fully entitled to restrict the exercise of right of easement of way in favour of the respondents through the appellants' property in the manner which is least onerous to the appellants and as such the location of such access can be decided by the appellants.

4. On perusal of the impugned order and records and upon hearing the learned advocate for the appellants it is seen that the fact that the respondents have right of passage through the property of the appellants is no more in dispute. The dispute is limited to the extent of the exact location of such

access and its dimensions. As rightly submitted by the learned advocate for the appellants, the plaint nowhere describes the exact location of such access through the property of the appellants, as also the length and width of access has not been anywhere described in the plaint. The judgment of the trial Court also does not disclose any issue being framed in that regard or any evidence having been led on this point. There is no finding either by the trial Court or the lower Appellate Court as regards the exact location and/or extent of the access through the property of the appellants. The judgment of the lower Appellate Court merely proceeds on the basis of the inspection and the report prepared by the lower Appellate Court itself as regards the claim of access through the property of the appellants. Moreover, the finding based on such inspection report is not borne out from the records as is apparent on the face of the impugned judgment. The judgment nowhere refers to any evidence on record except the said inspection report by the Court itself. It is well established that the inspection report by the Court cannot be of assistance to decide the right of the parties over any immovable property and it is for the parties to establish their right. The Court cannot act as witness for the parties. The inspection is to be carried out only to appreciate the evidence already recorded and not as a substitute for evidence. In this regard, therefore", the findings arrived at by the lower Appellate Court as regards the location of the suit access are clearly in breach of the procedure and cannot be sustained. Since, excepting the said finding based on inspection report, there is no other findings on the material aspect of the case and since neither the impugned order nor the order of the trial Court disclose any finding regarding the location of the access and the extent of the access, and rightly so, there being no materials either in the plaint or the pleading in that regard, the learned advocate is well justified in submitting that in such circumstances the appellants are certainly entitled to allow the access to the respondents in a least onerous manner to the appellants in relation to their property.

5. I am informed that the appellants have proposed an access of 1.5 mts. of width all along the northern boundary of the open land of appellants' property as an access for the respondents to pass through the appellants' property from internal road going to Colva Church to the house of the respondents which exists towards the west of the appellants' property. The proposed access, according to the learned advocate for the appellants, is least onerous to the appellants and in no way prejudicial to the respondents. As already observed above, there is no material placed on record nor there is any finding arrived at by the courts below regarding the exact location of the suit access and its extent. In the circumstances, the respondents cannot make any grievance about the proposed access by the appellants and it is to their advantage to accept the same,

6. In this view of the matter the appeal is liable to be allowed and the substantial question as framed above is to be answered in the affirmative.

7. In the result, the appeal succeeds. The decree of the trial Court is accordingly modified to say that the suit filed by the respondents is partly decreed and the respondents right of passage through the appellants' property is confirmed while it is left to the appellants to allow the respondents to use the said access through the passage of 1.5 mts. along the northern boundary of the open land of the appellants' property as shown in the sketch by letters A and B produced in the course of the arguments and taken on record and marked as Exhibit 'X' for identification. The sketch shall form part of the decree passed by the trial Court. The relief of injunction is also accordingly modified and

is restricted to the extent that the appellants are restrained from obstructing the respondents and their agents from using the said access of 1.5 mts. on the northern boundary of the open land of the appellants' property and as shown in the sketch Exhibit 'X' by letters A and B. The decree passed by the trial Court accordingly stands modified in above terms. Appeal is accordingly disposed of. No costs.

8. Decree modified accordingly.