

(2014) 03 BOM CK 0115

Bombay High Court (Aurangabad Bench)

Case No: Appeal from Order No. 26 of 2014 and Appeal from Order No. 27 of 2014

Karbhari and Others

APPELLANT

Vs

Mr. Devidas, Mr. Kishor, Sau.

RESPONDENT

Meerabai and Mr. Harishchandra

Date of Decision: March 4, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1(u) 100
- Easements Act, 1882 - Section 13 15

Citation: (2014) 5 ABR 113 : (2014) 6 ALLMR 859 : (2014) 4 BomCR 637 : (2015) 1 MhLj 700

Hon'ble Judges: T.V. Nalawade, J

Bench: Single Bench

Advocate: H.D. Deshmukh, for the Appellant; R.R. Mantri, Advocate, for the Respondent

Final Decision: Allowed

Judgement

T.V. Nalawade, J.

Both the appeals are admitted. By consent, both the matters are heard for final disposal, after making the notice returnable forthwith after admission. The learned counsel for caveator/respondent No. 2 insisted for early hearing in view of the order made by this Court on 3.3.2014 by which stay was granted to the operation and implementation of the judgment and order of First Appellate Court and further, some relief of interim nature was given to the present appellants.

2. The two appeals are filed against judgment and order of Regular Civil Appeal No. 615/2012 and Regular Civil Appeal No. 614/2012, respectively. The appeals were pending in the Court of Ad-hoc District Judge-2, Ahmednagar. R.C.A. No. 615/2012 was filed against judgment and decree of Regular Civil Suit No. 176/2007 and that suit was filed by present respondents. R.C.A. No. 614/2012 was filed against the judgment and decree of Regular Civil Suit No. 179/07 and that suit was filed by the present appellants. The present appellants/plaintiffs from R.C.S. No. 179/2007 had

prayed for relief of injunction in respect of right of way, for using a bandh situated on western side of lands of defendants/respondents as the way.

3. There are lands of plaintiffs and defendants and beyond their lands, there are lands of other farmers and this bandh is in existence between those lands also. It is the case of appellants that this bandh starts from Majleshahar-Shahartakli road and it goes towards southern side and there are fields situated on both sides of this bandh. This bandh is situated on western side of three lands of present respondents viz. Gat Nos. 164/1A, 164/1B, 164/1C and it is on the eastern side of few lands of the appellants. On both the sides, southern and northern side of lands of plaintiffs and defendants, there are lands of other farmers. It is the case of appellants that they have been using this bandh for more than 40-50 years as a way for approaching to their fields. It is contended that this portion is also being used by sugar factory for carrying sugarcane from adjacent fields. It is contended that sugar factory maintains and repairs this way. It is contended that on one side of this bandh, there is land Gat No. 168 and there is D.P. of M.S.E.B. in that land and employees of M.S.E.B. also use this way for approaching D.P. It is contended that the present respondents were trying to destroy this bandh, the way which has been in use of the plaintiffs and others by making digging. To prevent these activities of present respondents and for allowing the plaintiffs to use the bandh as a way, the suit was filed. It is the case of present appellants that they are using this bandh, even for taking bullockcarts and tractors to their fields.

4. In R.C.S. No. 176/2007 present respondents have contended that they are the owners of lands Gat Nos. 164/1A, 164/1B and 164/1C and defendants of this suit, present appellants have no concern whatsoever with these lands. It is contended that when they were doing the digging work for laying pipeline, they were obstructed by present appellants and so, they were required to file suit. They have prayed for relief of injunction to prevent interference of the appellants in their possession of these three lands.

5. In the written statement filed in R.C.S. No. 179/2007, the present respondents denied that there is such way in existence on the western bandh of their three lands. However, they have admitted that in Gat No. 164 there is south-north bandh. It is the case of the present respondents that present appellants are trying to create new way in their aforesaid three lands.

6. In Writ Petition No. 855/2013, this Court had directed the Trial Court to decide both the aforesaid suits together. In view of this direction and as issue involved in both suits is the same, both the suits were heard and decided by the Trial Court together. The Trial Court has held that present appellants have been using this bandh as a way since last more than 40 years. The Trial Court has held that this is the only way for present appellants to approach their respective fields. The relief of injunction as prayed was granted by the Trial Court. The suit of the present respondents was dismissed by Trial court by observing that there was no cause of

action for the suit.

7. The common judgment delivered by Trial Court in aforesaid two suits was challenged by filing aforesaid two appeals by present respondents. The District Court has set aside the judgment and decree of the Trial Court and has remanded back both the suits to the Trial Court for fresh trial. The learned District Judge has held that on the basis of material available, it cannot be said that such way is in existence. The discussion of the evidence made by the learned District Judge shows that he made an attempt to find out separate way, apart from the aforesaid bandh, the bandh situated on western side of three lands of present respondents. This is done in spite of clear contention in plaint para No. 2 of R.C.S. No. 179/2007 which is to the effect that the bandh itself has been used as a way. The learned District Judge has held that the present appellants have not established that they can use the disputed portion as easement of necessity. The learned District Judge has considered the record and proceeding which was filed under Mamlatdar Court's Act and it is observed that the said record is not consistent with the case of present appellants. The District Judge has expressed that revenue surveyor needs to be appointed as Court Commissioner and his report with regard to the dispute needs to be collected. In the direction, the District Judge has observed that the Trial Court needs to consider the record of Mamlatdar Court's proceedings.

8. Present appeals are filed against the order of remand made by the District Judge, which is appealable under Order XLIII, Rule 1(u) of Civil Procedure Code. Only due to this Rule, the judgment and order of District Court by which the matter is remanded back to Trial Court can be challenged in the present appeals. A separate category of its own is created by Order XLIII, Rule 1(u). As these appeals are against the decision of the First Appellate Court, the parameters used in Section 100 of C.P.C. are applicable to such appeals. Further, as the appeals are filed against the order of remand, the jurisdiction of this Court is limited and this Court is expected to decide as to whether the order of remand is necessary.

9. In the present matters, the question involved is whether the bandh situated on western side of the three lands of present respondents can be used as way by the plaintiffs for approaching their fields which are situated on other side of this bandh. As per Rule 4 of the Maharashtra Land Revenue (Boundaries and Boundary Marks) Rules, 1969, the Rules framed under Maharashtra Land Revenue Code, such bandhs are considered as boundary marks and nobody can cause damage to such bandhs. The Rule runs as under:-

4. Maintenance of continuous boundary marks:-The boundary strips, dhuras, or ridges shall not be ploughed up or otherwise injured by cultivation; they shall also be kept free from tree growth, any young plants being destroyed at inspection time.

The minimum width and height of boundary strips and of dhuras or sarbandhas shall be as follows, namely:-

Boundary strip:-In dry crop lands, 0.46 metre wide and 0.61 metre high. In rice and garden lands 0.23 metre wide 0.61 metre high.

Dhuras or Sarbandhas:-1.22 metres wide and 0.61 metre high:

Provided that,-

(i) where the boundaries of such lands are well defined by banks, hedges or the like, the actual width of the strip covered by such bank, hedges or the like shall be sufficient for the purpose of this rule;

(ii) where the boundary of a survey number also forms the boundary of any adjoining State, the minimum width prescribed above shall be maintained for the portion of the boundary strip on the side of this State; and

(iii) where village boundaries have been defined at the time of survey by double lines of boundary marks, the whole of the intermediate strip shall be maintained as a boundary strip.

10. The aforesaid Rule applies when the land is given particular Gat number or survey number (i) in general survey, (ii) when the consolidation of the lands takes place under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act and (iii) also when the land bearing Gat or survey number is divided due to transactions of sale of some portion of land or due to partition of the lands done under the provisions of Maharashtra Land Revenue Code. When due to sub-division of a particular survey number or Gat number, bandhs are created on the boundaries of the sub-divisions, these bandhs can be used by the owners of such sub-divisions of lands.

11. Such easementary right created in favour of the owners of sub-divisions falls u/s 13 of Indian Easement Act, 1882. In the present case, it is not disputed that the lands of present respondents are situated on eastern side of bandh and few lands of present appellants are situated on the western side of this bandh. The evidence given by the parties and the report of Court Commissioner is available to show the location of these lands and also the bandh. Thus, there are statements of facts available on rival contentions, there are admissions also in this regard. In such a case, the Court is expected to consider and decide as to whether so claimed right falls u/s 13 of Easement Act, easement of necessity, or it falls u/s 15, acquisition by prescription. The Court is also expected to consider the customary rights. When there are such bandhs and on one side of bandhs or both the sides of bandh, there are agricultural fields, the farmers are expected to use these bandhs as foot-path. The farmers cannot be allowed to enter the land of the other which is under cultivation and portion cultivation cannot be used as the way by anybody including the adjacent owner. Customary right is different from customary easement. Origin of such customary right is in easement of necessity. Over the years such right, to use bandhs as way became customary right but it has origin in concept of

"easement of necessity".

12. The contention made by the learned counsel for respondents that there is no specific pleading in aforesaid regard, cannot be considered in such a case. Though we are in adversary system, the litigants are not expected to know everything about the provisions of law and even the advocates cannot be expected to know everything as this field is very vast. In a case like present one, the Court is expected to see as to whether the right claimed is in existence, though the basis used by the plaintiffs for claiming the right may not be correct. Further, when there are statutory provisions as mentioned above, the Court cannot ignore the statutory provisions. The aforesaid Rule framed under the provisions of Maharashtra Land Revenue Code, other provisions and circumstances already mentioned need to be considered. The reasoning given by the learned District Judge shows that the real dispute is not at all considered and the Court has gone with the presumption that present appellants must prove the acquisition of right of easement by prescription. As there is statutory provision for creation and maintenance of such bandh, revenue surveyor, who can act as Court Commissioner, cannot have much role to play. His duties are altogether different under Maharashtra Land Revenue Code. When there are such provisions, only the statements of fact need to be made before the Court and the Court is expected to give decision on the statements of fact. This Court has no hesitation to hold that there is sufficient material on the record, which includes the report of Court Commissioner. The Appellate Court is expected to give due weight to the findings on fact recorded by the Trial Court on the basis of statements of fact. The aforesaid discussion shows that the Appellate Court has done misconstrued the evidence and the Appellate Court has committed grave error in remanding the matter for appointment of Court Commissioner and for taking into consideration the material, the statements which are there in the record of Rasta case proceedings. Remand of the matter is possible only in rare cases and as a general rule, the Appellate Court is expected to decide the entire case on the basis of evidence available. The District Court has committed grave error in remanding the matter and so, the decision can be interfered with even after considering the scope of section 100 of C.P.C. In view of these circumstances and the material, this Court holds that the judgment and order delivered in R.C.A. Nos. 615/2012 and 614/2012 cannot sustain in law. In the result following order:-
ORDER

(I) Both the appeals are allowed.

(II) The judgments and orders delivered by the learned District Judge, Ahmednagar in R.C.A. Nos. 615/2012 and 614/2012 are set aside.

(III) The District Court is to decide both the appeals on merits on material which is available.

(IV) Till the disposal of both the appeals, the parties shall act as follows:-

(i) The plaintiff in Civil Suit No. 179/2007 will be entitled to use only the bandh situated between the lands of the defendants and lands of plaintiffs which needs to be kept in existence as per Rule 4 of Maharashtra Land Revenue (Boundary and Boundary Mark), Rules 1969 as "foot-path". Both the sides are not to cause damage to bandh which is in existence and which is noted by the Court Commissioner in the report.

(V) The District Court is directed to dispose of the matters expeditiously and in any case within 45 days from the date of receipt of this order.

(VII) The learned counsel for the respondents requested for one month's time as he wants to challenge the decision of this Court. The Trial Court had granted statuesque and even after deciding appeals by Ad-hoc District Judge-5 of District Ahmednagar, the status quo order remained in existence. This is because the matter was remanded back and so the initial order of status quo made by the Trial Court would revive. That order was interpreted by this Court in Writ Petition No. 855 of 2013 and so accordingly the rights are to be exercised during next one month. With these observations, time of one month is given to the respondents.