(2006) 03 BOM CK 0150

Bombay High Court

Case No: First Appeal No. 958 of 1989

Smt. Shalini Laxman Wadnerkar		APPELLANT
	Vs	
Bank of Baroda Employees Co-operative Housing Society Ltd. and M.M. Koregaonkar		RESPONDENT

Date of Decision: March 31, 2006

Citation: (2006) 3 ALLMR 410 : (2006) 5 BomCR 292 : (2006) 3 MhLj 828

Hon'ble Judges: K.J. Rohee, J

Bench: Single Bench

Advocate: S.P. Kanuga, for the Appellant; M. Shirazi, for the Respondent

Final Decision: Dismissed

Judgement

K.J. Rohee, J.

The appellant is the only surviving legal representative of the deceased plaintiff as his daughter. She has preferred appeal against the common judgment delivered by the Additional Principal Judge, City Civil Court, Bombay in Special Civil Suit No.7708 of 1967 and Special Civil Suit No.1665 of 1979 on 21st September, 1987.

2. The facts which are not disputed for the purposes of the present appeal are that one Shri J.R. Gharpure owned land in Survey No.6 situated at Bamanwada village, Vile Parle (East) Bombay. On 21.10.1958 Shri G.G. Suvarnapathak (the original plaintiff) agreed to purchase Plot No.5, area 557 sq. yards out of the said land. He paid Rs.1,000/- as earnest money to Shri J.R. Gharpure. Shri V.J. Gharpure (the son of Shri J.R. Gharpure) issued a receipt (Exhibit ''A'') on behalf of his father in favour of the original plaintiff. On the next day i.e. On 22.10.1958 the possession of the land was also delivered to the original plaintiff. Earlier to the said agreement there were insolvency proceedings against Shri J.R. Gharpure in which he has adjudicated as insolvent on 16.12.1958. The original plaintiff led his claim for specific performance of agreement dated 21.10.1958 before the Official Assignee, but his claim was rejected. He was, however, granted leave to file suit against the Official Assignee for

specific performance of the agreement. Accordingly the original plaintiff filed suit bearing No. 4684/1961 against the Official Assignee for specific performance of the agreement. In the meanwhile the original plaintiff made construction on the said plot in the year 1959 by submitting a plan to the municipal authorities. A portion of the said construction was used for flour and masala mill and the remaining portion was used for residence of the original plaintiff. The original plaintiff used to approach his residence and flour mill through their remaining open plot of the original owner Shri J.R. Gharpure.

3. Defendant No.1 purchased land to the east of the original plaintiff''s land in an auction and made huge construction thereon for defendant No. 2. A deed of conveyance was executed in favour of defendant No. 2 on 5.7.1965.

4. The case of the original plaintiff is that he used to approach his residence and flour mill through the adjoining eastern portion of the land which was open then. There was 15 ft. wide way from his plot connecting the said passage to the road leading to village Sahar. The said road is a public road and was in continuous use for ingress and/ or egress for the past 75 years or so. It is a gauthan road. He continuously used the said way as of right and as an easement since the purchase of plot No. 5 by him. However, the underground cables were interfered with by the defendants. When the original plaintiff protested to the activities of the defendants, he was requested to permit shifting of the said cables from the said approach road. The original plaintiff agreed to the suggestion and accordingly electric cables were shifted from their original place to another side of the defendants'' plot. The original plaintiff did not give up his right to the approach road. The original plaintiff submitted that he has no alternative means of access to his plot. However, the defendants encroached upon the approach road by making construction thereon. Hence the original plaintiff instituted Special Civil Suit No. 7708/1967 for mandatory injunction against defendant No. 2 directing it to remove encroachment on his way; perpetual injunction restraining defendant No. 2 from preventing the original plaintiff, his servants, agents and customers from using the way and directing the defendants to pay damages at Rs.25/- per day from the date of suit till removal of encroachment.

5. Defendant No. 1 did not appear though served.

6. Defendant No. 2/Society resisted the suit by filing written statement. They denied that there was any road 15 ft. in width or any other width from the land of the defendants as alleged by the original plaintiff. They denied that it was a gauthan road and was used by the public. Defendant No. 2 contended that it had no notice to the alleged road of access and they are bona-fide purchasers without notice of any alleged right of the public or any other person. Defendant No. 2 submitted that the construction was done on their plot without any objection from the original plaintiff or any member of the public. According to defendant No. 2 the original plaintiff had no right of way from their land. Defendant No. 2 denied that it encroached upon the

so called approach road of the plaintiff by erecting buildings. Defendant No. 2 submitted that the plaintiff made false claim with a view to harass the defendant. The suit is false and is liable to be dismissed.

7. During the pendency of the suit the original plaintiff died. His widow and married daughter are brought on record as legal representative. Thereafter the widow of the original plaintiff also died and the daughter of the original plaintiff is the sole surviving legal representative.

8. The plaintiff examined five witnesses, whereas defendant No. 2 examined two witnesses. It appears that the learned trial Judge visited the spot. He found that the plot of the plaintiff is land-locked and there is no way for the plaintiff to approach the premises except 6 ft. wide road which was granted with the consent of the parties. After considering the oral and documentary evidence the learned trial Judge held that the plaintiff proved that he has a right of way through the land of defendant No. 2; that the defendants illegally blocked the access road; that the said access road is also an easement of necessity; that the plaintiff is entitled to lay water pipes and drainage pipes for his plot through 6 ft. access road. The learned trial Judge accordingly declared that the plaintiff has a right of way through the defendants'' land. However the width thereof should be 8 ft. from the wall of Gokarna Housing Cooperative Society; the defendants were directed to remove the existing barbed wire fencing so as to extend the width of the passage to 8 ft; that the plaintiffs are entitled to lay water pipes and drainage pipes through 8 ft. wide access land. The defendants were restrained from obstructing the plaintiff for laying such pipes. Dissatisfied with the judgment and decree the appellant preferred this appeal.

9. I have heard Mr. S.P. Kanuga, Advocate for the appellant and Mr. M. Shirazi, Advocate for the respondents.

10. The only point that arises for determination is as under :

Points Findings

(i) Whether the trial court erred in granting the approach road to the plaintiff of the width less than 15 ft ? In the Negative.

(ii) What order ? As per final order.

REASONS

11. I have gone through the record and proceedings of the suits. I have also gone through the oral as well as documentary evidence adduced by the parties. It has been strenuously contended by the learned counsel for the plaintiff/appellant that the trial court erred in holding that the appellant failed to establish that the width of the approach road of the plaintiff/appellant was 15 ft. The learned counsel for the plaintiff/appellant pointed out that the CTS map clearly mentions the width of the

public road as 15 ft. The learned counsel for the plaintiff/appellant further submitted that the plaintiff has claimed the said approach of road as prescriptive easement as well as easement of necessity. The learned counsel for the plaintiff/appellant submitted that the evidence on record is sufficient to establish both kinds of easements. The learned trial Judge, therefore, should not have reduced the width of the road to that of 8 ft.

12. The learned counsel for the defendants, on the other hand, submitted that the trial court has exercised full discretion in favour of the plaintiff/appellant and there is no need to interfere with the impugned judgment and decree.

13. I have carefully considered the rival submissions. The evidence adduced by the plaintiff/appellant does not show that when the plot of the plaintiff was vacant 15 ft. wide way was being used as approach road. All that the evidence shows is that the approach road was from the vacant plot to the eastern side of the plaintiff''s plot. The evidence does not establish that the width of the said approach road was 15 ft. The plaintiff/appellant cannot take advantage of the entry about the width of the road as 15 ft in CTS Map because the map is very vague and it does not show that there was clear cut 15 ft wide road right from village Sahar to the plot in occupation of the original plaintiff. As such the plaintiff/appellant cannot insist that 15 ft. wide approach road should have been granted to him.

14. Admittedly the entire land originally belonged to Shri J.R. Gharpure. Some portion of the land was purchased by the original plaintiff and some portion was purchased by the defendants in an auction. It may be noted that in order to claim an easement of necessity it must be shown that it is one without which the property retained upon severance cannot be used at all. It has been established on record that the plot of the original plaintiff is land-locked. It has no access from any side except the remaining portion of the plot to the east. Thus the plaintiff/appellant can claim approach road as an easement of necessity.

15. It may further be noted that easement of necessity must be an absolute necessity and not merely a convenient mode of enjoyment of property and an easement of necessity cannot be granted merely on the ground of convenience and advantage. It is solely dependent upon absolute necessity. Necessity cannot be understood as mere rule of convenience. As to what constitutes absolute necessity in a case, is to be determined with reference to the circumstances and environments of each case.

16. In the present case it is apparent that the plaintiff/appellant is harping on the width of the approach road as 15 ft. because he wants to develop his plot by erecting flats thereon and without there being an approach of 15 ft. width, he is not entitled to utilise full F.S.I. In my opinion that this would not be a criteria for deciding the absolute necessity of the plaintiff/appellant. 8 ft. width of the approach road is sufficient for user of the plot, house and flour mill of the plaintiff/appellant. What is

required in the present case is absolute necessity and not convenience of the plaintiff/appellant. In view of this, the width of 8 ft. for the approach road granted by the trial Court appears to be quite just and reasonable and I see no reason to interfere with his findings. In the result, I pass the following order :

ORDER

(i) The appeal is dismissed with no order as to costs.

(ii) The Judgment and decree of the trial Court is hereby confirmed.