

PETITIONER:
MOTILAL DAULATRAM BORA & ORS.

Vs.

RESPONDENT:
MURLIDHAR RAMCHANDRA BHUTABE[SINCE DECEASED] BY HIS LRS & OR

DATE OF JUDGMENT: 16/04/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
BHARUCHA S.P. (J)

CITATION:
JT 1996 (5) 615 1996 SCALE (4)37

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

The only question in this case is: whether the High Court of Bombay in S.A. No. 698 of 1965 would be justified in its judgment dated April 8/10, 1974 to interfere with the concurrent findings of fact recorded by the trial Court and the appellate Court? The admitted position is that both the appellants and the respondents purchased from the common owner property bearing Survey No. 108/1/1, 109/2-A situated near 'Peth' road in Panchwati Area, Nasik City. The claim of the plaintiffs in a suit for injunction to restrain the respondents from use of the road, practically not in dispute, is that there was a common road in existence. Whether it extends to the width of 30 feet is the question. The existence of the road for use of both the plaintiffs and the defendants as well as access to the well existing in the property also is not in dispute. The only area of dispute at the trial was the width of the road. According to the appellants-plaintiffs the width is 30 feet and according to the respondents-defendants the width, after excluding the encroachment, would range between 10-15 feet at one point and at another 20-22 feet. After elaborate consideration of the evidence by the trial Court, it came to the conclusion given at pages 58-59 of the paper book thus:

"The suit road mentioned by letters A.B.E.F. in the plan Ext. 42 of the uniform breadth of 30' throughout is hereby declared to be of the common ownership and user of the plaintiffs and the defendants. The defendants are hereby perpetually restrained from obstructing the plaintiffs right and user to the same road in any way.

The defendant No.1 is hereby enjoined to remove the encroachment made by him on this road as shown

in Ext. 42 in red colour and to shift his compound backwards so as to leave the same road of the uniform breadth of 30' on the Southern Side of his land. The defendants 2 and 3 are also enjoined to remove the encroachment made by them on this road as shown in Ext. 42 in red colour and to shift their compound backwards so as to leave the same road of the inform breadth of 30' on the Southern Side of their land. The defendants are directed to do this within fifteen days from hence. On their failure the plaintiffs are at liberty to get the same encroachment removed through court".

The appellate Court also equally extensively considered all the documentary and oral evidence and reached the conclusion given at pages 79-80 thus:

"All this oral evidence has been considered carefully by the Learned Judge of the Lower Court. He has accepted the version of the plaintiffs are regards the situation of the road and its width and has disbelieved the version of the defendants that the road was on the Southern Side and it has been encroached upon by the plaintiffs. He has, however, accepted the right of the defendants to take water from the well situated in Southern portion. The conclusion arrived at by the Learned Judge of the Lower Court is fully borne out by the documentary and circumstantial evidence to which I have already made a detailed reference. Considering the entire evidence on record, it cannot be said that the plaintiffs are not entitled to the reliefs of declaration, mandatory injunction and permanent injunction claimed by them. I hold that they are entitled to these reliefs and find accordingly on Point No. 7"

The High Court while opening the case, has found itself holding that it is difficult situation to identify the land. That difficult question was sought to be resolved in the second appeal by appreciation of evidence. It sought to place reliance on an order passed by one of the learned single Judges at an interlocutory stage for appointment of a Commissioner on April 10, 1974 and the report submitted by the Commissioner in support thereof. Practically, in the judgment in Second Appeal the report of the Commissioner formed foundation. The question is: whether the High Court was justified in reversing the concurrent findings of fact based solely on the Commissioner's report. When the matter had come up on last occasion for hearing on December 13, 1995, we directed the Registry to obtain the original report of the Commission, objections filed by the appellants in the High Court. Letter has been sent by the Registrar of the

Bombay High Court stating that the same have been destroyed. Consequently, we do not have the benefit of findings recorded by the Commissioner as to the circumstances in which he came to the conclusion with regard to the existence of the road.

Shri P.H. Parekh, learned counsel appearing for the appellants has contended that in view of the concurrent finding recorded by the courts below and the High Court having noticed that difficult question of fact had arisen for decision in the case, the High Court would not have embarked upon re-appreciation of the evidence to come to its own conclusion. We find force in the contention. The High Court was not right in stating that the documentary evidence was not considered by both the courts and the effect that could be reached on consideration of the evidence is not a question of law. In fact, the trial Court and the appellate Court have extensively considered all the documentary as well as oral evidence on the basis of which they reached the finding that road did exist, as contended by the learned counsel for the appellants. So, the High Court's reasoning that the courts below did not consider the said documents is clearly unjustified.

The question then is: whether the High Court would be justified in appointing a Commissioner and reversing the finding of fact on the basis of the report of the Commissioner? It is admitted position that in the trial Court an application had, in fact, come to be made for appointment of Commissioner. The Commissioner had gone to the property, identified the location and submitted his report together with the plan. That report came to be objected by both the parties. Consequently, it was rejected. Having had rejected the report, the High Court was not right in again appointing a Commissioner to localise the land and then decide as to the existence of the road.

Shri E.C. Agrawala, learned counsel appearing for the respondents, has contended that by virtue of the device adopted by the appointment, the appellants are seeking to take the property in excess of the land actually purchased by them. Consequently, the respondents are being denied of the extent of the land they had purchased. He contends that the appellants and the respondents had purchased the property in equal shares from a common owner. By virtue of the existence of the road, the appellants stand to gain much more than they actually purchased. Unfortunately, that was not the defence taken in the written statement nor adduced any evidence. We find that no argument in this behalf was addressed either in the High Court or in the courts below. Under those circumstances, as parties have gone on trial regarding the width of the road and the demarcation thereof having been put in issue, the High Court was not right in disturbing the findings of facts recorded by the courts below.

The appeal is accordingly allowed. The judgment and decree of the High Court is set aside and that of the courts below stand confirmed. No costs.