

HIGH COURT OF GUJARAT

PATEL CHELABHAI BHAGVANBHAI DECED THRHEIRS AND ORS

Versus

MAFATLAL MULCHANDBHAI PATEL AND ORS

Date of Decision: 21 December 2012

Citation: 2012 LawSuit(Guj) 1387

Hon'ble Judges: [C L Soni](#)

Case Type: Second Appeal

Case No: 16 of 1993

Subject: Civil, Contract

Acts Referred:

[Code Of Civil Procedure, 1908 Sec 100](#)

[Contract Act, 1872 Sec 45](#)

[Specific Relief Act, 1963 Sec 38](#)

[Registration Act, 1908 Sec 17, Sec 17\(1\)\(b\).](#)

Final Decision: Appeal disposed

Advocates: [R C Jani](#), [Renu D Chaudhary](#)

C. L. Soni, J.

[1] This appeal under Section 100 of the Code of Civil Procedure is at the instance of the original defendants against whom, the respondents- original plaintiffs have filed Civil Suit No.96 of 1979 for declaration and permanent injunction.

[2] It is the case of the plaintiffs in their suit that the plaintiffs are owners of a house constructed on Plot No.52. The front door of the house of the plaintiffs is facing western side and 5 ft open land in front of the house is of the ownership of the plaintiff. It is further averred that in the front of such 5 ft open land, there is 15 ft. width road and on other side of the road, i.e. on the western side of the house of the plaintiff, plot No.47 belonging to the defendants is situated. It is further stated that Plot No.47 is of the ownership of defendant No.1. Plot Nos.52 and 47 are on the land bearing Survey No.51, which was purchased in the year 1949 by about 60 persons, including the plaintiffs and defendant No.1 and it was decided that between plot Nos.6 to 10, 23 to

30, 41 to 45, 56 to 60, 11 to 15, 31 to 35 and 46 to 50, a road of width of 30 ft would be made available and the doors of the houses on the said plot shall be placed facing western side. It is further stated that it was agreed between the plot holders that the owners of plot Nos.11 to 15, 31 to 35 and 46 to 50 shall not place any door on the eastern side of the house i.e. on the back portion of their houses. According to such understanding, agreement was executed on 30.6.1979, whereon defendant No.1-owner of plot No.47 had signed along with all other plot holders. It is further case of the plaintiffs that as per the said agreement, defendant No.1 was not entitled to place any door on the east side of the house, so as to obstruct right of the plaintiffs to use road of 15 ft width. It is also case of the plaintiffs that defendant No.3 is real brother of defendant No.1 and defendant No.2 is wife of defendant No.3 and they had started making new construction in the house wherein they are trying to place a door on the east side of their house though they have already placed a door facing western side in their house. On plaintiffs raising objection to such attempt on the part of the defendants to place door facing the east side in their house, the defendants reacted with rude answer. The plaintiffs thus filed the suit to get declaration that the defendants have got no right to place doors facing the east side in their house on plot No.47 and they have got no right to commit breach of the agreement entered into between the plot holders. The plaintiffs also prayed for permanent injunction restraining the defendants from placing any door in the east side of their house and from creating any new right contrary to the agreement entered amongst the plot holders and to further restrain the defendants from causing any obstruction in the way of the plaintiffs from using the road of 15 ft width.

[3] The suit was resisted by defendant No.1 by filing written statement at Exh.23, stating therein that he was not aware about purchase of the entire land in 1949 and that in family partition, plot No.47 had gone to the share of his brother and wife of his brother and they are owners and in occupation of plot No.47 and he has been wrongly joined in the suit. He has also stated that he was not aware about any agreement made by the plot holders. It is further stated in the written statement that every plot holder has got right to place doors on any side of the house and such plot holder is also entitled to make use of the common road from each side of the house. It is further stated that all the plot holders have constructed their houses as per their convenience and requirement and therefore, the so-called agreement was never implemented and stood cancelled automatically. He also stated that no copy of such agreement was ever made available to him and there was no proceeding drawn of the general meeting which was stated to have been held for the purpose of making an agreement for the plot holders. He has also taken a legal contention that the alleged agreement since was in respect of the immovable property, such agreement was compulsorily registrable and since the so-called agreement in question is not registered, the same is not

admissible in evidence. Defendant No.1 has also raised many other contentions in his written statement.

[4] On appreciation of the evidence available on record, learned Trial Judge came to the conclusion that agreement at Exh.101 dated 30.6.1979 was not signed by all plot holders, that the said agreement was in respect of immovable property and therefore, the same was required to be registered and the plaintiff is not entitled to claim any right on the basis of the unregistered agreement. Learned Trial Judge also came to the conclusion that there is no evidence as regards holding of the meeting nor even the plaintiff has produced minutes of the meeting, wherein decision to arrive at agreement was stated to have been taken. Learned Trial Judge also came to the conclusion that the agreement in question could not be enforced by single individual and other plot holders are not joined in the suit. Learned Trial Judge also observed that copy of the agreement was never given to the defendants and that there are other plot holders who have also not acted as per the agreement and therefore, it cannot be said that the defendants were only persons who did not act as per the agreement. Learned Judge further came to the conclusion that road of 15 ft in width is for common use of every plot holder and as per the agreement, if any plot holder commits any breach, such was required to be taken to the meeting of the plot holders and dispute was first required to be resolved by calling meeting of the plot holders. Learned Judge has also recorded that road of 15 ft in width has already vested with the Municipality and everybody has common right to make use of such road and the defendants having constructed their house after taking permission from the Municipality, cannot be said to have committed any breach of the agreement. Learned Judge lastly recorded that neither the Municipality nor any plot holder has objected to the act of the defendants of placing door on the back portion of their property. On the above such findings and reasoning, learned Trial Judge ultimately dismissed the suit by judgment and decree dated 28.8.1984.

[5] Original plaintiffs, therefore, filed Regular Civil Appeal No.156 of 1984. Before the learned Appellate Judge, it was pointed out by the plaintiffs that the defendants have already a door in the western side of their property abutting on 30 ft road in width and they are trying to put new door in the eastern side of their property abutting on the road of 15 ft in width, which will be opposite to the plot No.52 of the plaintiffs and therefore, as per the agreement, the defendants are required to be restrained from putting up such door. Learned Appellate Judge on appreciation of the evidence came to the conclusion that defendant No.1 was party to the agreement Exh.101 and therefore, he was bound by such agreement and he having agreed not to put any door in the east side of his property abutting on 15 ft width road, he cannot put up any door in the east side and putting up any such door by him would be in breach of the agreement.

Learned Appellate Judge further recorded that immovable property for which the agreement was made between the plot holders was not of the value beyond Rs.100/- and therefore, no registration of such agreement was required. Learned Judge thus observed that the findings given by learned Trial Judge that registration of such agreement was required was contrary to law. Learned Appellate Judge further recorded that defendant No.1 being the signatory to the agreement, cannot take up a stand that the road had vested with the Municipality and he was making construction as per the permission of the Municipality and therefore, he did not remain bound by the agreement. Learned Appellate Judge further observed that since defendant No.1 was party to agreement, it was not open to defendant No.1 to take a stand that defendant Nos.2 and 3 were occupiers of the plot in question and therefore, they were not bound by the agreement. Learned Judge thus came to the conclusion that the agreement Exh.101 was admissible in evidence though the same was not registered under the Registration Act and the defendants were bound by such agreement and were not entitled to put any door in the eastern side of their house. Learned Appellate Judge has also considered the provisions of Section 38 of the Specific Relief Act and Section 45 of the Indian Contract Act and has held that the said two provisions have got no application in the facts of the case. Learned Appellate Judge further recorded that since the civil rights of the plaintiffs are breached and infringed, the plaintiffs have remedy to file civil suit before Civil Court and therefore, once the agreement is found to have been entered by and between the plot holders, learned Trial Judge committed an error in not relying upon such agreement and in dismissing the suit of the plaintiffs. Learned Appellate Judge thus did not agree with the reasoning given by learned Trial Judge that the plaintiffs have got no right to file suit for the purpose of enforcement of the agreement. On such reasoning and conclusion, learned Appellate Judge ultimately allowed the appeal of the plaintiffs by judgment and decree dated 6.4.1990 and quashed and set aside the judgment and decree passed by learned Trial Judge and declared that the defendants have no right to fix door in their house in the eastern side abutting the road of 15 ft width (back side of plot No.47 of the defendants) and also declared that they could not create any new right for the same. The defendants were also permanently restrained from fixing any door in the eastern side of plot No.47 abutting the road so as to obstruct the right of the plaintiffs of enjoyment of the road of 15 ft in width. It is this judgment and decree of the learned Appellate Judge which is under challenge before this Court in this appeal.

[6] This appeal was admitted by order dated 10.3.1993 on the following substantial questions of law:-

- (1) When all the co-owners have admittedly a joint right to own, possess and enjoy the common roads in the Building Complex jointly put-up by them, this common

right in the immovable property (the common roads) cannot be limited or extinguished except by an instrument in writing as per Section 17(1)(b) of the Indian Registration Act (Act of XVI of 1908) and in the present case, the alleged writing Exh.101 being unregistered, cannot operate to extinguish or limit the said common right of the defendants- appellants.

(2) When the roads are taken over by the Municipality and vested in the Municipality as public streets, whether any such earlier argument between the parties in respect of the common right of passage be operative.

[7] I have heard learned advocates for the parties.

[8] Learned advocate Shri R.C. Jani appearing for the appellants submitted that the agreement in question is illegal and not enforceable at law. Mr. Jani submitted that the so called agreement was not signed by all the plot holders. He submitted that there was no association but the plot holders just got together and had arrived at the understanding and such could never be permitted to be enforced in the Court of law. Mr. Jani submitted that the alleged agreement in fact was void ab initio because it purported to extinguish the rights of defendants to use their property the way they wished to use. He further submitted that it is for the defendants to decide on which side of their house they would like to place the door in the property and in which manner use of the property to be made. He submitted that since the alleged agreement amounted to extinguishment of the right of the defendants, such agreement was required to be registered compulsorily under the provisions of section 17 of the Registration Act. Mr. Jani submitted that since the agreement in question was not lawful, most of the plot holders have not acted according to the terms of the agreement. Mr. Jani further submitted that the learned trial Judge has recorded cogent reasons for holding as to why the agreement in question is not enforceable in law. He submitted that all roads surrounding the plots in question have vested in the Municipality and the plot holders have common right to use all such roads and if the alleged agreement is held to be enforceable at law, it would take away the right of the defendants to use the common road of 15 ft. in width and, therefore, such agreement cannot be enforced in the Court of law. He submitted that the fact that the agreement itself recites separate mechanism for resolving the dispute between the plot holders by calling the meeting, it goes to suggest that the agreement was not to be enforced in the Court of law and it was just an understanding between the plot holders when the plots were ear-marked on the original land bearing survey No.51. Mr. Jani submitted that since the suit was for the enforcement of agreement and since there is no grievance made by the plaintiffs about the violation of any of their rights like privacy, light and air, learned trial Judge has rightly dismissed the suit of the plaintiff and therefore learned appellate Judge ought not to have interfered with the judgment and

decree passed by the learned trial Judge. Mr. Jani submitted that the learned appellate Judge has materially erred in coming to the conclusion that the alleged agreement was not required to be registered and that the agreement was enforceable at law. Mr. Jani thus urged to allow this appeal.

[9] As against the above arguments of learned advocate Mr. Jani, learned advocate Ms. Renu D. Chaudhary submitted that defendant No.1 having consciously signed the agreement, he and defendants No.2 and 3 all would remain bound by the agreement and, therefore, the plaintiff was justified in filing the suit for enforcement of such agreement. She submitted that since all the plot holders except few had agreed not to place any door on the back portion of their house constructed on their plots, agreement could be said to be enforceable at law and, therefore, such agreement was not required to be registered. She submitted that the agreement between the parties was lawful agreement and, therefore, such agreement was certainly enforceable in the Court of law. She further submitted that the agreement in question does not take away any of the rights of the defendants but in fact, all the plot holders including the defendants have been fully using all common roads surrounding all the plots. She submitted that if the plot holders have decided to have doors only in the front portion of their houses and if there is no other injury to the person or the property of the defendants by the agreement in question, the defendants were under obligation to comply with the agreed terms of the agreement and cannot take up the stand that such agreement purports to extinguish any of their rights to their property and to the common road. She submitted that by the alleged agreement, rights of the defendants to use the common road have never been taken away. She further submitted that simply because the common roads have vested with the municipality is no ground to defy the terms of agreement especially when the purpose of entering into agreement between the plot holders was to see that every plot holders fully enjoy their residential property on such plots. She submitted that the learned appellate Judge has rightly come to the conclusion that defendant No.1 being signatory to the agreement, cannot resile from the agreement on the ground that the house on plot no.47 is presently occupied by defendants No.2 and 3. She further submitted that the learned appellate Judge has come to the right conclusion by holding that the value of the property for alleged extinguishment of the right of the defendants could not be said to be beyond Rs.100.00, no registration of such agreement was required. Such agreement was therefore admissible in evidence and the plaintiffs were therefore entitled to file the suit for the purpose of enforcement of such agreement. Learned appellate Judge has therefore rightly read such agreement in evidence and has rightly held that the defendants cannot be permitted to act contrary to agreement. She, thus, urged to dismiss the appeal.

[10] Having heard the learned advocates for the parties and having perused the judgment and decree passed by the Courts below with the Records and Proceedings, it appears that originally, the land bearing plot No.51 was purchased jointly by about 60 persons for the purpose of ear-marking different plots thereon and to construct their residential houses on their individual plots. There is nothing on record to show that such individual plot holders had ever formed any cooperative society or any association. It further appears that such individual plot holders came to an understanding for the purpose of development of the plots and in furtherance of such understanding, agreement at Exh. 101 was made. This agreement was signed by almost all the plot holders except 4 to 6 plot holders. One of the terms of the agreement is that none of the plot holders shall place door on the back portion of their house. It is provided that if any of the plot holders acts contrary to such term and place door on the back portion of their house, such an act of the plot holder would be an illegal act. One another term provides that if any plot holder acts contrary to the terms of the agreement, the dispute could be resolved by calling meeting of the members. Courts below have held that defendant No.1 is signatory to this agreement.

[11] It is required to be noted that all roads surrounding the plots have vested with the Municipality. There is no dispute about the fact that the defendants have constructed their houses after taking permission from the Municipality. There is also no dispute between the parties that all the plot holders are entitled to make use of internal roads surrounding the plots. Dispute is about the defendants attempt to place door on the back portion of their house constructed on plot no.47 which would abut on the 15 ft. width road on east direction facing the house of the plaintiff which was constructed on plot no.52. Question would be whether the agreement Exh. 101, if enforced, would extinguish right of the defendants to fully enjoy his own property constructed on plot no.47? Suit is for enforcement of agreement and if enforced, the defendants would be restrained from placing any door in back portion of their own property. Resultant effect of enforcement of the agreement would be that the right of the defendants to have door on the back portion of his property would stand extinguished and he would be virtually deprived of his further right to have access on 15th ft. road on the back portion of his property. Such agreement would resultantly deprive the defendants to fully enjoy their own property.

[12] Learned trial Judge has found as a matter of fact that not only few of the plot holders have not signed the agreement but many of the plot holders have not acted as per the agreement, therefore, such agreement was never meant to be enforced in law but it was initially made between the plot holders to see that the plot holders might have some planning in the construction of their houses. Learned trial Judge has considered that by the agreement in question, right of the defendant to enjoy his own

property and to enjoy common road would be extinguished and, therefore, such agreement was, if at all to be enforced in the court of law, required to be registered compulsorily. However, since the agreement is not registered, same could not be enforced against the defendants. In my view, learned trial Judge has not committed any error in taking such view. Learned appellate Judge was, therefore, not justified in interfering with such view mainly on the ground that the agreement was not required to be registered and that the defendant No.1 was party to the agreement.

[13] At this stage, it is required to be noted that pending the appeal, the plaintiffs have filed affidavit stating that the defendants have placed door on the back portion of their property and have also put up cement concrete steps to have access on the road of 15 ft. width from the said door of the property. With the affidavit, some photographs are also placed on record. Though there is reply filed by the defendants to this affidavit, the fact of placing the door on the back portion of their property is not denied. It appears from the photographs produced on record that the properties adjoining to and in the same line of the property of defendants, have windows on the back portion of their property. Windows appear to be of very big size. Property of the defendants has also windows on the back portion. Plaintiffs have objection only against the placement of the door by the defendants. Plaintiffs have no grievance about the violation of their right of privacy, or light or air by the placement of door by the defendants on the back portion of their property. But, the plaintiffs objection is only on the basis of agreement against placing of door by the defendants on the back portion of their property. Therefore, prayer in the suit is also for declaration that the defendants have got no right to place the door on the back portion of their property and thereby to commit breach of the agreement. Thus, the plaintiffs claim right in terms of the agreement to restrain the defendants from placing door on the back portion of their property. In my view, when the agreement at Exh. 101 purports to take away right of the defendants or purports to extinguish right of the defendants to place door in their own property, such agreement is only required to be registered but such agreement is also not enforceable in law. By such agreement, even the right of the defendants to have access on 15 ft. common road through back door of their property is taken away. Therefore, in my view, the learned trial Judge has rightly held that the agreement in question is not enforceable in law and the plaintiffs are not entitled to any relief in the suit.

[14] However, what appears from the photographs is that the defendants have after placing door on the back portion of their property, constructed cement concrete steps on 15 ft. width road with one cement water tank and if such construction is allowed to remain, such would definitely take away right of the plaintiffs to enjoy common road of 15 ft. in width. Learned advocate Mr. Jani has therefore fairly stated before this Court

that the defendants shall remove such construction from the common road of 15 ft. in width within the period of four weeks from today. Learned advocate Mr. Jani however states that since the door on the back portion is already placed and since the defendants have access on the road of 15 ft. in width, removable fabricated steps would be required to be used as and when the defendants want to have access on the road. He further states that such removable steps would be used only when the defendants want to have access on 15 ft. road in width.

[15] In view of the above, the judgment and decree passed by the first appellate court is required to be quashed and set aside on the substantial questions of law framed by this Court.

[16] In the result, this appeal is allowed. Judgment and decree passed by the first Appellate Court in Regular Civil Appeal No.156 of 1984 is hereby quashed and set aside. The judgment and decree passed by the Trial Court in Regular Civil Suit No. 96 of 1979 is hereby restored.

[17] In view of the statement made by the learned advocate Mr. R.C. Jani for the defendants, defendants are hereby ordered to remove the offending construction of cement concrete steps and small water tank from 15 ft. road in width within four weeks from today. Appeal is accordingly disposed of.