

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 28 OF 1986.

1. Hanmanta Gyandev Chavan
2. Patingrao Bala Chavan
(Since dead through his L.Rs.)
- 2-A. Tejim S/o Patingrao Chavan,
Age:70 years, Occu-Agri.
- 2-B. Subhash S/o Patingrao Chavan,
Age:60 years, Occu-Agri.

Both R/o Bhagoor, Tq. Vaijapur,
District-Aurangabad.
3. Shankar S/o Bala Chavan,
(Since dead through his L.Rs.)
- 3-A. Kashinath S/o Shankar Chavan,
Age:70 years, Occu-Retd.
R/o Gangapur, District-Aurangabad.
- 3-B. Vishwas S/o Shankar Chavan,
Age:60 years, Occu-Business,
R/o Jay-Vijay Apartment,
Plote No.96, Block 201,
G.I.D.C. Colony, Umargaon,
Tq. Umargaon, Dist. Valsad Gujarat.
- 3-C. Haribhau S/o Shankar Chavan,
Age:57 years, Occu-Service,
R/o Kasliwal-Pushp, Plot No.C-5,
Near Mewad Lodge, Nageshwar Vadi,
Aurangabad.
- 3-D. Jagannath S/o Shankar Chavan,
Age:54 years, Occu-Business,
R/o Jay-Vijay Apartment,
Plot No.96, Block 201,
G.I.D.C. Colony, Umargaon,
Tq. Umargaon, Dist. Valsad Gujarat.

3-E. Prashant S/o Shankar Chavan,
Age:50 years, Occu-Service,
R/o Deep-Stambh Housing Society,
Bhavani Nagar, In front of Prem Auto Petrol Pump,
Kalyan (West), Thane.

4. Sahebrao S/o Bala Chavan,
(Since dead through his L.Rs.)

4-A. Dnyaneshwar S/o Sahebrao Chavan,
Age-60 years, Occu-Service,
R/o R/M 282/4, Jai Janardhan,
Housing Society, Bajaj Nagar,
Aurangabad.

4-B. Pramod S/o Sahebrao Chavan,
Age-55 years, Occu-Agri,

4-C. Atmaram S/o Sahebrao chavan,
Age-50 years, Occu-Agri,

Both R/o Bhagoor, Tq. Vaijapur,
District-Aurangabad.

**....Appellants.
(Ori. Deft. Nos. 2 to 5)**

Versus

1. Bapu Tatya Chavan,
2. Suryakant Gopalrao Kulkarni,
3. Group Gram Panchayat, through
its' Sarpanch at Bhagoor,
Taluka-Vaijapur, District-Aurangabad.

(Respondent No.1 Original Plaintiff
and Respondents Nos.2 and 3 are
Original Defendants)

**....Respondents.
(R-1, Ori. Plff. & R- 2
& 3 are Ori. Defts)**

Mr. N.K. Chaudhari, Advocate for appellants.

Mr. R.G. Joshi, Advocate for respondent Nos. 1 & 2.

CORAM : T.V. NALAWADE, J.
DATED : 15th October, 2015.

JUDGMENT :

1. The appeal is filed to challenge the judgment and decree of Regular Civil Appeal No. 230/1980, which was pending in the Court of Additional District Judge, Aurangabad. The appeal filed by original plaintiff of Regular Civil Suit No. 8/1972, which was pending in the Court of Civil Judge, Junior Division, Vaijapur is decided in his favour and the relief of declaration with regard to easementary right of cart track is given and the relief of injunction is also given to protect this right of plaintiff. Both the sides are heard.

2. The suit was filed in respect of cart way passing through land Gat No. 330, 334, 341 and 22 of village Bhagoor. The plaintiff is the owner of land Gat No. 8 and it is his contention that he has been using the cart way, shown in the hand sketch map which is filed along with the plaint, for approaching land Gat No. 8. It is contended that due to some political rivalry, initially defendant No. 2 ploughed cart way to prevent the plaintiff from using the cart way and that was done in the year 1971. It is his contended that when plaintiff tried to convince defendants that he has right to use this cart way, they

did not pay heed to his request and on the contrary, they started creating thorny fencing to stop the use of the road. So, the suit was filed in the year 1972 and aforesaid reliefs were claimed.

3. Defendant No. 1, owner of land Gat No. 330, filed written statement to contest the suit. Other defendants like defendant No. 2 to 6 and defendant No. 6 filed similar written statements. They admitted the contention of the plaintiff that he was the owner of land Gat No. 8, but they denied that such cart way was in existence. They denied that they ploughed the portion of cart way and they have brought that portion under cultivation.

4. On the basis of aforesaid pleadings, issues were framed. The issues were about acquiring of right of easement by prescription and also for easement of necessity. Both the sides gave evidence.

5. The trial Court had dismissed the suit by holding that there is alternate way available for approaching the land of plaintiff. The point of acquisition of easementary right by prescription was not considered by discussing evidence. The first appellate Court considered the material, which includes revenue

map of the lands showing that the disputed cart way was in existence from the year 1920 A.D. It appears that a copy of such map was produced in the trial Court, but it was not touched by the trial Court. In the appeal, permission was given to produce more record about this road and the old record of 1920 was produced. In view of this record, the first appellate Court gave the decree in favour of plaintiff.

6. While admitting the appeal, this Court has formulated following substantial question of law.

(i) Whether Exh. 17/1 ought to have been relied by the first appellate Court ?

7. The record of the trial Court shows that the hand sketch map, which was annexed with the plaint, was at Exh. 53/1 and the revenue map in respect of disputed way was at Exh. 17/1. At that time, the lands were bearing survey numbers. In the map which was prepared in the year 1319 Fasli (1920 A.D.) the cart way was shown and it was passing through the land of defendants. This cart way matches with the hand sketch map of the cart way annexed with the plaint.

8. The plaintiff has come with a specific case that in the

year 1971, damage was caused to the cart way by defendant No. 1 and plaintiff was prevented from using this cart way. In the trial Court, Court Commissioner was appointed. But when the Court Commissioner visited the spot, the cart way at the spot mentioned in the plaint map was not in existence. It was obvious that the cart way was not in existence at that time and plaintiff has also come with the case that it was destroyed by the defendants. The submissions made show that another way which can be also used as cart way is now in existence and that passes through the lands of defendants. The photographs of that way are produced in this proceeding for original defendants. Submissions made show that the defendants tried to settle the dispute and they created another cart way along the boundaries of their lands. It can be said that the previous cart way was dividing the lands of defendants and that was affecting the cultivation and crop yield.

9. The plaintiff was expected to prove that he had acquired easementary right by prescription. The suit was filed in the year 1972 and he has produced the Government record of the year 1920 A.D. There was oral evidence in support. Thus, on preponderance of probability, the case of the plaintiff was probable, but the trial Court ignored aforesaid relevant material.

The first appellate Court did not commit error in considering the material and more material, which was in relation to this map. There is power of accepting such evidence under Order 41, Rule 27 of Civil Procedure Code with the first appellate Court. In view of these circumstances, this Court holds that the first appellate Court has not committed error in considering the material, which was not considered by the trial Court and allowing to produce more material which was in relation to the copy of map which was produced before the trial Court. Thus, it is not possible to interfere in the decision of the first appellate Court and the aforesaid point needs to be answered in favour of plaintiff.

10. Though the plaintiff succeeds, it needs to be observed that the division of agricultural land in such a way needs to be avoided. That is against the interest of not only the farmers, but the country. Due to division of land by such road, in many cases, small portions of lands are created and that create difficulties in cultivation of the lands. That affects productive capacity of the lands. This thing needs to be considered atleast by the farmers like plaintiff. First, it was cart way for private use, the use of agriculturists of that area. These farmers can sit together and sort out the differences in the interest of all.

11. The learned counsel for appellant placed reliance on the case reported as **AIR 2005 SUPREME COURT 236 [Justiniano Antao and Ors. Vs. Smt. Bernadette B. Pereira]** and submitted that it is necessary for the plaintiff to prove that the road has been in existence for more than 20 years and he has been using the road as of right for more than 20 years. The facts of this reported case were altogether different. In view of the facts of the present case, this Court holds that the observations made by the Hon'ble Apex Court are of no help to the defendants in the present matter. Similar observations are made in the case decided by Allahabad High Court reported as **AIR 1963 ALLAHABAD 340 (V 50 C 95) [Basai Vs. Hasan Raza Khan and Ors.]**. There cannot be dispute over the propositions made.

12. In the result, appeal stands dismissed.

[T.V. NALAWADE, J.]

ssc/