

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

906. SA/165/2015
With
CA/4411/2015 In SA/165/2015
RAMBHAU KADU ISHTAKKE AND ORS
V/S
DWARAKABAI NAMA ISHTAKKE AND ORS

Mr. S.M. Vibhute, Advocate for appellants.

Mr. S.D. Kotkar, Advocate for respondent No. 1 to 3.

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

ORDER :

1. Heard both the sides.

2. The appellants were defendant Nos. 3 to 5 in Regular Civil Suit No. 633/2004, which was pending in the Court of Civil Judge, Senior Division, Aurangabad. The suit was filed by respondents for relief of declaration and injunction in respect of so called implied grant of easement of necessity in respect of way over the boundary of land Gat No. 139. The trial Court has granted the relief and the appellate Court has dismissed the appeal of the present appellants.

3. In the prayer clause of the plaint, it was not specifically mentioned that the plaintiffs wanted cart way on this

boundary. The Courts below have also not made it clear that it will be a cart way. On the other hand, evidence is given to show that some of the defendants, who were on the side of the plaintiffs, were using this portion for taking even the fully loaded tractors. Thus, confusion is created due to absence of specific pleading and due to circumstance that the Courts have not given specific width of so called way, road.

4. It appears that the land Gat No. 139 was initially owned by the ancestors of plaintiffs and defendants. After the partition, the dispute started. On the eastern side of the land allotted to the share of defendant Nos. 3 to 5, there is Kaigaon – Ganeshwadi road, which is a tar road. This Court has seen the village map and it shows that on western side of land Gat No. 139, there is the Government road though it appears that it is a *Kaccha* road. It is admitted that some portion adjacent to this western road is purchased by the plaintiffs from some of the defendants and so, they have direct access to the western road.

5. The plaintiffs have claimed that they got implied grant of necessity in respect of the disputed portion and they can use that portion as the way. On the southern side of land Gat No. 139, there is land Gat No. 138. Admittedly, the owner of land

Gat No. 138 is not made party to the suit when the plaintiffs have claimed the right to use boundary as the way. As per the provisions of Maharashtra Land Revenue Code and Rules framed thereunder, the boundaries are created by creating *bandhs* and the owner of either side is expected to keep some portion for creation of *bandh*. In view of these circumstances, apparently the owner of Gat No. 138 was necessary party. In view of these circumstances, this Court holds that though both the Courts below have gone against defendant Nos. 3 to 5, the appeal needs to be admitted. So, the appeal is **admitted** on following substantial questions of law.

(i) Whether on the boundary which is apparently the boundary between Gat Nos. 139 and 138 the Court can create road under the claim of implied grant of necessity when the owner of one property like land Gat No. 138 is not party to the suit ?

(ii) Whether it was proper on the part of the Courts below to vaguely give relief when the specification about the way, road was not given in the plaint ?

(iii) Whether it was proper on the part of the Courts below to grant such relief without giving specifications of the rights, describing the length, width

etc. of the road, way ?

(iv) Whether it was proper on the part of the Courts below to hold that there is such implied cart way apparently when there is another access to the property of plaintiffs which is to the western side of their property ?

6. The learned counsel argued for interim relief in the application filed for stay. In view of the aforesaid discussion, this Court holds that to some extent the relief granted needs to be restricted. In view of the provisions of Maharashtra Land Revenue Code and Rules framed thereunder for survey and fixing boundary marks, the relief is restricted to make it possible to original plaintiffs to use the southern boundary of land Gat No. 139 as *foot path* for going to their own portion. Application is allowed and disposed of in those terms.

7. Notice to respondents in appeal. Learned counsel Shri. Kotkar waives notice for original plaintiffs after admission.

[T.V. NALAWADE, J.]

ssc/