

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, directions and orders.	Notes, of Court's orders and Registrar's	Office Coram,	Court's or Judge's orders.
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SECOND APPEAL NO. 804 OF 2009
WITH CA/11923/2009 IN SA/804/2009

BABASAHEB BAPURAO PATIL
VERSUS
GIRIDHAR PANDHARINATH KULKARNI

Advocate for Appellant : Mr. Patil N. P. Jamalpurkar.
Advocate for Respondent: Mr. G. N. Kulkarni....

CORAM: T. V. NALAWADE, J.
DATED: 29th OCTOBER, 2015.

PER COURT:

1. The appeal is filed against judgment and decree of Regular Civil Suit No.137 of 2005 and also against judgment and order of Regular Civil Appeal No. 60 of 2008. The suit was pending in the Court of Civil Judge, Junior Division, Latur and the appeal is decided by District Judge-1, Latur. The suit filed for relief of permanent injunction by present Respondent is decided in his favour, against the present Appellant. Both the sides are heard.
2. The suit was filed in respect of common Bandh

which is in existence in between the portions of land in possession of the plaintiff and defendant. It is contended that the plaintiff is the owner of land Block No.14, admeasuring 2 Hectare 30 Are and on the east of this land there is a land of the defendant bearing Block No.21. It is contended that the North-South Bandh lying between these two portion is common Bandh and plaintiff is entitled to use this Bandh portion as foot path. It is contended that defendant is causing damage to this Bandh and due to that there will be encroachment made on the property of plaintiff and plaintiff may not be able to use this portion as foot path.

3. Defendant filed written statement and contested the suit. He contended that the disputed portion lies within his property Block No.21 and there are old tress on this portion. He denied that he was damaging this portion. Defendant denied that plaintiff is the owner of Block No.14 and he is in possession 2 Hectares 30 Are.

4. On the basis of aforesaid pleadings, issues were framed. Both the Courts below have held that there is existence of common Bandh between the two portions and this portion can be used as foot path.

5. It appears that in the second appeal, at the instance of the Appellant, defendant Court Commissioner was appointed and the Cadestral Surveyor made measurements of the lands of plaintiff and defendant. Report is submitted by the Cadestral Surveyor and it is to the effect that the plaintiff himself has made encroachment over 6 Are portion of the land of defendant. However, the report shows that there is a Bandh between the portions of plaintiff and defendant and on this portion there are few trees also.

6. Thought there is oral evidence given by both the sides, and there are aforesaid circumstances. In view of the provision of Maharashtra Land Revenue Code and the Rules framed with regard to the survey of the lands and boundary marks, such Bandhs are required to be kept between two survey numbers. There is customary right to the persons having lands in that area to use the Bandh as foot path. The relief of injunction is given by the Courts below only in respect of the area of Block No.14 and the defendant is prevented from damaging the Bandh which is in existence between the two portions.

7. The aforesaid finding is a finding of fact and there is concurrent finding of the Courts below. Learned counsel for the Appellant placed reliance on some reported cases like (1) **2014 (5) Mh.L.J. 60 [Hemraj S/o Gangaram Iname and others V/s Suryabhan S/o Bhiva Dhawas]**, (2) **2014 (5) Mh.L.J. 382 [Vasant Tukaram Prabhu V/s Xalinibai Borcar alias Shalinibai Borkar (Expired) Rep. by her L.R's and another]**, (3) **2014 (5) Mh.L.J. 427 [Rukhmabai W/o Rambhau Bhad V/s Samadhan S/o pandhari Ingle and another]**, (4) **2014 (4) Mh.L.J. 231 [Bhupendra S/o Bhagwat Turkar V/s Homraj S/o Zituji Meshram]**, (5) **2014 (4) Mh.L.J. 237 [Malhar S/o Ganpat Bokerphod and others V/s Shivaji S/o Vishwanath Pawal]**, (6) **2014 (4) Mh.L.J. 250 [Sulemankhan S/o Mumtajkhan and others V/s Bhagirathibai Wd/o Digamber Asalmol and another]**, (7) **2014 (4) Mh.L.J. 366 [Bento Antonio Gomes alias Antonio Bento Gomes V/s Rosario Salvador Carneiro and others]**, (8) **2012 (4) Mh.L.J. 198 [Vichhalabai W/o Kundlik Gavane and others V/s Chinkaji S/o Malhari Jadhav and others]** and (9)

2012 (2) Mh.L.J. 541 [Habibkhan S/o Inauttalakhan and others V/s Waman S/o Govind Rathod and others]. These cases are on the power of the Court under Order 26 Rule 9 of Civil Procedure Code of appointment of Court Commissioner and necessity of such appointment when there is a dispute about the boundaries. There cannot be any dispute over the propositions. In the present matter also, at least at this stage, the Court Commissioner was appointed and there is a report of aforesaid nature.

8. When the measurement is made by Cadestral Surveyor as Court Commissioner such measurement is a private measurement and it needs to be proved. However, the proof of such measurement in the present matter will be of no help to defendant, appellant. It will be necessary for the defendant to prove that the portion in dispute lies inside of his land and so plaintiff has no right to use that portion as common Bandh. The defendant will also be required to take steps like filing suit for recovery of the possession, if there is really such encroachment. Thus, the basic thing is that the defendant will be required to prove the so called

encroachment and till then the Court is expected to go with the presumption that there is a Bandh between the two portions which is common Bandh and the farmers of that area are entitled to use this Bandh as food path as a customary right. It can be said that the measurement recently taken, has created a cause of action to the defendant for filing such suit. Nothing can be achieved in the present matter by admitting the appeal as there is a finding of aforesaid nature and there are aforesaid circumstances. No substantial questions of law as such can be formulated.

9. In the result, appeal stands dismissed.

10. In view of dismissal of the appeal itself, nothing further survives in the civil application for stay and the same stands disposed of accordingly.

[T. V. NALAWADE, J.]

Dt.29/10/2015
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