

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

SECOND APPEAL NO.31 OF 2015

Mohan Shenphadu Sonawane

Age 47 years, Occu. Service

Resident of : Goraksha Vidyalyaya,

Khamgaon, Taluka Fulambri,

District Aurangabad

.. Appellant/Original

Defendant/

Respondent

Versus

1. Ramesh Gajanan Kale,

Age 36 years, Occu. Agriculture,

Resident of : At Khamgaon,

Taluka Fulambri,

District Aurangabad

2. The Talathi,

Khamgaon, Taluka Fulambri,

District Aurangabad

3. The Circle Inspector,

Wadod Bajar,

Taluka Fulambri,

District Aurangabad

4. The Tahsildar,

Fulambri, Taluka Fulambri,

District Aurangabad

5. The State of Maharashtra,

Through Collector, Aurangabad,

District Aurangabad,

.. Respondents /

(No.1 original plaintiff/

Respondents No. 2 to 5

Original Defendants/

Respondents)

Mr Mukul S. Kulkarni, Advocate for appellant

Mr S.P.Daund, A.G.P. for respondents No.2 to 5

CORAM : N.W. SAMBRE, J.

**DATE OF RESERVING
THE ORDER : 24.02.2015**

**DATE OF PRONOUNCING
THE ORDER : 05.03.2015**

ORDER

1. This second appeal is by original defendant No.1. Respondent No.1 herein filed Regular Civil Suit No.407 of 2010 in the Court of 3rd Joint Civil Judge, Senior Division, Aurangabad for perpetual injunction against present appellant, claiming removal of encroachment made by defendant no. 1 over public way admeasuring 33 x 250 feet, and thus claimed infringement of right of easement of plaintiff and other villagers over the public path.

2. The aforesaid suit came to be decreed by the judgment and order dated 26th July 2013, thereby restraining defendant No.1 perpetually from disturbing enjoyment of right plaintiff and other villagers over the said way situated at Khamgaon. Defendants No.2 to 5 were also restrained from taking mutation entry of the said public way in defendant no. 1's name. The said public road is bound on;

East : by public way going to Wadod Bazar,

West : public way going to Babra,

South : small ditches for rain water, and

North : 20 gunthas land sold to defendant by the plaintiff.

3. The appellant herein, feeling aggrieved by the judgment of trial court, preferred Regular Civil Appeal No.185 of 2013 which came to be dismissed by an order dated 27th August 2014, by the District Judge-5, Aurangabad, as such, the present second appeal.

4. Mr Kulkarni, learned Counsel for the appellant, while questioning the legality of the concurrent findings recorded against the present appellant, has taken me through the observations made by learned trial Court and the lower appellate Court and also through the pleadings of defendant No.1 in the form of written statement. He has also sought to rely upon the sale-deed executed by the appellant herein so as to canvass that the claim of the respondent - plaintiff is far away from the truth and, according to him, the case does call for interference. The contention that is sought to be pressed into service by the appellant herein that the findings of admission recorded by the learned Court below against the appellant are perverse as, according to him, no such admission was given by the appellant. He would further urge that from the perusal of the sale-deeds which are in the form of Exhibit 58, 59, 87 etc. from its boundaries it would reflect that the claim of the plaintiff as is granted by the Courts below was contrary to the documentary evidence.

5. Mr Kulkarni further urged that though in the appeal before the district court, the appellant had filed an application under Order XXVI, Rule 9 of the Code of Civil Procedure at Exhibit 16, the said application was rejected by the learned lower appellate Court in view of observations made in paragraph 27 of the judgment of lower appellate Court. He would further urge that the said application Exh.16 was not considered by the learned lower appellate Court in its proper perspective and as such sought interference on that count also. Amongst other, he has also sought to raise a ground of perverse

appreciation of evidence and sought re-appreciation by this Court in second appeal.

6. The claim of the plaintiff-respondent No.1, as is sought to be resisted by the present appellant by filing written statement at Exhibit 41, depicts that the appellant has denied all material averments claiming that there was a cart track road in between lands bearing Gut No. 404 and 405 which was in irregular shape. He further claimed that the old cart track road was removed after the construction of tar road by laying down straight road resulting in division of Gut No.405 into two parts. He further claimed that the tar road passing through Gut No.405 was constructed 40 years ago and was at a height of 5 feet as that of agricultural lands. He has further disputed the adjoining boundaries, however, claimed that the road as is claimed, is not available since last 40 years. He has denied the documents, such as, map filed by the plaintiff on record. According to remaining defendants, the public way having 33 feet width on the Southern border of 20 gunthas land cannot be ascertained unless and until it is measured through Taluka Inspector of Land Records. It is further claimed by them that the Circle Officer and Talathi had inspected the spot and had drawn panchanama on 27th June 2010 which shows that there is a road in Gut No.405. Defendant No.1 had purchased land ad-measuring 9-R from Ramesh Sonawane on the Northern side of the said road and denied any encroachment by defendant No.1-appellant, however, has made a categorical statement that the defendant No.1 has given 10 feet of land for the use of plaintiff. It is, however, clarified by them that the issue of encroachment cannot be

commented upon unless and until the land in question is measured through Taluka Inspector of Land Records.

7. Based on the claims as have been put forth by the parties, the learned trial Court had framed following issues and answered the same accordingly.

<u>ISSUES</u>	<u>FINDINGS</u>
1. Does plaintiff prove that the defendant No. 1 is trying to grab the public way adjacent to his land ?	Yes
2. Whether plaintiff is entitled for perpetual injunction as prayed ?	Yes
3. Decree and costs ?	Suit is decreed with costs

8. Learned trial Court has taken into account the evidence of the plaintiff who has examined himself at Exh. 51, PW-3 Dattu Kale at Exh.62, PW-2 Sunil Kale at Exh.63, PW-4 Hiralal Bighot at Exh.65 who is Cadastral Surveyor, whereas defendant No.1 has examined himself at Exh.85 and DW-2 Sonaji Sonawane at Exh.92. In addition to above oral evidence, he has produced on record the map of measurement, as he has carried out the measurement, panchnama prepared by Circle Inspector (Revenue), objection lodged with the Tahsildar that forged panchnama was drawn by the Circle Inspector (Revenue). The defendant No.1 has placed on record various sale-deeds whereunder he has purchased the property adjoining to the alleged disputed way.

9. Learned trial Court noticed that the claim in the suit revolves

around the question as to whether the cart way is adjacent to the suit property bearing Gut No.404 on the Southern side of it. The trial Court noticed that defendant No.1-appellant has come out with a case that Gut No.404 is adjacent to Gut No.405 and that he has denied that the cart way is adjoining to Gut No.404 on its northern side and that he has further claimed that tar road passes through Gut No.405 resulting into division of Gut No.405 into two parts on Northern side and Southern side. Out of this land, portion of 9 gunthas is purchased by defendant No.1 from Sonaji. The trial Court noticed that the defendant No.1, in paragraph 3 of the written statement, has admitted that earlier, there was a cart track road in between land Gut Nos.404 and 405 and as such, given clear admission about existence of cart track road. Learned trial Court, as such, has drawn an inference based on the admission and oral evidence of the parties that the land bearing Gut No.404 is not adjacent to Gut No.405 and boundaries of land were separated by the cart track road. Learned trial Court has also taken into account the old revenue record to give finding that there exists way in between Gut Nos.404 and 405 which, according to trial Court, also substantiates the stand of the plaintiff so also the fact that the Gut No.404 is not adjacent to the land Gut No.405. Learned trial Court has also taken into account the admission given by DW-2 Sonaji that there was a cart track road in the land. It is further inferred by the learned trial Court in paragraph 7 of the written statement that the land between the tar road and Southern side of the plaintiff's land is barren one. It was also admitted by defendant No. 1 Mohan that there is no evidence on record to show that this

barren land ad-measuring 9 gunthas which was in possession of erstwhile owner. Learned trial Court has taken into account certain important admissions given by the said witness. Learned trial Court has taken into account the sale-deed Exh.87, executed by Sonaji, the sale of 20 gunthas land adjacent to 9 gunthas by the defendant No.1 on 5th October 2010 for a meager a consideration of Rs.5,000/-, the own explanation of Sonaji about the alleged sale of land for meager consideration.

10. The trial Court inferred that PW-4 Hiralal Bighot at Exh. 65 has deposed that there exists a way adjoining the land Gut No.404. The Court has also taken into account the tonch maps of land Gut Nos.376, 372, 371, 401, 402 and 404 at Exhs.102, 101, 100, 76, 73 and 70 which clearly indicate government way on the Southern side of all the above mentioned Gut numbers. It is also noticed that the tonch map at Exh.99 of Gut No.405 owned by PW-1 Ramesh, shows government way on its Northern side. Exhibit 84, tonch map of Gut No. 405, 404, 403 and 402 was also taken into account that the Gut Nos.404 and 405 are separated by the government way.

11. As such, based on the oral and documentary evidence, the learned trial Court has decreed the suit of the plaintiff.

12. Perusal of the judgment delivered by the learned lower appellate Court reflects that it has framed following points for consideration and has answered the same accordingly.

POINTSFINDINGS

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| 1. Whether plaintiff proved that to the Southern side of 20 gunthas land sold by him to the defendant firstly there is tar road and then there is 33 ft. vide cart road (पाणद रस्ता) Wadod Bajar to Babra ? | In affirmative |
| 2. Whether plaintiff proved that after coming along the tar road, he has to cross that 33 ft vide Wadod Bajar to Babra cart track for entering into his land ? | In affirmative |
| 3. Does he further prove that defendant No. 1 tried to erect compound wall to the Southern side of 20 R land purchased from him in such a way to grab Wadod Bajar cart track (road) portion ? | In affirmative |
| 4. Does he further prove that defendant is trying to obstruct his right of way as alleged ? | In affirmative |
| 5. Whether plaintiff is entitled to get relief of perpetual injunction as prayed ? | In affirmative |
| 6. Whether any interference is required in the Judgment and Order of the learned trial Judge? | In negative |
| 7. What Order ? | As per final order |

13. The lower appellate Court has also taken into account the entire evidence including that of PW-4 Hiralal Bighot, the Cadastral Surveyor and has independently analysed the same. The lower appellate Court has discussed in details the entire set of evidence and has reached to the conclusion that no case at the behest of the appellant for interference could be made out.

14. Based upon re-appreciation of evidence, the learned lower appellate Court has given finding that the plaintiff has proved that the disputed place is a cart track road which is in existence and being used by the public in general i.e. adjacent land holders under Section 20 of the Maharashtra Land Revenue Code, so also by the plaintiff himself. It was also noticed by the learned lower appellate Court that the plaintiff is owner of the property in question and there exists no other way to him to approach his house and agricultural land. As such, in my opinion, the lower appellate Court has rightly dismissed the appeal in the light of oral evidence, admissions given in cross-examination by appellant-defendant No.1 himself and his conduct of encroaching upon the public way.

15. So far as the contentions of the appellant as regards wrong appreciation of boundaries from the sale-deeds and wrong interpretation of admissions given in the written statement, are concerned, the same, in my opinion, in the light of observations made by both the Courts below would amount to re-appreciation of evidence which is not open for this Court to go into, unless the perversity at its face is noticed resulting into the substantial injustice to the appellant.

16. Even the attempt on the part of the appellant in moving an application for appointment of Court Commissioner under Order XXVI, Rule 9 of the Code of Civil Procedure before the lower appellate court has failed in view of the finding given by learned lower appellate Court in Paragraph 27 of its judgment which, for the reasons stated in the said para, in my opinion, does not call for any interference.

17. As such, the present second appeal being devoid of merits, stands dismissed.

(N.W. SAMBRE, J.)

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