

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.337 OF 2011

Ananda Parasu Naikwadi	.. Appellant
Vs.	
Sanjeev Shamrao Jagtap & Ors.	.. Respondents

....

Mr.Sachin U. Dhakephalkar, Advocate for the Appellant.
Mr.P.J. Shinde, Advocate for the Respondent.

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CORAM : RAVI K. DESHPANDE, J.

DATED : JUNE 24, 2015.

P.C. :

Regular Civil Suit No.143 of 1992 claiming mandatory injunction against the defendants to close down the windows opened on the first and second floor of their house adjacent to the house of the plaintiff was dismissed by the trial Court on 6th April, 2004. The counter claim filed by the defendant claiming easement by necessity to discharge the waste and rain water from the property of the plaintiff was also dismissed. Regular Civil Appeal No.211 of 2004 was preferred by the defendants against the rejection of the Counter-claim. The same has been allowed and mandatory injunction has been issued directing the plaintiff to remove obstructions in discharge of waste and drain water of the house of the defendants through property

G.P. No.359, by Judgment and order dated 29th January, 2011. The plaintiff is before this court to challenge the decree passed by the appellate Court in the Counter-claim. There is no challenge to decree passed dismissing the suit by the trial Court and confirmed in the Appeal.

2 In view of above, Admit on the following substantial question of law:

“ Whether the finding recorded by the Lower Appellate Court that the respondent - defendant had right to discharge the waste and rain water from the property of the appellant - plaintiff, is based upon relevant admissible evidence available on record?”

3 Heard the matter finally by consent of the counsel for the parties.

4 The Appellate Court has recorded the finding in paragraph 22 of its judgment that the evidence shows that the respondent - defendant has made arrangement for discharge waste and rain water over southern side of their house. In view of this, it is apparent that it was not a case of easement of necessity, as contemplated by Section 28 of the Indian Easement Act. There is no custom established for discharge of such water. The decree passed by the Lower Appellate Court cannot

therefore be sustained as the findings recorded are perverse.
The substantial question of law is answered accordingly.

5 The Second Appeal is partly allowed.

6 The judgment and decree passed by the Lower
Appellate Court on 29th January, 2011 in Regular Civil Appeal
No.211 of 2004, granting mandatory injunction to the appellant -
plaintiff to remove obstruction in discharge of waste and rain
water is hereby quashed and set aside.

7 No order as to costs.

(RAVI K. DESHPANDE, J.)