

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

Second Appeal No. 67 of 2014
(Baburao Shivram Lichade .vs. Prabhudas Tikaram Lichade and anr.)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's Orders.

Court's or Judge's orders.

Mr.N.S.Deshpande, Adv. for the appellant.
 Mr.V.R.Chaudhari, Adv. for respondent no.1.

CORAM : A.P.BHANGALE, J.

DATED : 30th JUNE, 2015.

Heard.

This appeal is preferred by the original plaintiff in Regular Civil Suit No.124 of 2006 which was instituted in the Court of 4th Joint Civil Judge (Jr.Dn.), Bhandara with a prayer for declaration of easementary right and for permanent and mandatory injunction.

Briefly stated, it was the case of the plaintiff before the trial Court that his father had purchased immovable property i.e. land bearing Khasra No.70, area 0.71 decimal situated at mouza Kothurna, Tq. and Distt. Bhandara. The property was purchased under registered Sale deed dt.11.2.1957 from one Sakhya Nanya Kalar. The house property possessed by the plaintiff was also recorded in Gram Panchayat record as house no.109/1. It is stated that Gram Panchayat, Kothruna had issued notice dt.6.8.2005 to

the plaintiff to demolish the house in his possession which was in dilapidated condition. The plaintiff alleged that he used to come through the land for keeping the bullockcart and tying his cattle and to enter his house. But defendant no.1 Prabhudas Lichade had constructed hut in front of plaintiff's house closing easementary way of the plaintiff. Report was lodged at Police Station by the plaintiff against defendant no.1 and he made application to Sub-Divisional Officer, Bhandara as well on 8.6.2005 to remove the encroachment caused by defendant no.1. On 24.5.2006 plaintiff had applied for construction of a new house with permission of Gram Panchayat u/s. 52 of the Bombay Village Panchayat Act, 1958. The plaintiff had also issued notice to defendant for not to encroach in front of his house. Under these circumstances, the suit was filed.

The learned trial Judge found that the plaintiff did not establish right of way through the open land marked as 'ABADI' in the plaint map so as to establish easement by way of prescription. The trial Court also held against the plaintiff that he failed to prove regarding alleged obstruction of right of way by the first defendant. It is positively held that there was suitable approach road for the plaintiff to have excess to his house and the plaintiff had equally efficacious alternative remedy available under the Bombay Village Panchayat Act to approach Village Panchayat concerned for removal of encroachment, if any by the

first defendant. Thus, the suit of the plaintiff was dismissed after evidence was received and in view of admitted facts in the course of evidence. The plaintiff admitted that east-west road towards northern side of his house leads to a temple and his brothers are using that road. The trial Court, thus, found that there was alternative way available for the use of the plaintiff and therefore, open land marked as “ABADI” cannot be used as easementary right by way of prescription for want of evidence.

Unsuccessful plaintiff in the appeal bearing Regular Civil Appeal No.97 of 2009 failed to establish the right of way, as alleged, through the open land “ABCD” in the plaint map as also the fact that defendant no.1 has also failed to establish the alleged case that defendant no.1 was obstructing his right of way through open land 'ABCD' shown in the plaint map. Thus, there is concurrent finding against the plaintiff/appellant that he failed to establish right of easement by way of prescription and also concurrent findings against him that there is no case made out by the plaintiff since there was suitable approach road available to the plaintiff/appellant than the way claimed. Under these circumstances, since this is a Second Appeal u/s.100 of the Code of Civil Procedure, there must be a substantial question of law involved in the appeal. Considering the Judgments passed by the Courts below and the concurrent findings recorded against the plaintiff/appellant, no easementary right by

way of prescription was established. On the other hand, the evidence before the Courts below indicated that there was existence of suitable alternative way available to the plaintiff than the way claimed in the plaint. The Second Appeal, as such, is not a matter of right but available only when decision of the Courts below is contrary to law or decision by the Court below is involving substantial error or defect in the procedure according to law. That being so, in the absence of any debatable or material question of law and in the absence of error on the part of the Courts below according to law, I do not find any ground made out to formulate substantial question of law. Hence, the Second Appeal, as such, has prima facie no merits. Hence, it is dismissed. No order as to costs.

JUDGE

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