

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

Second Appeal No. 128 of 1992

* Nilkanth Vithu Patil,
Age 39 years,
Occupation : Agriculture,
R/o Chikhali Khurd,
Taluka Yawal, District Jalgaon. .. **Appellant.**

Versus

- 1) Chindhu Mansaram Wayakole,
Since deceased through his
legal heir -
Hemchandra @ Hemaraj Chindhu
Wayakole, Age 48 years,
Occupation : Tailoring Class,
R/o Methaji Plot, Bhusawal,
Bhusawal, District Jalgaon.
- 2) Lalji Chindhu Wayakole,
Occupation: Agriculture
R/o Pilode, Taluka Yawal,
District Jalgaon.
- 3) Trivenibai w/o Ramdas Chaudhary,
Age 45 years,
Occupation : Household,
R/o Sahakarnagar, Bhusawal.
- 4) Shushilabai w/o Girdhar Patil,
Age 42 years,
Occupation: Household,
R/o Viroda, Taluka Yawal
District Jalgaon.
- 5) Vatsalabai w/o Dnyandeo Ingale,
Age 40 years, Occupation: Household,
R/o Khiroda, Taluka Raver,
District Jalgaon. .. **Respondents.**

Shri. A.G. Talhar, Advocate, for appellant.

Shri. P.P. Kothari, Advocate, holding for Shri. S.S. Bora, Advocate, for respondent No.1.

CORAM: T.V. NALAWADE, J.

DATE : 22 JULY 2016

JUDGMENT:

1) The appeal is filed against the judgment and decree of Regular Civil Appeal No.204/1986 which was pending in the Court of the Additional District Judge, Jalgaon. The appeal filed by present respondent, original defendant No.1, against the judgment and decree of Regular Civil Suit No.4/1979 which was pending in the Court of the Civil Judge, Junior Division, Yawal is allowed by the District Court. In the suit, the trial Court had given relief of declaration that plaintiff, present appellant, has right to take water from well situated in land belonging to the defendant and relief of injunction was given to prevent the defendants from interfering in the right of the plaintiff to take water from the well. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :-

3) Plaintiff is owner of land Survey No.87/1 (new Gat No.234) situated at village Pilode Bk. Tahsil Yawal, District Jalgaon and it admeasures 4 acres 46 gunthas. The land of the defendant bearing Survey No.82/2 (Gat No.232) admeasuring 2 acres 25 gunthas is situated in the vicinity of the land of the plaintiff. It is contended by the plaintiff that in the land of the defendant there is well and the plaintiff has right to take water from this well. It is contended that this right was there to the vendor of the plaintiff also, and plaintiff has been exercising such right. It is contended that this right was given in the year 1919 to the first purchaser from owner. It is contended that in the sale deed, by mistake Survey No.86 was mentioned to show that the purchaser had right to take water from the well situated in Survey No.86 but the land was correctly described as Kalamala and the land Survey No.88/2 was described in the sale deed.

4) It is the case of the plaintiff that one revenue proceeding was started and entry was made in favour of the plaintiff with regard to the aforesaid right but the revenue proceeding is decided against him and so he is required to file the suit.

5) Defendant filed written statement and contested the matter. He denied that such right is given to the plaintiff under the sale deed. He denied that plaintiff has such right in any other way. He contended that there is well in Survey No.86 and plaintiff may have right to take water from that well. He has admitted that RTS proceeding was started by the plaintiff for making entry of this right in the revenue record and that proceeding is decided in his favour.

6) On the basis of aforesaid pleadings issues were framed by the trial Court. Both sides gave evidence. The trial Court had given decree by holding that there was motor of the plaintiff fixed on the well of the defendant and he has given admission that the motor was fixed in the year 1974-75. The trial Court had observed that the

land of the defendant is known as "Kalamala" and so the contents of the sale deed of 1919 can be used against the defendants. The first appellate Court has set aside this decision by holding that the plaintiff has not proved that the vendor had such right.

7) This Court, other Hon'ble Judge, admitted the appeal on 16-3-1992 but substantial questions of law were not formulated. Both the sides were allowed to argue on following substantial question of law :-

Whether the District Court has committed error in not considering any material giving probability that plaintiff has right to take water from the well of the defendant ?

8) Both the sides have given oral evidence and there is admission of the defendant to the effect that on his well in the year 1974-75 motor of the plaintiff was installed. There is important record like original sale deed at Exhibit 83 executed by the same person from whom the property came to the plaintiff. This document was executed in the year 1914. Sale deed was executed in favour of the plaintiff in the year 1919. In the sale deed

executed in favour of the defendant under which the property No.88/2 was sold there is mention that there is well in the land and along with the well, the property was sold to the defendant. Thus nothing was left with the vendor on the basis of which he could have given right to the plaintiff to take water from the well situated in Survey No.88/2.

9) It appears that plaintiff purchased the property from previous purchaser in the year 1954. In the sale deeds of 1919 and 1954 care was taken to mention that right is given to the purchaser to take water from the well situated in the land Survey No.86 first and then from Survey No.88 in the year 1954. Due to aforesaid circumstances no right or interest has passed to the plaintiff. No steps were taken by the plaintiff to enter his right in the revenue record on the basis of sale deed till there 1973-74. First his name was entered in the revenue record of Survey No.88/2 but the defendant contested the proceeding and the revenue authority decided the matter in favour of the defendant. The admission given by the plaintiff shows that on the date of the suit there was no

connection of electricity to the motor installed on the well of the defendant. Thus on the date of the suit he was not taking water. Though defendant has not come with any specific case as to why he allowed the plaintiff to install the motor, there is possibility that due to aforesaid circumstances he had permitted the plaintiff to take water. There is no pleading of easementary right from the plaintiff. In view of these circumstances, this Court holds that no declaration could have been given in favour of the plaintiff and relief of injunction also could not have been given. The District Court has not committed any error in deciding the matter in favour of the defendant. So the aforesaid point is answered in negative and the appeal is dismissed.

Sd/-
(T.V. NALAWADE, J.)

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