

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

SECOND APPEAL NO. 743 OF 2013

Subhash s/o Gopalrao Patil Yewatkar
Age 62 years, occupation: agriculture,
R/o Yeoti, Tq. Mukhed, Dist. Nanded

... Appellant
Orig. Defendant

vs

1. Jaywantrao s/o Satwajirao Subhedar,
Age 76 years, occup. and agriculture
r/o Yeoti, Tq. Mukhed, Dist. Nanded

2. Sambhajirao Pundlikrao Subhedar,
Age 72 years, occup. Agril.

3. Ramrao s/o Pundlikrao Subhedar,
Age 67 years, occup. Agriculture,
R/o Yeoti, Tq. Mukhed, Dist. Nanded

.... Respondents/
Orig. Plaintiffs

Mr. Kiran M. Nagarkar, Advocate for appellant

CORAM : SUNIL P. DESHMUKH, J.
12TH JANUARY, 2016

ORDER:

1. Heard Mr. Nagarkar, learned counsel for the appellant – original defendant.

2. Second appeal purports to take exception to two concurrent findings, recorded by trial court (Civil Judge, Junior Division, Mukhed) in its judgment in regular civil suit no. 34 of 1993 on 06-07-2001 and by appellate court (District judge,

Nanded) in its judgment in regular civil appeal no. 27 of 2003 (new) (old no. 65 of 2001) dated 30-04-2013 confirming the decree by the trial court putting restraint on the defendant from causing interference in plaintiffs' right to ingress and egress as claimed in the suit as well as to fetch water from the well.

3. The defendant on the other hand has claimed to be owner of '*Gadhi*'. According to him, the plaintiffs were let in over some portion of it and they have been residing in the same with consent of the defendant. The defendant has referred to that the plaintiffs have some other way for ingress and egress and they have no right to fetch water from the well and that the well had not been in use for over a period of twenty years.

4. Necessary issues arising out of pleadings by the parties had been framed by the trial court. The trial court found that the plaintiffs have proved that they have right to use of main entrance door on northern side of the Gadhi, for that matter, for ingress and egress to and from city survey no.360/197. Trial court has extensively discussed evidence as has come on record including CTS record and with reference to the same has considered that pursuant to the city survey carried out in 1974 by the inquiry officer in respect of village Yeoti, there is recorded plaintiffs' such right and that entry to that effect was taken in

the extract of CTS no.360 which was not set at naught till the proceedings which had been filed in 2004/2005 at the instance of defendant challenging said decision of the inquiry officer. The trial court, apart from aforesaid, also considered that there is sufficient evidence in the form of criminal proceedings from which it appears that the plaintiffs' right to ingress and egress and right to fetch water from the well is sufficiently borne out and is even admitted.

5. The matter was taken in appeal at the instance of defendant bearing regular civil appeal no. 27 of 2003. The appellate court also scanned the entire evidence and has found that trial court's decision and findings are in tune with evidence and record and as such, dismissed the appeal under order dated 30-04-2013 as stated at the inception.

6. The bone of contention of Mr. Nagarkar learned advocate for the appellant-defendant is that an injunction cannot be issued unless the plaintiffs are in possession and that they are owners of the property. Here, in the present case, such burden cannot be said to have been discharged by the plaintiffs and in such a case, injunction as has been granted is not warranted. He submits that in the face of decision of enquiry officer being set aside in 2006 in the appeal at the instance of defendant, the

rights claimed by the plaintiffs pursuant to entries in their favour in city survey records have been negated and as such, their claim to injunction stands falsified.

7. Although Mr. Nagarkar submits as above, the matter has been viewed from an angle as required, and rightly so, by both the courts. The suit had been instituted to have protected right of ingress and egress which has been granted and also for protection of right to fetch water.

8. The trial court as well as appellate court have considered that city survey was carried out in respect of village Yeoti in 1974 and the entry about rights of the plaintiffs had been taken in respect of CTS no.360 where the plaintiffs have been residing. The entry had not been subject-matter of challenge till 2005 and appeal at the instance of defendant had been filed in 2005 in respect of city survey no. 197 which came to be allowed in 2006. The appellate court noticed that it was an *ex-parte* order.

9. The appellate court has further considered that there are admissions by defendant and his witnesses in their cross examinations. It has been referred to that from the same, it has emerged that the plaintiffs are residing on *Gadhi* and main entrance to *Gadhi* is from northern side. Defendant's witness Sheshrao has admitted in his cross examination that the

plaintiffs are having right to use northern side main entrance to the *Gadhi* and of fetching water from well. The appellate court has further referred to cross examination of defendant Subhash as prosecution witness in regular criminal case no. 134 of 1998 wherein he admits that all the persons are having only one way for going to *Gadhi* and that the well is used by the accused, including plaintiffs. The appellate court had considered that by the decision in appeal filed by defendant – appellant questioning order of enquiry officer, under order dated 30-01-2006, it cannot be said that the plaintiffs' rights of enjoyment of ingress and egress from northern side entrance of *Gadhi* as well as to water from the well have come to an end.

10. Both the courts on appreciation of evidence have found that the plaintiffs have been able to substantiate their claim for injunction and said appreciation can hardly be said to be perverse.

11. The questions which are sought to be raised cannot be said to be substantial questions of law for, it is not disputed that the plaintiffs are residents over *Gadhi* for which right of ingress and egress has been claimed and also as such they may be requiring water. In the circumstances, the question sought to be raised about ownership is not a germane. Further, the plaintiffs

have claimed civil rights and have supported the same by evidence.

12. The questions sought to be raised in the second appeal are not the questions deserving any answer and are not involved in the matter. Second appeal as such stands rejected.

SUNIL P. DESHMUKH, J.

pnd