

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

SECOND APPEAL NO. 627 OF 2016
WITH
CIVIL APPLICATION NO. 12563 OF 2016

Gorakhnath s/o Prakash Pawar and others .. Appellants

versus

Smt. Kamalbai w/o Vasantrao Pawar and ors. .. Respondents

Mrs. M. A. Kulkarni, Advocate for appellants

CORAM : SUNIL P. DESHMUKH, J.
DATE : 13th October, 2016

ORDER :

1. Heard learned counsel for the appellants-original defendants no. 4 and 5.

2. The appellants-original defendants no. 4 and 5, aggrieved by judgment and order dated 11-07-2016 passed by learned District Judge-6, Beed, dismissing present appellants' regular civil appeal no.62 of 2011 challenging the

judgment and decree in favour of present respondents no. 1 to 7 – original plaintiffs passed by 2nd Joint Civil Judge, Junior Division, Beed, in regular civil suit no. 26 of 2008, are before this court.

3. It is the case of the appellants that respondents no. 1 to 7 - original plaintiffs had sued defendants claiming injunction against them for their user as way over an area admeasuring 10' x 77' from land survey numbers 44/A and 45 situated at Tarafkhed, Beed, which is claimed to be used by them as a way from times immemorial. It appears from the pedigree on either side that the plaintiffs as well as most of the defendants, save a few of them, are some way related to each other. It is the case of the plaintiffs that on northern side of lands survey no. 44A and 45, there is east-west government road and from said road, a south-north passage for ingress and egress of 10' x 77' to approach survey number 44 and 45 is being used as shown in red colour under letters A, B, C and D in the sketch map annexed to the plaint. Defendants are purchasers from defendant no. 1, of certain portions of ancestral lands and purported to contend that there is no right of way as is being claimed by the plaintiffs.

4. The trial court framed necessary issues as to whether the plaintiffs proved that they had right to use the way as referred to in the plaint map and whether the defendants are creating hindrance in the user, and answered the same in the affirmative after scanning the evidence adduced.

5. The matter had been taken by present appellants-defendants no. 4 and 5 in regular civil appeal no. 62 of 2011. The appellate court as well framed points for consideration, namely, whether the plaintiffs proved their right of way through survey numbers 44A and 45 and whether the plaintiffs proved obstruction in their user by defendants and whether they are entitled to perpetual injunction, answering the same in the affirmative. Additionally, the appellate court, had also framed point, whether the plaintiffs have alternate way and has answered the same in the negative.

6. Learned counsel Mrs. Kulkarni, appearing on behalf of the appellants contends that in the face of sketch map as adjunct to the plaint, it cannot be said that the plaintiffs have no alternate way other than the way claimed from survey nos. 44/A and 45 and further that it cannot be said to be an easement of necessity for enjoying right of user over

disputed portion as referred to in the plaint and if at all it be so, it cannot be said that the plaintiffs have proved the same.

7. While the arguments are being so advanced, one may have to consider that the relief claimed by plaintiffs is simplicitor of injunction based on existence of the way claimed and on obstruction to the user of the same. The trial court as well as appellate court have concurrently considered that there is subsistence of such way and right of user over the same to the plaintiff. Both the courts have duly considered the evidence as appearing on record. The appellate court has in paragraphs no. 13, 14, 15, 16, 18, 19, 20, 21 and 23 observed as follows;

" 13) The plaintiffs are claiming right to way through boundary between Survey No. 44-A and 45. Survey No.44-A and 45 part belongs to defendant No. 1, 4 and 5, whereas Survey No.44-A part is possessed by the plaintiffs. From the southern side of Survey No. 44 and 45 there is a public road. It is admitted that there exists east-west path-way through land Survey No. 44-A and 45. It is the contention of the plaintiffs that the road claimed by them is 10 feet in width and 77 feet in length which is shown in red colour by letter A, B, C, D marked portion along with map annexed with the plaint for identification. The said road is used by their forefathers since time immemorial. Defence of the defendant (appellant) is that there is no such way as claimed by the plaintiffs. It is the contention of the defendants that the plaintiffs are having two alternate approach way to their land. Firstly path-way

from which one person can pass. Second way is on the eastern side of Survey No. 45.

14) In order to establish the claim of the plaintiffs, they examined Rameshwar S/o Vasantrao Pawar PW-1 at Exh. 82, Jaydatta Kashinath Pawar PW-2 at Exh. 93, cousin and adjacent land holder. Advocate Shivaji S/o Ranuji Ujgare PW-3 at Exh. 99, who is Court Commissioner.

15) On the other hand, defendants No. 1, 2, 3, 6 and 7 examined Prakash S/o Vishwanath Pawar DW-1 at Exh. 111, Sachin Prakash Pawar DW-2 at Exh. 113.

16) In the testimony of plaintiff, he testified about existence of suit way in south-north direction. According to him, plaintiffs are using the suit way since time immemorial. He deposed that the defendants obstructed his way on 21-10-2007. He denied in specific that alternate way is available to him which is passing near Baban Gore's cattle shed from western side of his land as well as from lake. Though PW-1 Rameshwar admitted that there is path-way, but it is convenient only for single person and he is unable to carry agriculture equipments for cultivation and harvesting. He denied any alternative way except the way pointed out in the suit map. He categorically deposed that gift-deed Exh. 94 and sale deed Exh. 95 contains suit way in between Survey No. 44-A and 45. Nothing is elicited from his cross - examination.

18. The plaintiffs examined Jaydatta Pawar PW-2 at Exh. 93, co-owner of Survey No. 44-A and 45. He is the witness to gift-deed Exh. 94 and sale-deed Exh. 95. He fortified the claim of the plaintiffs about existence of suit way as described in plaint map. Nothing is elicited in his cross examination to disbelieve his version.

19. PW-3 Shivaji Ujgare deposed that the suit way is in existence

which is shown in the map annexed with the plaint. It has come in his evidence that marks of bullock-cart appears on the suit way. To substantiate his contention, he proved commissioner report and map Exh. 80. He categorically deposed that other way shown in green mark portion passes through hilly area which has ups and downs and carves passes adjacent to lake. He is unable to state name of owners from whose land the said road passes. It is further contended that the western side of Survey no. 44-A and 45 there is stream and it is 1 and 1-1/2 feet depth and at the time of commission the stream was flowing. It is pertinent to note that PW-3 was cross-examined by the defendants. He admitted the suggestion that as per the map Exh.80 that there is cart-way in between Survey No. 44 and 45.

20. The facts which are proved through the testimony of these witness are that there is existence of suit way on border of agriculture land survey No.44-A and 45. It is used by the plaintiff since time immemorial as approach way. In Gift -deed Exh-94 and sale - deed and sale-deed Exh-95 categorically mentioned existence of suit way to approach the Survey No.44. Survey No. 44-A was alienated by Dnyaneshwar to Mandakini Mirge and Sarvottam Gawarswar and further they alienated Survey No.44-A to defendant No. 8. Thereafter, defendant no. 8 transferred Survey No.44-A in favour of the defendant No. 4 and 5 by registered sale-deed. However, thereafter no reference of suit way appeared in the sale-deed. Dispute arise after purchase of Surey No.44-A by defendants no. 4 and 5 and who are the sons of the defendant no.1.

21) It also seen from the map Exh-80 filed by the Court Commissioner Shri Shivaji Ujgare PW-3 that he had shown alternate road in green colour. However, he deposed that he did not make inquiry from whose land the said alternate road passes. He admitted that road passes from hilly area adjacent to the lake. The plaintiffs

had categorically denied use of the said road. The alternate way as proposed by the defendants is available to the plaintiff as path-way in which one person can pass at one time and bullock-cart can not pass through the said way as the same is narrow. It also seen that there is a stream having ditches and bullock-cart can not pass through the said stream. Stream is flowing in rainy season. Accordingly alternate way suggested by the defendants that alternate road passing through the land of Baban Gore, stream and path way is not available to the plaintiffs. It is, therefore, established by the plaintiffs that other than the suit way no other approach way is available to them.

23. *Considering litigation between the parties, it is seen that defendants obstructed suit way. Defendants No. 4 and 5 who are sons of defendant No. 1 had purchased land Gat No.44-A by registered sale-deed dated 18-05-2006. Defendant No. 1 possess Survey No. 45. Suit way passes through Survey No. 44-A and 45, that means from the land of defendants No. 4, 5 and 1. The dispute arise after defendant no. 4 and 5 purchase Survey No. 44-A in 2006. Necessary inferences can be drawn on the basis of evidence that the plaintiffs have right to use the suit way as a necessity. The plaintiffs are thus entitled for permanent injunction restraining the defendants from obstructing them from using the suit way. Hence, I answer point No. 1 to 3 in the affirmative and point No. 4 in the negative. "*

8. Having regard to aforesaid, the observations and findings as are recorded are not in any way shown to be besides the facts and evidence on record.

9. In the circumstances, the matter does not appear to be

a case warranting any substantial question of law to be framed for consideration in the second appeal having regard to the nature of dispute between the parties.

10. Second appeal, as such, stands dismissed.

11. Civil application, in view of aforesaid, does not survive and stands accordingly disposed of.

SUNIL P. DESHMUKH,
JUDGE

pnd