

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 70 OF 2015****ALONGWITH****CIVIL APPLICATION NO.157 OF 2015****IN****SECOND APPEAL NO. 70 OF 2015****Mrs.Vidya Madhukar Thorat****..... Appellant****VERSUS****Mahadev Baburao Patil****(Deceased) through his legal heirs & Ors.****..... Respondents**

Mr.Sandesh Shukla, i/b. Abhay Nevagi & Associates for the Appellant.

Mr.Chetan Patil for the Respondents.

CORAM : R.D. DHANUKA, J.**DATED : 7th JANUARY, 2016****P.C.**

By this second appeal, the appellant has impugned the order and judgment dated 20th November, 2014 passed by the lower appellate court thereby dismissing the Regular Civil Appeal No. 70 of 2014 filed by the appellant (original plaintiff).

2. It is the case of the appellant that an agreement was executed between the respondents and the predecessor in the title of the appellant on 23rd March, 1988 pertaining to the right of ownership of the suit building nos. 1 to 4, to use and enjoy the said suit passage and other passage for building nos. 1 to 4 for ingress and egress, though the said suit passage was exclusively owned by the respondents.

3. On 15th March, 2002 an agreement was executed by and between the appellant and the respondents under which according to the appellant, the respondents were allowed to do certain constructions of the drainage line on the

property of the appellant in return of giving quiet and peaceful access/right of way (motorable) or otherwise through the said suit passage and subject to certain restriction.

4. It was the case of the appellant that sometime in the year 2005, the respondents however obstructed the use and enjoyment of the suit passage by the appellant and the respondents raised constructions and tried to park their two wheeler and four wheeler vehicles in the said suit passage. The appellant accordingly filed a suit Reg.Civil Suit No.438 of 2005 before the learned trial judge on 7th June, 2005 inter alia praying for for injunction and for other reliefs.

5. On 26th December, 2013 the learned trial judge dismissed the said regular civil suit filed by the appellant after considering the oral evidence as well as documentary evidence. The learned District Judge – 1, Kolhapur dismissed the Regular Civil Appeal No. 70 of 2014 filed by the appellant.

6. Learned counsel appearing for the appellant invited my attention to the reasons recorded by both the courts below and would submit that though the appellant had averred in the plaint before the learned trial judge that the appellant was allowed to use the right of way not only by way of ingress and egress but also to use the passage by use of vehicles, the lower appellate court in ignorance of such pleadings filed by the appellant has taken a view that there was no such pleadings filed by the appellant.

7. It is submitted by the learned counsel for the appellant that the findings rendered by both the courts below are perverse and is contrary to the provisions of the agreement entered into between the parties under which the appellant was allowed to use and enjoy the excess and right of way.

8. Learned counsel appearing for the respondents on the other hand supported the findings rendered by the two courts below and would submit that both the courts have considered the documentary as well as oral evidence led by the parties and have rightly rejected the suit as well as the appeal filed by the appellant respectively. He submits that since the findings rendered by the two courts below are not perverse, this court cannot interfere with concurrent findings of fact rendered by two courts below.

9. A perusal of the two orders passed by the two courts below clearly indicates that the appellant could not prove before the courts below that appellant was allowed to use the right of way by use of vehicles. There is no dispute that the appellant was allowed to use right to way for ingress and egress.

10. The appellant also could not prove before the two courts below that the predecessor in title of the appellant who had entered into a separate agreement with the respondents also were allowed to use the right of way by use of two wheelers and four wheeler vehicles.

11. In my view, both the courts have rendered concurrent findings of fact after considering the oral evidence as well as documentary evidence which findings are not perverse and thus cannot be interfered with by this court under section 100 of Code of Civil Procedure, 1908. In my view, no substantial of law arises in the appeal. Appeal is devoid of merits and is dismissed. In view of dismissal of the second appeal, civil application does not survive and is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]