

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

**SECOND APPEAL NO. 370 OF 2012
WITH
CIVIL APPLICATION NO.13008 OF 2015**

Jaising Manchakrao Choudhari,
age : 54 years, Occu.: Service,
R/o.: Ganeshnagar Housing Society,
Ambajogai, Tq. Ambajogai **APPELLANT**

VERSUS

- 1 Namdeo Madhavrao Bhujbal
age: 58 years, Occu.: Pvt. Service,
- 2 Motilal Radhakishan Bharade,
age: 69 years, Occu.: Business,
- 3 Venkatrao Santaram Bembde,
age: 58 years, Occu.: Business,
- 4 Raja @ Balaprasad Shrikishanji
Rujwal,
Age : 48 years, Occu.: Business,
- 5 Sow Shindubai Anantrao Kulkarni,
Age: 58 years, Occu.: Household,

All above r/o Ganesh Housing
Society, Ambajogai,
Dist. Beed

RESPONDENTS

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Mr.V.V.Bhavthankar, Advocate for appellant

Mr.P.P.Dama, Advocate for respondent nos.1, 2 and 4

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CORAM : SANGITRAO S. PATIL, J.

DATE : JULY 10, 2017

ORAL ORDER :

Heard the learned Counsel for the appellant.

2. The appellant is original plaintiff no.2. The appellant and respondent nos.3 to 5 (original plaintiff nos.1, 3 and 4, respectively) had filed R.C.S. No.322 of 1992 for injunction simplicitor restraining respondent nos.1 and 2 from encroaching upon the road, allegedly having width of 25 feet, which was running along the western side of the plot of the appellant. According to them, respondent nos.1 and 2 were constructing a house on some of the portion of road by committing encroachment.

3. Both the contesting parties produced evidence before the trial Court. On appreciation of the evidence, the trial Court held that though there is mention of 25 feet wide road to the western side of the plot of the appellant, in fact, there is no

authentic documentary evidence to show existence of such road having width of 25 feet. In paragraph 20 of the judgment of the trial Court, it is observed that from the evidence of Vyankat (PW 2), who was original plaintiff no.1, it would be seen that there was a road having width of 25 feet, but because of the construction carried out by defendant no.1 i.e. respondent no.1, the said width has been reduced by 7 feet. As such, there is road in existence having width of about 18 feet. The trial Court observed that in the absence of any documentary evidence, such as lay out plan, mere recital in the sale deed about width of the road cannot be acted upon. In the circumstances, the trial Court dismissed the suit.

4. The first appellate Court in R.C.A. No.159 of 2000 has re-appreciated the evidence in detail and concurred with the finding recorded by the trial Court holding that there is no authentic record to establish that in fact, there was a road having

width of 25 feet in existence to the western side of the plot of the appellant. The appeal before the first appellate Court, thus, came to be dismissed.

5. The learned Counsel for the appellant submits that the present appellant has also filed Civil Application No.13008 of 2015 for appointment of Court Commissioner to measure all the plots situate in Survey No.595/B Hissa No.7 at Ambejogai, in order to bring the factual position on record.

6. In my view, this exercise should have been done by the appellant in the trial Court or at the most, before the first appellate Court. Such factual aspects cannot be considered by this Court in Second Appeal. Therefore, the request of the appellant for appointment of Court Commissioner cannot be considered at this stage.

7. There is concurrent finding of facts by the trial Court as well as the appellate Court to the effect that actually, there was no road in existence

having width of 25 feet to the western side of the plot of the appellant. Consequently, the suit for injunction came to be dismissed. Such concurrent finding of facts cannot be questioned in the Second Appeal. There is no substantial question of law involved in this appeal.

8. Hence, the order :-

- (i) The Second Appeal is dismissed.
- (ii) No costs.
- (iii) Civil Application No.13008 of 2015 stands disposed of.

[SANGITRAO S. PATIL, J.]