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

**CIVIL APPLICATION NO.5629 OF 2015  
IN/WITH  
SECOND APPEAL (ST.) NO. 11485 OF 2014  
WITH  
CIVIL APPLICATION NO.5630 OF 2015**

Sopan s/o Shripatrao Waghmare,  
Age: 45 years, Occu: Agril.,  
R/o. Walibamala, Main Road Manwat,  
Tq. Manwat, Dist. Parbhani

..APPLICANT/APPELLANT

**VERSUS**

1. Laxmansa s/o Tukaramsa Kadtan,  
Age: 75 years, Occu: Business,  
R/o. Main Road, Manwat, Tq. Manwat,  
Dist. Parbhani

2. Chief Officer, Municipal Council Manwat,  
Tq. Manwat, Dist. Parbhani

..RESPONDENTS

Mr J. M. Murkute, Advocate for applicants/appellants;  
Mr S. S. Gangakhedkar, Advocate for respondent No.1;  
Mr R. R. Chandak, Advocate for respondent No.2

**CORAM : N.W. SAMBRE, J.**

**DATE : 4<sup>th</sup> July, 2017**

**ORAL ORDER**

By consent of the parties, delay of 50 days caused in preferring second appeal stands condoned. Civil Application No. 5629 of 2015 stands allowed.

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2. The appellant-plaintiff filed Regular Civil Suit No.65 of 2008 (old No.4 of 2008) in the Court of Civil Judge Junior Division, Manwat, seeking injunction against present respondents-defendants from changing the nature of public way, removal of encroachment to the extent of 10 to 15 fts. on the said public way. The suit came to be decreed by judgment and order dated 15<sup>th</sup> September, 2009, passed by the Civil Judge Junior Division, Manwat, whereby respondent-defendant No.1 was restrained from changing the path way and was directed to remove encroachment.

3. Respondent No.1-defendant No.1, feeling aggrieved thereby preferred an appeal being Regular Civil Appeal No. 129 of 2009 in the Court of Principal District Judge, Parbhani, which appeal came to be allowed vide judgment and decree dated 5<sup>th</sup> December, 2013. Thus, the present second appeal by the original plaintiff.

4. Mr Murkute, learned Counsel appearing on behalf of the appellant submits that while reversing the findings of the Trial Court, in view of law laid down by the Apex Court in the matter of **Santosh Hazari vs. Purushottam Tiwari (deceased) by L.Rs.**, reported in **(2001) 3 SCC 179**, it was expected of the appellate Court to deal with each and every finding of the Trial Court and then record its own finding substituting the same by providing reasons, which is conspicuously absent in the judgment of the appellate Court. He would then submit that the appellate Court is required to respect the view expressed by the Trial Court, particularly when the same is based on cogent evidence and according to him, the appellate

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Court has disbelieved oral evidence and reversed the finding. According to him, a substantial question of law is required to be framed by this Court in that regard.

5. Per contra, the learned Counsel for respondents would urge that the appellant is the busy body, who is putting spoke in the regular running of FL2 shop of the present respondent No.1, which was established after approval of the competent authority i.e. Collector under the provisions of Bombay Prohibition Act, 1949. According to him, it is only upon inspection of the premises permission to administer the licence came to be granted in his favour. He would then invite attention of this Court to the order passed by the Division Bench of this Court in Writ Petition No.2220 of 2015, which was preferred at the behest of the appellant dismissing the petition in which a similar prayer was made. According to him, the spot was already inspected by the Collector and no encroachment was noticed. He, therefore, sought dismissal of appeal.

6. Having considered the rival submissions, it is required to be noted that the Trial Court framed issues in the light of rival pleadings of the parties. The plaintiff examined himself at Exh.24 and other five witnesses in support of the claim in the plaint. He has placed on record various documents at Exhs. 28 to 39 and articles A1 to A11 and B to I.

7. It is then to be noted that along with the plaint, the plaintiff filed a plaint map which is claimed to be in scale drawn by a Surveyor, however,

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such Surveyor has not been examined by the appellant-plaintiff. Apart from above, neither any application for appointment of Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure came to be moved nor independent report of the Court Commissioner is placed on record so as to establish the fact of the record as regards the encroachment made by respondent No.1.

8. In the aforesaid background, in my opinion, while appreciating the evidence, the learned appellate Court has rightly disbelieved oral evidence of the appellant and his witnesses as the appellant has failed to establish by leading any primary evidence as regards exact dimension of the encroachment and nuisance caused to them because of such act. Apart from above, it is required to be noted that it is the policy of the State Government not to permit operation of any licence issued under the Bombay Prohibition Act on an encroached or illegally constructed area. In the wake of the same, there is presumption in favour of respondent No.1 – license holder that if he is permitted to operate the licence under the Bombay Prohibition Act, the said licence is in lawful and legal structure only. Apart from above, while deciding Writ Petition No.2220 of 2015 on 11<sup>th</sup> August, 2016, the Advocate appearing on behalf of the Municipal Counsel has made a categorical statement that already a bridge is constructed over the pandan on which the present applicant is claiming that respondent No.1 has committed encroachment.

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9. In the aforesaid backdrop, the appellant having failed to establish his case qua the alleged encroachment made by the respondent No.1-licence holder, in my opinion, there is hardly any substantial question of law involved in the present second appeal. Second Appeal, therefore, fails and stands dismissed.

10. In view of dismissal of appeal, Civil Application No.5630 of 2015 does not survive and stands disposed of accordingly.

**(N.W. SAMBRE, J.)**

amj