

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

**SECOND APPEAL NO. 386 OF 2012
WITH
CIVIL APPLICATION NO.8935 OF 2012**

1. Shivaji s/o Niloba Warekar,
Since deceased, through his L.Rs.)
 - 1A Nilawati wd/o Shivaji Warekar,
Age : 55 years, Occu.: Household,
R/o.: Utka, Tq. Ausa, Dist. Latur
 - 1B Sow. Anusaya Vithalrao Zete,
Age : 38 years, Occu.: Household,
 - 1C Dnyaneshwar s/o Shivaji Warekar,
Age : 36 years, Occu.: Agril,
 - 1D Parmeshwar s/o Shivaji Warekar,
Age : 34 years, Occu.: Agril,
Both r/s. Utka, Ta. Ausa,
Dist.Latur
2. Bharatbai w/o Shesherao Warekar,
Age : 55 years, Occu.: Agril,
3. Dattatraya Shesherao Warekar,
age : 40 years, Occu.: Agril
4. Jyotiram Shesherao Warekar,
age : 37 years, Occu.: Agril,
5. Laxman Shesherao Warekar,
Age : 34 years, Occu.: Agril,
6. Shridhar Angad Warekar,
Age : 37 years, Occu.: Agril,

7. Sakharam Niloba Warekar,
age : 53 years, Occu.: Agril,

All r/o Utka, Tq. Ausa,
District Latur

APPELLANTS
(Ori. Defendants)

VERSUS

1. Ramprasad Govind Mahavarkar,
age : 32 years, Occu.: Agril,
2. Guruprasad Govind Mahavarkar,
age : 40 years, Occu.: Agril,
3. Shivprasad Govind Mahavarkar,
Age : 44 years, Occu.: Agril,

All R/o Utka, Tq. Ausa,
District Latur

RESPONDENTS
(Ori. Plaintiffs)

--

Mr.B.N.Patil, Advocate for appellants

Mr.C.R.Deshpande, Advocate for respondent no.1

--

CORAM : SANGITRAO S. PATIL, J.
DATE : JULY 10, 2017

ORAL ORDER :

Heard the learned Counsel for the
appellants (original defendants) and the learned
Counsel for respondent no.1 (original plaintiff
no.1).

2. None appeared for respondent nos.2 and 3, though they were duly served with notice of appeal.

3. The learned Counsel for the appellants submits that the learned trial Judge in the judgment dated 27.02.2009 delivered in R.C.S. No.361 of 2003 has clearly observed in paragraph 14 of the judgment that the disputed brook was not shown in the measurement map prepared by the cadastral surveyor who had visited the disputed site on 27.07.2004. He submits that when the disputed brook was shown along the land of the respondents and Utka-Davatpur way, there was no question of directing the appellants to change the direction of the said brook and take it through their lands bearing block nos.171, 272 to 274. He submits that there is no specific pleading and proof to show as to when there has been change in the course of the brook, allegedly made by the appellant. He submits that the findings of the

trial Court were based on the evidence that was recorded by the trial Court. However, the first appellate Court wrongly ignored that evidence and recorded perverse findings contrary to that of the trial Court and wrongly directed the appellants to restore the flow of the brook through the lands bearing block nos.171, 272 to 274. He submits that since the findings of the appellate Court are perverse, the Second Appeal is maintainable.

4. On the other hand, the learned Counsel for respondent no.1 submits that it was a specific case of the respondents that the appellants changed the flow of the brook in the year 2000-01 by creating obstacles in the flow and consequently, the brook started flowing through the land of the respondents bearing block no.275. He submits that the suit was filed in the year 2003 and during pendency of the suit, the disputed site was inspected by cadastral surveyor. He prepared map of the lands of the parties after

visiting the site on 27.07.2004. Therefore, the position that was standing on on 27.07.2004 was noted by the cadastral surveyor, however, the map that was prepared in the year 1954 as well as the record of consolidation clearly show existence of the brook running through the lands of the appellants. He submits that the trial Court did not consider the earlier record and dismissed the suit merely on the basis of the position that was standing after filing of the suit. He submits that the appellate Court has rightly considered the earlier record showing existence of brook through the lands of the appellants and rightly decreed the suit for mandatory injunction directing the appellants to restore the flow of brook through the lands bearing block nos.171, 272 to 274. He submits that the findings of the appellate Court are based on the evidence produced on record and that such findings are not at all perverse.

5. As seen from the rival contentions raised by the learned Counsel for the parties as well as the evidence discussed by the trial Court as well as the appellate Court, the position that was noticed by the cadastral surveyor after visting the disputed site on 27.07.2004, was that the disputed brook was not flowing through the lands of the appellants and that it was flowing through the land of the respondents. However, it is the specific case of the respondents that the appellants changed the course of the brook with ill-motive in the year 2000-01, which was earlier flowing through their lands bearing block nos.171, 272 to 274 and made it to flow through the land of the respondents, despite their resistance. The respondents mainly relied on the earlier record of consolidation and map of 1954 showing existence of brook through the lands of the appellants. When the earlier record was showing existence of brook through the lands of the appellants, it was

necessary for them to show as to how, the said brook changed its course and started flowing through the land of the respondents. The oral evidence of the respondents made it clear that it is the appellants who changed the course of the brook and resultantly, it started flowing through the land of the respondents. The earlier documentary evidence strongly supported the case of the respondents about existence of the brook through the lands of the appellants. The learned Judge of the appellate Court in paragraph 34 of the judgment, has considered this aspect of the matter and has rightly held that the course of the brook has been changed prior to filing of the suit and therefore, it started flowing through the land of the respondents.

6. In my view, the findings recorded by the appellate Court cannot be said to be perverse. On the contrary, it seems that the trial Court had not properly appreciated the evidence in respect

of change in the flow of the brook and the earlier record showing existence of the brook through the lands of the appellants. The said mistake has been rightly corrected by the appellate Court.

7. No substantial question of law is involved in this Second Appeal. In the circumstances, I am not inclined to admit the appeal.

8. Hence, the order :-

- (i) The Second Appeal is dismissed.
- (ii) No costs.
- (ii) Civil Application No.8935 of 2012 is also disposed of.

[SANGITRAO S. PATIL, J.]