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

**SECOND APPEAL NO. 291 OF 2015
WITH
CIVIL APPLICATION NO.7573 OF 2015**

1. Prabhakar s/o Trimbak Mote,
Age: 62 Years, Occ: Agri.,

2. Ganesh s/o Prabhakar Mote,
Age: 42 years, Occ: Agri.,

Both R/o Shivankhed (Bk),
Tq. Chakur, Dist. Latur.

..APPELLANTS

VERSUS

1. Dyanoba Hanmant Kule,
Age: 57 years, Occ: Agri.,
Through his Power of Attorney
Holder Madhav Dnyanoba Kule,
Age: 57 years, Occ: Agri.,

2. Pashu Ismail Dhone,
Age: 67 years, Occ: Agri.,
Through his Power of Attorney
Holder Nawab Pashu Dhone,
Age: 34 years, Occ: Agri.,

Both R/o. Shivankhed (Bk),
Tq. Chakur, Dist. Latur.

..RESPONDENTS

Mr R.R. Suryawanshi, Advocate for appellants;
Mr M.S. Deshmukh, Advocate h/f Mr U.L. Momale,
Advocate for respondent Nos.1 & 2

CORAM : N.W. SAMBRE, J.

DATE : 27th JULY, 2017

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ORAL ORDER :

This appeal is by original defendants. Respondents-plaintiffs filed Regular Civil Suit No. 69 of 2012 for perpetual injunction claiming that appellants-defendants be restrained from carving out any way from land Gat No. 310, 311 and 312 situated at village Shivankhed (Bk), Taluka Chakur, District Latur. The said suit came to be dismissed by judgment and order dated 23rd April, 2014 passed by Joint Civil Judge, Junior Division, Chakur.

2. Original plaintiffs, feeling aggrieved thereby, preferred Regular Civil Appeal No.85 of 2014. The lower appellate Court allowed the appeal preferred by the plaintiffs and decreed the suit on 25th March, 2015. As such, this second appeal.

3. Learned Counsel for the appellants-original defendants would invite attention of this Court to the sale deed executed by original owner Habib Ismail Dhone, who was owning land Gat Nos. 310 to 313. According to him, sale deed dated 19th

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March, 1986 provides way to approach his field Gat No. 313 from eastern side of Gat No. 311. In addition, he would urge that learned lower appellate Court framed issue of easementary right in absence of any findings recorded thereon by the trial Court. According to him, said issue was required to be reconsidered so as to enable the present appellants to have opportunity.

4. per contra, Mr. Deshmukh, learned Counsel for the respondents opposed the claim on the ground that revenue authorities, particularly Tahsildar has carried out spot inspection and has noted that there is no road passing through eastern side of Gat No.311. According to him, issue of law, which can be raised at any point of time. According to him, the appeal lacks merits and be dismissed.

5. At the outset, it is required to be noted that the sale deed in favour of present appellants speaks of right of way from the eastern side of Gat No.311. The said aspect should have been prevailed

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before the lower appellate Court before passing judgment, which is impugned herein. Apart from above, perusal of the lower appellate Court judgment depicts that the order of Tahsildar in the matter of provisions under Mamlatdar's Courts Act was considered. Exhibit-15 is the order of Tahsildar, which speaks of spot inspection and Tahsildar has noted that there is no road passing through eastern side of Gat No.311 when he carried out field verification. The order of Tahsildar is taken as gospel truth by learned lower appellate Court.

6. Learned lower appellate Court, in my opinion, while considering and relying upon the order of Tahsildar Exhibit-15, has lost sight of the principle that proceedings under the Mamlatdar's Courts Act, are always subject to outcome of civil proceedings and no other way. Admittedly, neither Tahsildar nor any public servant who was witness to the spot verification was subjected to cross examination. As such, the

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findings recorded by the lower appellate Court by relying upon the order of Tahsildar Exhibit-15 passed under the provisions of Mamlatdar's Courts Act are not sustainable.

7. Though Mr. Deshmukh, learned Counsel for the respondents has raised plea that issue of law, can be raised at any point of time, however, in my opinion, while dealing with such issue, a party may be give appropriate opportunity. From the record and proceedings depicts that issue of easement was never raised and canvassed before the trial Court and lower appellate Court on its own proceeded to deal with issue of easement. Such approach on the part of lower appellate Court denies opportunity to the appellants to defend their case.

8. On both these grounds, in my opinion, the judgment of the lower appellate Court is not sustainable.

9. This Court in second appellate

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jurisdiction in appreciation of evidence, particularly in the aforesaid background does not call for substitution of its own judgment. However, in my opinion, it will be appropriate, in the interest of justice to quash and set aside the judgment dated 25th March, 2015 passed by the District Judge-2, Latur in Regular Civil Appeal NO. 85 of 2014 by remanding the said appeal to the file of learned District Judge for deciding it afresh. Accordingly, second appeal stands allowed. The impugned judgment dated 25th March, 2015 passed by District Judge-2, Latur in Regular Civil Appeal No. 85 of 2014 is hereby quashed and set aside. Regular Civil Appeal No. 85 of 2014 stood restored to the file of District Judge-2, Latur, who shall decide the same after giving opportunity to the parties to the appeal. The parties agree that they shall appear before the lower appellate Court on 28th August, 2017. As such, second appeal is partly allowed.

10. During pendency of appeal, if either of

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the parties, move for any injunction, the lower appellate Court may decide the same on its own merit without being influenced by the above observations.

(N.W. SAMBRE, J.)

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