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

SECOND APPEAL NO. 88 OF 2012

1. Bhaskar s/o Trimbak Karale,
Age: 65 years, Occu: Agri.

2. Sau. Bhimabai w/o Bhaskar Karale,
Age: 60 years, Occu: Household,
Both R/o. Kapurwadi, Tal. & Dist. Ahmednagar,
Through G.P.A.,
Manohar s/o Bhaskar Karale,
Age: 30 years, Occu: Agril.,
R/o: Kapurwadi, Tal. & Dist. Ahmednagar ..APPELLANTS

VERSUS

1. The State of Maharashtra,
Through the Collector,
Ahmednagar

2. The District Inspector of Land Revenue,
Ahmednagar, Dist. Ahmednagar

3. Namdeo s/o Bhau Kasar,
Age: 70 years, Occu: Agri.
(Appeal abated against R/3 as per
Court's order dated 11/12/2015)

4. Kaniphnath s/o Namdeo Kasar,
Age: 35 years, Occu: Agril.

5. Mayamba Namdeo Kasar,
Age: 32 years, Occu: Agril.

6. Kangunabai Namdeo Kasar,
Age: 52 years, Occu: Agril.,
Resp. No. 3 to 6 all R/o
Kapurwadi,
Tal. & Dist. Ahmednagar ..RESPONDENTS

Mr Yuvraj V. Kakade, Advocate for appellants;
Mr C. V. Dharurkar, Assistant Govt. Pleader for respondent Nos. 1 & 2;
Mr N. C. Garud, Advocate for respondent Nos. 4 to 6

CORAM : N.W. SAMBRE, J.

DATE : 8th June, 2017

ORAL ORDER

Regular Civil Suit No. 480 of 1993 for declaration and injunction filed by the appellants-plaintiffs came to be decreed on 20th November, 2002 with following order :-

> “(1) Suit of the plaintiffs is hereby decreed.
>
> (2) It is hereby declared that, the “Tipan” which is maintained in the office of defendant No. 2 which shows area 12 Sakhali 13 Aane is true and correct.
>
> (3) Defendant nos. 3 to 6 are hereby restrained from closing the natural flow of the water through the streamlet runs towards the southern side of the suit land.
>
> (4) Defendant nos. 3 to 6 do pay the cost of this suit to the plaintiffs and bears their own.
>
> (5) Decree be drawn-up accordingly.”

2. Against the aforesaid decree, respondents-original defendants No. 3 to 6 preferred Regular Civil Appeal 2 of 2004 before the District Judge, Ahmednagar, in which the decree to the extent of declaration came to be set aside, whereas remaining part of the judgment and decree passed by the Trial Court came to be maintained. Thus, the present second appeal.

3. The declaration that was ordered by the learned Trial Court as is claimed by the learned Counsel for the appellants-plaintiffs is based on the written statement filed by defendant No.1, wherein according to him, the Tipan which was formed to be the basis as regards wahivat of the appellants was part of the public record about which there is a presumption in law. According to him, a substantial question of law is required to be framed on the issue, as to whether the lower appellate Court has committed an error apparent on the face of record by ignoring the written statement of original defendant No.1 i.e. State Government through its Department of Revenue. He would then urge that as a consequence of refusal of declaration, the holding/wahivat of the present appellants which was based on the revenue record was considered to have been not established.

4. Per contra, Mr Garud, learned Counsel appearing on behalf of respondents – original defendants supports the judgment and decree of the lower Court and submits that the declaration as was sought would not fit within the requirements of Section 36 of the Specific Relief Act. He would then urge that the written statement filed by defendant No.1 of two Tipans as regards wahivat of the appellants-plaintiffs and it was bounden duty of the appellants to prove the same by examining the proper witness to that effect. According to him, the appellants cannot draw support from the vague written statement based on record of defendant No.1 and sought dismissal of the appeal.

5. Considered the findings recorded by the Trial Court and the lower appellate Court on the said issue. The Trial Court, while ordering the declaration as regards Tipan maintained in the office of defendant No.2 about the land of present appellants, to the extent of 12 Sakhali 13 Anas, had relied upon the statements of defendants No. 1 and 2 that they are ready and willing to correct the Tipan as per the factual aspect and measurement and proceeded to grant declaration without considering the factual matrix and the evidence as was brought on record.

7. Per contra, the lower appellate Court while dealing with the said issue of declaration, while negating the finding of the Trial Court on the said issue, has in detail dealt with the issue as regards the declaration based on the Tipan maintained by defendant No.2 and also the written statement of defendant No.2 on the said issue of existing two Tipans in regard to wahivat of the present appellants.

8. Admittedly, the land of the appellants is located on a bank of a stream and there will always be change in the alignment of the land in view of its location on a bank of a stream as erosion of soil is the cause for the same. As a consequence, the Revenue Manual provides for change of wahivat as per actual position on the field and that is what appears to be the stand of the Revenue Department that they are ready and willing to correct themselves as per the actual wahivat on the spot.

9. In the aforesaid backdrop, having noted that the Revenue Department is ready and willing to change the alignment of the land of the appellants and that of the respondents based on actual wahivat, in my opinion, the said statement needs to be accepted with a liberty to the Revenue to act in accordance with the Manual for carrying out such corrections in the respective wahivats.

10. With above observations, I hardly see any ground to interfere as the present appeal lacks substantial question of law. Thus, the second appeal fails and stands dismissed with above observations.

(N.W. SAMBRE, J.)

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