

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

SECOND APPEAL NO.223 OF 2012

1. Chandrakant s/o. Ganpatrao Kulkarni
(died) through Lrs.

1/a) Smt. Minakshi Chandrakant Kulkarni,
(Pimprikar), Age – 52 years,
Occ. Household

1/b) Kiran s/o. Chandrakant Kulkarni
(Pimprikar), Age – 30 years,

1/c) Kishor s/o. Chandrakant Kulkarni
(Pimprikar), Age – 22 years,

1/d) Kavita d/o. Chandrakant Kulkarni
(Pimprikar), Age – 25 years,

1/e) Sau. Kirti Surendra Deshmukh,
age – 27 years,

All r/o. Ganeshnagar, Osmanabad,
Tq. and Dist. Osmanabad

2. Mukund Ganpatrao Kulkarni,
Age – 48 years, Occ. Medical
Practitioner,
r/o. Ganesh Nagar,
Osmanabad

..Appellants

Vs.

1) Shaikh Mustafa Shaikh Mehtab,
Mujawar, Age : 50 years,
Occ. Agri.

2) Shaikh Ikram Shaikh Mehtab
Mujawar, Age : 50 years,
Occ. Agriculture

3) Shaikh Chhotu Shaikh Mehtab
Mujawar, Age : 42 years,
Occ. Agri.

All r/o. Khaja Nagar,
Osmanabad

..Respondents

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Mr.V.D.Salunke, Advocate for appellants

Mr.Mandar Deshmukh, Advocate i/b. Mr.S.G.
Chapalgaonkar, Advocate for respondent no.1

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CORAM : SANGITRAO S. PATIL, J.

DATE : JULY 18, 2017

ORAL ORDER :

Heard the learned Counsel for the parties.

2. The learned Counsel for the appellants pointed to the judgment of the trial Court, wherein five points have been framed in respect of the controversy between the parties. The trial Court has considered the evidence in respect of those points and dismissed the suit. One of the points was in respect of the right of the appellants of use of the suit way. It was alleged

that the respondent encroached upon the suit way and thereafter, obstructed right of the appellants to have access to the land. The learned Counsel further pointed out to the judgment of the first appellate Court, wherein only one issue has been framed in respect of the easement. Even there is no point framed for consideration, as to what kind of easement has been claimed by the appellants and whether, there is alternative way to approach their land, if it is their claim that they are claiming easement by way of necessity. The impugned judgment of the first appellate Court *ex-facie* is cryptic and sans reasons. This fact, according to the learned Counsel for the appellants, itself shows that the judgment of the first appellate Court is perverse and if that be so, the Second Appeal will have to be admitted. In support of his contention, he relied on the judgment in the case of **Smt. Anita M. Harretto Vs. Abdul Wahid Sanaullah, AIR 1985 BOMBAY 98,**

wherein it has been held that the first appellate Court has to cover all important points while passing the judgment in appeal in view of Order XLI Rule 31 of the Code of Civil Procedure.

3. The learned Counsel for the respondent tried to justify the judgment of the first appellate Court on the basis of the judgment of the trial Court, which is rather exhaustive. However, when the judgment of the trial Court was challenged before the first appellate Court, it was expected of the first appellate Court to frame necessary points for determination or consideration under Order XLI Rule 31 of the Code of Civil Procedure, consider the evidence that is recorded by the trial Court, to record its findings on all the points, and then opine, whether the judgment of the trial Court is correct or otherwise.

4. No such exercise has been done by the first appellate Court. The judgment of the first appellate Court is cryptic and non-speaking. As such, the same will have to be characterised as perverse. If that be so, the Second Appeal is required to be admitted. Accordingly, the appeal is admitted.

5. The appeal is admitted.

6. Since the appeal has been admitted in view of the cryptic judgment of the first appellate Court, with the consent of the parties, I think fit to decide the appeal finally at the stage of admission itself.

7. Considering the non-speaking judgment passed by the first appellate Court, there is no alternative, but to set aside the judgment and remand the appeal to the first appellate Court for being decided afresh according to law after considering the evidence on record in detail.

8. The first appellate Court shall frame necessary points, as contemplated under Order XLI Rule 31 of the Code of Civil Procedure and after considering the evidence on record, record its findings on this point.

9. With these observations, I allow the present Second Appeal and pass following order :-

O R D E R

(i) The impugned judgment and decree passed by the first appellate Court in R.C.A. No.293 of 2007 is quashed and set aside.

(ii) The appeal is remanded to the first appellate Court for deciding it afresh according to law.

(iii) The parties shall remain present before the first appellate Court on 16.08.2017 positively.

[SANGITRAO S. PATIL, J.]

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