

Vidya Amin

FARAD CONTINUATION SHEET

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER (ST.) NO. 1277 OF 2017
WITH
CIVIL APPLICATION (ST.) NO. 1279 OF 2017**

Lankabai Chandrabhan Gadakh ... Appellant/Applicant
Vs.
Murlidhar Shankar Gadakh & Ors. ... Respondents

Mr. P.N. Joshi, Advocate for the appellant/applicant.
Mr. Sachin Gite, Advocate for respondent nos. 1 to 5.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 15th September, 2017.

P.C.:

Admit. By consent, the Appeal is heard finally and decided at the stage of admission.

2. In this Appeal from Order, the order dated 1st December, 2016 passed by the District Judge-9, Nashik in Regular Civil Appeal No. 180 of 2016 below Exhibit 5 is under challenge. The present appellant is a respondent in Regular Civil Appeal No. 180 of 2016 and original defendant in Regular Civil Suit No. 141 of 1993. The present respondent nos. 1 to 5 have filed Regular Civil Suit No. 141 of 1993 before the Civil Judge Junior Division, Sinnar for declaration in respect of their right of way from the property of the appellant.

The present respondent nos. 1 to 5 filed an Application Exhibit 5 for interim injunction before the trial Court, however, the Application was disposed of on 6th March, 2000 for want of prosecution. Thus, no order was passed in favour of the plaintiffs/respondents till 2000 and thereafter in the said suit. The suit was finally dismissed on 5th January, 2016, against which, respondent nos. 1 to 5 have filed Regular Civil Appeal No. 180 of 2016 and in the said Appeal also, an Application Exhibit 5 for interim injunction was filed, which was allowed and the judgment and decree dated 5th January, 2016 passed by the Civil Judge, Junior Division, Sinnar in Regular Civil Suit No. 141 of 1993 was stayed till the final disposal of the Appeal and in the operative clause no. 3, the learned District Judge passed the order of interim injunction in respect of use of the road in favour of the respondent nos. 1 to 5/original plaintiffs. Hence, this Appeal.

3. The learned counsel for the appellant has submitted that no order of injunction was passed in favour of the respondents/plaintiffs throughout the trial and on merit, the suit was dismissed. Under such circumstances, the learned District Judge ought not to have passed an interim order in the Civil Appeal. He further submitted that while passing the order, the learned District Judge has erred in

relying on the order dated 29th December, 2009 passed by the Tahsildar, Sinnar in Revenue proceedings in respect of the said road. He submitted that the said order was set aside subsequently by Tahsildar, Sinnar by order dated 30th March, 2012, as the matter was remanded and the challenge given to that order was not entertained by the Revisional Authority.

4. Per contra, the learned counsel for the respondent nos 1 to 5 submitted that the order passed by the learned District Judge is well reasoned and has considered the right of way of the respondents correctly. He has further submitted that the learned District Judge has relied on the Court Commissioner Report while granting stay in favour of respondent nos. 1 to 5/original plaintiffs. The learned counsel further submitted that the said Appeal is now fixed for hearing and it can be heard and this Appeal from Order is to be dismissed.

5. Perused the order passed by the learned District Judge. Also perused the orders of the Tahsildar, Sinnar dated 29th December, 2009 and 30th March, 2012. It appears that the revenue authority has granted order in favour of respondent nos. 1 to 5 in the year 2009 in respect of use of way. However, the said order was set

aside by the Tahsildar, Sinnar on 30th March, 2012, as the matter was remanded. The said order of Tahsildar dated 30th March, 2012 was not set aside further in Revision and it remained as it is. The suit was filed in the year 1993. Throughout the trial till 2016 no interim injunction was granted in favour of the respondents/plaintiffs and against the appellants/defendant. The submissions of the learned counsel for the appellant that the learned District Judge at the time of granting interim relief on Application Exhibit 5 has committed error in taking into account and relying on the order of Tahsildar dated 29th December, 2009 which was set aside, are correct. In view of this, the order passed by the learned District Judge dated 1st December, 2016 in the operative clause no. 3 is hereby set aside and the learned District Judge to proceed with the Appeal and to expedite it preferably till 13th October, 2017. It is to be noted that while setting aside the order of the District Judge, has considered the illegality in the order, however, has not considered the factual merits of the matter. All the contentions are open.

6. Appeal from Order is disposed of. Civil Application is also accordingly disposed of.

(MRS.MRIDULA BHATKAR, J.)