

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

***SECOND APPEAL NO.124 OF 2015
Along with
CIVIL APPLICATION NO. 540 OF 2015***

1. Pandharinath Dada Yadav
Through L.Rs.
1a. Rajendra Pandharinath Yadav & others. .. Appellants

Vs

1. Shri Sambhaji Nivrutti Yadav & others. .. Respondents

Mr.V.S.Kapse a/w Shailesh Chavan, for Appellants & Applicants.

Mr.Dilip Bodake, for Respondent Nos.1 to 4.

Mr.Ameet Palkar – Assistant Government Pleader, for Respondent Nos.5 & 6.

***Coram : N.M.Jamdar, J.
Date : 27 April 2017.***

Oral Order :

This Second Appeal is filed by the original Defendants. The Respondents-Plaintiffs are the owners and in possession of Gat no.672 situated at village Atit, taluka and District Satara. According to Respondents, the Appellants-Defendants, without any right whatsoever, were trying to force their way through the northern part

of Gat No.672. According to the Respondents-Plaintiffs, the Appellants with an intention to grab the property of the Plaintiffs made an application before the Tahsildar Satara, on 12 December 2006 and the Tahsildar, Satara by order dated 25 March 2008 permitted the Appellants to use 8 feet wide road from boundary of Gat No.672 and 673 to approach the National Highway. The Respondents-Plaintiffs challenged the said order of the Tahsildar in view of Section 143(5) of the Maharashtra Land Revenue Code, 1966 by filing a Suit No.132 of 2008 in the Court of Civil Judge, Senior Division, Satara. The Appellants appeared in the Suit and contended that the order passed by the Tahsildar was correct as and there was no alternate way for the Appellants to approach the National Highway or the village. The learned Civil Judge, by the judgment and order dated 10 July 1972 decreed the Suit and set aside the order passed by the Tahsildar Satara. An Appeal No.336 of 2012 was filed by the Appellants in the District Court, Satara which was dismissed by the learned District Judge by judgment and order dated 9 May 2014. Thereafter the present Second Appeal is filed.

2. Heard learned counsel for the parties.

3. The learned counsel for Appellants submitted that the statements before Tahsildar ought to have been considered, which was not done by both the Courts. It was contended that the Commissioner's report, which was filed at Exh.64, was not properly considered. The learned counsel submitted that the burden was on

the Respondents-Plaintiffs to demonstrate that there existed no road and that the Appellants had another alternative way. He submitted that in the Suit filed under section 143(5) of the Code, the burden will be on the Plaintiffs to demonstrate non-existence of the route and the presence of alternative way. The learned counsel for the Appellants relied upon decision of the learned Single Judge in the case of *Pandurang Chandrabhan Bauche and another Vs. Jalindhar Sarandhar Tupe and others – 2009(3) Mh.L.J.* The learned counsel for the Respondents-Plaintiffs, relying on the evidence of the parties, contended that there exists no such road and the order of Tahsildar has sought to create a way which never existed. He submitted that neither the Commissioner's report nor the photographs produced on record show existence of any road and the Appellants in the past have used another road, which is clear from the evidence.

4. Section 143 of the Maharashtra Land Revenue Code 1966 empowers the Tahsildar to inquire into and decide the claims of persons in respect of right of way. The decision of the Tahsildar is amenable to appeal as well as revision under the Code. The provision also contemplates a civil suit. Section 143 of the Code reads thus :

(1) The Tahsildar may inquire into and decide claims by persons holding land in a survey number to a right of way over the boundaries of other survey numbers.

(2) In deciding such claims, the Tahsildar shall have regard to the needs of cultivators for reasonable access to their field.

3) The Tahsildar's decision under this section shall, subject to the provisions of sub-sections (4) and (5), be subject to appeal and revision in accordance with the provisions of this Code.

(4) Any person who is aggrieved by a decision of the Tahsildar under this section may, within a period of one year from the date of such decision, institute a civil suit to have it set aside or modified.

(5) Where a civil suit has been instituted under sub-section (4) against the Tahsildar's decision, such decision shall not be subject to appeal or revision.

Therefore it is clear from the scheme of the Section 143 that, either a party can challenge the decision of the Tahsildar by way of an appeal or revision as provided under the Code, or institute a civil suit. Civil suit, if instituted, bars the remedy of appeal and revision under the Code. Civil suit is filed under general law. When such a suit is filed the Civil Court will decide the *inter se* rights of the parties. The civil suit cannot be considered as an extension of the decision of the Tahsildar in the hierarchy of the remedies provided under the Code. The civil court will have to decide the civil rights of the parties as per the material produced before it. When the suit was filed, a question therefore arose before the Court was whether there exists a right of way in favour of the Appellants. Admittedly, the Appellants are neither the owners of Gat no.672 nor 673, therefore what is claimed is an easementary right.

5. The learned counsel for Appellants has sought to urge that the

Appellants have both a right of prescription as well as a right of necessity. As far as right of prescription is concerned, the Appellants will have to demonstrate that the Appellants have been using this path to access the National Highway for a long period of time. On this question of fact, before the Courts, parties led their evidence. The Appellants led their evidence and he were cross-examined. In the examination-in-chief, the Appellants asserted that the Appellants were using the said path for a long period of time. After from self-serving statement, the Appellants solely relied upon the order passed by the Tahsildar. Once the order of Tahsildar was put into question and rights of the parties were being independently decided, it was obligatory on the part of the Appellants to demonstrate the existence of the road.

6. In the context of the site inspection report of the Court Commissioner, various admissions given by the Appellants, which demonstrate that there never existed a road for a long period of time as sought to be alleged. The Commissioner was appointed by the learned Civil Judge on 18 November 2008 with notice to both the sides. The Commissioner visited the site. The Commissioner filed his report on record which stated that there is an indication of narrow footpath on which certain crops are grown. He also stated that there is an indication of a path by the bund which at some places is 4 feet and at some places is 5 feet. He however stated that there are certain electricity poles which are close to each other. I have gone through

the report and the photographs, which are on record. There does not seem to be any 8 feet wide path as alleged. There are electricity poles close together which will make navigation difficult. Thus except for the bare statement of the Appellants and the order of the Tahsildar, no independent evidence of existence of this road has been placed on record by the Appellants.

7. Both Courts therefore after appreciating the evidence on record have rendered a finding of fact that there does not exist any such 8 feet wide road. In the decision of *Pandurang Bauche* cited by the learned counsel for the Appellants, the learned single Judge was called upon only to consider a question whether the right conferred on the Tahsildar under section 143 of the Code is independent of easementary rights. But from this decision it cannot be argued that when an independent civil suit is filed, the entire burden shifts on the Plaintiffs. If a party is claiming easementary rights over property of another then the Civil Court will have to call upon such party to demonstrate its rights, and such party cannot state that it will produce no evidence.

8. As far as the easement of necessity is concerned, it was contented that the Appellants have no other way and the land of the Appellants is landlocked. The learned counsel for the Respondents has submitted out that there exists a way but it is slightly longer and it is only for sake of shorter route that a road is being forced through the land of the Respondents. In the cross-examination the Appellant has

accepted that the Appellants had taken crops of sugarcane and soyabean earlier and those crops were sold to the sugarcane factory. The map has been placed on record by the Commissioner does not rule out a possibility of a road from the southern side. The above aspects are in the arena of assessment of evidence. The arguments of the Appellants are calling upon this Court to assess the evidence and set aside concurrent findings of fact. No question of law arises, as contemplated under section 100 of the Code of Civil Procedure.

9. After hearing the matter it was adjourned to find out whether dispute can be resolved amicably on monetary terms but however the learned counsel for the parties state that the talks have failed.

10. Second Appeal is accordingly dismissed. Civil Application stands disposed of.

(N.M.Jamdar, J.)