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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.860 OF 2017

Vasant Dagu Jadhav & Ors.	..Appellants.
V/s.	
Bhaskar Hari Jadhav & Ors.	..Respondents.

Mr.A.R.Shaikh i/b. Harshad E.Palve for the appellants.

Mr.Nitin Mulye for the respondents.

CORAM: NITIN W.SAMBRE, J.

DATE : DECEMBER 6, 2017

PC.:-

Heard learned counsel for the respective parties. The respondents-plaintiffs had filed the Regular Civil Suit No.17/2004 claiming the right of way by easement of prescription and for the perpetual injunction. The right to way was sought to be established by the respondents-plaintiffs which came to be rejected by the Civil Judge, J.D. Niphad by judgment and order dated March 17, 2009 which was reversed vide order dated August 8, 2017 by the Appellate Court in Regular Civil Appeal No.68/2009

preferred by the present respondents-plaintiffs. The learned District Judge while setting aside the judgment and decree of dismissal of the suit declared that the respondents-plaintiffs have an easementary right over the disputed way as demonstrated by the plaint map and issued an order of permanent injunction which prompted the appellants-original defendants to file this Second Appeal.

2. Amongst the grounds which are sought to be canvassed are, to establish that there exists a public way, no material was available on record. Learned counsel for the appellants would urge that just because the adjacent field owners were using the said way pursuant to the consent given by the appellants does not give a right to claim declaration in general, as the lower Appellate Court has ordered that there exists a public way. The submission of learned counsel for the appellants is that, the way that was in existence is only for the purpose and use of the appellants and cannot be termed to mean for use by other adjacent land owners or public at large. According to him, there exists an alternate way which is available to the respondents-plaintiffs. He would then

urge that if the lower Appellate Court recorded a finding of existence of way, the least that was expected was to appoint a Court Commissioner under Order XXVI Rule 9 of the Civil Procedure Code, calling upon the respondents-plaintiffs to establish the existence of way and thereafter to adjudicate the rights of the parties.

3. Per contra, learned counsel for the respondents submitted that the Appellate Court has proceeded on the basis of evidence that is brought on record. According to him, the onus shifts on the present appellants the moment they come out with the details of existence of an alternate way, which was not discharge by them. According to him, the appeal lacks merits and hence be dismissed.

4. After having considered the rival submissions, it is appreciated that the present appellants-defendants have categorically admitted the existence of way. Once the existence of way is admitted by the present appellants, the same is analysed in the backdrop of the evidence of witnesses which was very much

established through evidence that the way in question was in existence for about 40 years and that being so, the lower Appellate Court has rightly answered the plea of the respondents of existence of easement by prescription in favour of the respondents.

5. So far as the claim of the appellants as regards the existence of an alternate way is concerned, the appellants themselves have admitted about existence of the disputed way.

6. May be the lower Appellate Court has recorded a finding that there exists a public way without any revenue records. This finding in my opinion was uncalled for, but still in view of admission given by the appellants, the fact remains that the claim put forth by the respondents and the admission given by the appellants has rightly prompted the lower Appellate Court to decree the suit.

7. If the appellants have come out with a defence about existence of an alternate way, in such eventuality, the burden is on the appellants-defendants and not the respondents-plaintiffs to

prove that there exists an alternate way. The appellants-defendants have failed to demonstrate that there exists an alternate way and as such, the appellate Court has rightly negated such submission of the appellants. In my opinion, the appeal lacks merits. No substantial question of law arises. The Second Appeal is dismissed.

(NITIN W.SAMBRE, J.)