

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

**CIVIL APPLICATION NO.156 OF 2017
IN
SECOND APPEAL NO.903 OF 2007**

Shri Prakash Rajaram Aadivarekar And Ors. ...Applicants

vs.

Shri Anil Vitthal Thakurdesai And Ors. ...Respondents

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Mr. R.M. Haridas, i/b. S.S. Radij, for the Applicants.

None for the Respondents.

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CORAM : S.C. GUPTE, J.

DATED : 10 MARCH 2017

P.C. :

. Heard learned Counsel for the Applicants (Original Appellants). The Respondents are absent, though represented by an Advocate. Even on the last occasion, i.e. on 3 February 2017, when the matter was called out, none appeared for the Respondents and the matter was stood over as a last chance to the Respondents.

2. The Appellants had filed the present suit claiming a right of access through a road passing over the property of the Respondents (Original Defendants). Whilst the suit was decreed by the Trial Court after the court inspected the site and ascertained the facts of the case, the lower Appellate Court, on the Respondents' appeal, set aside that decree and dismissed the Appellants' suit. The Second Appeal is admitted on substantial questions of law. It is the case of the Applicants/Appellants in the present Civil Application that the Appellants, who have filed this

suit in a representative capacity, have been using this particular access, which is a 12 feet wide passage, along with the other villagers. It is submitted that this access is used by the villagers even for vehicular traffic. It is submitted that this access is convenient to all villagers, including school children, who have been using it to access the main tar road, namely, the Kharepatan-Pamburle Road. It is submitted that, on the representations of villagers, the grampanchayat has passed a resolution for construction of a proper road going through different lands, which include the subject passage through the Respondents' land, to access the Kharepatan-Pamburle Road from the village. It is submitted that the relief in the Civil Application is sought on the ground that the impugned order of the lower Appellate Court should not come in the way, if the grampanchayat is otherwise entitled to construct a road passing through the subject passage over the Respondents' land. There is a reply filed by the Respondents' contesting these claims.

3. Prima facie it does appear that the Trial Court has considered oral evidence of the parties, including the testimony of a surveyor and after local inspection by the Court of the site in the presence of the parties and their Advocates, has held that the suit road/access was the only road/access available to the villagers to access the main road and that this passage has been used for accessing the main road from Bandarwadi for a long time. Considering the evidence, the local inspection and the map produced on record by the surveyor, the Trial Court came to a conclusion that the Plaintiffs had proved their case that the suit road was the only access in use and occupation of villagers and easementary rights have been secured by the villagers, including the

Plaintiffs, by way of prescription and, accordingly, decreed the suit. This decree was reversed by the lower Appellate Court on grounds, such as the failure on the part of the Plaintiffs to furnish the exact length of the passage over the suit land as also the access being of a width of about 2 to 4 feet and not 12 feet, as claimed by the Plaintiffs, without in effect considering the case of the Plaintiffs that the passage was, in fact, being used by the villagers, including the Plaintiffs, for access to the Kharepatan-Pamburle Road. It transpires from the record and the Civil Application that there is a village panchayat resolution passed by the Grampanchayat Kunkavan that they propose to construct the road after following due process.

4. On these facts, it appears to be in the interest of justice that this Court issues a clarification in the present Civil Application that in case the grampanchayat proposes to construct a road passing over the suit passage of land by following due process, the impugned judgment and order of the lower Appellate Court shall not come in the way. It is also clarified that as a fallout of this order, in case the Second Appeal is decided in favour of the Respondents, the Appellants shall not claim any equities arising out of today's order.

5. At the request of learned Counsel for the Appellants, the hearing of the Second Appeal is expedited.

6. The Civil Application is disposed of accordingly.

(S.C. GUPTE, J.)