

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

**SECOND APPEAL NO.1057 OF 2012  
with  
CIVIL APPLICATION NO.2100 OF 2012**

Dhondiba Gangaram Somawamshi & anr. ... Appellants

Vs.

Shri Mohan Govind Divanji ... Respondent

Mr.Drupad S. Patil for the Appellants  
Mr.J.S. Kapre for Respondent

**CORAM: Mrs.MRIDULA BHATKAR, J.  
DATED: APRIL 25, 2018**

**P.C. :**

1. This Second Appeal is directed against the judgment dated 31.10.2012 passed by the Principal District Judge, Solapur in Regular Civil Appeal No.274 of 2006 thereby modifying the judgment and decree passed by the learned Civil Judge, Junior Division, Akkalkot dated 6.10.2006 in Regular Civil Suit No.84 of 2000, and granting relief of declaration and mandatory injunction sought by way of counter claim of the defendants in the said civil appeal.

2. The appellants are the original plaintiff Nos.1 and 2 respectively, who are the owners of Survey Nos.323 and 322 respectively and the defendant is an owner of Survey No.321, which is towards southern side of these Survey Numbers. (for the sake of brevity, the parties are henceforth addressed to by their original status as 'plaintiffs' and 'defendants'.) The defendants have applied to the revenue authority for having access from his land on Survey No.321 approaching towards the way on the north, which runs east-west. The access claimed by the defendants runs through the boundary line of Survey No.322 owned by plaintiff No.2 and Survey No.323 owned by plaintiff No.1. The Tehsildar by his order dated 28.9.2000 passed order and declared that the access of cart way on the common bund between 323-322 is available to the defendant. The said order was challenged by the appellants by filing Civil Suit No.84 of 2000 before the learned Civil Judge, Senior Division, Akkalkot.

3. The respondents appeared in the suit and claimed that they have right of access on the bund going through gat No.322 and 323 since last 104 years. The defendants claimed their easementary right of access through the lands of the plaintiffs. He

contested the suit by filing written statement and counter claim of right of way and also prayed for perpetual and mandatory injunction, thereby specifically denying all the averments. In the said suit, the trial Court framed issues and the plaintiffs and the defendants tendered documentary as well as oral evidence. The trial Court after considering the evidence, dismissed the suit with no costs by order dated 6.10.2006. The Court dismissed the suit of the plaintiffs and partly decreed the counter claim on the point of access on the bund running through gat Nos.323 and 322 and by way of permanent injunction restrained the plaintiffs from causing obstruction to the defendant in user of the bund.

4. The said judgment was challenged by the appellants/plaintiffs by filing Regular Civil Appeal No.274 of 2006. In the said appeal, the defendants filed Cross Objection. The Appeal No.274 of 2006 was partly allowed and the order of the learned Civil Judge, Junior Division, Akkalkot dated 6.10.2006 was modified by granting the relief of declaration and mandatory injunction as sought by the defendant in the counter claim. The appellate Court held that the Tehsildar's order directing the removal of trees and fixation of price of the trees and the payment

of the same is improper and illegal and it was set aside. The appellate Court has further directed the plaintiffs to remove the trees which are causing obstruction to the right of way of the defendants over the bund on both the lands. It is also held that the plaintiffs are entitled to recover the price of the said trees from the defendants and if the plaintiffs failed to do so, then, the defendants were given liberty to execute the order of mandatory injunction by taking out execution proceedings and the defendants shall be liable to pay the price of such trees to the plaintiffs which may be fixed by the executing authority. So also, the relief of perpetual injunction was rejected as it was premature. The said order of the learned Principal District Judge, Solapur dated 31.10.2012 is challenged under the present Second Appeal.

5. Learned Counsel for the appellants has formulated the following substantial question of law:

Whether the first appellate Court failed to appreciate that there is no easement by grant or any easement in favour of the respondent and the Tehsildar has no power to pass order of access under 143 of the Maharashtra Land Revenue Code?

6. Mr.Patil, the learned Counsel for the appellants, has submitted that the respondent should have filed application u/s 5 of the Mamlatdars' Court Act, 1906 and the Tehsildar has no power to pass such order of removing of trees or obstruction and giving access. The learned Counsel has submitted that an alternative way is available to the respondent from the southern side to reach to Gaothan. The respondent cannot be given the way through the lands of the plaintiffs. He submitted that if this access is created through the lands of the plaintiffs, it would result in acquiring or taking away the agricultural land of the plaintiffs for giving access to the respondent. He submitted that the agreement on the basis of which the respondent claimed their right of access, is an agreement dated 9.10.1897, which is bogus and does not say about the access of the defendant/respondent. In support of his submissions regarding the powers of the Tehsildar, he relied on the judgment in the case of **Krushna s/o. Damaji Choudhari & Anr.**<sup>1</sup>.

7. On the point of easement, Mr.Patil relied on the judgment of the Madras High Court in the case of **Ponnan & Ors. vs. Peraman & Anr.**<sup>2</sup>.

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1 2012(2) ALL MR 337

2 2006 (5) CTC 573

8. Per contra, the learned Counsel for the respondent has relied on the judgment of the trial Court as well as the first appellate Court on the point of access. The learned Counsel has submitted that the respondent has made an application to the Tehsildar for right of way on a common bund between the lands of both the plaintiffs. He submitted that the Tehsildar by his order dated 28.9.2000 carved out access i.e., a cart-way which is maintained by both the Courts below and the order of Tehsildar is not disturbed to that extent. The learned Counsel for the respondent has further submitted that on the southern side of his land, i.e., survey No.321, there is no way for him to approach the Gaothan but the way passing through the Survey No.322 and 323 of the plaintiffs, touches the northern side road is only available road to go to Gaothan.

9. He submitted that there is no substantial question of law in respect of the document i.e., the sale deed dated 9.10.1897 which is marked as exhibit 114A and which was executed between the father of one of the plaintiffs i.e., plaintiff No.2 and the predecessor in title of the respondent. He pointed out that in the said sale

deed, it was agreed by the forefather of the plaintiffs that a way will be provided to the respondent through the bund.

10. Perused the judgments of the Courts below. Perused the plaint, appeal and the record so also the exhibited documents. The document exhibited at exhibit 114A is the sale deed between the forefather of the plaintiffs and the predecessor in title of the respondent wherein the right of way of the owner of survey No.321 on the bund from south to north, is protected. So, it is an easement by grant, which is claimed from plaintiff No.2 who is the owner of property on Survey No.322. The Tehsildar has granted access by invoking powers u/s 143 of the Maharashtra Land Revenue Code and carved out a cart-way on the bund running through the plaintiff Nos.1 and 2 having survey No.322 and 323. Thus, it appears that the Tehsildar has considered the easement of grant in respect of survey No.322 and easement by necessity in respect of survey No.323, and made way available for the respondent to use the bund to the width of cartway. The appellate Court in its order has considered the order passed by the Tehsildar, which is based on the document and as per section 143 of the Maharashtra Land Revenue Code, the Tehsildar has power

to make enquiry on the access and also decide the claims of the parties in respect of the right of way over the boundaries. As the Tehsildar has rightly used his power u/s 143 and in view of the contents in the sale deed, wherein the right of access was specifically mentioned in the year 1897, I do not find any substantial question of law in this matter.

11. In the case of **Krushna s/o. Damaji Choudhari & Anr.** (supra), a learned Single Judge of this court at Nagpur Bench has held that the application u/s 143 cannot be treated as a Suit filed u/s 5 of the Mamlatdars' Courts Act. The powers u/s 143 given to a Tehsildar are limited and the Tehsildar can pass order as to whether the right of access exists but cannot pass the order of removal of obstructions.

12. In the case of **Ponnan & Ors. vs. Peraman & Anr.** (supra), the Madras High Court held that if easement of grant is claimed, then, the party claiming so, has to produce the agreement because easement of grant is an outcome of contract and it cannot be mixed up with easement by necessity. However, in the said Second Appeal, the learned Single Judge has reiterated the scope of interference of High Court in the Second Appeal filed u/s 100 of

the Civil Procedure Code. Even the question of law is raised in the memorandum, if not a substantial question of law, then, it cannot be interfered with, especially, when there is a concurrent finding of facts.

13. In view of the right of access granted in the sale deed, I do not find any substantial question of law in this appeal. The trial Court as well as the first appellate Court both have discussed the factual position correctly and have weighed the circumstances holding the right of cartway in favour of the respondents.

14. Lastly, one more issue in respect of cutting of the trees is to be dealt with. As pointed out by the learned Counsel for the respondent, earlier, when the suit No.84 of 2000 was filed, the plaintiffs i.e., the appellants themselves have mentioned that the bund was approximately 3' in width and the trees like 10 to 12 Babool, Surbi trees were standing on it. The court Commissioner was appointed in the suit and as per his report, there were grown up trees to the extent of 15 to 20. The learned Counsel for the appellants has argued that there are many trees now standing on the bund and it is not possible to cut those trees. By order of this Court, panchanama was made by the Tehsildar, Akkalkot on

21.4.2018 which is taken on record and marked exhibit A, which states that total 57 trees including Babool and Sandalwood and tamarind trees are standing there and unless these trees are cut, the bund cannot be used as access, though the erstwhile physical condition of the property when the suit was filed, has to be taken into account, the trees being growing and living and a part of the nature, in a span of 18 years, different trees have grown up and the old trees have become stronger and bigger. The learned Counsel for the appellant pointed out the Maharashtra Felling of Trees (Regulation) Act, 1964 and relied on section 3 of the said Act wherein restriction is placed with non-obstante clause. I have considered this aspect. While I maintain the order passed by the first appellate Court, it is further directed that the whosoever is going to remove the trees including the big trees, shall transplant the same and especially the big trees of sandalwood and tamarind, may not be touched, however, if they are required to removed, they are to be planted at the border of the plaintiffs' field. For the purpose of removal or felling of trees, the party who is going to remove the trees, will approach the Tree Officer as mentioned in Maharashtra Felling of Trees (Regulation) Act, 1964 and the concerned Tree Officer in view of the order passed by this Court

and in accordance with rules, shall decide the application within one month from the receipt of such application.

15. With this, the Second Appeal is dismissed. Civil Application No.2100 of 2012 also stands dismissed.

16. At this stage, the learned Counsel for the appellants seeks stay of this order to enable him to challenge it before the Hon'ble Supreme Court. The order is accordingly stayed and will be operative for a period of eight weeks from the date of uploading the order.

**(MRIDULA BHATKAR, J.)**