

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 504 OF 2018

Prakash s/o Shivaji Wadwale,
Age 35 years, Occupation Agri.,
R/o Ruibhar Tq. and Dist.
Osmanabad. ...Appellant.

VERSUS

1. Nagnath s/o Babu Wadwale,
Age 38 years, Occupation Agri.,
R/o Ruibhar Tq and Dist.
Osmanabad.
2. Balasaheb s/o Babu Wadwale,
Age 33 years, Occupation Agri.,
R/o Ruibhar Tq and Dist.
Osmanabad.
3. The State of Maharashtra,
Through : Collector, Osmanabad.
4. The Tahsildar,
Tahsil Office, Osmanabad. ...Respondents.

...
Advocate for Appellants : Mr. V.M.Vibhute and Mr. P.S.Tele

Advocate for Respondents No.1 and 2 : Mr. D. A. Naik.

AGP for Respondents No.3 and 4- State : Mr.Y.G. Gujarathi

...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 15-01-2019.

ORAL ORDER :

1. Original defendant No.3 has filed this second appeal to challenge the Judgment and decree passed by District Judge -2, Osmanabad in Regular Civil Appeal No.207 of 2014 on 23-12-2016,

thereby dismissing his appeal which was filed to challenge the Judgment and decree in Regular Civil Suit No. 213 of 2013, by 2nd Joint Civil Judge, Senior Division, Osmanabad on 08-11-2014. The suit for restraining the defendants perpetually from excavating the land in Gut No.532 situated at Ruibhar Tq. and Dist. Osmanabad and constructing the road through the suit property was decreed.

2. Plaintiff No.1 is the owner and possessor of 2 H 23 R land and plaintiff No.2 is the owner and possessor of 1 H 11 R land. Defendant No.3 had filed application on 23-06-2008 with other land holders to defendant No.2 for grant of road from land Gut No.530 and 531. Circle Officer prepared panchanama and then passed order to make the road encroachment free. On the basis of said panchanama, in the month of January 2009 the order was passed. However, again on 20-05-2009 another application was filed by defendant No.3 stating that, still the road is blocked. Police authority at that time had prepared the panchanama in which it was mentioned that, there is no cart road available through the suit property but only footpath is available. It is thereafter stated that, defendant No.3 by joining hands with defendant No.2 started interfere in the possession of plaintiffs over the suit property. Defendant No.3 is having alternate road through the common boundary of land Gut No.537 and 538. It is stated that, defendant No.2 illegally granted the road through suit property and started constructing the road by dismantling the boundary marks and trees.

Hence, the suit was filed.

3. It appears that, the original defendants No.1 and 2 had not filed any written statement. Defendant No.3 filed written statement. He did not challenge the ownership and possession of the plaintiffs over the suit land, however he denied the contention that he had filed an application dated 23-06-2008 and asked the road to be made encroachment free. It is stated that, plaintiff himself had filed that application in personifying defendant No.3. It is denied that, he has alternate road to go to his house situated in Gut No. 532. It is stated that, the suit property and the land Gut No.537 was owned by ancestors of plaintiffs and his own. In the partition plaintiff had received the suit property and defendant No.3 had received land Gut No.537. It is specifically stated that, he has a road through land Gut No.532 which he is using since last more than 30 to 35 years ago. Plaintiffs had consented for the use of the road, and therefore, they are not constructing the road illegally.

4. With these rival contentions parties went trial, evidence has been led. After considering the evidence, the suit was decreed. The defendants were restrained perpetually from excavating the suit property and constructing road through the suit property.

5. The defendant No.3 challenged the said Judgment and decree in the said appeal. After hearing both the sides, appeal has been dismissed. Hence, the present second appeal.

6. Heard Mr. V. M. Vibhute and Mr. Pavan S. Tele, Advocates for applicant, Mr. D. A. Naik, Advocate for respondents No.1 and 2, and Mr. Y. G. Gujarathi, AGP for respondents No.3 and 4 – State. Perused the record and proceedings. Both the learned advocates had made submissions in support of their respective contentions.

7. The first and the foremost fact that is required to be considered is that, both the Courts below are consistent in coming to the conclusion that the defendants are illegally constructing way through the suit land. This was on the basis of evidence led. Under such circumstance this Court would be very much slow in admitting the second appeal which should be normally on the basis of pure question of law.

8. If the pleadings are considered it is to be noted that, plaintiffs had come with a specific case that, when the defendant No.3 has alternate road and there was no right of way given to him then without taking any legal recourse the defendants were not justified in constructing road by excavating the land Gut No.532. Defendant No.3 is not disputing the ownership of the plaintiffs over the suit land. He is coming with a case that, he has a right of way. What kind of right of way he was canvassing is not clarified. At one breath he was saying that, it is his easementary right which he is using since more than 30 to 35 years. He has also pleaded that, the suit land and his land was owned by one ancestor and then in

partition the owners are separate. Thus he tried to implement the right of way by legal necessity. However, it is also to be noted that, a document has been produced on record which is stated to be the 'Sammati Patra' (Exhibit 67) executed by plaintiffs in favour of the defendant No.3 and others. If the defendant is relying upon this document, then it is to be noted that in clear terms it is stated that it is only for a temporary re-period and if the revenue authorities grant the land as a way then it would be enjoyed in perpetually. If the defendant No.3 had the right of way since 30 to 35 years ago, there was no occasion for him to take consent deed Exhibit 67. That means, the defendant No.3 is blowing hot and cold at the same time. This can also be considered from another fact that, in the written statement he has taken a defence that, he had not filed the application dated 23-06-2008. He had rather categorically stated that, plaintiff No.1 by in personifying himself to be defendant No.3 had filed that application. At the same time the defendant No.3 wants to take advantage of the said application. At the cost of repetition it can be therefore said that, he was blowing hot and cold at the same time which cannot be allowed at all.

9. It is also to be noted that, on two occasions the panchanama of the spot was carried out. Only foot road is stated to be in existence and not the cart road. Under such circumstance if there is only a foot road, it cannot be converted into a cart road without adopting due procedure of law. It is to be noted that, Tahsildar by

passing an order on 22-03-2010, it appears that injunction was granted as contemplated under Section 5 (2) of the Mamlatdar Courts Act. However it can be said that, that would be restricted to the existing road which can be said to have been blocked. When there was no cart road in existence, advantage of the said injunction order cannot be taken to construct a cart road. None of the parties have come with a case that, an application under Section 143 of the Maharashtra Land Revenue Code was ever filed and procedure thereunder was undertaken by the revenue authorities.

10. One more fact has come on record that, defendant No.3 has alternate road. If alternate road is available then there is no question of easement road. Though it has come through the Court Commissioner's report or other documents that, there is road in existence from Gut No.532 yet it can be traced out that it is by virtue of consent deed (Exhibit 67). Defendant No.3 has not led any evidence that since prior to the consent deed a road was in existence which was used as cart road. What was the road that was given was from the Sarbandh that is boundary which cannot be made beyond the said. Thus when the defendant No.3 has failed to prove the right of way, defendants No.1 and 2 were not justified in constructing the way for defendant No.3 and others at the behest of defendant No.3.

11. Both the Courts below have appreciated the evidence properly. Under such circumstance, no legal point has been pointed

out to be a substantial question of law. Therefore, there is no necessity to interfere with the concurrent findings of both the Courts below. Hence, second appeal is **not admitted** and accordingly it is disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.