

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Second Appeal No. 0383 of 2018

District : Dhule

Mansing s/. Jagatsing Rajput,
Age : 59 years,
Occupation : Agriculture,
R/o. Bhorkheda,
Taluka Shirpur, Dist. Dhule.

.. Appellant
(Original
plaintiff
& appellant)

versus

1. Kewalsing s/o. Lotansing
Rajput,
Age : Major,
Occupation : Agriculture.
2. Sau. Gangabai w/o. Lotansing
Rajput,
Age : Major,
Occupation : Agriculture.
3. Devising s/o. Lotansing
Rajput,
Age : Major,
Occupation : Agriculture.
4. Lotansing s/o. Chandrasing
Rajput,
Age : Major,
Occupation : Agriculture.
5. Rajendra s/o. Lotansing
Rajput,
Age : Major,
Occupation : Agriculture

6. Vijaya w/o. Kewalsing
Rajput,
Age : Major,
Occupation : Agriculture.

All R/o. Bhorkheda,
Taluka Shirpur,
Dist. Dhule.

.. Respondents
(Original
defendants
&
respondents)

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*Mr. Prakashsing B. Patil, Advocate, for the
appellant.*

*Mr. D.S. Bagul, Advocate, for respondents
no.01 to 06.*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the order : 23rd January 2019**

**Date of pronouncing
the order : 27th February 2019**

ORDER :

01. Present appeal has been filed by the original plaintiff / appellant in the first appeal to challenge the judgment and decree passed in Regular Civil Appeal No. 58 of 2011, dated 02-08-2017 passed by learned Ad hoc District Judge-1, Dhule. In the said appeal, judgment and decree passed in Regular Civil Suit No. 35 of 2009, dated 14-11-2011 by Joint Civil Judge (J.D.), Shirpur, District Dhule, was challenged.

02. Present appellant - original plaintiff contended that he is the owner and possessor of agricultural land bearing Gut No. 17/1 admeasuring 3 hectares 64 R land situated in Asali village, Taluka Shirpur, which is more particularly described by boundaries in para 01 of the plaint. It was stated that towards eastern side of the suit land, village boundary of Borkheda is situated. Defendants are the owners of agricultural lands bearing Gut No.158, 159, 160/A-1/2/3 and 160/B-1/2. It is stated that the suit land is in Asli shivar, whereas lands of the defendants are in Bhorkheda shivar. Defendants have approach road towards north side of their lands from Chopda-Shahada road. Defendants have no right, title or interest or right of way through the suit land. However, they are creating a road / cart way through the suit land from eastern Bandh adjacent to their lands. Plaintiff had gone to his land on 22-02-2009 and saw that the defendants were crossing the freshly prepared field from the suit land with their bullocks and, therefore, he had tried to restrain the defendants. Defendants abused him and, therefore, he filed suit for permanent injunction.

03. Defendant no.01 contested the suit by filing written statement and other defendants have adopted his written statement. They have denied the contents in the plaint specifically except the fact that they

are the owners of the said lands. It is stated that lands Gut No.158, 159 and 160 were previously owned by ancestors of plaintiff. However, thereafter there was partition between plaintiff and his uncle. Gut Nos.158, 159 and 160 went to the share of plaintiff's uncle and the defendants have purchased those lands from plaintiff's uncle. They have contended that they are not using eastern side *Bandh* of the suit land but they are using eastern *shiv* (boundary) for approaching their lands. According to them, that part of land is not of the ownership of the plaintiff. There was no question of crossing the land belonging to the plaintiff. They prayed for dismissal of the suit by saying that it is false and vexatious.

04. With these rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence on record. After considering the evidence on record and hearing both sides, learned trial Court has dismissed the suit.

05. The judgment and decree passed by the learned trial Court was challenged in aforesaid Regular Civil Appeal No. 58 of 2011 and after hearing both sides, learned Ad hoc District Judge-1, Dhule, dismissed the appeal on 02-08-2017. Hence, the plaintiff intends to approach this Court in this second appeal.

06. Heard learned Advocate Mr. P.B. Patil appearing for the appellant and learned Advocate Mr. D.S. Bagul appearing for the respondents. Perused the record & proceedings.

07. Learned Advocate appearing for the appellant vehemently submitted that both the courts below have not considered the factual aspects and, therefore, there is prejudice caused to the plaintiff. When defendants had admitted that there was no road on the eastern boundary of the field of the plaintiff, then there was no question of proving its existence by the plaintiff. In fact, the agricultural land belonging to the plaintiff is situated in Asli shivar, whereas lands of the defendants are situated in Bhorkheda shiv. There is Nala (streamlet) in between the fields which was since time immemorable available to the defendants to go to their field. In spite of the existence of the said road, the defendants were bent upon creating new road from the land of the plaintiff. He relied on the decision of the Hon'ble Apex Court in *Deva (Dead) through L.Rs. Vs. Sajjan Kumar (Dead) by L.Rs.* [AIR 2003 SC 3907] wherein it has been held that *the High Court was right in interfering with the judgments of courts below on the basis of admission contained in the statement of defendant and, therefore according to him, substantial questions of law on the basis of said admission is arising.*

08. It is to be noted that plaintiff had come with a specific case, that defendants are trying to create new road through his land. First of all, he was required to prove the said fact. Except his evidence, there is nothing on record. He has, in fact, described the four boundaries of the suit land which includes Bhorkheda shivar and also a Nala. Even if for the sake of arguments it is accepted that Nala is used for ingress and egress, then it can only when it is dry and, therefore, it cannot be taken as a way. Further, he has not given any rough sketch explaining from which place exactly the defendants intend to create new road from his land. When the situation which has been brought on record shows that the defendants are owners of different lands, then whatever right or liability that would be there, would be as against each one of them and not collectively. Another fact which has not been explained by the plaintiff is that why the defendants want to create any new road apart from the village boundary road because he has not come with a case that defendants want to introduce a shortcut to go to their respective lands. The fact which has come on record, that the defendants have purchased lands from the uncle of plaintiff. That means, the suit land as well as the land owned by the defendants was previously under the use and occupation as well as cultivation by one family. Definitely, when

defendants purchased the lands, they would have seen whether they have road for approaching to their respective lands, or not. It cannot be said that after so many years of purchase of the lands by the respective defendants, they have now come up with the plea that they want a new cart road. Even at the time of arguments before this Court, the photographs, which were on record, were tried to be pointed out. However, it is to be noted that the photographs have not been proved by examining the photographer and by leading appropriate evidence by the plaintiff. Therefore, those photographs cannot be considered in evidence.

09. The judgments by both the courts cannot be said to be illegal or perverse as each and every piece of evidence before the trial Court was considered by them. The ratio laid down in *Deva (Dead) through L.Rs. Vs. Sajjan Kumar (Dead) by L.Rs. (supra)* cannot be disputed. However, taking into consideration the facts of the case before the Hon'ble Apex Court, the Apex Court had come to the conclusion that under those particular facts, the High Court was right in interfering with the judgments of the courts below. Here, even if we consider the admitted situation on record, yet, plaintiff had failed to prove that defendants are trying to create a new road and, therefore, there is no substantial question of law in this case.

10. In the result, the second appeal is hereby dismissed / not admitted.

11. Record & proceedings be sent back to the concerned court.

(Smt. Vibha Kankanwadi)
JUDGE

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