

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

SECOND APPEAL NO.764 OF 2017

Ananda s/o Govindrao Mahajan,
Age 52 yrs., Occ. Agri. & Business,
R/o Bharadi, Tq. Sillod,
Dist. Aurangabad.

... Appellant.

...Versus...

- 1 Totaram s/o Ganu Mahajan,
 Age 77 yrs., Occ. Business,
 R/o Bharadi, Tq. Sillod,
 Dist. Aurangabad.
- 2 Punjabi s/o Totaram Mahajan,
 Age 72 yrs., Occ. Business,
 R/o As above.
- 3 Pundlik s/o Totaram Mahajan,
 Age 37 yrs., Occ. Business,
 R/o As above.
- 4 Ranjanabai w/o Pundlik Mahajan,
 Age 32 yrs., Occ. Business,
 R/o As above.
- 5 Dhanji s/o Ganu Mahajan (**Died**),
 Age 67 yrs., Occ. Business,
 R/o As above.
- 6 Muktabai w/o Dhanji Mahajan,
 Age 64 yrs., Occ. Business,
 R/o As above.
- 7 Gajanan s/o Dhanji Mahajan,

Age 37 yrs., Occ. Business,
R/o As above.

- 8 Raghunath s/o Dhanji Mahajan,
Age 32 yrs., Occ. Business,
R/o As above.
- 9 Sugandhabai w/o Ramchandra Mahajan,
Age 47 yrs., Occ. Business,
R/o As above.
- 10 Ashok s/o Ramchandra Mahajan,
Age 37 yrs., Occ. Business,
R/o As above.
- 11 Jagannath s/o Ramchandra Mahajan,
Age 35 yrs., Occ. Business,
R/o As above.
- 12 Samadhan s/o Ramchandra Mahajan,
Age 47 yrs., Occ. Business,
R/o As above.
- 13 Jyoti w/o Ashok Mahajan,
Age 32 yrs., Occ. Business,
R/o As above.
- 14 Vitthal s/o Dagduba Mahajan,
Age 77 yrs., Occ. Business,
R/o As above.
- 15 Kautik s/o Dagaduba Mahajan,
Age 42 yrs., Occ. Business,
R/o As above.
- 16 Daulat s/o Vitthal Mahajan,
Age 32 yrs., Occ. Business,
R/o As above.

... Respondents.

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Mrs. P.V. Langhe, Advocate for the appellant

Mrs. V.P. Latange, Advocate for the respondent Nos.1 to 4 and 6 to 16

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 22th JANUARY, 2019

PRONOUNCED ON : 28th FEBRUARY 2019

JUDGMENT :

1 Present appeal has been filed by the original plaintiff challenging the Judgment and Decree passed in Regular Civil Appeal No.230/2013 by learned District Judge-1, Aurangabad dated 19.09.2017, whereby the decree passed in his suit bearing Regular Civil Suit No.185/2011 by learned 2nd Jt. Civil Judge Junior Division, Sillod on 27.09.2013 for permanent injunction came to be dismissed.

2 The present appellant-original plaintiff had come with the case that there is a road belonging to him, running East-West towards South of his agricultural land bearing Gat No.103 admeasuring 1 Hectare 5 Ares situated at village Bharadi, Tq. Sillod, Dist. Aurangabad. It is stated that the said suit property had come to him by virtue of partition.

He has constructed Wakhar (a temporary shed constructed in the field) towards South on the Western part. He is residing in the said field along with his family since many years. He goes to his Wakhar from the said East-West road, which is a cart road from Wangi-Bharadi road. He contends that defendants have no concern with the suit property. Wangi-Bharadi road goes North-South from Gat No.11 to 103, by dividing the lands in East-West strips. According to the plaintiff, defendants are using Wangi-Bharadi road to go towards their respective lands. There is also an alternative road available to the defendants, which is a cart road, from the Bank of Manjardari river. Defendants entered his land unauthorizedly on 02.07.2011 and told plaintiff that he should provide them cart road from Wakhar towards their land and in case, he does not allow them, they would permanently demolish the said road. Thereafter, the defendants started obstructing the road by putting thorns and stones. When plaintiff tried to persuade them, he was abused and therefore, suit was filed for permanent injunction.

3 The defendants resisted the claim by filing written statement at Exh.15. All the contentions in the plaint have been denied specifically. They have admitted that plaintiff is the owner of the suit property,

however, they have stated that the suit road, which is up to the Wakhar of plaintiff, is not belonging to him alone. All the neighbours use that road, so also defendants are using it. There is no alternative road available for the defendants, from the bank of river Manjardari. It is stated that the said common road is from the bandh of plaintiff's land and it is, therefore, stated that there was no reason for them to ask plaintiff to give any road or threaten him. There was no reason for the plaintiff to file suit. Revenue authorities have drawn panchnama of the said road. It is open and plaintiff as well as defendants are using it. It is specifically stated that plaintiff intends to grab the said portion and therefore the suit has been filed.

4 Taking into consideration the rival contentions, issues came to be framed and parties led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned trial Court has dismissed the suit on 27.09.2013.

5 The said Judgment and Decree was challenged by the original plaintiff in R.C.A. No.230/2013, which came to be dismissed on 19.09.2017 by learned District Judge-1, Aurangabad, after hearing both sides. Hence, this Second Appeal.

6 The Record and Proceedings was called and heard learned Advocate Mrs. P.V. Langhe for the appellant and learned Advocate Mr. V.P. Latange for defendant Nos.1 to 4 and 6 to 16. It will not be out of place to mention here that respondent No.5 has expired and his legal representatives are already on record and pursis to that effect has been filed.

7 It has been vehemently argued on behalf of the appellant that both the Courts below had not considered the case of the plaintiff and evidence properly. The Judgment and orders passed by the learned Courts below are perverse. In fact, the defendants had admitted that plaintiff is the owner of the suit property, but still the issue No.1 was answered in the negative, which was in respect of the fact that he is possessor of the suit property. When the fact was admitted, there was no necessity to prove the same. The admissions given by the defendant Gajanan in that respect have not been considered properly. When the existence of the suit way and possession of the plaintiff was admitted, there was nothing to be proved independently by the plaintiff. Further, the existence of alternate way to the defendants was also admitted by DW 1 Gajanan. Under such circumstance, almost all the contents of the

plaint were proved by the plaintiff. There was also proof regarding obstruction by the defendants. When the defendants were resisting the claim of the plaintiff, it could have also been taken as proof for obstruction. There was no proof led by the defendants to prove the common usage of the suit way. The learned First Appellate Court wrongly relied on Section 143 of Maharashtra Land Revenue Code and observed that the suit was barred before the Civil Court again, when it was stated that there was the proceeding taken before the revenue authorities. In fact, undue weightage ought not to have been given to the orders passed by the learned revenue authorities, when the substantial right could be agitated before the Civil Court. The learned First Appellate Court got confused regarding the powers of the Mamlatdar under Section 5 of the Mamlatdars Courts Act and Section 143 of the Maharashtra Land Revenue Code. Learned Advocate for appellant has relied on the decision in Krushna Damaji Choudhari & anr. vs. Additional Commissioner, Nagpur Division & ors, 2012(5) Bom.C.R., 815, wherein it has been held that

“Application under Section 143 of Code cannot be treated as suit under Section 5 of Mamlatdars Court Act and Tahsildar exercising powers under Section 143 cannot direct removal of

obstruction. Order passed by Tahsildar to extent if directs removal of obstruction created by respondent 2 over boundaries cannot be sustained. Authorities below committed error in maintaining order. However, no fault can be found with order passed by authorities under Section 143 of M.L.R. Code, declaring that there subsist way on boundaries of petitioner, writ petition allowed. Orders passed by authorities below are quashed and set aside only to extent that it directs removal of obstruction in way through boundaries of petitioner. Parties at liberty to adopt all proceedings as are available to them.”

Further reliance has been placed on Mohommad Khan s/o Rahim Khan vs. Shankar s/o Maroti Dhage and another, 2017(3) Mh.L.J., 135, wherein it has been held that

“The proviso below sub-section (1) of Section 5 of the Mamlatdars' Court Act empowers the Mamlatdar to refuse to exercise the power under the said provision if it appears to him that such a case can be more suitably dealt with by the Civil Court. Though there is a revision provided under Section 23 of the said Act to challenge the order passed by the Mamlatdar under Section 5, the Act nowhere attaches finality either to the order passed under Section 5 by the Mamlatdar or merits or to the order passed in revision under Section 23 of the said Act. In the absence of such finality being attached to the order passed under the Act, the jurisdiction of the Civil Court cannot be held to be impliedly barred merely because the Act provides a separate machinery for getting

the grievance redressed. The ouster of the plenary jurisdiction of Civil Court cannot be readily interfered (sic. inferred) and such jurisdiction remains intact and available to be exercised either against the order under Section 5 or against the order of revision under Section 23 of the said Act.”

Learned Advocate for appellant, therefore, submitted that substantial questions of law are arising in the matter requiring admission of the Second Appeal.

8 Per contra, the learned Advocate appearing for the respondents submitted that there are concurrent findings in respect of facts by both the Courts below. They both have stated that plaintiff is not the owner and possessor of the suit way to the exclusion of the defendants. The earlier order passed by Tahsildar on 21.04.2003, which was produced under Order 41 Rule 27 of the CPC has been rightly considered. The said matter was before Tahsildar in respect of same disputed property. The existence of the road was not denied, but what was denied was exclusive ownership of the plaintiff over the same. Husband of defendant No.9 had filed those proceedings before revenue Court, when it is stated that the present plaintiff had obstructed him from using the said road. Panchnama was drawn by the revenue authorities,

which proved the existence. Under such circumstance, no substantial question of law can be said to be arising requiring admission of the Second Appeal.

9 The perusal of the plaint would show that plaintiff contended that he is the owner of agricultural land Gat No.103 admeasuring 1 Hectare 5 Ares out of 1 Hectare 25 Ares from village Bharadi, Tq. Sillod. He says that he has constructed the Wakhar on the Southern side of his Western side land. He says that there is a road exclusively belonging to him, running East-West in direction from Wangi-Bharadi road. He takes the said East-West road, which is a cart road to go towards Wakhar. The first and the foremost fact that is required to be noted is that he claims that the said road is part of his land, but has not produced any rough sketch giving directions and place in order to identify the property. If his map is considered, he can go to his property from any way or there need not be a specified road. It is not his case that the said road is in between his land. If we consider the situation given in collective map of Gat Nos.100 to 105, which is stated to be tonch nakasha that the strips of the lands are in East-West direction and the said Wangi-Bharadi road goes in North-South direction, dividing those

lands into two parts. In cross-examination, the plaintiff has clearly stated that he has no record to show that there is a Wakhar in his land, however, it can be seen that the existence of Wakhar is admitted to the defendants. Though the existence is admitted, the exact place of the said Wakhar ought to have been given by the plaintiff, in order to appreciate the situation of his property as well as suit road. Though the existence of the road as well as the fact that Gat No.103 belongs to plaintiff, what was denied by the defendants is that disputed road is part of Gat No.103. Under such circumstance, both the Courts below have stated that though the existence of the same is proved, it was necessary for the plaintiff to prove that it is of his exclusive ownership and possession.

10 As regards the jurisdiction of the Court is concerned, even if, we brush aside the observations in respect of bar, under Section 143 of Maharashtra Land Revenue Code, made by the First Appellate Court, yet on the available evidence on record, it cannot be stated that plaintiff had proved that the suit road exclusively belongs to him. According to the defendants, disputed road is from bandh of plaintiff's land and the plaintiff has come with the case that it is part of his Gat No.103. Therefore, to this limited dispute, there ought to have been a specific

evidence. It is not in dispute that a declaration was drawn on 20.06.2004 by the revenue authorities, which is at Exhs.41 and 42. At that time, it was noticed by the panchas that the present plaintiff has obstructed the Government cart road from Gat No.103, whereas the owner of the Gat No.102 had kept that road open. That means, it was noted by the panchas that plaintiff had created obstruction in respect of the said road. Those panchnamas were denied by the plaintiff in cross-examination. Suggestions were put to DW 1 Gajanan that Sugandhabai Ramchandra Mahajan, who is defendant No.9 had given the complaint with the revenue authorities and the said revenue decision was in favour of the defendants. It has not been brought on record on behalf of the plaintiff that he had ever challenged the said decision by the revenue Courts or not. Taking into consideration this fact, it appears that the learned First Appellate Court has stated that plaintiff could not have agitated the same issue before Civil Court. No doubt, taking into consideration the decision in **2017(3) Mh.L.J., 135**, the jurisdiction of the Civil Court cannot be outstayed, but then also, if we independently see the facts of this case, the plaintiff cannot be said to have proved his exclusive ownership over the suit way. As per the decision in **2012(5) Bombay Cases Reporter**,

815, it is stated that order of Tahsildar to direct removal of obstruction made under Section 143 of M.L.R. Code cannot be sustained, but it was observed that **no fault can be found with the order passed by the authorities under Section 143 of M.L.R. Code, declaring that there subsist way on boundaries of petitioner.** Therefore, when the existence of the road on the boundaries was noted by revenue authorities and the a way was cleared and that order was not challenged by the plaintiff immediately or independently. This piece of evidence will have to be taken against the plaintiff. Under such circumstance, when both the Courts below had taken the facts of the case into account and come to the proper conclusion that the suit way does not exclusively belong to the plaintiff. Plaintiff was not entitled to get any injunction. There was no perversity in the findings given by both the Courts below. Under such circumstance, no substantial question of law has been made out. The Second Appeal is therefore dismissed. In view of this, Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)

Date : 28.02.2019.

11 After pronouncement of the Judgment, the learned Advocate appearing for the appellant prays for continuation of the protection, which was granted.

12 It is to be noted that the appellant is the original plaintiff, whose suit for permanent injunction came to be dismissed, thereafter his appeal has also been dismissed and now, the Second Appeal is also dismissed, as no substantial question of law has been made out. Under such circumstance, there cannot be extension of protection any further. His oral request is rejected.

(Smt. Vibha Kankanwadi, J.)

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