

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 528 OF 2017
WITH
CIVIL APPLICATION NO. 978 OF 2017
IN
SECOND APPEAL NO. 528 OF 2017**

Shri Dadaso Biraji Ghule and Ors. ... Applicants/Appellants.
V/s.

Shri. Sadashiv Narayan Masal (deceased) ... Respondents
through LR.s. and Ors.

Mr. S.M. Oak a/w. Mr. Sagar Joshi I.by Mr. Akshay S. Deshpande for
the applicants/appellants.

Mr. Abhijit Purushottam Kulkarni for the respondents.

CORAM : SMT. SADHANA S. JADHAV, J

DATED : 22nd JANUARY 2020.

PC. :

1. The appellants herein impugn the judgment and order dated 12th June 2017 passed by the Ad-hoc District Judge-2, Baramati in Civil Appeal No. 89 of 2013, thereby confirming the judgment and decree dated 10th May 2013 passed by the Civil Judge Junior Division, Baramati in Regular Civil Suit No. 17 of 2011.

2. The substantial questions of law as framed by the appellant is as follows:-

“Whether the Courts below were right in decreeing the suit without any specific pleadings in the plaint of the Respondent no. 1, 1a and 1d and the respondent no.2 as to from what date

to which date they had been using the disputed way for the last 20 years as contemplated under section 15 of Easement Act, 1882 and categorical evidence regarding the same”.

3. The facts of the case are as follows:-

4. The appellants herein happen to be the original defendants in Civil Suit No. 17 of 2011. The suit was filed by the plaintiffs for simplicitor injunction. It was contended by the plaintiffs that they are the owners of Gat No. 129A. They had given the boundaries of the lands of the plaintiffs as well as the defendants. It was specifically contended that the disputed property is a passage which is about 10 feet and passes through Gat No. 110 and 111 (East and West). It was specifically contended by the plaintiffs, that the said way is being used by the plaintiffs since their forefathers and was in existence even on the date of filing of the suit.

5. They had also claimed that defendants were also using the same way to reach their land and house that was built on the agricultural land. It was contended that on 10th December 2005, for the first time the defendants had obstructed the way. Thereafter, there were proceedings before the Revenue Authorities. It is specifically contended that during the pendency of the proceedings before the Revenue Court the defendants had not created any obstruction. However, after the order was passed in the year 2011 i.e. on 24th January 2011 the defendants have obstructed their way and therefore the plaintiffs were constrained to file the Civil Suit seeking injunction.

6. The learned counsel for the appellant submits that both the Courts have erred in appreciating section 15 of Easements Act which reads as follows:-

“15... Acquisition by prescription- Whether the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person’s land, or things affixed thereto, has been peaceably received by another person’s land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested”.

7. It is vehemently argued that there are no pleadings to the effect that the way was in existence for 20 years or for more than 20 years which is the mandate of section 15 of Easements Act. The plaintiffs had examined three witnesses to substantiate their contentions. The witness Pradeep Shinde who was officiating in the Irrigation department had specifically contended that the dimension and description of the suit properties as stated in the plaint was admitted. It was further admitted that there was a small bridge on this water canal which was 100 years old and the plaintiffs are using this

road to approach their agricultural lands. Simultaneously Dadaso Borkar who was an employee of the sugar factory has contended that the plaintiffs were transporting the sugarcane through this disputed way. The plaintiffs had also filed on record the certified copies of the orders in R.C.S No. 59 of 2006 and R.C.S. No.57 of 2006 and it was specifically contended that Exhibit-168 which is the certified copy of the survey no. 85 would show that there is entry of disputed way since the year 1944-1945.

8. It is pertinent to note that in the substantive evidence the defendants had also categorically admitted that this road was in existence for more than 40 years.

9. At this stage, it would be relevant to refer to section 58 of the Indian Evidence Act which contemplates that the facts which are admitted need not be proved. Section 58 reads as follows:-

*“58...**Facts admitted need not be proved**- No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings”.*

10. The learned counsel for the appellant submits that it is mandatory upon the plaintiffs to specifically plead and prove that the way was being used for more than 20 years.

11. The learned counsel has placed reliance upon the judgment of the Apex Court in the case of *Justiniano Antao and Ors v/s.*

Bernadette B. Pereira (Smt) reported in (2005) 1 Supreme Court Cases 471, wherein the Apex Court has held thus:-

“In order to establish the right of prescription to the detriment of the other party, one has to aver specific pleadings and categorical evidence. But in order to establish a right by way of prescription one has to show that the incumbent has been using the land as of right peacefully and openly and without any interruption for the last 20 years. There should be categorical pleadings that since what date to which date one is using the access for the last 20 years”.

12. It appears that in that particular cases the plaintiff had started using the access road only in the year 1984 and the plaintiff had contended that it was used as a way to reach by her vehicle. There was evidence to show that the plaintiff had produced the photograph only in the year 1982. The suit was filed in the year 1984. In the facts of the case the Supreme Court has set aside the orders passed by the Appellate Courts.

13. The learned counsel has also placed implicit reliance upon the judgment of the Hon’ble Apex Court in the case of ***Bachhaj Nahar v/s. Nilima Mandal and Another*** reported in (2008) 17 Supreme Court Cases 491, wherein the Apex Court has held as follows:-

“It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings”.

14. It was further held by the Hon’ble Supreme Court that:-

“No amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief. Only in exceptional cases, can this general rule be deviated from, if the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue.

But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. Again where neither party puts forth such a contention, the court cannot make out such a case not pleaded, suo motu”.

15. The learned counsel has drawn the attention of this Court to paragraph no. 20 which reads as under:-

“20....The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and the defendant’s servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to watercourse. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleadings or evidence”.

16. In the present case, it is a matter of record that the appellant herein i.e. the original defendant had filed Regular Civil Suit No. 59 of 2006 for injunction and declaration. The suit was dismissed on the ground that the said order is appealable under clause 5 of

section 143 of Maharashtra Land Revenue Code. In fact, the defendant had also filed an appeal against the said order. It is pertinent to note that although the suit was dismissed on account of alternative jurisdiction, the Civil Court had gone into the facts of the case and had observed that the said way was in existence since long and the same was corroborated by the witnesses.

17. The Apex Court has specifically observed in the case of ***Bachhaj Nahar*** (*cited supra*) that in exceptional cases where the Court is fully satisfied that the general rule is deviated relief can be granted. In the present case apart from the admission of the defendant, the records indicate that the said way was in existence since from time immemorial or probably even before the plaintiff had started cultivating the said land. It is true that there is no specific reference to the period, since it was being used, but from admission of the officer of the Irrigation department that the way was in existence for more than 100 years it is sufficient to infer that the said way was in existence since more than 20 years. In Regular Civil Appeal no. 59 of 2016 also there was no specific pleadings that the said way was not in existence. In fact, it is specifically contended that the appellants herein were using the same way to reach their land as well as to reach their house.

18. In view of the above discussion, the substantial question of law as framed by the appellants deserve to be answered in the negative. The second appeal being sans merits deserves to be dismissed. The Civil Application is accordingly disposed of.

19. The learned counsel for the respondents has drawn the attention of this Court to Paragraph No. 17 of the judgment of the Appellate Court wherein it is specifically held that 'parties to the present suit are close relatives'. It is also suggested on instructions that the parties shall have a clean shake and put an end to all litigations. However, the said order cannot be passed and it is for the parties to arrive at amicable settlement in the interest of both the families.

20. The learned counsel for the respondents has fairly submitted that he would not prosecute execution proceedings for a period of four weeks.

(SMT. SADHANA S. JADHAV, J)