

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

921 SECOND APPEAL NO.260 OF 2019
WITH
CIVIL APPLICATION NO.5396 OF 2019

KAKASAHEB CHHABURAO RAJGURU

VERSUS

EKNATH ASARAJI KARANDE AND OTHERS

...

Mr. C.K. Shinde, Advocate for the appellant

Mr. D.A. Bide, Advocate for respondent Nos.1 to 5

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 11th AUGUST, 2021.

ORDER :

1 Present appeal has been filed by the original plaintiff to challenge the Judgment and Decree passed by the First Appellate Court. He had filed Regular Civil Suit No.4/2009 before Civil Judge Junior Division, Shevgaon, Dist. Ahmednagar for permanent injunction. It came to be decreed on 11.02.2013. Thereafter, present respondents-original defendants filed Regular Civil Appeal No.93/2013 and it was allowed by learned Adhoc District Judge-6, Ahmednagar on 12.10.2018. Hence, the present Second Appeal.

2 Heard learned Advocate Mr. C.K. Shinde for the appellant and learned Advocate Mr. D.A. Bide for respondent Nos.1 to 5. In order to cut short, it can be said that they have argued in support of their respective contentions.

3 The case of the plaintiff is that he is the owner of land Gat No.276/1 admeasuring 01 H 04 R situated at village Bhavinimgaon, Tq. Shevgaon, Dist. Ahmednagar. Towards the west, there is land belonging to defendant No.1 bearing Gat No.279. According to him, there is customary way on the bandh towards north for the defendants and another road is available from the bandh of Gat Nos.277 and 278. Plaintiff is using both the roads since time immemorial. The defendants damaged the western side bandh oftenly and raised obstruction. Hence, the suit. Defendant No.4 filed the written statement and it has been adopted by defendant Nos.1 to 3 and 5. They all have denied the averments in the plaint. Objection was raised that Gat No.276/1 is not belonging to plaintiff alone and, therefore, the suit suffers from non joinder of necessary parties. There is village boundary (shiv) towards southern side of the plaintiff's land. He used to go to the said road on the village boundary from that road since time immemorial. He had no right, title or interest in Gat Nos.277 and 278.

4 After the parties had led evidence, it was held by the Trial Judge

that plaintiff has proved that there is a road since time immemorial from the band of Gat Nos.277 and 278 to the plaintiff to go towards north. Further, there are 25-30 neem trees on his western side bandh. Defendants damaged his bandh oftenly. It was also held that the defendants have proved that plaintiff has road from his south side since time immemorial. The suit came to be decreed. Original defendants then challenged the said decree in Regular Civil Appeal No.93/2013. It was decided by learned Adhoc District Judge-6, Ahmednagar and it came to be allowed. The civil suit was then dismissed. The First Appellate Court has held that plaintiff has failed to prove that there is a customary way to his field through a common boundary of land Gat Nos.277 and 278. Defendants had proved that there is a customary way to suit land through its southern boundary and, therefore, it was held that there is necessity to interfere in the Judgment and Decree passed by the Lower Court.

5 At the outset, unless it is shown that the First Appellate Court's findings are perverse, the Second Appeal cannot be admitted. Here, when the plaintiff is coming with a case that he is using the said road since times immemorial, then he will have to prove that he has that customary road available to him. It has come on record that the land Gat No.276 is the ancestral land of plaintiff and his family. He then comes with a case that he

is the exclusive owner of Gat No.276/1. The question is, when that partition took place ought to have been brought on record. Further, if we see the map drawn by Court Commissioner, then it can be seen that there are trees in between Gat No.279 and 276/1. Towards east there is Gat No.276/2, which is, as aforesaid, belonging to the family of the plaintiff. Towards south immediately it is shown as 'shiv' i.e. village boundary and cart road, it is going towards east. It appears that when the Court Commissioner had gone, at that time, there was water stagnation on that village boundary. But it has not been explained by the plaintiff, as to whether the said situation remains throughout the year. It is also to be noted that plaintiff has not explained, who are owners of Gat No.275 and 274, which are towards further east. In his cross-examination he has categorically admitted that he has no documentary evidence to prove that he has customary way to go towards north from the bandh of Gat Nos.278 and 277. It also appears that there are various shareholders in Gat No.277 and it has come in the cross of the plaintiff. Those other persons are not party to the proceedings.

6 Coming back to the fact that sole Gat No.276 has been divided into two parts; Gat No.276/1 and Gat No.276/2. The plaintiff says that Gat No.276/1 is in the share of himself and mother and Gat No.276/2 is to the share of his father and brother. He has not explained, as aforesaid, when the

partition had taken place. Further, he has also not explained, as to which road his father and brother are using. There is also foot road available towards north of Gat No.276/2, from the bandh between that land and Gat No.277, going towards east from the boundary of Gat No.274 . Further, in the corss-examination he has stated that as regards that foot road is concerned, there is no problem with the land owners of those Gat numbers. Therefore, merely because some road is in existence towards north, he cannot claim it as a customary road. It has been rightly noted by the learned First Appellate Court that the plaintiff neither pleaded nor adduced evidence that he has difficulty to access his field from the southern side. The village boundary is situated on the southern side of his land. Then unless he pleads that he was not using that road for some or the other reason, he cannot claim as of right the road in existence towards north. Further development during the pendency of the appeal has also been considered by the First Appellate Court, which was adduced by way of certified copies of the Judgment and orders passed by Tahsildar under Section 5 of the Mamlatdars' Courts Act,1906. This Court had set aside the order passed by the Tahsildar by order dated 11.12.2012 and directed the Tahsildar to decide the matter afresh. It appears that there was local inspection carried out, once again, in respect of existing access roads to the suit land. Panchnama was prepared in presence of the parties and then order has been passed on 02.06.2014 by the learned

Tahsildar. In the local inspection it was found that a way is in existence between the land Gat Nos.277 and 278. Some part was found cultivated in land Gat No.278. Marks of access way in east-west direction were found up to Gat No.272 and, therefore, Tahsildar had ordered the plaintiff i.e. present appellant to use Shahartakli to Bhavinimgaon east-west shiv road on the south side of land Gat No.276, as it is situated on the village boundary and being a nearest road. It appears that said order was further challenged before the Sub Divisional Officer, but it appears that he had considered the evidence from a different perspective. Under such circumstance, when the Tahsildar, by exercising his rights and the factual situation that was brought on record, had come to the conclusion that nearest road would be the village boundary i.e. shiv situated on the south of the suit property. It appears that the First Appellate Court has correctly reversed the findings.

7 In Second Appeal, this Court is not supposed to go through the facts of the case, unless it is shown that the same have been arrived at perversely. This aspect has not been shown by the appellant. Hence, the Second Appeal deserves to be dismissed. Accordingly, it is dismissed. Civil Application No.5396 of 2019 stands disposed of.

(Smt. Vibha Kankanwadi, J.)