

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**SECOND APPEAL NO.413 OF 2013**

**WITH**

**CIVIL APPLICATION NO.7870 OF 2013  
IN SA/413/2013**

SHAIKH KHALIL SK.AJIJ AND ANOTHER  
VERSUS  
INAYATKHA RAMJAKHA AND OTHERS

.....

Advocate for Appellants : Mr. A. G. Talhar

Advocate for Respondents No.2, 3 and 4-A: Mr. V. B. Patil

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**CORAM : SMT.VIBHA KANKANWADI, J.**

**DATE : 20-08-2021.**

**ORDER :**

1. Present second appeal has been filed by the original defendants challenging the concurrent findings and Judgment by the Courts below. Present respondents are the original plaintiffs who had filed Regular Civil Suit No.136 of 1997 before Civil Judge, Junior Division, Raver, District Jalgaon, for declaration and perpetual injunction. The said suit came to be decreed on 17-01-2006 and the declaration was given that the plaintiffs are having cart way of easement of necessity through the land Gut No.70 abutting to its western side bandh, which runs from

south to north up to the Gut No.69 and further in Gut No.72. The defendants No.1 and 2 were permanently restrained from causing obstruction to the enjoyment of the way by the plaintiffs by themselves or through third person on their behalf. This decree was challenged by the present appellants/original defendants before District Court Jalgaon by filing Regular Civil Appeal No.59 of 2006. the said appeal was heard by learned District Judge-1, Jalgaon and came to be dismissed on 10-10-2012. Hence, this second appeal.

2. Heard leaned Advocate Mr. A. G. Talhar for appellants and learned Advocate Mr. V. B. Patil for respondents No.2, 3 and 4-A.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the evidence properly. The original plaintiffs had not proved that they are having easementary right of necessity and in fact the present defendants had proved that there was alternative way available to the plaintiffs, yet the injunction has been clamped on the defendants. Both the Courts below erred in giving finding that the gut numbers as have been canvassed by the plaintiffs before the Trial Court i.e. Gut No.69 to 72 were the part of old Gut No.64 and they were then sub-divided in several tenements. Gut No.64 was having original road available

to the ancestors of plaintiff and defendants. Even if for the sake of arguments it is accepted that Gut No.69 to 72 are part of old Survey No.64, that does not mean that the plaintiffs would have right of way as claimed. The admissions given by the plaintiffs witnesses have not been considered at all and the evidence led by the defendants has been unnecessarily discarded. No documentary evidence has been produced to prove that such easement was available to the plaintiffs. Substantial questions of law are arising in this case and, therefore, the second appeal deserves to be admitted.

4. Per contra, the leaned Advocate appearing for respondents No.2, 3 and 4-A supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case.

5. At the outset, this Court under second appeal cannot go much dipper into the facts of the case, however, those facts can be considered only to the extent if the party preferring appeal is successful in showing that the findings arrived at in respect of the facts are perverse.

6. Both the Courts below after taking into consideration the facts

have arrived at the conclusion that Gut No.69 to 72 are part of old Survey No.64. This has been shown on the basis of revenue records which have not been seriously challenged by the defendants. Those parts were the effect of partition and purchase of portion of land. The documents produced at Exhibit 56 to 67 showed how old Survey No.64 was sub-divided and numbered as Gut No.69 to 72. Original owner of Survey No.64 was one Imammiya. He was having three sons namely Rajjak, Vajir and Dinmohammad. After death of Imammiya, partition had taken place and the land was divided into three parts. Survey No.64/1 went to the share of Rajjak, Survey No.64/2 went to the share of Vajir and Survey No.64/3 went to the share of Dinmohammad. Thereafter, there is further division of Survey No.64/3 into two parts i.e. Survey No.64/3 A and 64/3 B, and they have then be renumbered as Gut No.69 to 72. The easement of necessity would definitely applicable here when the original survey number is then divided. Each division should have the access for approach. Under such circumstances, the easement as contemplated under Section 13 of the Indian Easements Act would be applicable. Section 13 (a) Indian Easements Act Provides that :-

“Where one person transfers or bequeaths immovable

property to another -

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement.”

Further, Section 13 (e) provides that :-

“There would be easement of necessity if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement.”

The Act itself makes it very clear that the easement mentioned in the Section 13 (a) (c) and (e) are called easement of necessity and the illustrations, those illustrations explained what could be the easements of necessity and the case in hand is perfect example of the same. Therefore, even if there would have been some alternative road available, yet by virtue of Section 13 of the Indian Easements Act, the plaintiffs will have the cart way as shown by them.

7. Both the Courts below after taking into consideration the evidence have come to the conclusion that the defendants have failed to prove that there was another or alternative road available, this Court cannot go into the assessment of those facts again in

Second Appeal. Hence, no substantial questions of law as contemplated under Section 100 of the code of Civil Procedure are arising, the second appeal stands dismissed at the threshold. Pending civil application stands disposed of.

**(SMT. VIBHA KANKANWADI)**  
**JUDGE**

*vjg/-*