

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

SECOND APPEAL NO. 71 OF 2013

Shri Arjun Namdeo Raut

= **APPELLANT**
(orig.Plaintiff)

VERSUS

Shri Bhaskar Gajendra Sarak

= **RESPONDENT**
(orig.Defendant)

Mr.Mukul S.Kulkarni,Advocate for Appellant;

Mr.KC Sant,Advocate for Respondent.

CORAM : SMT.VIBHA KANKANWADI,J.

DATE : 2nd September, 2021.

PER COURT :-

1. Present appeal has been filed by appellant - original plaintiff, challenging the concurrent judgment and decrees of both the Courts below. The appellant is original plaintiff, who had filed Regular Civil Suit No.223 of 2007 in the court of learned Civil Judge, Junior Division, Tuljapur, seeking injunction against the respondent-original defendant. The said suit came to be dismissed by learned Trial Judge on 12.7.2010. Aggrieved by the decision of the Trial Court, dismissing the suit, the plaintiff-appellant filed Regular Civil Appeal No.224/2010 in the court of District Judge-1, Osmanabad. The said appeal has

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been dismissed by the learned Judge of the first appellate court on 25th November, 2011. Hence, this Second Appeal.

2. Heard learned Advocates appearing for the respective parties. In order to cut short it can be stated that both of them have made submissions in support of their respective contentions.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not properly considered the evidence and the law points involved in the case. Both the Courts below erred in dismissing the suit without any cogent reason. Both the Courts below did not apply their mind to the facts of the case and they failed to appreciate the pleadings of the parties in proper perspective. Proper issues and points for their determination were not framed and erred in answering the same. The first Appellate Court has not framed any point as regards nature of *Bandh*, i.e. whether it is common or exclusively belonging to the defendant. The defendant has failed to adduce evidence in respect of exclusive possession. Findings recorded, reasons given and conclusions

arrived at are erroneous, which are giving rise to substantial questions of law in the appeal.

4. Per contra, learned Advocate appearing for the respondent supported the reasons assigned by both the Courts below and submitted that both the Courts below, after having properly scanned the evidence brought on record, arrived at the findings which do not require interference by this Court and, therefore, the appeal does not involve any substantial questions of law and it deserves to be dismissed.

5. It is to be noted that both the Courts below, as regards the fact, about the existence of the cart road, as contented by the plaintiff, is concerned, have taken consistent view that the plaintiff has failed to prove the same. This Court, being second Appellate Court, cannot undertake fact finding work. However, to a limited extent as to whether that fact finding, which has been arrived by both the Courts below, is perverse, it can be considered. However, no such inconsistency or perversity appears on the face of record. When the plaintiff had come to the Court with certain averments and he was seeking certain

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reliefs, the burden was on him to prove the existence of cart-road and the right that was claimed. He claimed that there is 25 to 30 ft. wide cart-road from the Bandh of his as well as defendant's land; whereas it was the contention of the plaintiff that the Bandh belongs to him as he has created it to stop the soil erosion. Except the oral statement of the plaintiff and his witness, there is nothing to show averment about use of the alleged road since time immemorial. Both the Courts below have considered as to how the oral evidence adduced by the plaintiff is unbelievable. Under such circumstance, when the existence of the road itself is not proved, there is no question of creation of any right in favour of the plaintiff.

6. No substantial question of law, as contemplated under Section 100 of CPC, is arising in this case, The Second Appeal stands dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV