

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.93 OF 2013

GUNWANT S/O VISHWANATH THORAT AND ORS
VERSUS
MAKBUL RASHUL SHAIKH AND ORS

...
Mr. D. B. Pokale h/f Mr. S. S. Choudhary, Advocate for appellants.
Mr. D. P. Deshpande, Advocate for respondent No.1.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 26.08.2021

ORDER :-

. Present appeal has been filed by original defendant Nos.3 to 4D to challenge the judgment and decree passed in Regular Civil Appeal No.148 of 2011 by learned Adhoc District Judge-1, Osmanabad dated 02.08.2012, whereby the appeal filed by present respondent No.1-original plaintiff came to be allowed and his suit came to be decreed.

2. Present respondent – original plaintiff filed Regular Civil Suit No.19 of 2008 before the learned 3rd Joint Civil Judge Senior Division, Osmanabad for perpetual injunction. The said suit came to be dismissed on 01.07.2011. Original plaintiff challenged the said judgment and decree in the abovesaid appeal and the first Appellate Court reversed the decree by allowing the appeal and decreed the suit. Hence, this second appeal.

3. Heard learned Advocate Mr. D. B. Pokale holding for learned Advocate Mr. S. S. Choudhary for the appellants and learned Advocate Mr. D. P. Deshpande for respondent No.1. In order to cut short it can be said that both of them have made submissions in support of their respective contentions.

4. At the outset, it is to be noted that unless present appellants show substantial questions of law, the second appeal need not be admitted at all. Merely because there is contradictory findings and decree by the learned Lower Court, that does not *ipso facto* rise to framing of substantial questions of law. Here, the plaintiff had come with the case that he is the owner and possessor of 1 H 82 R land out of Gut No.50 at Ghatangri, Tq. and Dist. Osmanabad. He had purchased it from one Mashabee Shaikh on 30.10.2000. Defendant Nos.3 to 6 had made application to defendant No.2 – Tahsildar on 01.01.2004 to allow them to use 21 feet wide cart road through the suit land. According to the plaintiff, defendant No.2 – Tahsildar without visiting the spot passed order on 03.02.2004 allowing defendant Nos.3 to 6 to use the cart way through the suit land. That order was challenged by the plaintiff before the Sub-Divisional Officer, Osmanabad. The Sub-Divisional Officer partly allowed the appeal and remanded the matter to defendant No.2 asking him to make inquiry once again. But again, defendant No.2, without

making inquiry, passed similar order and, therefore, the suit was filed for perpetual injunction.

5. It is to be noted that present appellants – original defendant Nos.3 to 4D and defendant Nos.4E, 4F, 5 and 6 had not even filed the written statement and, therefore, the matter had proceeded without their written statement. Only the Tahsildar i.e. defendant No.2 had filed the written statement explaining that how his order is correct. According to him, defendant No.2 had never ordered the new way to be carved out from the suit land and his order is not challenged by the plaintiff before the Superior Authority and, therefore, the suit is not tenable. As regards the tenability of the suit is concerned, Section 143(4) of the Maharashtra Land Revenue Code gives right to the person aggrieved by the decision of the Tahsildar to file a Civil Suit to have it set aside or modified within a period of one year from the date of such decision. However, in this case, in fact, the suit is only for perpetual injunction. No doubt, it was stated in the suit that the order passed by the Tahsildar is illegal. The learned Trial Judge dismissed the suit on the ground that the plaintiff has not asked for any relief in respect of the order passed by the Tahsildar. Interesting point to be noted is that the Trial Court had held that the plaintiff had proved that the orders passed by defendant No.2 on 03.02.2004 and 20.12.2007 granting approach way to defendant Nos.3

to 6 from the suit land is illegal. It was also held that the plaintiff has failed to prove that the defendants are trying to create new way through the suit land. Yet, it appears that the learned Trial Judge had not exercised his jurisdiction properly. Merely because, no specific relief was asked in respect of that order passed by defendant No.2, it appears that the suit came to be dismissed and it was also held that equally efficacious relief is available to challenge the order passed by Tahsildar. It appears that, that finding is in ignorance of Section 143(5) of Maharashtra Land Revenue Code. The first Appellate Court has also, after considering the evidence on record, held that defendant No.2 without taking evidence, had passed the said order and the defendants are trying to create new way. In fact, the plaintiff had purchased the said land in the year 2000. It ought to have been endeavor for defendant Nos.3 to 6 to prove that they were using that road since prior to 2000 and it was only because of plaintiff, that way was obstructed. They did not contest the suit and, therefore, now the second appeal, when there is absolutely no legal point involved, cannot be considered at all. As no substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising, the second appeal deserves to be dismissed. Accordingly, it is dismissed.

[SMT. VIBHA KANKANWADI, J.]

scm