

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 11 OF 2018

1. Pyar Mohammad Khan Baj Mohammad
Khan Rohilla
2. Issa Mohammad Bor Mohammad Rohila
3. Yusuf Mohammad Bor Mohammad Rohila
4. Musa Mohammad Bor Mohammad Rohila
5. Yakub Mohammad Bor Mohammad Rohila
6. Gaus Mohammad Vali Mohammad
7. Nisar Mohammad Gaus Mohammad Pathan
All Adults, Occ: Agriculture, R/o. Hiwara
Rohila, Tq. & Dist. Washim **APPELLANTS.**

// VERSUS //

Nazir Khan Baba Khan Rohila,
Aged about 70 years, Occ. Agriculturist,
R/o Hiwara Rohila, Tq.& Dist. Washim.

.... **RESPONDENT.**

Shri S.D. Chande, Advocate for Appellants.
Shri Raja Dandwate, Advocate h/f Shri R.J. Mirza, Advocate for the
Respondent.

CORAM : ANIL S. KILOR, J.
DATED : NOVEMBER 15, 2021

ORAL JUDGMENT :

1. The reversal of the judgment and decree of the trial Court, by the learned lower Appellate Court vide judgment and decree dated 08/09/2017 in a suit for mandatory injunction, is under challenged in this appeal.

2. Brief facts of the present case for consideration of the controversy involved in the present appeal, are as follows. (The parties are referred as per their status before the trial Court):

3. It is the case of the plaintiff that he is owner and in possession of field Survey No.31/2 at village Hiwara Rohila, Tq. and Dist. Washim as well as defendant Nos.1 to 5 are the owners and possessor of field Survey No.31/1. So also defendant Nos.6 and 7 are the owner and possessor of Survey No.31/2-A. Survey No.31/1 situated towards northern side and Survey No.31/2-A is situated towards the western side of the Survey No.31/2. Since his forefathers plaintiff is in possession of the land Survey No.31/2.

There is a customary way (Wahiwat) passes through the common Dhura/ Bandh of field Survey Nos.31/1 and 31/2 and 31/2-A. Since long plaintiff is using the said customary way for doing the field operations in Survey No.31/2. (The said customary way is hereinafter referred as 'suit way').

4. It is further contended that in the year 1986-87 defendant No.1 and deceased Tur Mohammad, ancestor of defendant Nos.6 and 7, obstructed the plaintiff to use the suit way/customary way which passes between field Survey No.31/2 and 31/1. Therefore plaintiff had filed a proceeding against them before the revenue authority under Section 5(2) of the Mamlatdars' Courts Act, 1906. Accordingly, parties led their evidence before the Mamlatdar. After scrutinizing evidence on record and conducting the spot inspection, the learned Mamlatdar decided the said suit on merit holding that defendants have obstructed the plaintiff from using the customary way passing through the common Dhura of Survey No.31 and under Section 5(2) of the Mamlatdars' Courts Act, and granted injunction in favour of the plaintiff restraining the defendants from

obstructing the plaintiff's use of said existing customary way passes through the common Dhura. The defendants have not preferred any appeal/revision against the said order and therefore the said order attains the finality.

5. It is further contended that despite the said order on 10/11/2005, defendant Nos.6 and 7 fixed the thorny fencing on the customary way on the common Dhura and defendant Nos.1 to 5 dug pits for constructing a structure in cement concrete. Plaintiff requested them not to obstruct his way, however, they did not listen but threatened him and therefore, the plaintiff has filed the suit for injunction.

6. During pendency of the suit on 22/08/2006 defendants obstructed the use of suit way and defendant Nos.1 to 3 and 5 constructed a structure by bricks, cement and sand on the disputed way about 3 to 4 ft above the ground level and committed breach of the order of injunction dated 22/12/2005 and therefore he carried out the amendment in the plaint and prayer clause to that regard for

granting mandatory injunction directing the defendant to remove the structure from the disputed way and removed the thorny fencing.

7. Defendant Nos.1 to 5 appeared and filed written statement vide Exh.24 and denied the contents in the plaint in toto. It is specifically denied that since forefathers of the plaintiff is using the suit way as a customary way. It is further denied that plaintiff is having right of customary way from the suit way. It is further denied that they obstructed the use of alleged customary way which passes through the alleged common Dhura of the field Survey No.31 or fix the thorny fencing over it. It is denied that they constructed a structure over the suit way. It is also contended that proceedings before Mamlatdar's Court was absolutely false and filed with intent to harass the defendants. The said matter was not decided on merit. The order passed by Naib Tahsildar on 05/10/1987 was ultra virus and without jurisdiction. Hence it is nullity and not binding on the defendants. It is further contended that Survey No.31 is sub divided in 4 parts i.e. Survey No.31/1, 31/2, 31/2-A and 31/3.

8. Towards the western side of Survey No.31, there is a Gaothan and Hiwara-Rohila road having width 30ft. passes through Survey No.31/2. Said road touches to the common boundary of whole Survey No.31 from southern side common Dhura/Bandh. The common Dhura between Sub-division of Survey number cannot be in any case more than 3 ft. width and same can be used only for dividing the sub-divisions for convenience and cultivating the fields. The said common Bandh can be used only for the purpose of footpath and nothing else. Since beginning plaintiff's forefathers are using road for bullock-cart to approach to their field from Hiwara-Rohila-Shrihari road. Defendants' construction is 5 ft. away from common Dhura towards the southern side of their field. The plaintiff can take action for breach of injunction before the Mamlatdar's Court and therefore they prayed that suit be dismissed.

9. Defendant Nos.6 and 7 filed their written statement vide Exh.28 and denied the contents in the plaint in toto. It is denied that since the forefathers of the plaintiff they are using disputed way

to approach their field. It is denied that they fixed the thorny fencing on the disputed way and created hurdle and disturbance in the customary way of the plaintiff. It is further contended that Survey No.31 has two customary ways, one on the northern side and other is on the southern side. The way from northern side has been used by the defendant Nos.1 to 5 and way which is on the southern side has been used by the plaintiff except these two ways, there is no any way in Survey No.31. The plaintiff has way to approach his field Survey No.31/2-A through southern side way which is known as Shrigiri Road. The said way passes through southern side of Survey No.31. It is further contended that plaintiff is having no right to claim permanent or mandatory injunction against them and therefore prayed for dismissal of the suit.

10. The trial Court after considering the rival contentions and also the oral as well as documentary evidence available on record, dismissed the suit vide judgment and decree dated 17/12/2008 passed by the Second Joint Civil Judge Junior Division, Washim in Regular Civil Suit No.263 of 2005.

11. The plaintiff, feeling aggrieved by the said judgment and decree carried the appeal before the learned Principal District Judge, Washim vide Regular Civil Appeal No.21 of 2009. The same came to be allowed and thereby the decree passed by the learned Trial Court was reversed and the defendants were restrained from obstructing the use of suit way by the plaintiff as customary way to approach his field. The defendants are further directed to remove the structure constructed on the suit way as well as remove thorny fencing raised on the suit way, within a period of one month from the date of the order. The legality and validity of the said judgment and decree has been questioned in the present appeal by the appellant/original defendants.

12. Heard learned counsel for the respective parties.

13. Shri S.D. Chande, learned counsel for the appellants submits that as the plaintiff was having alternate way available to approach his field, the plaintiff cannot claim right of way by way of easement. He has placed reliance upon the judgment of the Hon'ble

Supreme Court of India in the case of *Shree Swayam Prakash Ashramam and another Vs. G. Anandavally Amma and others*,¹

14. On the other hand, Shri Raja Dandwate, learned counsel for the respondent/original plaintiff submits that the learned lower Appellate Court, which is the last Court of recording findings of fact, has recorded the fact that the suit way is the only way available to the plaintiff. He has further pointed out that under the provisions of Mamlatdars' Courts Act, 1906, in the year 1986-87 the Mamlatdar has passed an order observing that the suit way in existence to approach the plaintiff to his land which passes through common Dhura/Bandh on Survey No.31/1 and Survey No.31/2 and it was further held that except the said customary way i.e. suit way, there is no other way to approach the plaintiff to his field Survey No. 31/2.

15. To consider the rival contentions of the parties, I have gone through the record and also perused the judgment cited by the learned counsel for the appellants.

¹ (2010) 2 SCC 689

16. In the present matter, there is no dispute that in the year 1986-87 in the proceedings filed by the plaintiff an order was passed on 05/10/1987 wherein it has been held that the plaintiff has a right of way since long and the said customary way is in existence to approach the plaintiff to his field since long, which passes through common Dhura/Bandh of Survey No. 31/1 and Survey No.31/2. It has also come on record that in the said order it has been held that except the said customary way, there is no further way available to approach the plaintiff to his field Survey No. 31/2.

17. The learned counsel for the appellants has fairly stated that the appellants have not challenged this finding of the fact recorded by the Tahsildar. In that view of the matter the finding recorded by the learned lower Appellate Court that there is no alternate way available to the plaintiff except the suit way is based on evidence and no perversity has been pointed out by the learned counsel for the appellants as regards this finding of the fact.

18. It is well settled law that the learned lower Appellate Court is the last Court as regards recording of finding of the fact. In absence of any perversity pointed out in respect of the aforesaid finding, this Court cannot interfere with the said finding.

19. In these circumstances, the judgment cited by the learned counsel for the appellants in the case of *Shree Swayam Prakash Ashramam*(supra) is not applicable to this case as the appellants have failed to point out any alternate way available to the plaintiff other than the suit way.

20. In that view of the matter, I am of the opinion that no substantial question of law is involved in this appeal.

Accordingly the appeal is **dismissed**. No order as to costs.

(ANIL S. KILOR, J)