

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

APPEAL AGAINST ORDER NO. 21 OF 2020

- APPELLANTS:** 1] Maroti Govinda Deokar (Dead),
(Original Plaintiff through Legal heirs,
No.1 on R.A.)
- 1-a) Smt. Sarjabai Maroti Deokar,
Age 65 years, Resident of Nagazari,
Tq. Mehkar, District-Buldana.
- 1-b) Sau. Indabai Narayan Morey,
Age 48 years, Occ: Agriculturist,
Resident of Ramnagar, District Jalna.
- 1-c) Sau. Jankabai Murlidhar Gunjkar,
Age 46 years, Resident of Takarkhed-
Helga, Tq. Chikhli, District-Buldhana.
- 1-d) Sau. Rukhmina Vithoba Dhawale,
Age 44 years, Occu: Agriculturist,
Resident of Takarkhed-Musalman,
Tq. Chikhli, District-Buldana.
- 1-e) Wasudeo Maroti Deokar,
Age 39 years, Occu: Agriculturist.
- 1-f) Shivaji Maroti Deokar,
Age 37 years, Occu: Agriculturist.
- 1-g) Jagannath Maroti Deokar,
Age 35 years, Occu: Agriculturist.
- 1-h) Bhaskar Maroti Deokar,
Age 33 years, Occu: Agriculturist
- Nos. 1-e to 1-h Residents of Nagzari,
Tq. Mehkar, District-Bhuldana.

APPELLANTS 2) Rameshwar Maroti Deokar (Dead)
(Original Plaintiff through legal heirs.
No.2 on R.A.)

2-a) Smt. Gayabai Rameshwar Deokar,
Age 48 years, Occu: Agriculturist.

2-b) Urmila Gopal Morey,
Age 25 years, Occu: Agriculturist.

2-c) Kishor Rameshwar Deokar,
Age 23 years, Occ: Agriculturist.

2-d) Shital Rameshwar Deokar,
Age 20 years, Occu: Agriculturist

Nos. 2-a, 2-c and 2-d Residents
Nagzari Bk. Tq. Mehkar, District
Buldana. No. 2-b resident of
Ramnagar, Tq. And District Jalna.

..V E R S U S...

RESPONDENTS : 1] Madan Narayanrao Bhosale,
(Respondents No. 1 to Aged Major, Occu: Agriculture.
3/Appellants before
the Lower Appellate 2] Prakash Sonaji Golayat,
Court. On R.A. not Aged Major, Occu: Agriculture.
party in the Trial
Court) 3] Rajendrakumar Bhagwan Deokar,
Aged Major, Occu: Agriculture.

Nos. 1 to 3 R/o Nagzari Bk.
Tq. Mehkar, Distt. Buldana.

(Respondents No.4 & 4] State of Maharashtra,
5/Ori. Defendants through Collector, Buldana.
No.1 and 2 on R.A.)

5] Tahsildar, Mehkar,
Distt. Buldana.

Shri D.R. Khapre, counsel for the appellants.
Shri R.G. Kavimandan, counsel for the respondent Nos. 1 to3.

CORAM : ANIL S. KILOR, J.
DATE : 08th DECEMBER,2021

ORAL JUDGMENT :

1. In this appeal, the judgment and decree dated 28/02/2020 passed in Regular Civil Appeal No. 06/2019 by District Judge-1, Mehkar, is under challenge, whereby the appeal was partly allowed and the judgment and decree dated 23/06/2006 passed in Regular Civil Suit No. 11/2002 passed by the Civil Judge, Senior Division, Buldana is set aside and the suit is remanded back for fresh trial.

2. The brief facts of the present case are as under:
(parties are referred to as per their status before the trial Court).

The appellants/plaintiffs filed a suit for permanent injunction restraining the defendants i.e. State of Maharashtra and Tahsildar from preparing layout and developing any portion of land on the suit land i.e. Gut Nos. 318 and 319, Survey No. 61. It is the case of the plaintiffs that with the consent of ancestor of the plaintiffs North-South road was laid on suit property, due to said road suit property was divided into two parts. Eastern portion was allotted to

plaintiff No.2 and it was given Gut No. 318, whereas the Western side of portion of the road was allotted to plaintiff No.1 and it was given gut No. 319.

3. It is alleged that in the year 1970 or 1971 Government has constructed another new road from other land, hence, the disputed road in the field of plaintiffs was not being used.

4. It is alleged that on 15/01/2002 and 18/01/2002 there was local publication by bits of drums in the village to the effect that the portion of the land under road admeasuring 1 acre 38 gunthas is going to be auctioned by laying plots. Immediately plaintiffs have approached the Tahsildar and by an application dated 21/01/2002 put their grievance that the Government has no authority to sell the plots from the disputed road. Thus the plaintiffs have apprehended that their private property is in danger and is being wasted at the behest of defendants and they are likely to be evicted from lawful possession of private property and hence, the suit.

5. The defendants have opposed this suit by their written statement at Exh. 17. They have made evasive denial of the contents of plaint para wise contending interalia that though initially land from survey No. 61 at present Gut No.

319 of village Nagzari Bk. was owned and possessed by the plaintiff but, 1 acre 38 gunthas land out of said survey number, was acquired by the Government vide RC No. 6/16/72/73 of said village Nagzari Bk.

6. They have contended that another road was constructed running North South and previously constructed road is not under the use of public hence, the Government has decided to prepare lay out and accordingly 37 plots were demarketed in the said land which has been approved by Sub Divisional Officer on 2nd August 1974.

7. They have further alleged that the land in dispute is in possession of the Government and with these contentions they have prayed for dismissal of the suit.

8. The learned Trial Court decreed the suit and thereby granted permanent injunction against the defendant i.e. State of Maharashtra through Collector and Tahsildar from preparing any layout, developing any operation of the suit land including the portion of old road and from allotting the said plot of any portion of the suit land till defendants acquired the property through legal process.

9. Against this judgment and decree, the Government

did not prefer any appeal.

10. However, 03 villagers filed an appeal and according to them the original plaintiffs had obstructed their road on 19/07/2016, passing through their field and also shown them a copy of the judgment and decree.

11. According to the respondent Nos. 1 to 3, the said road was owned and constructed by Government and it is a Tar Road and the plaintiffs have no right to create obstruction using this road by the appellants and villagers, as they are using this road since from their forefathers.

12. It is also claimed that the villagers have got easementary right by way of prescription. It is also alleged that the judgment and decree was obtained by playing fraud and by suppressing some material documents.

13. The learned Lower Appellate Court, after considering the case of the respondent Nos. 1 to 3 and also after considering the submissions made by the learned counsel for the original plaintiffs / appellants, partly allowed the appeal and remanded the matter back to the trial Court for fresh trial vide judgment and decree dated 28/02/2020, which is under challenge in this appeal.

14. I have heard the learned counsel for the respective parties.

15. Shri D.R. Khapre, learned counsel for the appellant has drawn attention of this Court to the operative part of the order passed by the learned Trial Court on 23/06/2006 and submits that there is no order adverse to the interest of the respondent Nos. 1 to 3 and therefore they cannot maintain any appeal.

16. It is further submitted that the respondent Nos. 1 to 3 were not parties before the trial Court and they cannot also be termed as necessary party in this matter.

17. It is submitted that the land on both the sides of the road is admittedly owned by the plaintiffs and therefore, there is a presumption that the land below the road is also owned by the plaintiffs.

18. Shri D.R. Khapre, learned counsel for the appellant further points out that the learned Lower Appellate Court has misdirected itself while remanding the matter, on the ground that the presence of the respondent Nos. 1 to 3 is necessary to establish by adducing evidence that the land in question is owned by the Government and the State Government is in possession of the same. It is submitted that for the said

reason, it is not permissible to set aside the judgment and decree of the trial Court and to remand the same for trial afresh without going into the aspect whether the decree and the challenge is adverse to the interest of the persons at the behest of whom the remand has been made.

19. *Per contra*, Shri R.G. Kavimandan, learned counsel appearing for the respondent Nos. 1 to 3 has drawn attention to the order dated 21/05/1980 and submits that the plaintiff No.1 had moved an application under Sections 20 and 21 of the Maharashtra Land Revenue Code, 1966 read with Rule 37 of the Maharashtra Land Revenue (Disposal of Government Lands) Rules, 1971 for grant of land, which came to be rejected and the said order was never challenged by the plaintiffs in any proceedings and as such the said order has attained finality. It is submitted that the said order is sufficient to show that the land in question is not owned by the plaintiffs but it is owned by the Government.

20. Shri R.G. Kavimandan learned counsel for the respondent Nos. 1 to 3 further submits that to produce all this evidence and other revenue record, which is relevant and which show that the land in question is owned by the Government and not by the plaintiff, there presence in the suit is necessary. Therefore, remand made by the learned Lower Appellate Court is just and proper.

21. Considering the rival contentions of the parties, I have gone through the record and also perused the judgments and decree of both the Courts below.

22. There is no dispute that the suit filed by the plaintiff was decreed by the learned trial Court vide its judgment and decree dated 23/06/2006 and thereby granted permanent injunction in favour of the plaintiffs restraining the defendants i.e. State of Maharashtra through Collector and the Tahsildar from preparing any layout and developing of any portion of the suit land Gut No. 318, 319 (Survey No.61) including the portion of old road and from allotting and auctioning the said plots or any portion of the said land till defendants acquires the property through legal process.

23. There is no dispute that the learned trial Court has not obstructed any villagers from using any road if it is in existence. The injunction is in respect of preparing any layout or developing any portion of the suit land including the portion of old road and from allotting and auctioning the said plots or any portion of the said land till defendants acquire the property through legal process.

24. The State of Maharashtra and the Tahsildar have accepted this decree and they did not challenge it.

25. However, by seeking leave to appeal, the respondent Nos. 1 to 3 have filed appeal and thereby claimed that they are using the said road from the time of their forefathers and therefore, they have right over the said road by way of easement. They have claimed easementary right by way of prescription.

26. The learned Lower Appellate Court remanded the matter back to the trial Court to enable the respondent Nos. 1 to 3 to produce documentary evidence and to show that the land in question is owned by the Government and not the plaintiffs.

27. Surprisingly, though the Government is in possession of all relevant record, the Government has not filed any appeal challenging the findings recorded by the trial Court.

28. There is no doubt, that on 21/05/1980, the application moved by the plaintiff No.1 under Sections 20 and 21 of the Maharashtra Land Revenue Code, 1966 read with Rule 37 of the Maharashtra Land Revenue (Disposal of Government Lands) Rules, 1971, for grant of land, was rejected by the Sub Divisional Officer.

29. However, non-disclosure of the said order by the plaintiffs in the suit does not give any right to the respondent Nos.1 to 3 to get themselves impleaded as parties and contest the suit, particularly when the Government through Collector and Tahsildar were parties to the suit. It is their duty to bring correct and complete facts before the trial Court to protect the interest of the Government also the public

30. In the case of ***Nawab Sardar V/s The Secretary of State for India***¹ wherein it has been held that under the Indian Laws also there is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land. The site of the road must be presumed to belong to the adjoining properties half to one and half to the other upto the middle of the road.

31. The Division Bench of this Court in the case of ***Ramesh Hiranand Kundamal V/s Municipal Corporation of Greater Bombay and others***² has held thus :-

“14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he

¹ ILR (1941) 226

² AIR 1992 SCW 846

has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e. he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is a difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd. (1956) 1 ALL ER 273, wherein after quoting the observations of Wynn-parry, J. in Dollfus Miegiet Compagnie S.A. v. Bank of England, (1950) 2 All ER 605 (611), that the true test lies not so much in any analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established, Devlin, J. has stated:-

“The test is ‘May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights.’”

32. In the teeth of the above referred settled principles of law, if the findings recorded by the learned Lower Appellate Court are considered whereby the Learned Lower Appellate Court has held that the respondent Nos. 1 to 3 are necessary parties to be joined as defendant to the proceedings and to give them an opportunity for submitting their written statement and to adduce evidence, it can be said that the said findings are erroneous and contrary to the law.

33. At this juncture, it is pertinent to note that if it is the case of the respondent Nos.1 to 4 that they have easementary right of way by way of prescription and the plaintiffs have obstructed their right of way, they have independent remedies available under the common law.

34. Admittedly, the respondent Nos. 1 to 4, have not filed any proceedings claiming such right along with injunction against the plaintiff.

35. In that view of the matter, having held that the learned Lower Appellate Court has erroneously held that the respondent Nos. 1 to 3 are necessary parties, in absence of any adverse order passed by the learned Trial Court against the respondent Nos. 1 to 3.

36. On a specific query put to Shri R.G. Kavimandan, learned counsel for respondent Nos. 1 to 3, as to how their rights have been effected by the judgment and decree passed by the trial Court. The learned counsel for the respondent Nos.1 to 3 failed to point out any such adverse orders against the interest of the respondent Nos.1 to 3.

37. In the above facts and circumstances, I am of the considered view that the impugned judgment and decree needs to be set aside.

38. Accordingly, I pass the following order:

ORDER

- a] The appeal is allowed.
- b] The judgment and decree dated 28/02/2020 is set aside.

[ANIL S. KILOR, J.]

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