



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

**SECOND APPEAL NO.170 OF 2023
WITH
CIVIL APPLICATION NO.4316 OF 2023
IN
SECOND APPEAL NO.170 OF 2023**

Bhagwat S/o Ramdas Bhoi,
Age: 60 years, Occ-Agriculture,
R/o- Takarkheda, Tal. Jamner,
Dist. Jalgaon

..Appellant
(Orig. Respondent)

Versus

1. Dnyandeo s/o Jagannath Patil,
Age- 63 years, Occ-Agriculture,
2. Bharat s/o Rama Bhoi,
Age- 60 years, Occ- Agriculture
Both R/o. Takarkheda, Tal. Jamner,
Dist. Jalgaon.

..Respondents
(Orig. Plaintiffs)

...

Mr. N. R. Shaikh, Advocate for the Appellant.
Mr. A. J. Patil, Advocate for Respondent Nos.1 and 2.

...

**CORAM : S. G. CHAPALGAONKAR, J.
DATE : 02nd DECEMBER, 2024.**

ORDER:-

1. The appellant/original defendant takes exception to judgment and decree dated 23.12.2022 passed in Regular Civil Appeal No.229/2015 by the District Judge-5, Jalgaon, thereby reversing judgment and decree passed in Regular Civil Suit No.133/2008 dated 17.10.2015, passed by the Civil Judge Junior Division, Jamner, Dist. Jalgaon.

2. The respondents / original plaintiffs instituted Regular Civil Suit No.133/2008 claiming relief of declaration and injunction in respect of easementary right of way from Northern side of the land of defendant/respondent. The contention of plaintiffs is that they are owners of land out of Gut Nos.137 and 138. The defendant owns land in Gut No.139/2 situated at village Mauje Takarkheda, Tal. Jamner, Dist. Jalgaon. According to the plaintiffs suit way is available to them for approaching their field, which passes from Northern corner of Gut No.139/2 owned and possessed by defendant. According to the plaintiffs, since last more than 20 years, suit way was used by their previous owners to approach the field. The land owned by defendant was previously owned by uncle of plaintiff no.1. The Gut Nos.138 and 139 were joint family property of plaintiff no.1. In the meantime, bandh has been constructed on Kang River. The back water of river has been increased towards Northern side of land of plaintiffs and defendant. The defendant with the help of JCB Machine raised Northern side of his land and sowed crops over the suit way. When plaintiffs raised objections, defendant obstructed use of way. The plaintiffs have no alternate way to approach their lands. According to the plaintiffs, suit way has been used not only by plaintiffs, but other land holders, since more than 20 years, but defendant has illegally obstructed and threatened to close the suit way.

3. The defendant refuted plaintiffs' case contending that plaintiffs are attempting to create new approach way. They may file application before Tahsildar for grant of way, if so desire. Neither plaintiffs nor their previous owners used suit way to approach their field. They had approach road from Northern boundary of Gut No.138. However, they are trying to create new approach way.

4. The Trial Court framed the issues based on pleadings of the parties and proceeded to record evidence. The Trial Court concluded that plaintiffs failed to prove easementary right as prescribed in paragraph no.2 of plaint of the suit. The Appellate Court, however, reversed the findings holding that customary way is available to the plaintiffs and granted decree of perpetual injunction against defendant.

5. Mr. Shaikh, learned Advocate appearing for the appellant submits that First Appellate Court erroneously reversed the decree of the Trial Court without properly appreciating factual and legal aspects of the matter. He would submit that Appellate Court failed to appreciate that neither plaintiff proved easement by prescription nor have any other right. The Appellate Court erroneously relied upon report of Court Commissioner which is not proved in accordance with law. He would further submit that if defendant has created obstruction in the existing way as claimed, plaintiffs

had remedy under Section 5 of the Mamlatdar's Courts Act. Therefore, present suit was not maintainable.

6. Mr. Shaikh in support of his contentions relied upon judgment of the Supreme Court of India in case of ***Justiniano Antao & Ors. Vs. Smt. Bernadette B. Pereira***¹, ***Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and others***² and judgment of this Court in cases of ***Keshav Vithoba Khatdeo and others Vs. Gopal Sakharam Mundare and others (Second Appeal No.426/1999 dated 03.03.2014)*** and ***Mrs. Cristina Marques Vs. Lily Dias @ Lilia Dias Toscano @ Lily Dias Toscano and Others (Second Appeal No.44/2010 dated 21.01.2021)***.

7. Per contra, Mr. Patil, learned Advocate appearing for the respondents supports the impugned judgment and decree passed by the Appellate Court. He submits that Appellate Court recorded finding of facts after proper appreciation of evidence. No substantial question of law arises for consideration in this appeal. Hence, seeks dismissal of appeal.

8. Having considered submission advanced and after going through the reasoning adopted by the Courts below, it can be gathered that plaintiffs have put up case of easement by prescription to use suit way. The plaintiffs contend that their

¹ 2004 AIR SCW 6527.

² AIR 2010 SC 1162.

previous owner was also using said way for approaching the field. The defendant has purchased land from uncle of plaintiff no.1 who was using suit way without any obstruction. The plaintiff no.1 appears to have purchased his land from Jagannath Shyamrao Patil about 10 years prior to filing of suit and Jagannath Patil was in possession of said land since last 30 to 40 years. The Trial Court refused to accept the case of plaintiffs on the ground that plaintiff no.2 failed to produce sale deed on record and drawn adverse inference that as per his sale deed no way was made available to him. The Trial Court also observed that plaintiffs failed to examine previous owner. On the other hand, son of previous owner has been examined by defendant, who deposed that no way was made available to plaintiffs from Northern side of land of defendant. The Trial Court, therefore concluded that plaintiffs failed to prove easementary right. The Trial Court further observed that plaintiffs have failed to prove that they acquired easementary right either by prescription or necessity.

9. The Appellate Court, however, observed that sale deed of defendant placed at Exhibit-71 mentions about existence of 8 feet wide road. The names of rightful users of said road are stipulated in the sale deed, wherein name of Jagannath Shyamrao Patil is appearing. Consequently, Appellate Court observed that defendant's sale deed itself stipulates about right of Jagannath

Shyamrao Patil to use suit way. The plaintiff no.2 purchased land from Jagannath Patil. The Appellate Court, therefore, concluded that right of user of suit way was in existence. If vendor of plaintiff no.2 was having right to use way, it would be carried forward even in favour of plaintiffs.

10. The Appellate Court has further observed that sale deed of defendant not only reserved right in favour of vendor of plaintiff no.2, but also other adjacent land holders. Although son of vendor of plaintiff no.2 (DW-2) has deposed that plaintiff no.2 was not given right of way, he specifically admits that other land holders whose names are mentioned in sale deed at Exhibit-71 are still using the same way. Therefore, case of defendant that plaintiff no.2 has no right to use the way cannot be accepted.

11. The Appellate Court has further relied upon the Court Commissioner's report at Exhibit-19, wherein existence of way as claimed by plaintiffs has been approved.

12. In light of aforesaid findings of the facts, submissions advanced on behalf of appellant needs to be considered. In case of ***Justiniano Antao & Ors.*** (supra) it is held that it is for the plaintiff to prove use of way through property of defendant for more than 20 years. There cannot be dispute over the preposition of law. In present case, Appellate Court recorded finding of fact that right

of way in favour of plaintiffs' vendor is proved from contents of sale deed of defendant, which is placed at Exhibit-71. It has come on record that vendor of plaintiff no.2 was cultivating land for more than 40 years and it has come on record that he was using the same way to approach his land. Therefore, law laid down in case of ***Justiniano Antao & Ors.*** (supra) would not be impediment to the case of plaintiffs.

13. Second judgment relied upon by Mr. Shaikh in case of ***Keshav Vithoba Khatdeo and others*** (supra) observes that when claim for easement by way of prescription cannot be set up only because use of way was convenient for plaintiff. The claim of plaintiff could not have been approved on the basis of report of Court Commissioner-Lawyer. Such report could not be a substitute for the authentic proof of right of way. However, in present case plaintiffs have pleaded right of easement by prescription and the sale deed of defendant itself indicate that vendor of plaintiff no.2 was using suit way without any obstruction and such right of user has been protected as per stipulations in sale deed of defendant. Therefore, appellant cannot draw any assistance from cited judgments. The appellant further relies upon the case of ***Mrs. Cristina Marques*** (supra), wherein in absence of pleadings of customary easement findings were recorded that plaintiff has right of customary easement. Further, suit was filed seeking simplicitor

declaration without consequential reliefs. Thus Court held that such suit would not be maintainable. In present case, plaintiffs have specifically pleaded case of easement by prescription. The Trial Court had framed issues as regards to easementary right, but negatived claim of plaintiffs, however Appellate Court recorded affirmative findings based on appreciation of evidence.

14. The last judgment relied upon by the appellant is ***Malay Kumar Ganguly*** (supra) to contend that in absence of examination of author of the document, the contents thereof cannot be held to have been approved. It is true that in present case plaintiffs have not examined Advocate-Court Commissioner, who submitted report at Exhibit-19. However, as rightly observed by the Appellate Court, on submission of Commissioner's report, parties were given notice calling their objections. However, no objection was raised, then it was admitted in evidence and given Exhibit No.19. Further, as rightly contended by Mr. Patil, learned Advocate appearing for respondents, in view of Order XXVI Rule 10 (2) of the Code of Civil Procedure, the report of Court Commissioner can be considered as evidence. In absence of any objection by appellant before the Trial Court, the Appellate Court is justified in relying upon report of Court Commissioner and approving the claim of plaintiffs. Consequently, no substantial question of law arises for consideration in this appeal.

15. Hence, Second Appeal stands dismissed.

16. In view of dismissal of Second Appeal, Civil Application does not survive and accordingly stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/November-2024