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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 686 OF 2018
WITH
CIVIL APPLICATION NO. 1560 OF 2018
IN
SECOND APPEAL NO. 686 OF 2018**

Shri. Appa Bharmu Kavthekar and orsAppellants

Vs.

Shri. Appaso Bhau Sawalwade and anotherRespondents

Mr. Bhooshan R. Mandlik advocate for the appellants
Mr. Tejpal S. Ingale with Ms. Priyanka A. Babar and Ms. Chaitanya Narvekar for respondents

CORAM : GAURI GODSE, J.

DATE : 18th OCTOBER 2024

ORDER:

1. Heard learned counsels for the parties. This second appeal is preferred by the original defendants challenging the judgement and decree passed by the first Appellate Court dismissing the defendants' counterclaim and granting decree of injunction in favour of the plaintiff. The trial Court had dismissed the suit and allowed defendants' counter claim thereby declaring that there is 7 feet road on the northern side in the suit property. Thus, the trial Court had granted right of way to the

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defendants by way of prescription as prayed in the counter claim and restrained the plaintiff from obstructing the defendants' right of way. In the first appeal preferred by the plaintiff, the counterclaim is dismissed and decree of injunction is passed in favour of the plaintiff restraining the defendants from carrying bullock carts or any other vehicles from the said property. Hence, this second appeal by the original defendants.

2. Learned counsel for the appellants submits that the plaintiff failed to describe the suit property by giving proper boundaries. He submits that for want of proper boundaries, there was no clarity regarding the injunction sought by the plaintiff. He further submits that from the description of the suit property it is seen that some part of the suit property is stated as Port Kharaba. He, therefore, submits that the first Appellate Court ought to have accepted the defendants' contention that there is a right of way as pleaded by the defendants and the description of the property shown as Port Kharaba would indicate that the same is uncultivated land and thus there is a right of way to the defendants through the plaintiff's property. He submits that the defendants had led oral evidence of independent witnesses to support their contentions that there is right of way for the defendants from the

plaintiff's property. He, thus, submits that the second appeal would require consideration on the ground of mis-appreciation of the facts and evidence on record regarding defendants' claim of right of way by prescription.

3. Learned counsel for the respondent-plaintiff supports the impugned decree. He submits that the plaintiff's title is not in dispute. He further submits that though the defendants claim that their right of way was recorded in the record of rights, defendants failed to produce any document to indicate that they had any right of way from the plaintiff's property. He submits that the grounds argued on behalf of the appellants do not raise any substantial question of law.

4. I have perused the impugned judgments. The plaintiff's title is not in dispute. The defendants' claim of continuous use of right of way from the plaintiff's property is not supported by any material evidence. The first Appellate Court has thus on re-examining the pleadings and evidence on record, reversed the trial Court's findings on the defendants' claim of right of way by prescription. The first Appellate Court also referred to the court commissioner's report at exhibit 76 which was relied upon by the defendants. The report only reflected

that there were marks of wheels of bullock carts on the strip of land. However, the first Appellate Court held that the said observations in the court commissioner's report would not be sufficient to accept the defendants' case that they have a right of way through the plaintiff's land by way of prescription. Thus, for want of any specific evidence to support the defendants' claim of a right of way, the first Appellate Court reversed the trial Court's findings. The first Appellate Court has rightly held that the right of way by way of prescription cannot be granted on preponderance of probabilities and that a specific evidence is necessary to indicate that there is right of way by prescription as contemplated under Section 15 of The Indian Easement Act, 1882. The reasons recorded by the first Appellate Court indicates that the pleadings and evidence on record is thoroughly examined by the learned Judge. I see no illegality or perversity in the findings recorded by the first Appellate Court.

5. The grounds argued on behalf of the appellants are pertaining to the factual aspects which are already taken into consideration by the first Appellate Court which is the last finding Court. The grounds thus do not raise any substantial question of law. There is no question of law involved in the second appeal. Hence, the second appeal is

dismissed.

6. In view of dismissal of second appeal, Civil Application No. 1560 of 2018 is disposed of as infructuous.

[GAURI GODSE, J.]