

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 522 OF 2020
WITH
INTERIM APPLICATION NO. 3359 OF 2019
IN
SECOND APPEAL NO. 522 OF 2020**

Sopan Dnyanu Pawar And Ors.

.. Appellants

Versus

Smt. Induba Dnyandeo Sawant And Anr.

.. Respondents

...

Mr. Ashutosh R. Gole, for Appellants.

Mr. Mandar Limaye a/w Ms. Deepali Y. Deherkar, for Respondent No.1.

...

CORAM : SANDEEP V. MARNE J.

DATE : 28 FEBRUARY 2024.

P. C.:-

1) Appellants have filed this Appeal challenging the Judgment and Order dated 7 September 2019 passed by the Ad hoc District Judge-1, Sangli in Regular Civil Appeal No. 68 of 2014. The District Court has allowed the Appeal and has set aside the Judgment and Decree dated 18 March 2014 passed by Second Joint Civil Judge Junior Division, Vita in Regular Civil Suit No. 155 of 2009. The District Court has decreed Regular Civil Suit No. 155 of 2009 and has granted injunction against Appellants/Defendant Nos. 1 to 3 from creating any new road, cart way, or

pathway from the suit land. Appellants are aggrieved by the decision of the District Court and have filed the present Appeal.

2) Plaintiffs/Respondents instituted Regular Civil Suit No. 155 of 2009 seeking injunction against Defendant Nos. 1 to 3 / Appellants from creating any new road from the suit property. Plaintiffs' suit was essentially based on the decree passed on 13 April 2005 in Regular Civil Suit No. 156 of 1994. It was Plaintiffs' case that the said Regular Civil Suit No. 156 of 1994 was filed by their family members seeking same relief against the Defendant therein- Sopan Gnyanu Pawar to injunct him from creating any new road in suit properties bearing Gat Nos. 481/A, 440/A and 440/D. It appears that during pendency of the suit, a partition took place amongst family members under which land bearing Gat No. 481/A came to the share of the Plaintiffs/Respondents herein, who were therefore joined as Defendant Nos. 2 and 3 in Regular Civil Suit No. 156 of 1994. Though the Trial Court held that no road existed between the suit properties involved in Regular Civil Suit No. 156 of 1994, it decreed the suit only in respect of land bearing Gat Nos. 440/A and 440/D. The suit *qua* Gat No. 481/A was dismissed holding that the Plaintiffs therein no longer remained owner of Gat No. 481/A, whose ownership was with the Defendant Nos. 2 and 3 therein, who were held as not entitled to seek any relief in suit filed by Plaintiffs therein.

3) Since Plaintiffs were denied any relief in RCS No. 156 of 1994 on account of their impleadment therein as Defendants, they filed their own Regular Civil Suit No. 155 of 2009. The Trial Court dismissed the suit holding that there was no cause of action to file the same. The First Appellate Court has however reversed the Trial Court's decree and has decreed Regular Civil Suit No. 155 of 2009 granting injunction in favour of

the Plaintiffs and against the Defendants from creating any new road from Suit Property bearing Gat No. 481/A.

4) I have heard Mr. Gole the learned counsel appearing for the Appellants and Mr. Limaye the learned counsel appearing for the Respondent No.1.

5) The main objection of the Appellants to the decree of the First Appellate Court is consideration of evidence recorded in previous Regular Civil Suit No. 156 of 1994 while deciding Regular Civil Suit No. 155 of 2009. Mr. Gole contended that *qua* Gat No. 481/A, Regular Civil Suit No. 156 of 1994 was dismissed and there was no way that the Appellants could have challenge that decree, since they succeeded in the suit. That therefore no findings recorded against Appellants while dismissing Regular Civil Suit No. 156 of 1994 could have been relied upon while deciding Regular Civil Suit No. 155 of 2009.

6) No doubt, some findings are recorded against the Appellants while deciding Regular Civil Suit No. 156 of 1994 about non-existence of any road passing through the suit property. However even if the said findings as well as evidence recorded in Regular Civil Suit No. 156 of 1994 are to be ignored altogether, I find that there is still some evidence to show non-existence of any road in the suit property bearing Gat No. 481/A. The Appellate Court has considered the evidence given by the Appellant No. 1- Sopan Gnyanu Pawar, who has admitted existence of a stream on western side of suit property between his own land and the suit property. He has admitted that the said stream is two and half feet deep and eight to ten feet wide. He has further admitted that he has constructed a bund on the boundary of his land of height of two feet. It therefore appears quite

illogical that a cart road can exist in the light of obstruction in the form of two and half feet deep stream with narrow width of 8/10 feet., in addition to a bund with the height of two feet. Thus, between the Defendants' land and the stream, there is obstruction of total depth of four and half feet. If this depth of obstruction is considered in a narrow stream width of only 8 to 10 feet, the theory of existence of a cart road becomes unbelievable. In fact, in the previous round of litigation the Court had appointed a Commissioner who paid a site visit and observed that it was difficult for a person to cross the bund and the stream between the land of Plaintiffs and Defendants. In my view therefore, no serious error can be traced in First Appellate Court's approach in disbelieving the theory of Defendants/Appellants about existence of road through suit property bearing Gat No. 481/A through which he could access his own land.

7) It has also come in evidence that there is an alternate road for the Defendants to approach their land. There is yet another factor worth taking note of. The Defendants had simultaneously initiated proceedings under Section 5 of the Mamlatdar Courts Act for removal of obstruction on the alleged road passing through Gat No. 481/A. Panchnama was conducted at the site and the Mamlatdar held that no cartway existed at the site. The said proceeding was decided against Defendants as Rasta Case No. 6 of 2002 was rejected by the Mamlatdar on 31 December 2004. Defendant challenged the said Order before the Sub Divisional Officer by the preferring Appeal under Section 23 (2) of the Mamlatdar Courts Act, who granted liberty to Defendants to file fresh proceedings before Mamlatdar. However they failed to initiate any proceedings despite such liberty. This again shows non existence of any road passing through suit property bearing No. 481/A.

8) In my view the First Appellate Court has rightly appreciated the evidence and has correctly reversed the judgment of the Trial Court, which had erroneously arrived at a conclusion that no cause of action existed for Plaintiffs to file a suit. The Defendants were undoubtedly attempting to enter upon Plaintiffs' property by claiming existence of road. They had filed proceedings before Mamlatdar for removal of obstruction on alleged road. Therefore, there was clear cause of action for the Plaintiffs to file the suit. The Trial Court had committed an error in not deciding merits of the suit by recording unsustainable finding of absence of cause of action. The First Appellate Court has correctly reversed the Trial Court's decree. Even otherwise, existence of road or otherwise is a pure question of fact. No question of law, much less any substantial questions of law, is involved in the Appeal. The Appeal is accordingly **rejected**.

9) After the Order is pronounced, Mr. Gole has requested for continuation of ad-interim relief granted by this Court on 19 December 2019 for a period of four weeks. Considering that the Appellants have alternate route to approach their lands, the request for continuation of ad-interim relief is rejected.

10) In view of disposal of Second Appeal, Interim Application No. 3359 of 2019 does not survive. The same also stands disposed of.

[SANDEEP V. MARNE J.]