



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.540 OF 2023
WITH
CIVIL APPLICATION NO.13956 OF 2023**

1. Shivaji Namdeo Bhusal
Age 61 years, Occ. Agriculture
2. Anita Tukaram Bhusal
Age 51 years, Occ. Agri & Household
3. Sukdev Mhatarba Bhusal
Age 59 years, Occ. Agriculture
4. Tukaram Mhatarba Bhusal
Age 56 years, Occ. Agriculture
5. Vijaya Shivaji Bhusal
Age 46 years, Occ. Agri & Household
6. Bapu s/o Mhatarba Bhusal
Age 65 years, Occ. Agriculture
7. Parvatabai Madhav Kashid
Age 76 years, Occ. Agri & Household
8. Sanjay Changdev Bhusal
Age 46 years, Occ. Agriculture
9. Vijay Changdev Bhusal
Age 44 years, Occ. Agriculture
10. Anil Bhagwat Bhusal
Age 51 years, Occ. Agriculture
11. Popat Bhagwat Bhusal
Age 53 years, Occ. Agriculture
12. Sanjay Bhagwat Bhusal
Age 49 years, Occ. Agriculture
13. Abajai Sonyabapu Bhusal
Age 71 years, Occ. Agriculture

All R/o. Umabari Balapur,
Tq. Sangamner, Dist. Ahmednagar

..Appellants
(Ori. Defendants)

Versus

1. Bhimraj Bansi Bhusal
Age 60 years, Occ. Agriculture
2. Lahanbhau Bansi Bhusal
Age 57 years, Occ. Agriculture

Both R/o. UmbariUmabari Balapur,
Tq. Sangamner, Dist. Ahmednagar

..Respondents
(Ori. Plaintiffs)

Mr. V. D. Hon, Senior Advocate i/by Mr. A. V. Hon, Advocate for
the Appellants.

Mr. S. S. Dixit, Advocate for the Respondents.

CORAM : S. G. CHAPALGAONKAR, J.
DATE : 04th MARCH, 2025.

ORDER:-

1. The appellants/original defendants impugn judgment and decree dated 20.10.2023 passed by the District Judge-1, Sangamner in Regular Civil Appeal No.21/2022, thereby upholding judgment and decree dated 02.03.2022 passed by Joint Civil Judge, Junior Division, Sangamner in Regular Civil Suit No.348/2013. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. The respondents/original plaintiffs instituted Regular Civil Suit No.348/2013 claiming relief of declaration and injunction against defendants contending that they are absolute owners and possessors of the agriculture land bearing Gut No.309/1 at village Umbri, Tal. Sangamner. According to plaintiffs, defendants are owners of Gut Nos.307, 296, 395, 308 and 310 to 313 and they were

intending to create way through plaintiffs land. This has given rise to to cause of action to file suit seeking decree of perpetual injunction restraining defendants from interfering in plaintiffs' possession over the suit land.

3. The defendants while refuting claim of plaintiffs contended that since 1997, a 12 feet width way is in existence between plaintiffs' lands bearing Gut Nos.309/1 and 310, which runs North to South direction upto Gut Nos.307, 296, 295, 308 and 310 and ends at Gut No.313 of village Umbri. They contend that in the year 1997, Padmashree Vitthalrao Vikhe Patil Sahakari Sakhar Karkhana constructed suit way on requisition of farmers, facilitating irrigation for their lands. The existence of the road and water channels has been duly recorded with Grampanchayat. However, plaintiffs are unlawfully obstructing defendants' use of the road and attempting to close it.

4. The Trial Court framed issues on the basis of rival pleadings, recorded evidence of the parties and finally held that plaintiffs are entitle for declaration as claimed and consequential relief of perpetual injunction against defendants. Aggrieved defendants filed Appeal before the District Judge, Sangamner, who concurred with findings recorded by the Trial Court and dismissed the Appeal.

5. Mr. Hon, learned Senior Advocate appearing for the appellants submits that defendants were using way since 1997. The plaintiffs have obstructed use of way without any right causing inconvenience to large number of farmers. Further, Mamlatdar in exercise of jurisdiction under Section 5 of the Mamlatdar Courts Act, on verification of existence of way, injuncted plaintiffs from causing obstruction to defendants. He would submit that Nizameneshwar Irrigation Project is in existence since last 15 to 16 years and plaintiffs are continuously using way abutting to the water canal. The Courts below failed to consider aforesaid aspects of the matter and decreed suit of plaintiffs. The defendants have every right of way over boundaries of Gut Nos.309 and 310. He would further urge that plaintiffs' suit is beyond prescribed period of limitation. According to him, Article 58 of the Limitation Act applies to present suit. The plaintiffs ought to have filed suit within a period of three years from the date of cause of action. In support of his contentions he relies upon observations of Supreme Court of India in case of ***Vasantha (Dead) through legal representative Vs. Rajalakshmi Alias Rajam (Dead) through legal representatives***¹.

6. Per contra, Mr. Dixit, learned Advocate appearing for the respondents submits that defendants admitted ownership of plaintiffs over Gut No.309/1. There is no pleading in the written

¹ (2024) 5 SCC 282.

statement as to easementary right of defendants. In support of his contentions he relies upon observations of Supreme Court of India in case of *Bachhaj Nahar Vs. Nilima Mandal and Another*², *Zarif Ahmad and another Vs. Mohd. Farooq*³ and unreported judgment of this Court in case of *Digambar Vs. Vasant (Second Appeal No.111/2017* dated 11.01.2022).

7. Having considered submissions advanced, it can be observed that there is no dispute that plaintiffs are owners of land Gut No.309/1. The disputed way runs North-South on Western side of Gut No.309 and Eastern side of Gut Nos.310, 311, 312 and reaches to Gut No.295. The defendants filed written statement and claimed that in the year 1997, on request of farmers, Sugar Factory has created aforesaid way. On both sides of this way water channels of Nizameneshwar Irrigation Project exists and farmers are taking water from those channels, so also using way. The plaintiffs contend that on 08.04.2013, defendants unauthorizely removed East-West bandh of their lands and attempted to create road. In that view of the matter, question is whether defendants can raise lawful claim to use way passing from Gut No.309 owned by plaintiffs.

8. Apparently, as per pleadings in written statement defendants have not claimed easementary right to use way. Even

² (2008) 17 SCC 491.

³ (2015) 13 SCC 673.

it is assumed that they wish to assert acquisition of right by prescription, it is for them to plead and establish peaceful use of way as easement without interruption for 20 years, then only such right would be treated as absolute right. Evidently, when defendants are claiming creation of road in the year 1997, then till the date of institution of suit, period of 16 years has been lapsed. Therefore, plaintiffs cannot assert right of way by way of easement in terms of Section 15 of the Indian Easement Act. As rightly observed by Appellate Court, defendants cannot assert acquisition of right of way by prescription. The Appellate Court further observed that in case defendants wish to establish their rights of way by necessity, they shall independently plead and establish the same. They may resort to file independent suit. However, once they admit ownership of plaintiffs over land Gut No.309/1, they cannot assert right of user without fulfilling mandate of Section 15 of the Indian Easement Act.

9. So far as issue as to the limitation is concerned, the plaintiffs have pleaded that on 08.04.2013, defendants destroyed East-West bandh of suit property and made attempt to create road, which is stated as cause of action to file present suit. The defendants do not deny that they asserted their right of user on plaintiffs' land. They contend that plaintiffs are unconcerned with the part of land shown in the suit map. In this background, considering the cause

of action as pleaded in the plaint, limitation period of three years prescribed under Article 58 shall begin to run from the date when right to sue is accrued. Therefore, suit filed immediately after occurrence of cause of action dated 08.04.2013 will have to be treated within prescribed period of limitation. Pertinently, defendants have not raised plea of limitation in the written statement nor it has been raised before the Appellate Court. First time such an issue is sought to be raised. Recently in case of ***Jai Ram Vs. Som Prakash & Anr. Etc. (Special Leave Petition (C) Nos.1073-1074 of 2023*** decided on ***03.02.2025***), Supreme Court observed that in absence of objection as to limitation in written statement, issue before Trial Court and evidence on issue, High Court could not have upset order on point of limitation of District Court. In that view of the matter, there is no force in contention of the appellants on this point. In result, no substantial question of law arises for consideration in this Appeal.

10. Consequently, Second Appeal stands dismissed.

11. In view of dismissal of Second Appeal, nothing survives in Civil Application and same is accordingly disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

12. After pronouncement of judgment, Mr. Hon, learned Senior Advocate requested to continue interim relief as was in operation

during pendency of Appeal as appellants may take their chance before Hon'ble Supreme Court.

13. In view of submissions advanced, execution and implementation of decree passed in Regular Civil Suit No.348/2013 and confirmed by First Appellate Court and this Court shall be kept in abeyance for the period of four weeks from today.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/March-2025