



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

SECOND APPEAL NO.138 OF 2020

Atulkumar Dipaklall Jaiswal and another .Vs. Radhelal Ganulal Jaiswal

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. A.S. Deshpande, Advocate for petitioners.

Mr. N.R. Bhishikar, Advocate for respondent.

CORAM : ROHIT W. JOSHI, J.

DATE : 01/10/2025

1. The dispute between the parties pertains to the right of way. The property in question is land bearing Gat No.1, admeasuring 2.65 H.R. of village Lonbahel, Tal. Arni. This property was initially owned by one Sonubai, the mother of the present respondent and grandmother of the present appellants. Sonubai by way of a registered gift deed dated 21.10.2005, transferred 2.15 H.R. of land out of the said Gat number No.1 in favour of appellants/plaintiffs. She has also executed a Will dated 17.10.2005 with respect to the remaining 0.50 R. in the said Gat number in favour of her other son, Shrikant.

2. In the gift deed dated 21.10.2005, there is a mention of 15 ft. wide road. It is specifically stated in the gift deed that the respondent will have a right to use the said road, which passes through 2.15 H.R. of land gifted by Sonubai to the plaintiffs. The plaintiffs had filed a suit being

Regular Civil Suit No.33 of 2011, seeking a declaration that the order passed by the Naib Tahsildar sanctioning road from the agricultural land of the plaintiffs is illegal and for permanent injunction restraining the defendant from using the said way.

3. The said suit was dismissed by the learned trial Court vide judgment and decree dated 18.03.2014. The learned trial Court has held that the order passed by the Tahsildar was just and proper and accordingly, the suit was dismissed. The plaintiffs aggrieved by the said decree, preferred an appeal, which came to be dismissed vide judgment and decree dated 20.11.2019. The learned First Appellate Court has also held that the order passed by the Tahsildar under Section 143 of the Maharashtra Land Revenue Code, 1966, was proper and did not warrant interference. The present second appeal is preferred by the original plaintiffs assailing the said judgments. Notice in the appeal was issued vide order dated 15.02.2021, on the following substantial question of law:

“Whether both the courts below were justified in not considering the law that right of way cannot be transferred in view of the provisions under Section 6 of the Transfer of Property Act, 1882?”

4. Mr. Anand Deshpande, learned Advocate for the appellants contends that the right of way is essentially an easmentary right. Referring to Section 6(c) of the Transfer

of property Act, 1882, the learned Advocate argued that in view of the said provision, an easement cannot be transferred apart from the dominant heritage. He also draws attention to the Section 10 of the Transfer of Property Act, 1882 to contend that a condition in a document of transfer of property restraining alienation is void.

5. Having referred to the said provisions, in the considered opinion of this Court, the said provisions will not be applicable to the facts of the case. The property was owned by Sonubai, who had transferred it to the plaintiffs by way of a gift. The gift deed imposes an obligation that 15 ft. road shall be kept open for use by persons mentioned in the gift deed, including the present respondent/defendant. The Gift is made subject to the said easmentary right of way. The property which is gifted in favour of the plaintiffs therefore, becomes a servient heritage, through which the right of way is available to the respondent, who is the owner of the dominant heritage. The condition in the gift cannot be said to be hit by Section 6(c) of the Transfer of Property Act. Section 6(c) of the Transfer of Property Act applies when a easment is transferred without the dominant heritage. In the present case, the gift recites that thee shall be right of way over the property gifted which is neither prohibited under Section Section 6(c) nor Section 10 of the Transfer of Property Act. The substantial question of law is

answered and accordingly, the second appeal is dismissed with no order as to costs.

(ROHIT W. JOSHI, J.)

C.L. Dhakate