

**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

S.B. Civil Writ Petition No. 18191 / 2017

Dwarika Prasad Son of Shri Chouthi Lal, by Caste Brahmin, Aged About 71 Years, R/o Dwarika Puri, Ward No. 2, Vardhman Nagar, Hindauncity, District Karauli (raj.)

----Petitioner

Versus

1. Municipal Council, Hindauncity Through Its Commissioner, Municipal Council, Hindauncity, District Karauli, Rajasthan.
2. State of Rajasthan Through District Collector, Karauli, Rajasthan.
3. Tehsildar, Tehsil Hindauncity, District Karauli (raj.)

----Respondents

For Petitioner(s) : Mr. Anand Sharma, Adv.

For Respondent(s) : Mr. Deen Dayal Sharma, DGC

HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA

Judgment / Order

31/01/2018

1. By way of present writ petition, the plaintiff-petitioner challenges the order dated 22/09/2017 whereby the learned lower appellate court, while deciding the appeal filed by the defendants-respondents against the order dated 25/03/2015 passed by the trial court granting injunction in favour of the plaintiff-petitioner, has modified the order of the learned trial court with direction that the road, shown in the map as exhibited by the plaintiff-petitioner in his suit, be kept open for ingress and usage of general public and the plaintiff-petitioner has been bound not to cause hindrance in the use of the road for public way.

2. Learned counsel for the plaintiff-petitioner submits that the

order passed by the learned lower appellate court travels beyond the prayer made by the plaintiff-petitioner in the temporary injunction application. The learned lower appellate court has exercised jurisdiction which was not vested in him in passing order modifying the injunction order passed by the learned trial court and allowing a personal way to be made as a public way as it was to be decided after evidence whether the way which was within the boundaries of the possession of the plaintiff-petitioner can be said to be a public way. Further, it is his submission that there was no injunction application or counter temporary injunction moved by the defendants-respondents in appeal and therefore, the jurisdiction available to the learned lower appellate court was only limited to examine the legality or illegality committed by the learned trial court while passing the order. The order passed by the learned lower appellate court could have been stayed at best but could not have been modified to direct something which was not prayed nor averred in the temporary injunction application.

3. Learned counsel for the defendants-respondents does not contest the aspect that there was no prayer made in the temporary injunction application relating to the said way being allowed for public usages. However, he submits that it was contention of the respondent-Municipal Council that the way was a public way. It is his submission that as per decision dated 01/12/2014, the mutation no.4996 in-stead of Khasra No.67/1, measuring 58 ares, belongs to Khasra No.67/10146, measuring 25 ares which is a gair mumkin abadi land and in khatedari of Nagar Palika, Hindaun and therefore, there was a public way and learned

lower appellate court, in the interest of general public, has passed the order impugned which cannot be said to be unjustified. It is his submission that the plaintiff-petitioner had closed both sides of the roads by installing gates and putting locks.

4. Having heard learned counsel for the parties, this Court finds that the suit preferred by the plaintiff-petitioner relates to Khasra No.67, measuring .83 hectares of land. The western part of the said land measuring .25 hectares was converted under Section 90-B of the Land Revenue Act and Khasra No.67/2, measuring .25 hectares was brought into existence and the same has been shown and marked as in yellow colour in the map. Construction in the said land has already been made and the petitioner alongwith his sons have constructed their house and are living in the said land. The road, which they have constructed in the said land, is for their for personal usage and has got no connection with the public way and it is for the said purpose, to prevent any encroachment on their personal road that they filed the suit and also prayed that during pendency of the suit, the respondents may not allow the same to be ingressed by any other person.

5. The learned trial court had accordingly passed interim order restraining the respondents from breaking upon the gates and from constructing any road in the premises as shown in the map.

6. The learned lower appellate court, while hearing the appeal of the defendants-respondents, has proceeded on a presumption that the road is being used for public way and the order of the learned trial court would cause hindrance to the public in use of the said road and on that presumption, without recording of

evidence in the suit by the learned trial court, the order impugned has passed by the learned lower appellate court which goes beyond the issues involved before the trial court in the temporary injunction application. It is settled principle of law that the learned lower appellate court cannot travel beyond the averments as submitted or taken up before the trial court. New pleadings or new averments at the appellate stage cannot be taken into consideration unless fresh evidence is brought before it at the appellate stage. Admittedly, no fresh evidence has been recorded. Further, there is no cross application for seeking injunction by the defendants-respondents. Thus, it was nobody's prayer that the way could be kept open for public usage and the directions issued by the learned lower appellate court travelled beyond the pleadings and therefore, the order passed by the learned lower appellate court dated 22/09/2017 deserves to be set aside. It goes without saying that the question whether the way is a public way or not is a matter of evidence which has to be recorded and a finding of fact has to be arrived at in regard to the same in the suit.

7. Consequently, the writ petition is allowed. The order impugned dated 22/09/2017 passed by the learned lower appellate court is set aside and the order passed by the learned trial court dated 25/03/2015 is maintained till disposal of the suit.

(SANJEEV PRAKASH SHARMA)J.