

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

SECOND APPEAL NO. 3 OF 1994

Laxman Genu Jagtap since deceased)
by his legal heirs and legal representatives:)

1(a) Shrirang Laxman Jagtap, aged)
about 61 years, Occ. Agriculture,)
Residing at Udatore, Taluka Wai)
District: Satara)

1(b) Prakash Laxman Jagtap, aged)
about 53 years, Occ. Agriculture,)
Residing at Udatore, Taluka Wai)
District: Satara)

1(c) Sou. Kalpana Nanasaheb Nanaware,)
aged about 58 years, Occ. household,)
Residing at Udatore, Taluka Wai)
District: Satara)

1(d) Smt. Manjula Arvind Pharande, aged)
about 51 years, Occ. household,)
Residing at village Ozarde, Taluka Wai)
District: Satara)

1(e) Smt. Rukmini Laxman Jagtap, (Dead))
Issueless.)

1(f) Smt. Alka Anandrao Pharande, aged)
about 45 years, Occ. household,)
Residing at Udatore, Taluka Wai)
District: Satara)

.. Appellants

V/s.

Raghunath Tatyaba Jagtap
since deceased by his legal representative

- 1 Shri. Vilas Raghunath Jagtap, aged)
about 36 years, Occ. Service)
Residing at Village : Udatare,)
Taluka : Wai, Dist. Satara)
- 2 Shri. Satish Raghunath Jagtap, aged)
about 32 years, Occ. Service)
Residing at Village : Udatare,)
Taluka : Wai, Dist. Satara)
- 3 Sou. Shobha Shivaji Dudhal, aged)
about 43 years, Occ. Household)
Residing at c/o. Shivaji Sayaji Dudhal)
306-B, Sai Darshan, Shanti Nagar,)
Pandurang Wadi, Opp. Water Tank,)
Dombivali (E), District : Thane)
- 4 Sou. Sharda Daulat Korde, aged)
about 47 years, Occ. Household)
Residing at c/o. Daulat D. Korde)
At: Gorhe (Bk), Post : Donaje)
Taluka : Haveli, District: Pune)
- 5 Sou. Sindu Anil Karpe, aged)
about 39 years, Occ. Household)
Residing at c/o. Anil S. Karpe)
At & Post : Khanapur,)
Taluka : Haveli, District: Pune)

.. Respondents

Mr. P. J. Shinde for the appellants.
Mrs. Pratibha Shelke i/b P. J. Thorat for the respondents.

CORAM : K. K. TATED, J.
DATED : 03/09/2015.

JUDGMENT:

. Heard learned Counsel for the parties.

2 This Second Appeal is preferred by the defendant challenging the Judgment and Decree dated 30.01.1988 passed by the Civil Judge, Junior Division, Wai in Civil Suit No. 333 of 1980 issuing injunction order restraining the defendant from obstructing the plaintiff's possession and enjoyment in respect of land bearing Gat No. 40 admeasuring 9 R and Gat No. 33 admeasuring 41 R of Village Udatore Taluka Wai, District Satara and decree dated 27.01.1993 passed by the 2nd Additional District Judge, Satara in Regular Civil Appeal No. 117 of 1988 confirming the Trial Court's decree.

3 For the sake of convenience, the nomenclature of the parties will be referred to as stated in the plaint i.e. Appellants as defendant and respondents as plaintiff.

4 The plaintiff filed Regular Civil Suit No. 333 of 1980 in the court of Civil Judge, Junior Division, Wai for an order of injunction restraining defendant from disturbing his possession in respect of land bearing Gat Nos. 33 and 40. In that suit, the defendant filed his written statement and denied the plaintiff's case. The defendant raised the objection about the jurisdiction of the Civil Court to decide the suit in view of Section 36A of The Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter will be referred to as 'the said Act').

5 It was the case of the defendant that he applied to the Consolidation Officer under the said Act for rectifying his area. Pursuant to the said application, the Consolidation Officer passed an

order dated 30.07.1971 holding that the defendant was entitled to 19R of land from Gat No. 33. The Consolidation Officer also recorded that the plaintiff had given his no objection for allotment of 19 R of land from Gat No. 33 to the Defendant. Hence, for land admeasuring 19 R the separate Gat No. 1620 was given.

6 Being agreed by the said decree, the defendant preferred Regular Civil Suit No. 117 of 1988 in the Court of 2nd Additional District Judge, Satara. The Appellate Court by decree dated 27.01.1993 confirmed the decree passed by the Trial Court. Hence, the present Second Appeal.

7 The following two questions of law framed by this Court at the time of admitting the Section Appeal:

“A) The question as to whether the consolidation officer acted without jurisdiction while passing the order?

B) Whether the Civil Court has jurisdiction to declare the order of consolidation officer as ultra virus?”

8 Considering the Judgment and Decree passed by both the Courts below and the documents on record, by consent of both the parties, the additional substantial question of law framed, which is as under:

“C) Whether the plaintiff made out case for an order of perpetual injunction restraining defendant from disturbing his possession in respect of the suit land admeasuring 19 R from Gat No. 33 situated at Village Udatore Taluka Wai, District Satara?”

9 The learned Counsel for the defendant submits that both the courts below committed an error in decreeing the plaintiff's suit and restraining the defendant by an order of injunction from disturbing the

possession of the plaintiff to the extent of 19 R land which was given in possession of the defendant by the Consolidation Officer under possession receipt Exh. 76 being new Gat No. 1620. He submits that both the Courts below erred in holding that the Civil Court has jurisdiction to entertain and try the suit. He submits that on an application of the defendant, due enquiry was made by the Consolidation Officer and the scheme was implemented by separating 19 R land from Gat No. 33 i.e. new Gat no. 1620 and possession thereof was handed over to the defendant as per the order passed in that proceeding. As such, the subject matter of the suit was very much related to the consolidation scheme and therefore, jurisdiction of the Civil Court is barred in view of provision of Section 36A of the said Act. He submits that both the Courts below failed to appreciate that the possession receipt Exh.76 dated 28.03.1980 was prepared by the Consolidation Officer and possession of 19 R new Gat No. 1620 was given to the defendant and these facts were not denied by the plaintiff.

10 The learned Counsel for the defendant submits that the plaintiff in Civil Suit No. 333 of 1980 prayed for injunction restraining defendant from disturbing his possession in respect of Gat nos. 33 and 40 without specifying the area and inspite of that, the Trial Court at the time of passing the decree recorded that defendant should not disturb the plaintiff's possession in respect of 9 guntas of land from Gat No. 40 and land admeasuring 41 Guntas from Gat No. 33 which is contrary to the pleading on record. Hence, both the decrees passed by the Courts below required to be set aside.

11 On the other hand, the learned Counsel for the plaintiff vehemently opposed the present Second Appeal. She submits that there is concurrent finding of fact recorded by both the Courts below on the basis of pleadings and documents on record. Hence, there is no question of allowing the present Second Appeal. She further submits that initially the plaintiff filed Regular Civil Suit No. 6 of 1968 in the Court of Joint Civil Judge, Junior Division, Satara on 18.01.1968 for an order of permanent injunction restraining the defendant from disturbing their possession in respect of suit land i.e. Gat No. 33. She submits that the said suit was decreed by Joint Civil Judge, Junior Division, Satara by decree dated 08.08.1969. She submits that being aggrieved by the said decree, the defendant preferred Civil Appeal No. 350 of 1969 in the Court of District Judge at Satara on 16.09.1969. That Appeal stands dismissed by decree dated 26.03.1971. She further submits that thereafter, the defendant preferred Second Appeal no. 624 of 1971 in this Court. That Second Appeal was dismissed by this Court (Coram : S. B. Bhasme, J) on 30.07.1971. She submits that this itself shows that the plaintiff was in possession of suit property since the beginning. She submits that the order passed by the Consolidation Officer dated 30.07.1971 is contrary to law. She submits that the plaintiff never aggrieved to handover the possession of the 19 R of land to the defendant.

12 The learned Counsel for the plaintiff further submits that the plaintiff filed simplicity suit for injunction restraining defendant from disturbing her possession of the suit property i.e. Gat No. 33 and 40. Hence, there is no question of bar as claimed by the defendant under

Section 36A of the said Act. She submits that in the present proceeding the plaintiff has not challenged any order passed by the Consolidation Officer.

13 The learned counsel for the plaintiff submits that the defendant violated the injunction order passed by the Trial Court. Hence, the plaintiff preferred application below Exhibit 1 in Regular Darkhast No.43 of 1990. That application was decided by Civil Judge, Junior Division, Wai on 06.11.1992 directing the defendant judgment debtor to obey the injunction order passed against him in C.S.No.333 of 1980. The operative part of the said order reads thus:

“ORDER

J. D. is directed to obey the injunction order passed against him in C.S. No. 333/80. The property bearing Gat no. 64 belonging to J.D. Shall be attached for disobeying order of injunction passed in R.C.S. No. 333/80 till further orders for necessary action under law. J.D. being absent be intimated about this order.”

14 On the basis of these submissions the learned counsel for the plaintiff submits that it is crystal clear that the plaintiff was in possession of the entire Gut No.33. He submits that defendant has not made out any case for setting aside for concurrent finding of both the courts below. Hence, Second Appeal is required to be dismissed.

15 I heard both the sides at length. I have gone through the R & P of the present matter. Admittedly, in the present proceeding, the suit filed by the plaintiff was in respect of the land Gat No. 33 and 40. Counsel for the defendant made a statement that they are not disputing the

ownership and possession of the plaintiff in respect of land bearing Gat No.40.

16 On the basis of application filed by the Defendant under the said Act, the Consolidation Officer started proceeding in respect of land bearing Gat No. 33 for the defendant's claim to the extent of 19R land. Before the Consolidation Officer, the plaintiff appeared and gave his consent. The Consolidation Officer after issuing notice to both the parties passed order on 30.07.1971 holding that the defendant is entitled 19 Guntas land from Gat No.33. Therefore, on the basis of consent, the defendant has taken the possession of 19R land from Gat no. 33. These facts are supported by Exh.63, Exh.76 and Exh.93. Though, the defendant in his written statement raised specific ground for jurisdiction of Civil Court in view of Section 36A of the said Act, the same was not considered by the Courts below. Section 36A of the said Act reads thus:

“Section 36A- Bar of jurisdiction . -

(1) No Civil Court or Mamlatdars Court shall have jurisdiction to settle, decide or dealwith any question which is by or under this Act required to be settled, decided or dealt with by the State Government or any officer or authority.

(2) No order of the State Government or any such officer or authority made under this Act shall be questioned in any Civil, Criminal or Mamlatdars Court.”

17 Bare reading of the said Section shows that if any order had been passed by the consolidation Officer, then same can be challenged before the Authority only. The Civil Court has no jurisdiction to set aside the said order.

18 In the present proceeding, both the Courts below have not considered the fact that the Consolidation Officer by order dated 30.07.1971 held that defendant was entitled to 19 R of land from Gat No. 33 and thereafter, the same was numbered as the new Gat No. 1620 for 19 R of land. Considering this fact and in view of Section 36A of the said Act, I am of the opinion that Civil Court has no jurisdiction to entertain the suit as it is filed by the plaintiff. Hence, question B is answered in negative.

19 On the basis of application filed by the defendant, under the said Act, the Consolidation Officer started proceeding to inquire whether the defendant is entitled 19R of land from Gut No.33. After following the due process of law and after hearing both the sides, the consolidation officer passed order dated 30.7.1971. At the time of passing the order, the Consolidation Officer specifically recorded that plaintiff made a statement that they do not have any objection if the application filed by the defendant is allowed. Considering these facts and the order passed by Consolidation Officer dated 30.7.1971, it is not possible to hold that the Consolidation Officer acted without jurisdiction while passing the order. Hence, the Question no.A answered in the negative.

20 Plaintiff on his own made a statement before the Consolidation Officer that he has no objection to handover the possession of 19R land from Gat No.33 to the defendant. Same was recorded by the Consolidation Officer. Not only that, the possession was handed over to the defendant on 28.03.1980. For that 19 R land separate Gut No. 1620 was created by Revenue Authority. These facts were not disclosed

by the plaintiff at the time of filing the suit. Apart from that, the plaintiff prayed the injunction in respect of Gat Nos. 33 and 40 without mentioning the area. In spite of that the Trial Court at the time of passing the impugned decree restrained the defendant from disturbing the plaintiff's possession in respect of 40 R land from Gat No.33. Considering the fact that the Consolidation Officer passed order on 30.07.1971 and the possession was handed over to the defendant on 28.03.1980 both the Courts below erred in coming to the conclusion that plaintiff has made out case for injunction. Bare reading of the deposition of the D.W.2 Prakash Vinayak Khajure, Surveyor of Sub Division in the office of Assistance Consolidation Officer No.2, Satara shows that 19 R of land from Gat No.33 was handed over to the defendant. Therefore, the Question no.C is answered in the negative.

21 Hence, the following order is passed:

- a) Second Appeal is allowed.
- b) The impugned Judgment and Decree dated 30.01.1988 passed by the Trial Court in Civil Suit No. 333 of 1980 and the decree dated 27.01.1993 passed by the Appellate Court in Regular Civil Appeal No. 117 of 1988 confirming the Trial Court's decree is set aside.
- c) The oral request made by the Advocate for the plaintiff to stay the operation and implementation of this order for some time, is rejected.

(K.K.TATED, J.)