

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 214 OF 2016

1. Pandharinath Kachru Deore,
Age : 40 years, occup. Agril.,
R/o Gum-Satara, Phulambri,
Dist. Aurangabad
2. Prabhakar Kachru Deore,
Age : 35 years, occup. Agril.,
R/o as above
3. Sanjay Kachru Deore,
Age : 30 years, occup. Agril.,
R/o as above .. Applicants

versus

1. Ramrao Laxman Deore,
Age : 65 years, occup. Agril.,
R/o Gum-Satara, Tq. Phulambri,
Dist. Aurangabad
2. Kakaji Laxman Deore,
Age : 55 years, occup. Agril.,
R/o as above .. Respondents

Mr. D. L. Agrawal, Advocate for the applicants

CORAM : SUNIL P. DESHMUKH, J.

DATE : 7th December, 2016

ORAL JUDGMENT:

1. The applicants – original defendants purport to impugn in this civil revision application, a common order passed by Civil Judge, Junior Division, Phulambri on 18-11-2016, rejecting their applications Exhibits – 35 and 36 in regular civil suit no.

78 of 2014.

2. Respondents-original plaintiffs have instituted aforesaid regular civil suit seeking perpetual injunction restraining the defendants, their agents, servants or any other person claiming through them from causing interference with and/or obstruction to plaintiffs' physical possession over an area of 46 aar from land bearing gut no. 18 (old survey no. 7/5) situated at village Gum-Satara, Taluka Phulambri.

3. It is the case of the plaintiffs that their predecessor Laxman Dhondiba had been owner in possession of land erstwhile bearing survey no. 7/5 admeasuring 2 acre and 16 guntha. Adjoining land bearing survey no. 7/4 admeasuring 3 acre and 18 guntha had been owned and possessed by Dagadu Kondiba – the predecessor of the defendants. In 1979, an area of 50 aar from land owned and possessed by plaintiffs' predecessor comprising survey no. 7/5 had been acquired for percolation tank of village Borgaon Arj under award bearing No. LAQ-AR/8/79. Plaintiffs purport to contend that they have been continuously all along without interruption in possession of land survey No.7/5 now comprising gut no. 18. Said property is their ancestral property and they have been cultivating the same in their

own right as owners and have dug a well in the same about ten years before institution of the suit.

4. Plaintiffs claim, defendants have no concern to the suit property, however, the defendants, with a view to take disadvantage of the mistake in revenue record, are trying to cause disturbance and interference with plaintiffs' peaceful possession over suit property. There had been disturbance around August, 2014 at the hands of defendants and as such, the suit had been instituted.

5. The defendants, while resisting the suit, have filed applications Exhibits 35 and 36, former invoking Order VII, rule 11 (d) of the Code of Civil Procedure, 1908 and the latter purporting to be under section 9A (Maharashtra Amendment) of the Code, respectively praying for rejection of plaint and framing of preliminary issue about jurisdiction of the court.

6. Both the applications Exhibits-35 and 36, as referred to hereinbefore, were decided by common order rejecting the same, considering that suit is for injunction, referring to section 38 of the Specific Reliefs Act, it has been considered civil court's empowerment to decide the question of injunction is not taken away and that there is no challenge to the consolidation proceedings in the suit and as such section 36-A

does not impinge upon civil court's jurisdiction.

7. The defendants have opposed plaintiffs' claim, contending that the two adjoining lands i.e. survey no. 7/5 and 7/4 respectively admeasuring 2 acre and 16 guntha and 3 acre and 18 guntha were amalgamated forming gut no. 18 in implementation of consolidation scheme in application of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter, 'Consolidation Act'). Since 1972, pursuant to the provisions of the Consolidation Act, gut no. 18 had been allotted to the defendants whereas, gut no. 20 admeasuring about 1 hectare and 93 aar had been assigned to the predecessor of the plaintiffs. There had been no grievance in respect of implementation of the consolidation scheme as aforesaid and respective parties had accepted the same by mutual consent. Accordingly, the defendants have been in possession of gut no. 18 upon implementation of the consolidation scheme and the record is bearing the same. After about 42 years thereafter, plaintiffs have instituted aforesaid suit simplicitor for injunction, claiming possession over an area of 46 aar from survey no. 7/5.

8. Contention of defendants further is, the Consolidation Act is a code in itself and a person aggrieved by its

implementation or for that matter formation of blocks and guts and delivery of possession would have to make approach challenging the same in accordance with provisions of the Consolidation Act and a civil court would have no power or jurisdiction to decide or deal with the implementation of consolidation scheme. In this respect, emphasis has been placed on section 36-A of the Consolidation Act reading thus:-

' 36.A. (1) No Civil Court or Mamlatdar's Court shall have jurisdiction to settle, decide or deal with 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, authority made under this Act shall be questioned in any Civil, Criminal or Mamlatdar's Court. '

9. Learned counsel Mr. D. L. Agrawal emphatically submits that under the guise of civil suit, a challenge is latently posed to implementation of consolidation scheme of 1972. The revenue record continuously for a period of forty two years shows possession of defendants over gut no. 18 formed by amalgamation of lands survey no.7/4 and 7/5 under the consolidation scheme and the land has been accordingly allotted to the defendants and the certificate of ownership in respect of the same has also been issued to the defendants.

Whereas, plaintiffs have been allotted gut no. 20 admeasuring 1 acre and 1 guntha in the implementation of consolidation scheme. In the circumstances, the civil court would not have jurisdiction to grant injunction offending the consolidation scheme and record pursuant thereto. Learned counsel submits, in view of section 36-A of the Consolidation Act, a civil court would not be able to entertain suit by plaintiffs.

10. He places reliance on a decision of this court in the case of *Laxman Genu Jagtap vs. Raghunath Tatyaba Jagtap*, reported in 2015 (6) *Mh.L. J.* 450.

It appears, in the judgment relied on by learned counsel that, there had been a challenge to the application of consolidation scheme under the orders of the consolidation officers and as such while the matter had been in second appeal, the questions those were framed were about whether the consolidation officer acted without jurisdiction, whether the civil court had jurisdiction to declare the order of the consolidation officer as *ultra vires* and thirdly, upon the background, whether the plaintiff made out a case for an order of perpetual injunction restraining defendant from disturbing his possession in respect of suit land admeasuring 19 *aar* from Gut no. 33 situated at village Udatare Taluka Wai,

District Satara. Around 1971, defendant's entitlement to 19 *aar* area from gut no. 33 upon no objection for allotment of said area by plaintiff, was found to be right and proper and further that it had come to be separately numbered as gut no. 1620.

11. Having regard to aforesaid, it is discernible, the court had considered that challenge had been posed to consolidation scheme in the background as referred to hereinabove.

12. Other citation relied on by learned counsel, is a decision of the supreme court in the case of *Kamalakar Eknath Salunkhe vs. Baburao Vishnu Javalekar*, reported in 2016 (1) Mh. L. J. 159.

Perusal of aforesaid judgment would show, it has been considered that a civil court should decide an objection on jurisdiction as preliminary issue and that the provision neither contemplates nor refers to any circumstance where an objection, besides to the jurisdiction of the court, may be determined as preliminary issue. It seems that the defendants in said case had sought issue of limitation to be framed as preliminary issue and a three-judge bench of the Supreme Court had considered that the preliminary issue in

that case framed by the trial court with regard to limitation would not be an issue on the jurisdiction of the court and as such the trial court was not justified in framing the issue on limitation as preliminary issue. The apex court has referred to the scheme of section 9A (Maharashtra Amendment) of the Civil Procedure Code and considered as under in paragraphs no. 14 and 15 :

' 14. Section 9-A of the Code requires the Court to decide the issue as to jurisdiction before final adjudication on the application for interim relief. The language employed in section 9-A is clear and unambiguous. Section 9-A(1) contemplates that when a person makes an objection to jurisdiction of the Court, the Court shall determine such objection on jurisdiction as preliminary issue before proceeding with the application for interim relief. It further provides that such application raising an objection as to the jurisdiction of the Court ought to be heard and disposed of as expeditiously as possible and prohibits adjournment of such issue till the hearing of the suit. Section 9-A (2) provides that the Court shall have the power to grant interim relief, as it may deem appropriate, pending determination of such preliminary issue regarding jurisdiction before it.

15. The provision, ready in its entirety, neither contemplates nor refers to any circumstance where an objection besides the jurisdiction of the Court may be determined as a preliminary issue. It only contemplates the issue of jurisdiction to be framed and determined as a preliminary issue by the Court. '

13. The trial court while rejecting applications Exhibits - 35 and 36 under common order dated 18-11-2016 has considered the contents of the applications as well as of the responses to the same by the plaintiffs. The trial court has referred to the citations relied on, on behalf of the defendants. Referring to averments in the plaint, the court found that the suit has been for perpetual injunction claiming to be in lawful possession of gut no. 18 to the extent of 46 aar and has found that there is no challenge to the consolidation scheme. The court has further considered that the jurisdiction of the court has to be determined from the averments in the plaint and thus found that so far as reliefs claimed in the suit are concerned, it would not be that those have been barred under provisions of any law. The trial court has considered that the suit would fall in the category of suits referable to Section 38 of the Specific Reliefs Act, 1963 and that civil court's powers are not restricted in this regard.

14. Perusal of the order impugned shows that the court has taken a proper stock of the situation, plaint averments, law and the submissions on behalf of the parties and found that the suit is for perpetual injunction seeking restraint on disturbance by defendants to possession of the plaintiffs. It

does not appear to challenge the correctness of the consolidation proceedings at this stage. So far as the consolidation record is concerned, it would be a matter to be considered while it comes to defend the case on evidence.

15. It may have to be considered that the order of the trial court can hardly be found fault with since the trial court has considered the question under section 9A would be required at the stage of hearing of application for temporary relief. One will have to consider that there had already been interim relief granted in favour of the plaintiffs and the same stands confirmed at the miscellaneous appellate stage.

16. Whether a bar as contended is posed to the civil court's jurisdiction would be a matter for consideration on the basis of facts, circumstances and evidence as would be adduced in the suit. A decision thereon as a preliminary issue may not be possible, in this case, and also having regard to that stage at which the matter now rests, it has already passed the stage at which such a preliminary issue could be framed. The trial court appears to have appropriately considered that plaint averments do not disclose any challenge being posed to the application and implementation of the consolidation scheme and purports to base the case on possession.

17. Thus, decisions relied upon on behalf of the applicants may not assist defendants' cause in the present revision at this stage where-under, apparently there does not seem to be any challenge to the consolidation scheme and the suit appears to be based on plaintiffs claiming to be in possession of suit property. Appreciation by the trial court in the circumstances does not appear to suffer any infirmity.

18. In view of aforesaid, I do not find any substance in the present case.

19. Civil revision application, as such, stands dismissed.

SUNIL P. DESHMUKH,
JUDGE

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