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

**SECOND APPEAL NO.695 OF 2017
WITH
CIVIL APPLICATION NO.13431 OF 2017**

1. Shripati Sukhdev Akolkar,
since deceased, thr. L.Rs.

1-A. Chandrabhaga Wd/o Shripati Akolkar,
Age: 87 years, Occu: Household,
R/o Wakodi, Tq. and Dist. Ahmednagar

1-B. Bhanudas s/o Shripati Akolkar,
Age: 64 years, Occu: Agriculture,
R/o Wakodi, Tq. and Dist. Ahmednagar,
At present R/o Arangaon,
Tq. and Dist. Ahmednagar

1-C. Namdev s/o Shripati Akolkar,
Age: 54 years, Occu: Agriculture,
R/o Karanji, Tq. Pathardi,
Dist. Ahmednagar

1-D. Suryabhan s/o Shripati Akolkar,
Age: 51 years, Occu: Agriculture,
R/o Karanji, Tq. Pathardi,
Dist. Ahmednagar

1-E. Sanjay s/o Shripati Akolkar,
Age: 48 years, Occu: Agriculture,
R/o Karanji, Tq. Pathardi,
Dist. Ahmednagar

1-F. Kesarbai w/o Gorakshnath Hade,
Age: 65 years, Occu: Agriculture,
R/o Harewadi, Tq. Ashti,
Dist. Beed

1-G. Latabai w/o Mohan Shinde,
Age: 62 years, Occu: Agriculture,
R/o. Dagadwadi, Tq. Pathardi,
Dist. Ahmednagar

1-H. Shardabai w/o Namdev Pathak,
Age: 60 years, Occu: Agriculture,
R/o Ghatshiras, Tq. Pathardi,
Dist. Ahmednagar ..APPELLANTS

VERSUS

1. Tuliram Sukhdev Akolkar,
since deceased, thr. L.Rs.

1-A. Shantabai Wd/o Tuliram Akolkar,
Age: 82 years, Occu: Agriculture,
R/o Ghatdevalgaon, Tq. Ashti,
Dist. Beed
At present R/o. Karanji, Tq. Pathardi,
Dist. Ahmednagar

1-B. Subhadra w/o Vinayak Aute,
Age: 62 years, Occu: Agriculture,
R/o Ghatdevalgaon, Tq. Ashti,
Dist. Beed

1-C. Nanasaheb s/o Tuliram Akolkar,
Age: 59 years, Occu: Agriculture/Service,
R/o C-51/16, Shivajinagar, Cidco,
Aurangabad

1-D. Gorakshnath s/o Tuliram Akolkar,
Age: 56 years, Occu: Agriculture,
R/o Karanji, Tq. Pathardi,
Dist. Ahmednagar

1-E. Kanifnath s/o Tuliram Akolkar,
since deceased, thr. L.Rs.

1-E/1. Sangita Wd/o Kanifnath Akolkar,
Age: 49 years, Occu: Agriculture,
R/o Karanji, Tq. Pathardi,
Dist. Ahmednagar

1-E/2. Shital D/o Kanifnath Akolkar,
Age: 27 years, Occu: Education,
R/o Karanji, Tq. Pathardi,
Dist. Ahmednagar

1-E/3. Kishor s/o Kanifnath Akolkar,
Age: 25 years, Occu: Education,
R/o Karanji, Tq. Pathardi,
Dist. Ahmednagar

1-F. Popat s/o Tuliram Akolkar,
Age: 51 years, Occu: Agriculture,
R/o Bajajnagar, Waluj, Pandharpur,
Dist. Aurangabad ..RESPONDENTS

Mr A. P. Bhandari, Advocate for appellant;
Mr R. S. Kasar, Advocate for respondent No. 1-C

CORAM : NITIN W. SAMBRE, J.

DATE : 2nd November, 2017

ORAL ORDER:

Heard Mr Bhandari, learned Counsel appearing on behalf of the appellants and Mr Kasar, learned Counsel for respondent no.1(c)-caveator.

2. The appellants are legal representatives of original defendant in Regular Civil Suit No.19 of 2007 instituted by deceased plaintiff-respondent no.1 Tulshiram, seeking a declaration that mutation entry no.1585, in relation to land to the extent 0.20 R, which is suit property, is illegal and not binding on him, as also perpetual injunction restraining the defendant from transferring the suit property by sale, mortgage, gift, etc.

3. The suit came to be dismissed by the judgment and decree dated 4th October, 2010, passed by Civil Judge Junior Division, Pathardi, which decree was reversed in Regular Civil Appeal No.337 of 2010, vide judgment and order dated 27th July, 2017, passed by Principal District Judge, Ahmednagar, Thus, the present second appeal by legal representatives of original defendant.

4. Facts, as are necessary for decision of the appeal, are as under :-

One Sukhdeo was blessed with six sons, out of which plaintiff was the youngest. Plaintiff and defendant are real brothers *inter se*. It is claimed that before filing the suit, some 20 years back there was a partition of the suit property between six brothers and by virtue of mutation entry no.3530, the property held by Sukhdeo, their father, was partitioned amongst Rangnath, Jagannath, Tuliram, etc.

5. It is the case of the plaintiff that the present appellant-defendant carried out mutation entry no.1585, to the extent of 20 R land, with the help of revenue authorities, which is subject-matter of dispute. It is further claimed in the suit that based on such mutation entry, a threat was issued to respondent no.1-plaintiff by appellant-defendant on 15th January, 2007 for alienation of suit property, resulting into filing of the suit.

6. The appellant no.1-defendant resisted the suit claim by filing written statement at Exh.17 and denied the entire claim of respondent no.1-plaintiff. According to him, even the cause of action cited for filing the suit is incorrect. He has brought on record that the land to the extent of 20 R, out of Gat No.18, while implementing the consolidation scheme in 1983-84, was wrongly mutated in the name of the plaintiff and accordingly he had approached the revenue authorities for correction. The Tahsildar accordingly ordered correction. He further claimed that against the order of disputed mutation entry no.1585 ordered by the Tahsildar, the respondent-plaintiff had taken out proceedings before the Sub-Divisional Officer, vide Appeal No.6 of 2000, which was dismissed, against which

second appeal being RTS Appeal no.73 of 2006, at the behest of the respondent, was dismissed by the Additional Collector. It is claimed that the said judgment of Additional Collector was not questioned and as such the aforesaid mutation entry has attained finality.

7. In the aforesaid background, the learned Trial Court framed the issues at Exh.29, as under :-

Sr. No.	ISSUES	FINDINGS
1	Whether the plaintiff proves that mutation entry no.1585 is not binding on him ?	No
2	Whether the plaintiff proves that defendant has no right over the suit property ?	No
3	Whether the plaintiff proves that after the partition they are in respective cultivating possession of the property as per deed of partition ?	Yes
4	Whether the plaintiff is entitled to the reliefs sought in the suit ?	No
5	What judgment and decree ?	As per final order

8. In order to substantiate his claim, plaintiff has examined in all three witnesses, viz. P.W.1 himself, P.W.2 Uttam – Revenue Circle Inspector and P.W.3 Vilas – Taluka Inspector of Land Records, Pathardi, whereas appellant-defendant examined in all two witnesses viz. D.W.1 Bhanudas, his son and power of attorney holder and D.W.2 Bhausaheb.

9. Against the aforesaid findings, in appeal preferred by respondent-plaintiff, the points which fell for determination of the first appellate court, are :-

Sr. No.	POINTS	FINDINGS
1)	Is it proved by plaintiff that Mutation Entry No.1585 is illegal and not binding on plaintiff ?	Proved
2)	Is it proved by plaintiff that defendant has no right over this suit land ?	Proved
3)	Is it proved by defendant that plaintiff and defendant are in possession of the suit property as per Partition Deed ?	Not proved
4)	Is plaintiff entitled to declaration and perpetual injunction ?	Yes
5)	What order ?	As per final order

10. In the aforesaid background, Mr Bhandari, learned Counsel appearing on behalf of appellants-legal representatives of original defendant would invite attention of this Court to the provisions of Section 11 of the Bombay Revenue Jurisdiction Act, 1876 so as to claim that in view of availability of alternate remedy to the plaintiff of filing an appeal/revision, the Trial Court ought not to have entertained the suit. In order to substantiate his claim, Mr Bhandari would draw support from the prayers made in the plaint and also from the provisions of Section 158 of the Maharashtra Land Revenue Code, to claim that the suit against the State Government or its officer, in respect of claim to have an entry made in the record of rights, is not maintainable. So as to substantiate his contention, he would invite attention of this Court to the judgment in the matter of **Smt. Savita Bhagwantrao Patil & anr. vs. Shyam Pukhraj Asopa & anr.**, reported in **2015 (1) ALL MR 187,** particularly paragraph 40, which reads thus:-

"40. The principle that emerges from the in-depth discussion is that, if remedy is made available statutorily, it must be exhausted first before the Civil Court of ordinary jurisdiction can be approached upon afore-emphasized grounds. Conclusion is that when the remedy is specifically made available and specific remedy of injunction is carved out of the ordinary jurisdiction of the Civil Court under the special statute, such statutory remedy has to be exhausted first by the parties in accordance with special statutory provisions and then only the aggrieved party may approach the Civil Court if there was violation of fundamental judicial procedure or if process of law was abused by the statutory forum/Tribunal or that it acted in violation of the provisions of the Statute. This being the position, if, in view of averment in the plaint, the plaintiffs have statutory remedy, the plaintiffs must first approach the statutory forum for an order of injunctive reliefs available under the Statute against the respondents including the Bank concerned. Scheme and Object/purport of the SARFAESI Act leads us to the above conclusion. Hence, no interference is required in the impugned judgments and orders in the facts and circumstances of the case. The substantial question is answered accordingly. The second Appeal is dismissed with costs."

11. In addition, Mr Bhandari would also rely upon the judgment of this Court in the matter of **State of Maharashtra & anr. vs. Bhikulal Mahadeo Agrawal & ors.,** reported in **2014 (3) ABR 321,** so as to draw support for the aforesaid proposition.

12. In addition, Mr Bhandari would urge that the entry made pursuant to implementation of consolidation scheme could have been assailed within a

period of three years, whereas in the present case, the suit is filed at belated stage without explaining the delay. He would also submit that the reasonable period within which suit should have been filed is three years and not thereafter.

13. Mr Bhandari then would take me through the findings recorded by the Courts below in regard to pleadings in Regular Civil Suit No.253 of 2008, which in his submission, are contrary to the one made by the present respondent-plaintiff in the plaint. According to him, substantial question of law needs to be considered on the said line.

14. Per contra, Mr Kasar, learned Counsel appearing on behalf of respondent No.1(c) would urge that the learned lower appellate Court has rightly entertained the appeal, so also the Trial Court, as according to him, the claim in the suit is based on the cause of action as alleged. He would urge that the prayer for injunction is based on the cause of action cited in the plaint and the relief of declaration that mutation entry No.1585 is not binding on plaintiff, is incidental to the claim of injunction. According to him, from the very submissions of the plaintiff it can be inferred that he had taken recourse to the remedies available under the Maharashtra Land Revenue Code for questioning the revenue entry and it is pursuant to the order passed by the revenue authorities, the respondent-plaintiff filed the suit in question. In addition, he would urge that the issue of delay sought to be canvassed is not maintainable for the reason that the appellant himself had approached the Tahsildar for correcting the mutation entry,

resulting into sanctioning mutation entry No.1585 in his favour. If the said contention of the appellant is accepted, then it would amount to granting premium on the illegality of the appellant. He, therefore sought dismissal of the appeal.

15. Considered rival submissions.

16. The respondent-plaintiff in his evidence has brought on record that about more than 20 years back, a partition took place between the parties including other brothers, resulting into mutation entry No.3530, whereby admittedly the suit property came to be mutated in the name of the present respondent. The said fact could be borne out from evidence of the plaintiff and also evidence of defendant's witness D.W.2 Bhausaheb, who has deposed that all the brothers including plaintiff and defendant are cultivating their respective share pursuant to the partition noted vide mutation entry No.3530. Even at the time of implementation of consolidation scheme, plaintiff was shown to be in possession of land Survey No.30/5, which after implementation of consolidation scheme was re-numbered as Gat No.18. The date of partition is noticed to be 30th June, 1964 from which all legal representatives of deceased Sukhdev are in cultivating possession of their respective portion. So far as the claim of the appellant that the said land as against disputed mutation entry No.1585 has gone to his share is concerned, but for earlier mutation entry No.3530, by virtue of which partition between the brothers was taken into account, no other material is brought on record by the defendant to establish his

claim over the suit property. It is the plaintiff, who by virtue of the partition as claimed by him in mutation entry No.3530, has established that the property to the extent of 20 R out of Gat No.18 was and is in his cultivating possession.

17. In the aforesaid background, if the claim put forth by the learned Counsel for the appellants, particularly an embargo on jurisdiction of Civil Court in entertaining the suit is ascertained, Section 11 of the Bombay Revenue Jurisdiction Act, 1876, reads thus:-

> "11. **Suits, not to be entertained unless plaintiff has exhausted right of appeal -** [Except as otherwise expressly provided in the Maharashtra Land Revenue Code, 1966, no Civil Court shall entertain] any suit [against the [Government]] on account of any act or omission of any Revenue officer unless the plaintiff first proves that previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present."

18. The plain reading of aforesaid Section makes it clear that an embargo is put on the jurisdiction of Civil Court from entertaining any suit against the Government on account of any act or omission of any Revenue Officer, unless the aggrieved party proves that before filing the suit, he has presented all such appeals allowed by law for time being in force.

19. Section 158 of the Maharashtra Land Revenue Code, 1966, reads thus:-

> "158. No suit shall lie against the State Government or any officer of the State Government in respect of a claim to have an entry made in any record or register that is maintained under this Chapter or to have any such entry omitted or amended."

20. According to the appellants, the aforesaid provision of Section 158 of the Code also puts an embargo on maintainability of suit against the State Government or any officer of the State Government in respect of a claim to have an entry made in any record or register.

21. The plain reading of both these provisions *prima facie* depicts an embargo on jurisdiction of Civil Court to entertain a suit, which essentially has to be inferred to have been instituted against the Government or its officer, in the matter of an act or omission of any official duty.

22. What could be inferred from the pleadings in the plaint is, the suit was instituted between the private parties and not against State Government or its Officer and as such, the suit was rightly entertained by the Courts below. In addition, it is required to be noted that the suit is based on the cause of action *qua* the threat issued by the appellant of creating third party interest in relation to the property in question, which issue was rightly adjudicated upon by the Courts below.

23. It is also required to be noted that the appellate Court, while decreeing the suit of the respondent was sensitive to the fact that the

plaintiff has already taken recourse to the proceedings of filing revenue appeals, in which he had lost, however, there is an observation that the plaintiff may take recourse to filing of a civil suit.

24. In the wake of aforesaid observations, particularly in the backdrop of the pleadings, prayers made and evidence brought on record, if the findings recorded by this Court in the matter of Smt. Savita and State of Maharashtra & anr. vs. Bhikulal (supra) are appreciated, it has to be inferred that there is no abuse of process or procedure by the present respondent-plaintiff, and the law laid down therein cannot be inferred or read down to the detriment of the rights of the respondent-plaintiff, who happens to be real elder brother of the appellant-defendant.

25. So far as next submission of the appellant *qua* pleadings in Regular Civil Suit No. 235 of 2008 is concerned, the document Exh.63, a certified copy of plaint in the said suit, was never put to the respondent during the course of evidence so as to infer that there are contradictory pleadings to the one in the present suit and plaint Exh.63. The lower appellate Court, as such, in my opinion, has rightly recorded findings in paragraphs 17 and 18 to that effect rejecting the claim of the appellants.

26. So far as the issue of delay is concerned, the appellant himself has initiated the proceedings before the Tahsildar after implementation of the consolidation scheme in the year 1984-85 at belated stage and the Tahsildar passed an order sanctioning mutation entry No.1585 in his

favour. Admittedly, the present respondent has taken out revenue proceedings questioning the said order of Tahsildar, whereas the cause of action cited in the suit prompted him to file the suit in question. In the wake of above, it is really difficult to infer and to be more precise that the appellant has failed to demonstrate as to how the claim of present respondent was not within limitation.

27. In the light of what has been stated above, the appeal does not involve any substantial question of law and the same being devoid of merit stands dismissed. In view of dismissal of appeal, pending Civil Application No.13431 of 2017 does not survive and stands disposed of accordingly.

(NITIN W. SAMBRE, J.)

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