

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

Shivling Shivacharya Guru Madiwal Maharaj PETITIONER
Age - 103 years, Occ - Agriculture
and Mathadipati,
R/o Veer Math, Ahmedpur, Taluka - Ahmedpur
District - Latur

RESPONDENTS	
1.	Avinash Apparao Deshmukh Age - 31 years, Occ - Agriculture R/o Nandura Bk At Present Jawahar Colony, Thodga Road, Ahmedpur Taluka - Ahmedpur Distirct - Latur
2.	Uttam Devidas Chilakewar Age - 51 years, Occ - Agriculture R/o Dhanora Kd. Taluka - Ahmedpur District - Latur
3.	District Superintendent of Land Record Latur, District - Latur
4.	The Tahsildar Ahmedpur, Taluka - Ahmedpur District - Latur

Mr. V. D. Gunale & Mr. V. G. Kodale, Advocates for petitioner
Mr. G. O. Wattamwar, AGP for respondent - State
Mr. S. B. Madde, Advocate for respondent No. 1

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 12th FEBRUARY, 2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard learned

advocates for the appearing parties finally with consent.

2. Petitioner is defendant No. 1 in Regular Civil Suit No. 9 of 2018 instituted by present respondent No. 1 as plaintiff seeking declaration of ownership and injunction against the defendants along with the relief seeking declaration that action of defendants No. 3 and 4 about cancellation of mutation entry and deleting name of plaintiff and defendant No. 2 is *ultra vires* and without jurisdiction.

3. Present petitioner had filed written statement and had sought dismissal of the suit with costs. Petitioner had moved an application Exhibit-42 purporting the same to be pursuant to Order VII, Rule 11, clause (d) of the Civil Procedure Code contending that jurisdiction of the court being barred pursuant to section 36-A of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act.

4. The application had been resisted by respondent No. 1 - plaintiff and the trial court has rejected the application. As such, defendant No.1 is before this court in writ petition.

5. In the suit, prayer clauses are as under-

“ A) it be declared that the plaintiff, Avinash Apparao Deshmukh is the owner of the suit land as described in para

1 of the plant.

B) the defendant No. 1 Shivlingappa, his agents or servants may kindly be restrained permanently from obstructing or interfering in peaceful possession of the plaintiff over the suit land.

C) A temporary injunction restraining the defendant No. 1 from creating third party interest or alienating the suit property or its parts in any manner during the pendency of this suit be granted.

D) the order of defendant No. 3 and action taken by the defendant No. 4 for cancellation of mutation entry and for deleting the names of plaintiff and defendant No. 2 may kindly be declared as ultra vires and without jurisdiction.

E) The plaintiff be paid costs of the suit from the defendant No. 1.

F) Any other orders in the interest of justice be kindly passed. ”

6. The trial court has taken stock of the situation and has observed that the suit is filed for declaration of ownership and perpetual injunction claiming that the property being purchased under registered sale deed from defendant No. 2, who in turn had purchased it from defendant No. 1 and accordingly mutations were carried out way back in 1988 in favour of defendant No. 2. Thereafter in 2012 the plaintiff had purchased

the property after examining relevant record and accordingly is in possession of the property.

7. After about twenty eight years, defendant No. 1 purportedly has challenged mutation entries sanctioned in favour of the plaintiff and defendants No.3 and 4 have indulged into the request. Based on the same, possession of the plaintiff is being disturbed and, therefore, cause of action arose for the suit for declaration of ownership and injunction.

8. The matter had been defended by present petitioner contending that mutation has undergone alternation under the orders of defendants No. 3 and 4 in exercise of powers under the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter Fragmentation and Consolidation Act). The scheme having undergone change, any alternation in the same would not be the jurisdiction of civil court and civil court has been expressly barred from taking cognizance of the matter having regard to provisions of section 36A of the Fragmentation and Consolidation Act. It is on this basis, application Exhibit-42 has been moved and the same has been rejected as referred to above.

9. Learned advocate for the petitioner strenuously urges to

indulge into request made under the writ petition to intercept the suit on the ground that the same being barred under section 36A of the Fragmentation and Consolidation Act. Learned advocate for the petitioner relies on a decision of this court in the case of *“Yeshwant Ramchandra Dhumal V/s Shankar Maruti Dhumal and Others”* [MANU/MH/0634/2001 : AIR 2001 Bom 384]. According to him, the head note would show that the suit, as instituted, cannot be maintained since the possession being claimed pursuant to claimed consolidation record and being disputed by the present petitioner. He further purports to refer to a decision of this court in the case of *“Narayan S. Bite and Others V/s Mahadeo Shripati Pise and Others”* [MANU/MH/0272/2001 : 2001 (2) ALL MR 414], wherein it has been considered that issues relating to consolidation scheme arising from the pleadings of the parties would not be dealt with by civil court and it would have no jurisdiction to decide the same. It has also been observed that such issue will have to be referred to competent officer. He further refers to a decision of the Supreme Court in the case of *“R. K. Roja V/s U. S. Rayudu and Another”* [2016 (5) ALL MR 446 (SC)], wherein it has been ruled that the court has to consider only the plaint as a whole and no material is to be considered.

10. Mr. Madde, learned advocate appearing on behalf of

respondent No. 1 vehemently submits that the suit primarily is to secure possession along with declaration and the same being based on consolidation record. He submits that litigation with respect to alternation in consolidation scheme is going on before competent authorities and in the circumstances, it cannot be said that the suit, as a whole, is liable to be thrown out. He submits that having regard to law that only plaint averments are required to be seen while considering applications pursuant to Order VII, Rule 11 of the Civil Procedure Code and the plaint averments do disclose that, it is on the basis of record referred to therein, ownership has been claimed and injunction on the basis of possession as well is an issue. He, therefore, submits that the writ petition is devoid of any substance and for all right reasons the trial court has declined to indulge into the request under application Exhibit-42.

11. Perusal of impugned order shows that it has been considered by trial court that the claim of plaintiff is infringement of civil rights and, therefore, cause of action for the suit for declaration and injunction arose. Along with the same the plaintiff has also claimed relief against orders passed by defendants No. 3 and 4, however, that by itself according to contentions on behalf of the petitioner, would not take out entire

proceedings out of the jurisdiction of the civil court. The reasons which went into rejection of application Exhibit-42 are not unsubstantiated and carry a lot of force along.

12. Having regard to the facts and circumstances of the case, coupled with the fact that it is discernible that plaint is not liable to be rejected in part and accepted in part, the writ petition does not give rise to exercise discretion in favour of the petitioner. Writ petition, therefore, is dismissed with no order as to cost. Rule stands discharged.

13. Needless to refer to that observations hitherto made by the trial court in the impugned order passed on Exhibit-42 and by this court in present writ petition will have limited efficacy to the extent of decision on application Exhibit-42 and would not have influential value any further. All points are open for the parties.

**[SUNIL P. DESHMUKH]
JUDGE**