

Uday S. Jagtap

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

**SECOND APPEAL NO. 640 OF 2019
IN
CIVIL APPLICATION NO. 1355 OF 2019**

Birmal Kolekar .. Appellant

Vs.
Tanubai Gaikwad & Ors. .. Respondents

.....
Mr. Ketan V. Joshi for the appellant
None for the respondents

CORAM : PRITHVIRAJ K. CHAVAN, J.

DATED : 14th OCTOBER, 2020
(Through Video Conferencing)

P.C.

1. Heard Mr. Joshi, learned Counsel for the appellant.
2. The Memorandum of Appeal does not indicate the substantial question of law involved in the appeal as contemplated in sub-section 3 of Section 100 of the Civil Procedure Code.
3. It is no more *res integra* that scope of interference with the findings of fact while exercising jurisdiction under Section 100 of the C.P.C. is very limited, meaning thereby this Court will not disturb the findings of fact as a general principle of law. This

Court will only interfere in second appeal when there is perversity in the approach of the lower Courts. It is equally a settled position of law that the findings of fact recorded by the first Appellate Court cannot be interfered with in second appeal, unless such findings are perverse.

4. The original plaintiffs – respondents are illiterate rustic villagers. They claimed relief in respect of the original Gat No.22 admeasuring 0 H 84 R. The present Gat numbers are 22/1 and 22/2 admeasuring 0 H 42 R situated at village Shirpur, Tal. Mohol, Dist. Solapur. Undisputedly, the suit property was ancestral and was in the name of their father Bhanudas Takmoge, who died in the year 1962. The plaintiffs are only legal heirs and, therefore, their names were required to be mutated in the record of rights.

5. Bhagwan Takmote, deceased father of defendant no.1, however, got mutated his name in the suit property despite absence of any right in the ancestral property of the plaintiffs, as he was not the member of the plaintiffs' joint family. He took disadvantage of illiteracy of the plaintiffs and in collusion with

Revenue Authority, got mutated his name to the extent of $\frac{1}{2}$ share by mutation Entry No.1360 to the suit property. Thereafter, he transferred the said share in favour of defendant no.2 in the year 1971, which was against the provisions of Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (in short 'Fragmentation Act').

6. Subsequently, defendant no.2 sold the said portion in the year 2007. As such, the transaction entered into by Mr. Bhagwan Takmoge was *void ab initio*.

7. When the plaintiffs applied for loan for the development of the suit property and obtained 7x12 extract as well as the mutation entry, they realised about the illegality and fraud committed by deceased Bhagwan Takmoge. Despite a demand to correct the entries, the defendants refused thereby giving a cause of action to approach the Court.

8. Admittedly, defendant nos. 1 to 3 despite service did not appear in the trial Court and, therefore, the suit proceeded ex-parte against all the defendants. It goes without saying that the

averments in the plaint remained uncontroverted and, therefore, it would not lie in the mouth of the defendants to challenge the pleadings and evidence adduced by the plaintiffs.

9. The trial Court, it seems has committed grave error in dismissing the suit without properly appreciating the oral and documentary evidence on record, and, therefore, the plaintiffs approached the Court of District Judge, Solapur by way of an appeal bearing Appeal No.32 of 2016.

10. The learned District Judge-I, Solapur by the impugned judgment while reversing the judgment of the trial Court has correctly appreciated the oral and documentary evidence on record while returning his findings in favour of the plaintiffs. He *inter alia* observed that in view of the judgment of the Supreme Court in the case of ***Daya Singh & Anr. Vs. Gurdev Singh (dead) by LRs & Ors. 2010 (2) ALL MR 461*** the suit was within limitation, within the meaning of Article 58 of the Limitation Act. It is apparent that there was a collusion between defendant no.1 and the revenue authority who had, without any right in the suit property in order to grab the portion of the same, effected wrong

entries in the revenue record by taking dis-advantage of the illiteracy of the plaintiffs.

11. For the reasons stated hereinabove, I do not find any error or perversity in the findings arrived at by the first appellate Court and, therefore, the judgment impugned does want warrant interference.

12. For the reasons stated hereinabove, there is absolutely no substance and, therefore, the appeal deserves to be dismissed.

13. Consequently, the appeal stands dismissed with costs.

14. All pending civil applications, if any, shall stands disposed of.

15. This order shall be digitally signed by the Private Secretary of this Court. All concerned shall act on production by fax or e-mail of a digitally signed copy of this order.

(PRITHVIRAJ K. CHAVAN, J.)