

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**915 SECOND APPEAL NO.268 OF 2011
WITH
CA/6994/2011 IN SA/268/2011**

RAMBHAU BAJABA SALUNKE
VERSUS
PANDURANG SANTU SALUNKE AND ORS

...
Advocate for Appellant : Mr. Jayabhar Dattatraya R.
AGP for Respondents:
Advocate for Respondent No.1-A, 2-A, 3 and 4 : Mr. Y. V. Kakde
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 20-01-2021.

ORAL ORDER :

1. Present appeal has been filed by the original defendant challenging the Judgment and decree passed in Regular Civil Appeal No.288 of 2005 by learned District Judge 1, Ahmednagar on 07-01-2011 whereby the appeal filed by the original plaintiffs came to be partly allowed. The impugned Judgment by the Trial Court was set aside to the extent of refusing to grant the injunction and then the present appellant i.e. respondent in the first appeal was perpetually restrained from obstructing to the possession of the plaintiffs over the suit land Block No.1480 admeasuring 3 H 11 R either by themselves or through anybody else, except in due course of law. It is to be noted

that the original suit i.e. Regular Civi Suit No.193 of 1993 was filed by the present respondents for declaration and perpetual injunction and the suit was dismissed by learned Civil Judge, Junior Division, Parner Dist. Ahmednagar on 16-07-2005.

2. Heard learned Advocate Mr. D. R. Jayabhar appearing for the appellant.

3. Learned Advocate Mr. Y. V. Kakde for the respondents No.1-A, 2-A, 3 and 4 is absent.

4. The plaintiffs had come with a case that the suit land was their ancestral property. Consolidation scheme was implemented in their village Vasunde Tq. Parner Dist. Ahmednagar in 1973-1974 under The Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as "the Consolidation Act") It is stated that under the scheme some agricultural lands were exchanged between the plaintiffs and the defendants, and in view of that exchange they got the possession of the respective lands. It is stated that the defendants got annoyed and started obstruction to the possession of the plaintiffs, and therefore, they had filed the suit.

5. Defendant No.1 had contested the claim by filing written statement and it appears that then defendant No.2 had adopted the written statement filed by the defendant No.1 by filing a pursis at Exhibit 20. It was admitted that the consolidation scheme was implemented in their village. It was stated that on paper it was shown that some agricultural land of the defendants was allotted to the plaintiff. Further it appears that by way of additional written statement the defendants contended that Block No.1480, which is the suit property, was consisting of the earlier various survey numbers including land Survey No.34/2B admeasuring 42 R owned and possessed by defendant No.1. Though it was shown that the said piece of land was given to the predecessor in title of the plaintiffs namely Santu Salunke, but he was never put in possession of the same. The defendant is cultivating he said land. Tahsildar, Parner has executed a panchanama and revenue record shows that he is still possessing the same. It was then contented that the suit is not maintainable under the provisions of Specific Relief Act.

6. After the issues were framed, parties have led oral as well as documentary evidence. It was held by the learned Trial Judge that except 42 R land of original Survey No.32/2B, the plaintiffs

possessed rest of the area from Block No.1480. It was held that the plaintiffs have failed to prove obstruction at the hands of the defendants. Suit was held to be maintainable under the provisions of Specific Relief Act and it was also held that the suit is within limitation. It was held that the plaintiffs are not entitled to the relief of declaration as well as injunction and then the suit came to be dismissed.

7. The said decree was challenged by the original plaintiffs in above said Regular Civil Appeal No.288 of 2005, and after hearing both sides as aforesaid, the learned Additional District Judge has partly allowed the appeal. This is giving rise to the second appeal.

8. It will not be out of place to mention here that if this Court intends to admit the second appeal then only the law points are required to be framed, and if after hearing the parties concerned, if this Court is of the opinion that no law points are shown, then law points are not required to be framed. Here at this stage benefit can be taken of the recent pronouncement by the Hon'ble Apex Court in *Kirpa Ram (Deceased) Through Legal Representatives and Others v. Surendra Deo Gaur and Others*, reported in 2020 SCC OnLine SC 935, wherein it has been held that,

"23. Sub-section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of Section 100 of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court."

9. It has been vehemently submitted on behalf of the appellant

that plaintiffs never challenged the consolidation scheme before appropriate authority and they could not have challenged the same before the Civil Court as there is specific bar under Section 36-A of The Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. Reliance has been placed on the decision in *Yeshwant Ramchandra Dhumal deceased by L.Rs. v. Shri Shankar Maruti Dhumal and Another*, reported in *AIR 2001 Bombay 384*, wherein it has been observed that,

"11. It is settled law that the question of jurisdiction of Civil Court must not be readily inferred unless it is expressly excluded or must be taken to be so excluded by necessary implication. Having regard to the scheme of the present Act, the relevant provisions of which have been reproduced above, I am of the view that the jurisdiction of Civil Courts is barred by S. 36-A of the Act where the question is one relating to putting a owner in possession of the holding to which he is entitled under the scheme."

It is further submitted that perusal of document at Exhibit 44 which came to be exhibited in the testimony of DW.1 Chandrakant who was serving in Taluka Inspector of Land Records Office, Parner, it is very much clear that the said document which is styled as

possession receipt was not signed by Santu and even there is endorsement by the Consolidation Officer Shri G. B. Pai in the year 1975 "Not entered into possession." This shows that the actual delivery of the possession to the concerned farmers when the work of the scheme was undertaken was not completed, and therefore, it cannot be stated that the work was entirely completed in respect of the said village. If at all there was any dispute in respect of the implementation of the said scheme, the plaintiff ought to have approached the Settlement Commissioner or the appropriate authority under Consolidation Act. The effect of Exhibit 44 is properly considered by the learned Trial Judge, and therefore, even the plaintiffs themselves were aggrieved by those observations and in the appeal memo at ground No.3 and 4 they themselves have stated that the learned Civil Court had no jurisdiction under the scheme, yet the learned Appellate Court failed to consider the said point and assumed its jurisdiction, and therefore, law point in respect of the same is arising.

10. It has been further submitted on behalf of the appellant that the 7/12 extract of Survey No.34/2B stands in the name of the appellant and it shows that the appellant is cultivating the same.

Panchanama was prepared by Tahsildar in respect of the factual aspect and the said panchanama shows that the appellant is in possession and cultivation of 42 R land. The learned First Appellate Court erred in overlooking the said fact and further observing that Exhibit 77 which is the copy of Form No.5-A under Rule 18-A of the Consolidation Act shows that present appellant had handed over the possession, and therefore, Santu might have been put in possession of the said land. Exhibit 77 was contrary to the 7/12 extracts, and therefore, the point of possession is also not considered by the First Appellate Court properly, it is therefore, also giving question of law. Learned Advocate for the appellant, therefore, prayed for admitting the second appeal.

11. At the outset, it is to be noted from the documents those have been exhibited and the oral evidence that what is admitted to both the parties is the implementation of the consolidation scheme to village Vasande. Now as regards the exchange of land is concerned, defendant admits that 42 R land from Survey No.34/2B, which was belonging to him, was made part of Block No.1480 under the scheme, but then he says that actual possession of that land was not taken from him and was not handed over to Santu. The

documentary evidence in the form of Exhibit 44 has been relied by the defendants to canvas the above said contention. However, it is to be noted that the 7/12 extract of Block No.1480 shows its area as 3 H 11 R as per Exhibit 70-A, 71 and 72. In none of these 7/12 extracts for different years it is stated that 42 R land out of that block number was in possession of the appellant. He never objected the preparation of these 7/12 extracts before the appropriate authority. At the cost of repetition it can be said that formation of Block No.1480 was in the form of various block numbers, that is portion from various block numbers which is inclusive of Survey No.34/2B. Now it is to be noted from the testimony of DW.1 Chandrakant who was serving in Taluka Inspector of Land Records that the possession receipt was not signed by Santu as well as there is endorsement by the concerned officer at that time. Perusal of Exhibit 44 would show that it is a certified copy. No pains were taken to bring the original. In fact Exhibit 44 appears to be form No.5-A under Rule 18-A of the Consolidation Act. Though the Survey No.34/2B is mentioned, it is stated that, at one place there is no signature and there is then endorsement, "Not entered into possession." We cannot read Exhibit 44 in isolation for the simple reason that it has come on record that in exchange of Survey

No.34/2B, Survey No.420/2B was given to the defendant No.1. Now in order to prove this exchange, Exhibit 77 has been produced which is the form No.5-A under Rule 18-A of the said Act which was executed by the defendant on 27-03-1975, and it specifically says that, he has given possession of 34/2B for formation of Block No.1480 and on the back side of the said document which has executed on the same date, he has accepted the possession of Block No.420/2B. Now he is denying in his cross-examination that he has received the possession of the land which was earlier belonging to the predecessor in title of the plaintiffs. Important point to be noted is that in his cross-examination conducted on behalf of the defendant P.W.1 Pandurang Salunke has stated that, his Survey No.420 was given to defendant and others. He says that 45 Guntha land belonging to them was given to defendant and the possession receipt was executed in 1974. These were the questions asked on behalf of the defendant and the answers given by the plaintiff will have to be then taken into consideration to see that there was exchange, and therefore, it was rightly observed by the First Appellate Court that now the defendant cannot take advantage of some other revenue record. Exhibit 77 would show that the fact was verified by the Consolidation Officer on 19-12-1975, that means the

confirmation was from Consolidation Officer in respect of the same. Consolidation Officer cannot then say that the land which was taken from the defendant was not given to the predecessor in title of the plaintiff.

12. One more aspect that is required to be considered is that the Judgment delivered by the Sub-Divisional Officer, Ahmednagar on 07-06-1995 which is at Exhibit 32. Present plaintiffs had filed an application before Mamlatdar under the Mamlatdars' Courts Act bearing No.06 of 1993, it was decided on 19-09-1993, and it appears that before the Sub-Divisional Officer the plaintiffs had filed a revision. The revision came to be allowed. It was then observed that the defendant therein who is also the defendant in this case i.e. present appellant, raised dispute in respect of the consolidation scheme, and therefore, it was suggested to the defendant that he should approach the Consolidation Officer or the Settlement Commissioner of Land Records, Nashik. Thus, it can be seen from the said Judgment that already the advise was received by the present appellant to raise dispute before the appropriate authority under the Consolidation Act. But it appears that he has not approached and now he want to raise an objection that the Civil

Court had no jurisdiction. Important point to be noted is that from the frame of the suit it was for declaration and ownership, declaration was to the extent of declaring him to be the owner of the entire block. It might be as a precaution that the said prayer might have been made taking into consideration the earlier history. But the learned lower Court had held that the suit was maintainable. Further it can also be seen that no pains were taken by the present appellant to raise specific question of jurisdiction and get issue framed in respect of the same. Now in a Second appeal he cannot raise that the point of jurisdiction was not considered by both the Courts below. He cannot take advantage of the grounds those have been mentioned in the appeal memo by the present respondent. However, careful perusal of those grounds at Serial No.3 and 4 in the appeal memo would show that according to the appellant therein the fact was not considered by the Trial Court that the block was formed after consolidation scheme was implemented, and therefore, in that connection it was stated that the learned Civil Court had no jurisdiction under the scheme. The interpretation that is tried to be given by the learned Advocate for the appellant was not in the mind of the appellant before the First Appellate Court. The ratio laid down in case of *Yashwant Dhumal (Supra)* cannot be disputed. In fact, it

is a settled law but as regards the present case is concerned, it appears from the written statement that was filed by the present appellant that he never raised a specific point regarding bar of jurisdiction under Section 36-A of the Consolidation Act. Perusal of the written statement would show that it is only stated that the suit is not maintainable under Specific Relief Act. There was no attempt during the entire trial before the lower Court which went on for 11 years 10 months and 22 days to get a specific issue framed to that effect, and therefore, at the cost of repetition it is stated that the said point cannot be considered in second appeal for the first time.

13. Taking into consideration all the above aspects it can be seen that from the Judgment of the First Appellate Court, all the points are properly considered and it has been correctly held that, as regards the specific area of 42 R comprising of original Survey No.34/2B which was after the consolidation scheme was implemented was absolved in Block No.1480 admeasuring 3 H 11 R., the plaintiffs were continuously shown to be in possession and in cultivation. The other revenue record which was specifically for Survey No.34/2B could not have been in existence after the consolidation scheme ; the defendant cannot take advantage of the

said record, and therefore, the appeal was rightly partly allowed. No substantial questions of law have been shown, therefore, second appeal is disposed of as not admitted. Civil Application No.6994 of 2011 also stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-