

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.86 OF 2012
WITH CA/1333/2012 IN SA/86/2012

MURLIDHAR S/O RAMNARAYAN CHECHANI DIED THR. LRS
OMPRAKASH S/O MURLIDHAR CHECHANI AND OTHERS
VERSUS
NARAYANDAS S/O RAGHUNATHDAS CHECHANI DIED THR. LRS
RAMPRASAD S/O NARAYANDAS CHECHANI AND OTHERS

...
Mr. D. P. Palodkar, Advocate for appellants.
Mr. P. R. Katneshwarkar, Advocate for respondent Nos.1-B and 1-C
Mr. B. V. Virdhe, AGP for respondent Nos.1 to 4.

...
WITH
WRIT PETITION NO.8195 OF 2011

RAMPRASAD NARAYANDAS CHECHANI
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

...
Mr. P. R. Katneshwarkar and Mr. A. S. Bajaj, Advocate for the petitioner.
Mr. B. V. Virdhe, AGP for respondent Nos.1 to 4.
Mr. D. P. Palodkar, Advocate for respondent Nos.5 and 6.

...

CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 29.07.2021

Pronounced on : 13.10.2021

ORDER :-

. Present second appeal has been filed by the original defendants challenging the concurrent judgment and decree. Present respondents are the original plaintiffs, who had filed Regular Civil Suit No.422 of

2001 for perpetual injunction before learned IInd Joint Civil Judge Senior Division, Jalna. The said suit came to be decreed on 04.03.2004. The present appellants filed Regular Civil Appeal No.32 of 2004 before the learned District Court, Jalna. The said appeal was heard by learned District Judge-1, Jalna and dismissed on 12.11.2009. Hence, the second appeal.

2. The writ petition has been filed by respondent No.2 in the second appeal who was original plaintiff No.2 to challenge the order passed by the Superintendent of Land Records, Jalna dated 30.09.2010 in Consolidation No./C.S.R./68/2001 and judgment and order dated 26.08.2011 passed by the Hon'ble Revenue and Forest Minister, Government of Maharashtra, in Revision Application No. REV. 39(A)11/ Case No.188/L-1.

3. Heard learned Advocate Mr. D. P. Palodkar for appellants in second appeal and for respondent Nos.5 and 6 in writ petition, learned Advocate Mr. P. R. Katneshwarkar for respondent Nos.1B and 1C in second appeal and for the petitioner in writ petition and learned AGP Mr. B. V. Virdhe for respondent Nos.1 to 4 in second appeal as well as writ petition. (hereinafter the parties are referred by their nomenclature in the original suit for the sake of convenience).

4. It has been vehemently submitted on behalf of the learned Advocate for the original defendants that plaintiffs and defendants are related to each other and they represent two branches. Earlier, there was partition between those branches as they were having 28 Acres 27 Gunthas land situated in Survey No.57 village Shelgaon, Tq. Badnapur, Dist. Jalna. It was subdivided into four divisions 57/1 to 57/4. Out of that, it is said that 57/1 admeasuring 17 Acre went to plaintiffs. Survey No.57/2 and 57/4 admeasuring 5 Acres 20 Gunthas each went to defendants and it is stated that 57/3 admeasuring 27 Gunthas was kept in common. It is stated that during the implementation of the consolidation scheme, Raghunath Chechani who was having Survey No.56/3 admeasuring 14 Acres 9 Gunthas and adjacent to it there was Survey No.57/1 was assigned Block No.167, thus, his holding was to the extent of 31 Acres and 19 Gunthas. However, further land of 2 Acres 31 Gunthas bearing Survey No.57/5 was wrongly merged in Block No.167 during the consolidation scheme. In fact, there was no such land bearing Survey No.57/5, so as to increase the area of Block No.167. It was the contention of defendants that excess area shown in favour of Raghunath, in fact, belong to defendant and his brother Satyanarayan. On 05.01.1990, there was an agreement between the defendant, his brother Satyanarayan and deceased Raghunath. It was admitted that

area of land bearing Survey No.57/4 has been wrongly merged in the name of Raghunath by showing it as Survey No.57/5. He gave consent for the correction. In fact, Raghunath never cultivated the land personally, nor the plaintiffs are possessing the suit land, yet, the suit was filed for perpetual injunction. The defendants, therefore, went to the settlement commissioner i.e. Deputy Director of Land Records, Jalna for correction of the area in block number. As regards the suit is concerned, in the written statement, a specific defence was taken that the plaintiffs are not possessing the suit land and, therefore, the defendants cannot be enjoined, however, the learned Trial Judge went on to hold that since the revenue records show the possession of the plaintiffs and the defendants have not brought any relief by way of counterclaim, the injunction has been granted. The first Appellate Court also failed to consider the oral as well as documentary evidence on record. It was not considered that Raghunath was not holding agricultural implements and bullocks for cultivating the land. Both the Courts have discarded the defence taken by defendants that there was wrong entry at the time of consolidation. Further, now the position stands that the settlement commissioner i.e. Superintendent of Land Records, Jalna has given decision in favour of defendants and admitted that there was mistake committed while implementing the consolidation

scheme. So also, the Hon'ble Minister has dismissed the revision filed by the plaintiffs. The finality achieved to their decision is required to be considered and this evidence can be considered by this Court under Section 103 of the Code of Civil Procedure. Substantial questions of law are, therefore, arising in this case requiring admission of the second appeal.

5. Learned Advocate for original defendants pointed out the affidavit-in-reply filed on behalf of the respondent Nos.2 and 3 in the writ petition i.e. State Government Officers, in which it is stated that a clarification has been given as to how the entries were wrongly made at the time of implementation of the consolidation scheme. The corrigendum came to be submitted before respondent No.2 by respondent No.3 in the writ petition as per Section 31-A of The Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as the 'Fragmentation Act'). In fact, even the land was measured. The petitioner in the writ petition was present when the measurement had taken place. The said correction has been made on the basis of the application filed by the defendants on 28.09.2001. The judgment and order passed by the Hon'ble Minister has also been pointed out wherein he has stated that in order to correct that incorrect record, powers under Section 32(1) of the Fragmentation Act

can be used by the settlement commissioner and accordingly, it has been used.

6. Further, affidavit has been filed by one Pradip Annasaheb Patil working as Deputy Director of Land Records, Aurangabad Region, which was filed for a limited purpose and it was as per the orders passed by this Court on 27.06.2013. He has clarified that the order passed by the Deputy Director of Land Records on 30.09.2010 is a final order and it is made after following prescribed procedure as laid down in Section 31-A of the Fragmentation Act. Even respondent Nos.5 and 6 i.e. present appellants had filed the affidavit-in-reply, which is almost the same repetition of their written statement in the civil suit. The learned Advocate for the original defendants, therefore, submitted that the writ petition deserves to be dismissed.

7. Per contra, the learned Advocate appearing for respondent No.1-B and 1-C in the second appeal supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case. Learned Advocate representing the petitioner in the writ petition submitted that the application which was made by respondent No.5 in the writ petition was belated and the authorities under the Fragmentation Act ought not to have entertained the said

application. No reasons were given for such belated application. While taking objection to the said application, all the necessary facts were disclosed by the petitioner. No proper opportunity was given to the petitioner by the authorities under the Fragmentation Act to put forth his say. The order passed by the Deputy Director of Land Records has also not given proper reasons and, therefore, the writ petition deserves to be allowed.

8. At the outset, it is to be noted that the suit that was filed by the respondents in second appeal was for perpetual injunction. They had come with the specific case that they are in possession of the suit property. Important point to be noted is that in the 7/12 extract of the suit property, the name of plaintiff is written. They have produced the 7/12 extract at Exhibit-65 and 67 as well as the consolidation statement at Exhibit-69. The learned first Appellate Court after relying on the decision in *Kuldip Chand and Anr. Vs. Advocate General To Government, [2003 SAR (Civil) 234]* taken note of the fact that in terms of Section 35 of the Evidence Act, the entries in the revenue record would be presumed to be correct although the same is rebuttable. Further, reliance was placed on the decision of this Court in *Shri. Govind Anand Goltekar Vs. Shri. Dashrath Deoba Goltekar, [2006 (2) BCJ 535]*, wherein it was held that entries in revenue record is having presumption as to

correctness and sufficient to shift the onus of the proof on the party disputing the same. Therefore, when the revenue entries were standing in the name of plaintiffs, a *prima facie* presumption was raised in their favour. The onus had then shifted to the defendants to rebut the said presumption.

9. In order to rebut that presumption, defendants had examined D.W.1 Murlidhar Chechani, who admitted that the consolidation scheme was implemented in their village in the year 1970. According to him, he realized the mistake in the year 1989-1990, but it appears that he has not given any reason as to why he had not objected to the revenue records prepared after the consolidation immediately. Whatever objection has been raised is after the institution of the suit by the plaintiffs in this case. No doubt, as per the Fragmentation Act, the appropriate authority would be the Superintendent of Land Records to correct the entries and the record of the consolidation scheme, however, that should be done as per the procedure of law and not at the whims of any authority. When no reason is coming forward from the defendant's side as to why objection was not raised immediately, if there was any mistake and as per Section 31-A of the said Act, it would be clerical mistake, then why it should take so many years to get it corrected. Further, we will have to consider the admission given by D.W.1-

Murlidhar that he had come to know about the mistake committed in the year 1989-1990, yet the proceedings which are under challenge in the writ petition on the basis of application given by the defendant was in view of application submitted by him on 28.09.2001. So, even after realisation of the mistake in the year 1989-1990, he has slept over the rights till 2001, if at all he is having.

10. Another fact on which the defendant is harping upon is the alleged agreement or document which is stated to have been signed by the father of plaintiff No.1 Exhibit-86. However, both the Courts below have raised suspicion over this document and reasons for the said suspicion have been mentioned in the judgment. The first and the foremost reason is that in spite of such agreement alleged to have been executed in the year 1990, why the defendant has not put it to execution even till 2001 is a question. The said agreement could not have been got executed, just to be kept in cupboard. Immediately after the alleged execution of the said document Exhibit-86, it could have been used for getting the correction made in the consolidation scheme record as well as in the revenue records of the suit property.

11. The defendants disputed the implementation of the consolidation scheme itself and formation of Gut No.167, however, as aforesaid the

scheme was implemented in the year 1970, the realisation of the mistake was in the year 1989-1990, alleged execution of document Exhibit-86 was in the year 1990, still no legal steps till 2001; all these acts definitely go against the defendants and on that count both the Courts were justified in holding that the defendant has failed to rebut the presumption that is attached to the revenue record.

12. The oral evidence has been given by the defendants to support their contention about the possession over the suit property, however, that has been discarded by both the Courts below. It need not be re-appreciated here.

13. The learned first Appellate Court has also dealt with the point raised on behalf of defendants that the consolidation authorities have not issued certificate in the name of father of plaintiff No.1 while forming Gut No.167. Reliance has been placed on the decision in *Prabhakar Kushaba Hagwane and others Vs. Yashwant Bhau Hagwane since dead by his legal representatives, [1994 (1) Bom. C.R. 368]*, wherein this Court has held that “issuance of transfer certificate under Section 22 and 24 of Bombay Prevention of Fragmentation and Consolidation of Holding Act, 1947 is a matter of procedure and is only the evidence of the transfer which has already taken place. Vesting of

the title in the consolidation holdings, thus, does not depend upon the grant of certificate of transfer, or in other words, transfer is not effected on the basis of transfer certificate.” Therefore, production of transfer certificate in respect of Gut No.167 by the plaintiffs was not mandatory at all. Both the Courts below after taking into consideration the evidence on record held that the plaintiffs have established lawful possession referable to title and, therefore, the possession of the plaintiffs is protected by decree.

14. Taking into consideration the above discussion, no substantial questions of law are arising in this case as contemplated under Section 100 of the Code of Civil Procedure for admitting the second appeal. It deserves to be dismissed.

15. Turning towards the writ petition, it is to be noted that as per the affidavit filed by Mr. Pradip Annasaheb Patil – Deputy Director of Land Records, Aurangabad Region, while correcting the consolidation record, the authority has used the powers under Section 31-A of the Fragmentation Act and according to him, it is final order. However, it is to be noted that the Hon’ble Minister, who decided the revision has stated that settlement commissioner was justified in using his powers under Section 32(1) of the Fragmentation Act. Therefore, the affidavit

filed by Mr. Pradip Annasaheb Patil, the Deputy Director of Land Records, Aurangabad Region, appears to be in ignorance of the decision by the Hon'ble Minister.

16. At the outset, if we consider the application that was made by respondent No.5 in the writ petition, he has not quoted the Section in which he intended to have correction. His application is totally silent as to why he is giving the said application belatedly i.e. after about 31 years. In spite of lapse of so many years, it appears that the settlement commissioner or Deputy Director of Land Records has promptly entertained the said application. Even the measurement has been made which according to the writ petitioner is behind his back. When it was only the clerical mistake that is required to be corrected, whether the authorities under the Consolidation Scheme could have taken up the act of measurement is a question. Section 31-A of the Fragmentation Act empowers the concerned authority to correct the clerical or arithmetical mistakes only. If we peruse the order dated 30.09.2010 passed by Deputy Director of Land Records, Aurangabad, then it can be seen that it contains no reason at all as to why need has arisen to correct the alleged arithmetical or clerical mistake. It totally suffers from application of mind on the point that whether such application would be maintainable after such a long delay. No doubt, Section 31-A or Section 32 of the

Fragmentation Act does not prescribe any period of limitation, however, in this respect reliance can be placed on the decision by the Division Bench of this Court in ***Gulabrao Bhaurao Kakade since deceased by LRs. and others Vs. Nivrutti Krishna Bhilare and others, [2001 (4) Mh.L.J. 31]*** wherein following observations have been made :-

“6. The power given to the Settlement Commissioner for variation of the scheme is on account of an error other than that referred to in section 31A, irregularity or informality after following the procedure prescribed. Though there is no time limit prescribed under Section 32(1) for the Settlement Commissioner to vary the scheme which has come into force, but obviously even in the absence of any period prescribed under section 32, the said power can only be exercised within reasonable period in any case. What would be the reasonable period for exercise of power under Section 32(1) by the Settlement Commissioner may depend on facts and circumstances of each case and we do not intend to lay down any specific period for exercise of that power by Settlement Commissioner but ordinarily exercise of such power after three years of finalisation of scheme under section 22 may not be Justified. In the facts and circumstances of the present case, the exercise of power by Settlement Commissioner for variation of scheme which has come into force in the year 1973, by initiating proceedings in the year 1988 cannot be said to be within reasonable time. The fact is and that is not disputed that the earlier scheme was finalised in the year 1973 under the Act of 1947 to the knowledge of all the parties concerned. Nobody

was aggrieved by the said scheme finalised under the Act of 1947 and the scheme came into force under section 22. The said scheme which had been finalised in accordance with law and came into force and continued to be in force, could not have been unsettled by initiating the proceedings for variation under section 32 on the purported ground of error, irregularity or informality after a lapse of about 15 years. Thus, the exercise of power by Settlement Commissioner under section 32 for variation of the scheme in the facts and circumstances of the present case is grossly unjustified.”

In that case, the powers were tried to be utilized after lapse of 15 years which were struck down by the Division Bench of this Court. Here, it is used after lapse of 30 years. Still, that order dated 30.09.2010 has been confirmed by the Hon’ble Revenue and Forest Minister by order dated 26.08.2011. Both these orders are not sustainable. The concerned authorities under the Fragmentation Act ought not to have exercised their powers after lapse of 30 years and, therefore, the writ petition deserves to be allowed.

17. The learned Advocate appearing for appellants in second appeal has canvassed for exercise of powers of this Court under Section 103 of the Code of Civil Procedure. In connection with the said submission, note can be taken in respect of the ratio laid down in ***Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board and others,***

[(2010) 13 SCC 216], wherein it has been held thus :-

“25. Before powers under Section 103 C.P.C. can be exercised by the High Court in a second appeal, the following conditions must be fulfilled:

(i) Determination of an issue must be necessary for the disposal of appeal;

(ii) The evidence on record must be sufficient to decide such issue; and

(iii) (a) Such issue should not have been determined either by the trial court, or by the appellate court or by both; or

(b) such issue should have been wrongly determined either by trial court, or by the appellate court, or by both by reason of a decision on substantial question of law.

If the above conditions are not fulfilled, the High Court cannot exercise its powers under Section 103 CPC.”

18. This Court when has come to the conclusion that writ petition deserves to be allowed, that means orders passed in favour of appellants in second appeal deserve to be set aside in the writ petition and the application for correction in the consolidation scheme needs to be dismissed, there is no question of using powers of this Court under Section 103 of the Code of Civil Procedure.

19. For the aforesaid reasons, following order is passed :-

ORDER

I) The Second Appeal No.86 of 2012 stands dismissed.

II) Civil Application No.1333 of 2012 stands disposed of in view of dismissal of second appeal.

III) Writ Petition No.8195 of 2011 stands allowed.

IV) The order passed by the Superintendent of Land Records, Jalna on 30.09.2010 in Consolidation No./C.S.R./68/2001 and the judgment and order dated 26.08.2011 passed by the Hon'ble Revenue and Forest Minister, Mantralaya, Mumbai in Revision Application No.REV. 39(A)11/Case No.188/L-1 stands set aside.

V) The application filed by the respondent No.5 for correction of record in the consolidation scheme dated 28.09.2001 stands rejected.

[SMT. VIBHA KANKANWADI, J.]

scm