

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

SECOND APPEAL NO.571 OF 2019

Arun Diwan Patil and another .. Appellants

Versus

Hirabai Ravindra Suryavanshi and another .. Respondents

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Mr. Girish Rane, Advocate for appellant no.1

Mr. C.T. Jadhav and Mr. A.D. Pawar, Advocate for appellant no.2

Mr. R.M. Deshmukh, Advocate for Respondent nos.1 and 2

....

WITH

CIVIL APPLICATION NO.12539 OF 2019

IN

SECOND APPEAL NO.571 OF 2019

....

CORAM : MANGESH S. PATIL, J.

DATE : 17-02-2022

PER COURT :

. This is a Second Appeal filed by the original defendants against whom the trial court has passed a decree of perpetual injunction restraining them from obstructing respondents' / plaintiffs' possession over the suit property which is described as a portion admeasuring 32 Are from land Gat No.247, which decree has been confirmed by the lower appellate court by dismissing their appeal by

the judgment under challenge in this Second Appeal.

2. The sum and substance of the facts leading to the filing of the Second Appeal are as follows :

(a) Divan Chindha, Madhavrao Chindha etc., were the original owners of the land Gut No.247 admeasuring 84 Are. They sold it to one Chimanrao Madhavrao Patil. Out of that, Chimanrao converted 52 Are portion for non-agricultural use and sold the remaining 32 Are portion to the respondents under a registered sale-deed of the year 1983 (Exh.133).

(b) The respondents claiming to be in exclusive possession of that 32 Are portion (hereinafter referred to as the 'suit property') filed a suit for injunction averring that the appellants were disturbing their possession.

(c) Only appellant no.2 contested the suit by his written-statement. As far as execution of the sale-deed is concerned, he did not raise any dispute.

(d) Appellant no.2 contended in his written-statement that the original owner Diwan Chindha and Madhavrao Chindha etc.,

were the owners of land Survey No.1/1A which was merely comprising of 1 Acre 2 Gunthe portion, whereas their predecessor were the owners of the land Survey No.1/1B admeasuring 2 Acres 4 Gunthe. During consolidation scheme, Survey No.1/1A was allotted Gut No.247 and Survey No.1/1B was allotted Gut No.248. However, while implementing the scheme under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as the 'Consolidation Act'), an error was committed and the land Gut No.247 was shown to be comprising of 89 Are portion, whereas the land Gut No.248 was merely recorded as having 40 Are portion.

(e) The appellant no.2 further contended that taking advantage of such error in implementing the scheme under the Consolidation Act, Diwan Chindha and Madhavrao Chindha etc., sold 84 Are portion to Chimanrao who in turn converted 52 Are portion for non-agricultural use and sold the suit property i.e. remaining 32 Are portion from Gat No.247 to the respondents under a sham sale-deed.

(f) The respondents are none other than the daughters of Chimanrao.

(g) Holding that the land Gut No.247 admeasuring 89 Are was formed during implementation of the scheme under the Consolidation Act and which was never challenged nor were the sale-deeds and by observing that the revenue record consistently demonstrated respondents possession and following the principle that possession follows title, the trial court decreed the suit.

(h) The lower appellate court has confirmed the findings and dismissed the appeal of the appellants.

3. The learned advocate for the appellants, would vehemently submit that *ex facie* the respondents are taking disadvantage of a clerical error committed while implementing a scheme under the Consolidation Act, when it can be easily seen that their predecessor Chimanrao could not have derived a title to the entire 84 Are portion as even their predecessor Diwan Chindha and Madhavrao Chindha etc., were not having any title to that extent. Merely because a larger portion was shown as forming Gut No.247, no legal title could have been created in favour of the respondents.

4. The learned advocate would further submit that the suit

was a collusive suit filed by Chimanrao as a power of attorney holder of the respondents. However, during the course of pendency of the suit before the trial court, the respondents executed a fresh power of attorney in favour of their brother Prakash (PW-1), who had no personal knowledge about the facts of the case and was not competent to depose on behalf of the respondents in view of the decision of the supreme court in the case of **Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd and others, 2005 (1) Mh.L.J. 1170**. He would, therefore, submit that in the absence of direct evidence about obstruction, the respondents having failed to step into the witness box, there was no evidence much less sufficient and an adverse inference ought to have been drawn against them, which the lower courts failed to draw.

5. Per contra, learned advocate for the respondents would submit that there is no dispute about the fact that the scheme under Consolidation Act was finalized way back in the year 1970. Pursuant to such scheme even the revenue record was mutated consistently showing that the land Gut No.247 was admeasuring 89 Are. Since the Consolidation Act is a complete code, any error or illegality in implementation of a scheme under that Act can be challenged only within the provisions prescribed therefor under that Act. At no point

of time the appellants having ever made attempt to challenge it, they cannot be indirectly permitted to question its correctness. He would further submit that the effect of these provisions of the Consolidation Act were clearly borne in mind by the courts below while discarding the appellants' stand. The decisions being consistent findings of facts, no substantial question of law arises for the determination by this Court.

6. There can be no manner of doubt that the suit property is a part and parcel of Gut No.247 which has been formed in implementation of a scheme under the Consolidation Act. There is also no dispute about the fact that the scheme was finalized in the year 1970 and pursuant thereto, by virtue of Mutation Entry No.1658 revenue record was also mutated so as to demonstrate the extent of that land as 89 Are portion. The aims subjects for enactment of the Consolidation Act are clear. With a view to prevent fragmentation of agricultural holdings and to provide for consolidation of agricultural holdings for better cultivation, the Act was enacted. While prohibiting creation of any fragment in Chapter II, a procedure for consolidation is provided in Chapter III and effect of consolidation is stated in the provisions contained in Chapter IV. More importantly, Section 31A provides for correction of clerical and arithmetical mistakes in the

scheme, whereas Section 32 provides for a power to vary scheme on the ground of error, irregularity or informality. Under Section 33 and 33-A even a scheme can be revoked. If such is the state-of-affairs, when according to the appellants it is pursuant to an error committed during implementation of a scheme under the Consolidation Act, a remedy under these provisions was certainly available for them to invoke. Apart from the fact that they had never taken recourse to any such remedy of getting the error corrected till filing of the suit, even thereafter they never seem to have taken such steps. It is important to note that even under Section 32 a period of limitation of one month has been provided from the date of publication of a draft scheme to challenge it. It is, therefore, quite clear that the scheme that was finalized in the year 1970 has never been challenged by the appellants till date i.e. for more than 50 years. Therefore, they are now estopped from putting up any such defence referring to an error in implementation of the scheme under the Consolidation Act.

7. Allowing any such defence on these lines to be raised would tantamount to usurping a jurisdiction which does not vest in the civil court rather, which has been specifically barred by virtue of Section 36A of the Consolidation Act. Entertaining such a defence would certainly be in derogation to this provision. Though the courts

below have not specifically adverted to it, no defence could have been permitted to be raised touching implementation of scheme under the Consolidation Act. Therefore, the very stand of the appellants pointing to the errors in the scheme was not entertainable by the civil courts and the submission of their learned advocates banking upon it is liable to be simply discarded.

8. So far as the submission of the learned advocate for the appellants regarding drawing of adverse inference against the respondents for not stepping into the witness box as laid down in the case of **Janki Vashdeo Bhojwani** (supra), if the facts and circumstances discussed herein above are borne in mind, when there was no dispute about the fact that during implementation of a scheme under the Consolidation Act the area of land Gut No.247 was certified to be 89 Are and to which no challenge was put up and when admittedly the original owners sold 84 Are to Chimanrao who in turn converted 54 Are to non-agricultural use and sold remaining 32 Are to the respondents, no further evidence was required from the side of the latter to establish their claim. In my considered view, the appellants are not entitled to rake up an issue on this count by relying upon the decision in the case of **Janki Vashdeo Bhojwani** (supra).

9. Learned advocate for the appellants would lastly submit that since the appellants were disputing the title of the respondents, the suit could not have been decided by treating it as the suit for injunction simplicitor and question of title ought to have been gone into as laid down in the case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs and Ors, AIR 2008 SC 2033.**

10. With respect, the supreme court in the matter of **Anathula** (supra) has laid down the position in regard to suits for prohibitory injunction relating to immovable property and has laid down the parameters where the issue regarding title should be gone into. Though no specific issue was framed by the trial court touching the aspect of title, it has, by referring to the decision in **Anathula** (supra) correctly demonstrated as to how there was no cloud on the title of the respondents to the suit property, in view of the peculiar fact that the scheme under Consolidation Act was implemented and was sufficient to confer title on the respondents. To my mind, in real sense the dispute was never in respect of the title to be gone into by the trial court in view of the peculiar facts and circumstances and for the reasons discussed herein above.

11. In view of above, no substantial question of law arises

for decision of this court to upset the concurrent findings of the courts below. The Second Appeal is therefore liable to be dismissed and is accordingly dismissed.

12. In view of disposal of the Second Appeal, nothing survives for consideration in the pending Civil Application No.12539 of 2019 and the same stands disposed of.

(MANGESH S. PATIL)
JUDGE

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Gajanan