

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.819 OF 2018**

1. Sawata S/o Asaram Doke,
Age: years, Occu: Agril,
R/o. Khalapuri, Tq. Shirur-Kasar,
Dist. Beed.

2. Tukaram S/o Asaram Doke,
Age: years, Occu: Agril,
R/o. Khalapuri, Tq. Shirur-Kasar,
Dist. Beed.

..Appellants
(Orig. Plaintiffs)

Versus

1. Rohidas S/o Dagadu Doke,
Age: 58 years, Occu: Agril,
R/o. Khalapuri, Tq. Shirur-Kasar,
Dist. Beed.

2. Seetaram S/o Dagadu Doke,
Age: 63 years, Occu: Agril,
R/o. Khalapuri, Tq. Shirur-Kasar,
Dist. Beed.

..Respondents
(Orig. Defendants)

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Mr. V. P. Latange, Advocate for the Appellants.

Mr. K. D. Bade Patil, Advocate for Respondent Nos.1 and 2.

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CORAM : S. G. CHAPALGAONKAR, J.

DATE : 12th JULY, 2023.

ORDER:-

1. The appellants/original plaintiffs approached this Court under Section 100 of the Code of Civil Procedure challenging the judgment and decree dated 08.03.2018 passed by the District Judge, Beed in Regular Civil Appeal No.147/2015, thereby confirming the judgment and decree passed by the Civil Judge, Junior Division, Shirur (K), Dist. Beed dated 14.09.2015 in Regular Civil Suit No.8/2010. (Hereinafter, parties

are referred as per their original status before the Tribunal for the purpose of convenience and brevity).

2. The plaintiffs had instituted Regular Civil Suit No.8/2010 seeking relief of declaration of ownership and perpetual injunction in respect of the land bearing Gut No.794 admeasuring 28 R. The contention of the plaintiffs is that the suit land is their ancestral property. Their father Asaram Doke was original owner and in possession of the suit property during his lifetime. He partitioned the suit land amongst the plaintiffs. The mutation entry no.292 has been certified by the Circle Officer, Raimoha on 13.07.1988. It is further contended that the plaintiffs were using the said property for keeping their cattle. The existing construction is now in dilapidated condition; therefore, they had decided to reconstruct the property. However, the defendants raised dispute over the boundaries. The plaintiffs measured the land through surveyor, who prepared map dated 02.06.2009 after measurement. However, defendants obstructed the construction on 16.01.2010, therefore, plaintiffs have instituted the suit seeking decree of declaration and perpetual injunction.

3. The defendants contested the claim by filing written statement. The contention of the defendants is that the Gut No.794 has been carved out from original Survey No.144, which was exclusively in the name of the Dagdu Vithoba Doke. However, after merger of Survey No.144/4 in Gut No.794 during the consolidation scheme, the entire Gut No.794 has been shown in the name of Asaram Dhondiba Doke. They denied contention of plaintiffs that the entire Gut No.794 was owned by Asaram and his sons. It is further contented that the defendants are residing in the suit property since last more than 25 years and cultivating the portion of land for banana orchard and other crops. They contend

that there is no cause of action. The suit is instituted with intention to grab the part of the property within ownership of the defendants taking disadvantage of the incorrect mutation entry recorded during the consolidation.

4. The Trial Court had framed the issues based on pleadings of the parties. The evidence was recorded. The plaintiffs relied upon their own evidence filed on record, evidence of PW-2-Avinash and map prepared by Taluka Inspector of Land Record dated 02.06.2009 placed at Exhibit-47. The defendants relied upon the evidence of DW-1 Rohidas and DW-2 Seetaram. They have further relied upon the evidence of adjacent land owners. The Trial Court on appreciation of evidence recorded a finding that the plaintiffs could not prove the exclusive ownership and possession over the suit property and dismissed the Suit vide judgment and order dated 14.09.2015. The appeal filed before the District Court by the plaintiffs came to be dismissed by the judgment and order dated 08.03.2018 by which the findings recorded by the Trial Court are confirmed.

5. Mr. Latange, learned Advocate appearing for the plaintiffs submits that the plaintiffs had claimed relief of injunction in respect of land Gut No.794 admeasuring 28 R situated at village Khalapuri, Tal. Shirur (Ka), Dist. Beed. The property is more particularly described in the plaint by giving boundaries of the suit land. He would submit that the revenue record clearly reveals that the father of the plaintiffs was owner of the land during his lifetime. He partitioned the same and plaintiffs have acquired ownership and possession based on such partition. He would submit that the defendants have no concern with the land Gut No.794. Since the defendants had raised the dispute regarding boundaries, the plaintiffs had caused measurement through Taluka In-

spector of Land Records for fixation of boundaries. The Taluka Inspector of Land Records prepared map dated 02.06.2009, which is consistent with the boundaries described in the plaint. He would submit that if the defendants are raising any dispute regarding Consolidation, their remedy lies before authorities under the Consolidation Act. However, only because such dispute is raised, the plaintiffs cannot be unsuited. He would submit that both the Courts below have recorded perverse findings of fact and refused to grant relief of injunction to the plaintiffs. He would submit that having accepted the title of the plaintiffs over the suit property, the Courts below have committed serious error of law in refusing to grant discretionary relief in the nature of decree and perpetual injunction.

6. Per contra, Mr. Bade Patil, learned Advocate appearing for the defendants supported the judgment passed by the Courts below and contends that the second appeal cannot be entertained against the concurrent findings of facts unless the perversity is found. He would submit that no substantial questions of law arise in this second appeal and urge to dismiss the same.

7. It is trite that, this Court would entertain the second appeal only on substantial questions of law that arise for consideration in the facts of the case. Apparently, the Trial Court so also Appellate Court recorded findings of the fact that Gut No.794 situated at village Khala-puri, Tal. Shirur (Ka), Dist. Beed is carved out from Survey No.144. PW-2 the witness of plaintiffs admitted that there was no partition between plaintiffs and defendants, although the suit property was ancestral. The consolidation extract at Exhibit-73 filed on behalf of plaintiffs shows that the part of the Survey No.144 has been merged into the Gut No.794. The original Survey No.144 was standing in the name of the

Dagdu Vithoba Doke i.e. father of the defendants. Almost 14 gunthas of land from original Survey No.144 has been merged in Gut No.794. The 7/12 extract placed at Exhibit-46 in respect of land Survey No.144 shows that the father of the defendants was owner of 16 gunthas land from the said Survey number. The map at Exhibit-47 filed by the plaintiffs shows that only 15 R land is in the possession of the plaintiffs out of Gut No.794. The Gut No.794 is surrounded by Gut Nos.795, 793 and 790. The defendants are the owners of the lands adjacent to the Gut No.794. During the cross-examination of the plaintiffs, he accepts that the defendants have constructed house in their portion and there are constructions of respective land holders from East to West side. The portion of the plaintiffs is on Western part of the defendants.

8. The consolidation extract at Exhibit-73 clearly reveals that Gut No.794 has been formed including Survey No.144/4 belonging to the defendants, however, names of the defendants have been excluded from the ownership of Gut No.794. The dispute to that effect has been raised before the Appellate Authority under the provisions of Consolidation Act. The aforesaid factual aspects clearly depict that the plaintiffs could not establish their exclusive ownership as well as possession over the entire Gut No.794, particularly map at Exhibit-47 placed by the plaintiffs on record demolished their own theory. The Trial Court as well as the Appellate Court after considering the aforesaid factual aspects recorded the findings that the plaintiffs have failed to prove their exclusive ownership and possession over suit property. In that view of the matter, no error found in the finding recorded by Courts below.

9. Mr. Latange, learned Advocate appearing for the plaintiffs submits that when suit was filed simplicitor for perpetual injunction, the enquiry into title of the plaintiffs was not germane to the proceed-

ings. He would submit that the evidence of the plaintiffs supported by 7/12 extract shows that the plaintiffs are owners in possession of the entire Gut No.794. As such, the case for grant of decree for injunction was made out. However, such contention cannot be accepted. The plaintiffs raise claim that they acquired the title from forefather and continued in possession. It is also admitted that the properties were jointly owned by the ancestors of the plaintiffs and defendants. The old revenue record of Survey numbers depicts that the part of the Gut No.794 formulated after consolidation was owned by the grandfather of the defendants. The plaintiffs could not prove exclusive title and possession over the suit property. Even the map at Exhibit-47 relied by the plaintiffs shows that entire Gut No.794 is not possessed by them. In that view of the matter, the relief of perpetual injunction cannot be granted unless some enquiry regarding source of title of the plaintiffs is made and clouds of doubt on title of plaintiffs are cleared.

10. In view of the aforesaid circumstances, no substantial questions of law arise for consideration in the Second Appeal. No perversity is brought to the notice of this Court in the findings of facts so recorded. Such findings are based on admissible evidence placed into service. Hence, Second Appeal is dismissed in limine.

(S. G. CHAPALGAONKAR)
JUDGE