

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

WRIT PETITION NO. 5409 OF 2016

Santosh Pandurang Hembade and others	.. Petitioners
Versus	
Namdev Sakharam Wankhede and another	.. Respondents

Shri Hanmant V. Patil, Advocate for the Petitioners.

The Respondent No. 1 is served.

Shri Sudhir K. Chavan, Advocate for the Respondent No. 2.

**CORAM : SHARMILA U. DESHMUKH, J.
DATE : 06TH JANUARY, 2023.**

FINAL ORDER :

. The challenge in this petition is to the order dated 08th February, 2016 passed by the Civil Judge Junior Division, Sengaoon below Exhibit 48 in R.C.S. No. 58 of 2011, whereby the application of the third party applicant to be impleaded as a party defendant in R.C.S. No. 58 of 2011 came to be allowed.

2. R.C.S. No. 58 of 2011 came to be filed by the Petitioners for declaration of ownership, recovery of possession of 0.70R and for mesne profit against the respondent No. 1 herein. The subject land is gut No. 436 admeasuring 5.00H, which is claimed to have been inherited by the petitioners from their forefathers. It is the case of the petitioners that the father of the Petitioner was owner of Gat No 436 which was part and parcel of survey No. 99(3). Gat No 436 was partitioned by the father of the petitioners amongst the petitioners and the petitioners are cultivating the said land adm. 5H jointly. Upon measurement of Gut NO 436 on 2501.2011, it is alleged that the T. I. L. R. Sengaoon found

encroachment of the respondent No. 1 to the extent of 0H 70R.

3. On 10th October, 2013, an application came to be filed by the respondent No. 2-Ramhari seeking his impleadment in the suit proceeding on the ground that during the partition of land Sy. No. 99(3), which is the ancestral property, between the father of the Petitioners, Jaganath Vithal and the Respondent No 2, each party was allotted 4 H 72 R, however, the area which came to his share was reduced and thereby the share of the father of the petitioners was increased to 5H. As he claims right in the said 70R land, which is subject matter of suit R.C.S. No. 58 of 2011, the application was filed for impleadment, which was resisted by the petitioners herein on the ground that 7/12 extract of the subject property i. e. land gut No. 436 does not mention the name of the applicant and he is owner of separate gut No. 435 and accordingly his name is also mutated in the revenue record and as such present application has been filed in collusion with the original defendant No. 1 only for the purpose of prolonging the trial.

4. Learned counsel for the petitioners submits that the dispute is about encroachment of land and the respondent No. 2 is claiming his land on basis of consolidation scheme, which proceedings are not yet decided. He would submit that the Respondent No 2, who was allotted Gut No 435, had partitioned the same between himself and his brother and both of them have sold their share to third party. He would contend that the Respondent No 2 has no right title or interest in Gut No 436 and has no legal right to be impleaded as party. Learned Counsel for Petitioner has tendered the order Deputy Director of Land Records dated 11th July, 2017, whereby the appeal of the

Petitioners has been allowed and it has been held that during the consolidation scheme, the father of the Respondent No 2 was present and during his lifetime, there was no challenge to the consolidation scheme. Subsequently the land bearing Gut No 435 was sold to different purchasers and the name of Respondent No 2 has been deleted from 7/12 extract.

5. Per contra, learned counsel appearing for the respondent No. 2 supports the impugned order. He would further contend that the order dated 11th July, 2017 has been tendered during arguments and he has no instructions as to whether the order was carried further in challenge before the Hon'ble Minister.

6. The facts of the present case are that, land Sy. No. 99(3) was owned by one Ratnaji, who had three sons namely Jagan, Ramhari (present respondent No. 2) and Pandurang (father of the petitioners). There was oral partition between the sons of Ratnaji and the revenue record shows that each son got 4H 72R land. In the year 1985 in the consolidation scheme Ramhari i. e. respondent No. 2 was allotted 3H 76R and Pandurang i. e. father of the petitioners was allotted 5H 00R land and Jagan was allotted 5H 41R land. The dispute is between the respondent No. 2 Ramhari and the petitioners. Upon the consolidation scheme being implemented, land Sy. No. 99(3) was placed into three gut numbers bearing gut No. 431 allotted to Jagan, land gut No. 435 allotted to Ramhari and land gut No. 436 allotted to Pandurang. The petitioners claim to be the owners of 5H land, in which it is alleged that the respondent No. 1, who is the transferee of the part of the land allotted to Ramhari i. e. gut No. 435, had encroached and hence the suit came to be filed. In the suit which

was filed by the petitioners an application was made for impleadment by the respondent No. 2, which was rejected, against which the respondent No. 2 had filed Writ Petition No. 9789 of 2013, which came to be allowed and the matter was remanded to the Court of Civil Judge Junior Division, Shengaan for decision afresh, and the impugned order is the decision. It is necessary to take into consideration the observations made by this Court in the order dated 06th August, 2014 passed in Writ Petition No. 9789 of 2013, which reads as under :

"The claim of respondent in the suit if tested, the claim is made for an area of 5 hectare of land whereas from the 7/12 extract, it appears that his holding was to the extent of 4.73-R from Survey No.9. In any case, if the holding of the plaintiff to the suit is 4.73-R and if he is claiming relief of 5 hectare, the remaining land, other than the entry made in the 7/12 extract of Survey No.99 requires to be looked into as the remaining land i.e. 0.27-R for which relief is claimed in the suit, has to be from some other gut number."

7. Although, it is the case of the petitioners that the respondent No. 2 having partitioned his property between himself and Gajanan and thereafter the respondent No. 2 and Gajanan having alienated the property in favour of third party, it needs to be considered that the property which came to the share of the Ramhari in consolidation scheme was 3H 76R. The question still remains, as to when in the oral partition the heirs of Ratnaji were each allotted 4H 76R in the consolidation scheme the share of the respondent No. 2 was decreased to 3H 76R, whereas the share of the father of the petitioners is increased to 5H, out of which 0.70R is alleged to have been encroached by the respondent No. 1.

8. In view of the observations made by this Court in the order dated 06th August, 2014 in Writ Petition No. 9789 of 2013, which has attained finality, it is required to be determined, if the claim is made for 5H of land contrary to the 7/12 extract, where holding is shown to the extent of 4H 73R, the remaining land, other than the entry made in the 7/12 extract of Survey No. 99 requires to be looked into as the remaining land for which relief is claimed in the suit has to be from some other gut number. It therefore cannot be said that the respondent No. 2 is a complete stranger to the Gut No 436. Considering the above, it cannot be said that Respondent No 2 in the event the respondent No. 2 succeeds in the challenge to the consolidation proceedings, the decision in R.C.S. No. 58 of 2011 will bind the respondent No. 2 and will affect his interest.

9. Considering that it has come on record that there was an error in measurement at the time of consolidation scheme, it cannot be said that the Respondent No 2 has no interest in the suit land and as such the order directing impleadment of the respondent No. 2 cannot be faulted with.

10. Writ petition is devoid of merits and same is accordingly dismissed. Needless to state that the observations made herein are for the purpose of considering the validity of the impugned order and the proceedings before the trial court are to proceed on its merits and in accordance with law uninfluenced by the observations made herein. There shall be no order as to costs.

[SHARMILA U. DESHMUKH, J.]