

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.485 OF 2019
WITH
CIVIL APPLICATION NO.9858 OF 2019
IN SA/485/2019**

Irwanta s/o Maroti Shembale,
Age 66 years, occupation agri.,
R/o Phulwal Tq. Kandhar,
District Nanded.

...Appellant
(Original defendant)

VERSUS

Narayan s/o Vithoba Shembale,
Age 72 years, occupation agri. And
Pensioner, R/o Fulwal Tq.Kandhar,
District Nanded.

...Respondent
(Original plaintiff)

.....

Advocate for Appellant : Mr. V. B. Dhage
Advocate for Respondent : Mr. S. B. Patil

.....

CORAM : ARUN R. PEDNEKER, J.

Date of Reserving the Order : 20/07/2023

Date of Pronouncing the Order : 24/07/2023

ORDER :

By the present second appeal, the appellant is challenging the Judgment dated 09/08/2018, passed by the learned District Judge -1, Kandhar ,in Regular Civil Appeal No.40 of 2012, and the Judgment and order dated 31/10/2012, passed by the Joint Civil Judge Senior

Division, Kandhar in Regular Civil Suit No.86 of 2004, whereby the Courts have concurrently held that the appellant/defendant has encroached upon the suit property of the plaintiff/respondent and has directed the defendant to deliver possession of encroached portion to the plaintiff.

2. Brief facts giving rise to the filing of the present second appeal are as under : -

The suit land consists of 1 H 90 R land out of which 0 H 45 R is the disputed area of encroachment. The plaintiff contends that he is owner of land admeasuring 1 H 90 R situated at Phulwal, Taluka Kandhar, District Nanded. The plaintiff was residing out of village and defendant made encroachment on the Northern side of the suit land. Thereafter, the plaintiff on 23/02/2004 gave application for measurement of the suit land to Taluka Inspector of Land Records and deposited measurement charges. The surveyor after giving notices to the plaintiff, defendant and another person, measured the land on 16/03/2004 and 28/03/2004, and it was found that the defendant had made encroachment over 45 R land of plaintiff at North-West corner of the plaintiff's land.

3. The defendant refused to give possession of encroached portion to the plaintiff. Therefore, the suit was filed for the possession of 0 H 45 R land. The defendant in his written statement denied the title of the plaintiff and refused to give possession. He denied that measurement was carried out after notices to plaintiff and defendant. He contended that he has received suit land by way of inheritance by partition of inherited properties. Based on the pleadings, the Trial Court formulated the following issues along with its findings as under :-

	<u>ISSUES</u>	<u>FINDINGS</u>
1	Does plaintiff prove that he is owner of 1 H 90 R land of G.No.122 ?	...In the affirmative
2	Does plaintiff prove that defendant encroached 45 R land of plaintiff ?	...In the affirmative
3	Is plaintiff entitle for relief claim ?	...In the affirmative
4	What order and decree ?	...As per final order

The Trial Court held that the plaintiff is the owner of 1 H 90 R land of Gut No.122, and that the defendant has encroached 45 R land of the plaintiff, and thus directed the plaintiff to hand over the possession of the encroached portion of the plaintiff.

4. The defendant challenged the Judgment before the Appellate Court. The Appellate Court formulated following points for determination along with its findings as under :-

	<u>POINTS</u>	<u>FINDINGS</u>
1	It is proved that, plaintiff is owner of 1 H 90 R land in Gat No.122 of village Phulwal ?	...Yes
2	It is proved that, defendant has made encroachment over 45 R land out of 1 H 90 R land of plaintiff in Gat No.122 ?	...Yes
3	Whether impugned judgment and decree require interference ?	...No
4	What order ?	...As per final order

The Appellate Court concurrently held that the plaintiff is the owner of 1 H 90 R land of Gut No.122 and that the defendant has made encroachment over 45 R land of the plaintiff.

5. The defendant challenges the concurrent Judgments of both the Courts below and contends that the plaintiff had received excess land under the Consolidation Scheme and that plaintiff having received land under the Consolidation Scheme, determination of the rights under the Consolidation Scheme, cannot be made by the Civil Court as the Civil Court's jurisdiction is barred, under the Maharashtra Prevention of Fragmentation and Consolidation of

Holdings Act.

6. He relies upon Section 36 A of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act and submits that no suit can be filed against an order passed under the Act. Section 36 A of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act reads as under :-

“36 A. (1) No Civil Court or Mamlatdar’s Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the State Government or any officer or authority.

(2) No order of the State Government or any such officer or authority made under this Act shall be questioned in any Civil, Criminal or Mamlatdar’s Court.”

7. The submission of the learned Advocate for the petitioner that the Civil Court had no jurisdiction under Section 36 A of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act is misconceived, as the suit is based on title and encroachment of land. There is no order passed under the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act which is challenged or subject matter of the challenge

in the suit. The plaintiff has claimed that he is owner of the Gut No.122 of 1 H 90 R land. He is able to establish his ownership and so also encroachment on his land by the defendant.

8. Exclusion of the jurisdiction of the Civil Court has to be strictly construed. The land is allotted to the plaintiff under the Consolidation Scheme. The land may be allotted to the plaintiff under the Consolidation Scheme. However, in the present proceedings the Order under the Consolidation Scheme is not under challenge. The plaintiff's case is based on title and he has succeeded to prove the same. Thus, the issue of bar of jurisdiction under the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act does not arise. In view of the same, the second appeal is dismissed. Pending civil application stands dismissed.

(ARUN R. PEDNEKER, J.)

vj gawade/-.