

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 402 OF 1995

Govind S/o Chatru Jadhav,
Age: 46 years, Occu. Agril,
R/o Dahphal Khandare,
Tq. Partur, Dist. Jalna

....Appellant.
(Orig. Deft. No.1)

Versus

1. Renu S/o Ganpat Khandare,
(Died, Respondent Nos. 2 to 4
are the L.Rs. of Res .No. 1 as per
Court order dated 26/02/2016.)
2. Yeshwanta, Age: 26 years,
3. Bhima, Age: 31 years,
4. Abhimannu, Age: 33 years,
All S/o Renu – Res. No. 1
5. Arjun S/o Genu, Age: 46 years,
6. Gyanuba S/o Arjuna, Age: 21 years,
7. Babu S/o Baliram, Age: 41 years,
Occu: Agril, R/o As above.
8. Shivram S/o Vithoba, Age 76 years,
Occu and R/o above.
9. Damodhar S/o Shivram,
Age: 46 years.
10. Sheshrao S/o Shivram, Age: 41 years.
11. Deelip S/o Shivram, Age 31 years,
12. Apparao S/o Vithoba, Age: 66 years,

13. Raosabeb S/o Appearao, Age: 41 years,
14. Bhau S/o Apparao, Age 31 years,
15. Bhagwan S/o Appa, Age: 26 years,
16. Sakharam S/o Ambadas,
Age: 31 years,
(Appeal stands dismissed
as against Respdt no.16
and stands abated
as against Respdt No.18
as per Addl. Registrar's
Court's order dtd 7/1/1998)
17. Ranuji S/o Arjuna,
Age: 56 years,
R/o As above.
18. Sitaram S/o Khome, Age: 66 years,
Occu: and R/o As above.

....Respondents.

(R.Nos. 1 to 17 Orig.
Pltfs. And R.no. 18-
Orig. deft no. 2)

Mr. S.S. Bora, Advocate for appellant.

Mr. V.R. Naik, Advocate for respondents Nos.1 to 5, 7 to 13, 15 & 17.

CORAM : T.V. NALAWADE, J.

DATED : 27th June, 2016.

JUDGMENT :

1) The appeal is filed against judgment and decree of Special Civil Suit No. 34/1984, which was pending in the Court of Civil Judge, Senior Division, Jalna and also against judgment and decree of Regular Civil Appeal No. 39/1989, which was pending in District Court, Jalna. Both the sides are heard.

2) In short the facts leading to institution of appeal can be stated as follows :-

Respondents had filed suit for recovery of possession of agricultural land bearing Survey No. 15, admeasuring 14 Hecter and 72 R. situated at village Dahiphal, Tahsil Partur, District Jalna. It appears that after filing of the suit, the area came under the Jalna District Court. It is the case of plaintiffs that they are related to each other as cousins and they are successors of common ancestor Bhiva. They have given genealogy in the plaint. It is their case that the suit land was ancestral property of their predecessors and so, all the plaintiffs are owners of the suit property. It is the case of plaintiffs that some plaintiffs were in need of money as they wanted to purchase another land and so, they had agreed to sell the suit land to defendant No. 2 - Sitaram for consideration of Rs.4,500/-. It is contended that under agreement of sale, the earnest amount of Rs.500/- was given to them and the possession was given to defendant No. 2 by them. It is contended that the remaining amount of consideration was to be paid within a period of six months from the date of agreement. It is contended that at the time of agreement, only plaintiff Nos. 1, 8 and 16 had made such agreement and many plaintiffs were minors and as the permission was not obtained to sell the property of minors,

there was no agreement in respect of shares of minors with defendant No. 2. It is contended that in any case the remaining amount was not paid and no readiness and willingness was shown by defendant No. 2 to complete the transaction. It is contended that the agreement was made at the time of Gudipadwa of 1961.

3) It is the case of plaintiffs that defendant No. 2 avoided to make payment of the remaining amount and he did not return the possession, but in stead of that he handed over possession to defendant No. 1, who is influential person. It is contended that as the owners they are entitled to get back the possession from both the defendants. They contended that the cause of action took place in the year 1966 when defendant No. 1 contended that possession was given to him by defendant No. 2. The suit was filed in January 1977.

4) Defendant No. 1 filed written statement and he contested the matter. He denied everything including the relationship of plaintiffs with each other and their right to get the possession from defendants.

5) It is the case of defendant No. 1 that there was

agreement of sale between him and defendant No. 2 and prior to year 1966, some amount was paid by him to defendant No. 2 and he had agreed to sell the property for consideration of Rs. 11,100/-. It is contended that from time to time, amounts were paid to defendant No. 2 and total amount of Rs. 11,000/- was paid by him to defendant No. 2. He admitted that there was some transaction between some of the plaintiffs and defendant No. 2. He contended that the transaction had taken place in the year 1959 and under the agreement, the possession was given to defendant No. 2 by them. He also contended that he is a relative of defendant No. 2 and both of them were cultivating the land from the year 1950. It is contended that on 15.4.1961 permission was given by Tahsil Office under the Tenancy Act for purchasing the property and at that time, defendant No. 1 had not taken objection due to relationship with defendant No. 2. Thus, he contended that from prior to 1950, he has been in possession. He took alternative defence that he has become owner due to adverse possession.

6) Issues were framed on the basis of aforesaid pleadings. Both the Courts below have held that under agreement of sale, the possession of land was given to defendant No. 2 by some of the plaintiffs, but no readiness and

willingness was shown by defendant No. 2. It is held that possession of defendant No. 1 is permissive in nature and defendant No. 2 had no right to sell the property. It is held that plaintiffs have better title and so, the suit for possession is decreed.

7) This Court admitted the appeal by observing that substantial question of law can be formulated on the basis of ground E mentioned in appeal memo. The ground is as under :-

(i) Whether the Courts below have committed error in holding that possession of defendant No. 1 is not under section 53-A of the Transfer of Property Act and he cannot be given protection of this section ?

8) From the pleadings in the plaint and written statement, it can be said that defendant No. 1 has not disputed that the plaintiffs were the owners of the land though it is contended that defendant Nos. 1 and 2 were cultivating the land from the year 1950. Defendant No. 1 has further admitted that the agreement of sale was made by defendant No. 2 with plaintiff in the year 1959. In view of this admission and the record, it can be said that possession of defendant No. 2 was under the agreement of sale. Defendant No. 1 has come with

specific case that he has given some money to defendant No. 2 and defendant No. 2 had agreed to sell the property to him. There is record starting from the year 1955 which is including Khasra Patrak, crop cultivation record. The original document of agreement of sale made in favour of defendant no. 2 is at Exh. 62. This record is consistent with the pleadings in the plaint. This record shows that defendant No. 1 had no concern at all with the suit property. The revenue record shows that his name came to be entered first time in the year 1966-67 and this entry was pencil entry in crop cultivation column. Then the entry was made in the year 1967-68 which was confirmed entry of crop cultivation.

9) Exhs. 62 and 63, the two separate agreements made by some of the plaintiffs show that out of the total amount of Rs. 5,000/- which is mentioned in the document, the amount of Rs. 2,225/- was paid till 28.5.1960. The possession of Sitaram up to aforesaid year was under this agreement as per the revenue record. It is the case of defendant No. 1 that his possession was also under the agreement of sale and agreement was executed by defendant No. 2 in his favour. Thus, the possession of both defendant Nos. 2 and 1 was permissive in nature and in view of the nature of pleadings, it cannot be said that the possession of

defendant No. 1 was adverse as against plaintiffs.

10) Even if it is accepted that some validation certificate, the permission to execute the sale deed in favour of defendant No. 2 was granted, admittedly, no sale deed was executed in favour of defendant no. 2. There is no record to show that the remaining consideration was paid by defendant No. 2 to plaintiffs.

11) One so called agreement executed by defendant No. 2 in favour of defendant No. 1 is produced at Exh. 93. It was written on simple paper, not on a stamp paper. Though the penalty is shown to be recovered under the Stamp Act, the fact remains that only on the basis of this document dated 4.6.1966 defendant No. 1 is claiming his possession.

12) To take the protection of provision of section 53-A of Transfer of Property Act, it was necessary for defendant No. 2 to show that he was ready and willing to perform his part of contract. Defendant No. 2 did not contest the matter and there is material of aforesaid nature in favour of defendant No. 1. There was only the agreement of sale in favour of defendant No. 2 and so, no interest as such had passed in favour of defendant No. 2

in the suit property. If defendant No. 2 was not able to prove that he was ready and willing to perform his part of the contract, nothing could have been achieved by defendant No. 1 on the basis of aforesaid material. No interest has passed in favour of defendant No. 1 even if the aforesaid record is accepted as it is. The basic condition for getting protection of section 53-A of Transfer of Property Act is not fulfilled and so, the defendant No. 1 is not entitled to get that protection.

13) In view of the aforesaid documentary evidence, not much weight can be given to oral evidence. The oral evidence is not on the conditions specified in section 53-A of the Transfer of Property Act. In view of nature of pleadings quoted above, it was not possible to hold that possession of defendant No. 1 is adverse and he has become owner. In any case, the suit was filed in the year 1977 when it is the contention of defendant No. 1 that he came in possession in April 1966. Due to this circumstance also it was not possible for defendant No. 1 to prove his case of ownership due to adverse possession. It can be said that the defendant could keep the possession for so many years of the suit land, having area 14 Hector and 72 R. by misusing the process of law. The Courts below have not committed any error in giving decision in favour of plaintiffs. So,

the aforesaid point is answered in negative and appeal stands dismissed.

[T.V. NALAWADE, J.]

ssc/