

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

Second Appeal No.514 of 1996

- 1) Bhalchandra Kishanrao Khodve
Died, through his legal representatives
- 1-A) Rajani w/o Bhalchandra Khodve,
Age 65 years,
Occupation : Household,
R/o Sai Shanti Apartments,
Godawari Nagar, Taroda (Kh),
Nanded.
- 1-B) Sadhana w/o Sudhir Subhedar,
Age 48 years,
Occupation: Household,
R/o H.No.5-5-25, Khalilwadi,
Nizamabad (A.P.)
- 1-C) Sunil s/o Bhalchandra Khodve,
Age 45 years,
Occupation: Service,
R/o N/D-42, P-2, 3/6,
Bhavani Colony, HUDCO,
Nanded.
- 1-D) Urmila w/o Jayantrao Unhale,
Age 43 years,
Occupation: Household,
R/o Jyoti Mandir, Jyoti Nagar,
Aurangabad.
- 1-E) Sudhir s/o Bhalchandra Khodve,
Age 41 years,
Occupation: Service,
R/o Godawari Nagar, Taroda (Kh),
Nanded.

- 2) Rajaram Kishanrao Khodve,
Age 46 years, Occupation: Service,
R/o Loha, District Nanded.
- 3) Anant Kishanrao Khodve.
Died, through his legal representatives
- 3A) Shantabai w/o. Anantrao Khodve,
Age 62 years, Occupation : Household,
R/o Deul Galli, Vitthalwadi, Loha,
Taluka Loha, District Nanded.
- 3B) Archana w/o. Amolrao Ashturkar,
Age 32 years, Occupation: Household,
R/o As above.
- 3C) Aniruddha s/o. Anantrao Khodve (Pujari)
Age 27 years,
Occupation: Bhikshuki & Agriculture,
R/o As above.
- 3D) Ashwini d/o Anantrao Khodve (Pujari)
Age 25 years, Occupation: Household,
R/o As above.
- 3E) Aparna w/o. Vishnupant Dande,
Age 37 years, Occupation: Household,
R/o C/o. Rajeshwarrao Khodve,
Radhai Nivas, Farande Nagar, Nanded.
- 3F) Amruta w/o. Diwakarrao Pathak,
Age 30 years,
R/o. H.No.9/1/728, Nandi Colony,
Bidar (State of Karnataka)
- 4) Madhukar Kishanrao Khodve,
Age 42 years,
Occupation: Agriculture,
R/o Loha, District Nanded. .. **Appellants.**

Versus

- 1) Laxman Naroji Budruk,
Age 70 years,
Occupation: Agriculture,
R/o Pangri, Taluka Loha,
District Nanded.
- 2) Vithal Maruti Budruk,
Age 31 years,
Occupation: Agriculture,
R/o As above.
- 3) The State of Maharashtra,
Through the Collector, Nanded. .. **Respondents.**

Shri. S.V. Warad, Advocate, for appellants.

Shri. S.V. Kurundkar, Advocate, holding for Shri. M.D.
Narwadkar, Advocate, for respondent Nos.1 and 2.

Shri. S.P. Sonpawale, Assistant Government Pleader, for
respondent No.3.

CORAM: T.V. NALAWADE, J.

DATE : 9th AUGUST 2016

JUDGMENT:

- 1) The appeal is filed against the judgment and decree of Regular Civil Suit No.36/1985 which was pending in the Court of Civil Judge, Senior Division, Nanded and also against the judgment and decree of Regular Civil Appeal No.322/1991 which was pending in the Court of Joint District Judge, Nanded. The suit was

filed by present appellants for relief of recovery of possession of agricultural land and for declaration that the declaration made in favour of the predecessor-in-title of the defendants that he was protected tenant is void ab initio. The suit is dismissed by the trial Court and the findings given by the trial Court are confirmed by the first appellate Court. Heard both the sides.

2) The suit was filed in respect of 9 acres - 6 gunthas portion of land Survey No.27/B (now Gat No.59) situated at village Pangri, Tahsil Loha, District Nanded. It is the case of the plaintiffs that one Datta Guru had purchased entire survey No.27 admeasuring 24 acres 30 gunthas from one Haribhau Ganjewar under registered sale deed of 1942 AD (1352 Fasli) and he had taken possession of the land from the vendor. It is the case of the plaintiffs that in a suit filed in Civil Court, Court of Munsif, Kandhar in 1942 the title of Datta was confirmed and Datta was in possession till his death.

3) It is contended that the property was purchased by Datta for himself and his two brothers like

Kishan Guru and Ainath Guru and before the year 1950 AD partition had taken place amongst the three brothers. It is contended that Kishan Guru, father of plaintiff Nos.1 to 4 got 9 acres 6 gunthas of eastern side in the partition and he had come in possession of this property.

4) It is the case of the plaintiffs that one Maroti Nemaji, father of defendant No.2, and uncle of defendant No.1 was Mali Patil, Police Patil and also Patwari of village Pangri for many years prior to the year 1950 and even after 1950. It is contended that he was very influential man and when Maroti had no concern with the suit property and his real brother Naru Vithoba had also no concern with the suit property, they created record to show that they were the protected tenants in Survey No.27. It is contended that the record of cultivation was created for the year 1950-51 and then declaration was also made in favour of these persons. It is contended that false record of pahani patrak, cultivation record of the year 1348 Fasli, 1948 AD, was also created by them. It is contended that the declaration made in the year 1952 that these persons were protected tenants was not made by

following procedure laid down under the Tenancy Act (The Hyderabad Tenancy and Agricultural Lands Act, 1950) and so that declaration is not binding on the plaintiffs. It needs to be kept in mind that the declaration was in respect of entire area but the suit is filed in respect of area of 9 acres 6 gunthas portion.

5) It is the case of the plaintiffs that their predecessor, Kishan Guru was in possession of 9 acres 6 gunthas till the year 1974-75 after the partition but he was dispossessed in the year 1974-75 by the defendants who are successors of aforesaid Maroti and Naru. It is contended that Kishan Guru was poor and helpless man and as the defendants are influential persons, Kishan Guru could not do anything against them. It is contended that cause of action took place in the month of June 1975 when Kishan Guru was dispossessed. Suit was filed in the year 1985 and aforesaid reliefs were claimed.

6) The suit was contested by defendant Nos.1 and 2, successors of Maroti and Naru by filing written statement. They denied the allegations that false record

of cultivation was created and then declaration was made that their predecessors were protected tenants without following the procedure laid down under the Tenancy Act. It is the case of the defendants that even prior to purchasing of the property by Datta, these two persons were cultivating the land for previous owner and they continued to cultivate the land after purchasing the land by Datta. They contended that their names were entered in crop cultivation column and on the relevant date they were in possession and so they were declared as protected tenants of the suit property. They contended that they were the *Bataidars* of the previous owner and then also of Datta, the predecessor-in-title of the plaintiffs. It is contended that neither Datta nor Kishan challenged the declaration made in favour of the predecessor-in-title of the defendants and that declaration is binding on the plaintiffs. They contended that the suit is not tenable in the Civil Court and further the suit for declaration is not within limitation. They contended that the entries made in the record of rights and record of tenancy are conclusive in nature and they cannot be set aside by civil Court.

7) Defendant No.3, State of Maharashtra, filed written statement and it contended that necessary procedure laid down under the Tenancy Act was followed for making declaration of protected tenancy in favour of the predecessor-in-title of the defendants.

8) Issues were framed on the basis of aforesaid pleadings. Only the plaintiffs have given evidence. The trial Court held that the suit was not within limitation though it was held that the Civil Court has jurisdiction to give the reliefs claimed. The trial Court held that plaintiffs failed to prove that the declaration given in favour of Naru Vithoba, predecessor-in-title of the defendants that he was protected tenant is null and void. The District Court has confirmed the findings given by the trial Court.

9) This Court, other Hon'ble Judge, admitted the appeal by order dated 15-7-1998 though no substantial questions of law were formulated. In view of the rival contentions this Court allowed both the sides to argue on following substantial questions of law :-

(I) *Whether the Courts below have not considered relevant material on the basis of which inference could have been drawn that procedure was not followed for declaring the predecessor of defendant Nos.1 and 2 as protected tenant ?*

(II) *Whether the Courts below have committed error in holding that the suit for declaration is not within limitation ?*

10) Only the plaintiffs have given oral evidence. Before considering the oral evidence, the rival pleadings need to be kept in mind. It is specific contention of the defendant Nos.1 and 2 that their predecessor-in-title was cultivating the suit land, entire Survey No.27, even for the vendor of Datta Guru namely Haribhau Ganjewar and after the transaction made in favour of Datta Guru, they continued to cultivate the land on Batai basis for the purchaser. On the other hand, the plaintiffs came with the case that the defendants or their predecessor-in-title like Maroti Nemaji and Naru Vithoba had no concern at all with the suit property and they had never cultivated the suit land. The allegation of creation of false record of crop cultivation and tenancy record is made by plaintiffs.

It needs to be kept in mind that such record is created under supervision of the authority like Tahsildar and for giving declaration of protected tenant, Patwari has no role to play. It also needs to be kept in mind that during lifetime, Datta Guru or even father of the plaintiffs namely Kishan Guru did not challenge the declaration given in favour of the predecessor-in-title of the defendants. There is no explanation at all in respect of this circumstance from plaintiffs.

11) There is record like pahani patrak, crop cultivation record right from the year 1941 AD and it shows that the entire land was being cultivated either by Naru Vithoba or Maroti Mali. Admittedly they were real brothers *inter se*. There is record of Pik Pahani even of the year 1941 AD and it shows that in that year also son of Nemaji was in possession (Exhibit 63). Exhibit 64 shows that after purchasing the land by Datta Guru, Maroti and his brother continued to cultivate the land on Batai basis. The entries of these cultivators were continued for subsequent years and that can be seen from Exhibits 65 and 66. There are 7/12 extracts at Exhibits 67 to 71 and

they show that Naru Vithoba, predecessor-in-title of defendant Nos. 1 and 2 continued to cultivate the land and the entries are in his favour for the years 1960-61 to 1971-72. Plaintiffs are relying on one 7/12 extract of the year 1971-72 but the further revenue record like 7/12 extract for the years 1974-75 till date of suit is in favour of the defendants and it is not disputed by the plaintiffs that on the date of the suit defendant Nos.1 and 2 were in possession. This record also shows that in the year 1955 Nemaji, Naru Vithal was declared as protected tenant and he was in possession when the declaration was made.

12) Plaintiff No.3 Anant is examined for the plaintiffs and his examination-in-chief shows that after so called partition which took place amongst Datta and his two brothers, Maroti and Nemaji started cultivating the land. According to him, partition took place in the year 1950. He has specifically deposed in the examination-in-chief that they were cultivating the property on crop basis and this possession of Maroti and Naru continued till the year 1971. This evidence is totally inconsistent with the pleadings from the plaint already quoted. In the cross

examination this plaintiff has admitted that when Haribhau Ganjewar was owner of Survey No.27, father of defendant No.2 was cultivating Survey No.27. The entry in that regard made in revenue record is already quoted. Thus, possession of defendants from prior to 1941 is admitted. He has avoided to admit that since the year 1942 the entry in that regard in names of predecessor-in-title of defendants was there. He has only tried to say that entries in the 7/12 extract of Survey No.27 of Naru and Maroti were made without any inquiry. The entries are of various kinds and they can be of crop cultivation, 7-B entry or the entry with regard to declaration made of protected tenancy.

13) From the record it can be said that there is only Exhibit 5, 7/12 extract of the year 1971-72 showing that for that year the name of Kishan, father of plaintiffs was entered in ownership and cultivation column. But after that, the name of Naru Vithoba was again entered in the crop cultivation column and then names of the defendants were entered as successors of the protected tenant.

14) The learned counsel for the appellants submitted that when declaration of protected tenancy was challenged by the plaintiffs, it was necessary for defendant Nos.1 and 2 to show that necessary procedure as laid down in the Hyderabad Tenancy and Agricultural Lands Act, 1950 was followed by the authority. This proposition is not at all acceptable. Under section 114 of the Evidence Act presumption is available that necessary procedure was followed by the authority created under the Tenancy Act. Further, there is voluminous record to show the possession of the predecessor-in-title of defendant Nos.1 and 2 for relevant years. This Court is avoiding to discuss and interpret that record as that is the job of the tenancy Court. For the present purpose it was necessary for the plaintiffs to prove that the authority had not followed the procedure laid down in Tenancy Act. The relevant circumstances like absence of challenge from Datta Guru and even from Kishan is already quoted by this Court. These circumstances are sufficient to infer that the predecessors of the plaintiffs had no grievance with regard to the declaration made in favour of the predecessor-in-title of defendant Nos.1 and 2. In view of

these circumstances, there was no other alternative before the Courts below than to hold that the plaintiffs have failed to prove that proper procedure was not followed.

15) In the present proceeding, learned counsel for the appellants submitted that in the year 2015 application filed by the plaintiffs before the Tenancy Authority for deleting the names of protected tenant is allowed and so this circumstance needs to be considered. Learned counsel for the other side submitted that this order is challenged in appeal and stay is granted to the said order. In any case Civil Court is not expected to give such declaration and it can be said that now the plaintiffs have approached the proper authority. Though the point of jurisdiction is held in favour of the plaintiffs it can be said on the basis of record that, the civil Court could not have given such declaration.

16) Learned counsel for the plaintiffs, present appellants, submitted that now entries are made even in the crop cultivation column of the plaintiffs and they are

in possession. If that is true then there was no necessity for the appellants to prosecute the present matter. In any case when revenue record shows that in the capacity of protected tenant, the defendants are in possession, the civil Court has no jurisdiction to take possession from such persons and to hand it over to the landlord, owner. The Tenancy Act is self contained legislation and there is the procedure both for tenant and landlord for taking possession. Civil Court is not expected to use those provisions.

17) Learned counsel for the appellants has placed reliance on some reported cases like (1) **1996 (2) Mah LR (SC) 649 (Hanmanta Daulappa Nimbal v. Babasaheb Dajisaheb Londhe)**; (2) **1987(3) Bom.C.R. 258 (Bhagwanrao Jijaba Auti v. Ganpatrao Mugaji Raut)**; (3) **AIR 1971 Gujarat 77 (Mohmad Khan Jamiyatkhan v. Dadamiyan Mohmadmiyan)**; (4) **2010(5) Bom. C.R. 860 (Vaijnath Karpure v. Mahadeo Maruti Mote)**; and, **1977 Mh.L.J. 443 (Nilavabaj Sida Khajure v. Chanamalappa Bassappa Khajure)** (Bombay High Court). In the first case, the Apex Court has laid down that necessary

procedure needs to be followed for giving benefits of the Bombay Tenancy and Agricultural Lands Act, 1948 as person who is trespasser on the land cannot get benefit of the provisions of the Tenancy Act. There is no dispute over this proposition.

18) In the case of Mohmad Khan (cited supra) decided by Gujarat High Court, the provisions of the Bombay Tenancy and Agricultural Lands Act are discussed which are similar to the present Tenancy Act and it is made clear that possession can be taken only by following procedure given by the Bombay Tenancy Act when there is tenancy issue.

19) In the case of Nilavabaj Sida Khajure of Bombay High Court (cited supra) when the provisions of Tenancy Act were wrongly interpreted by the authority, the High Court under Article 227 of the Constitution held that the finding of the tenancy authority was illegal.

20) The law interpreted in the aforesaid cases shows that the Civil Court is not expected to use the

provisions of the Tenancy Act for giving relief of possession both to the tenant and the landlord.

21) The learned counsel for the appellants submitted that the Court ought to have referred the issue to the tenancy Court. This submission is not at all acceptable. The suit was for declaration and for possession. Declaration could not have been given by the Civil Court and for getting possession from protected tenant it was necessary for the plaintiffs to go to the authority created under the Tenancy Act. In view of these circumstances, it was not possible to refer the issue to the tenancy Court. So both the points are answered against the appellants and the appeal stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

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