

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, directions and Registrar's orders.	Notes, of Coram, Court's orders or	Court's or Judge's orders.
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SECOND APPEAL NO. 298 OF 2012
WITH CA/6167/2012 IN SA/298/2012

VIJESING NIMJI VASAVE AND ANR
VERSUS
JERMA SHEGA GAVIT

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Advocate for Appellants : Mr. A. S. Abhyankar, Advocate h/f Mr. Sharad V. Natu.

Advocate for Respondent: Mr. S. P. Wani, Advocate h/f Mr. Ajaykumar G. Magare.

CORAM: T. V. NALAWADE, J.
DATED: 28th MARCH, 2016.

PER COURT:

1. The appeal is filed against the judgment and decree of Regular Civil Appeal No.44 of 1999 which was pending in the Court of Civil Judge, Junior Division, Nandurbar and against the judgment and order of Regular Civil Appeal No.4 of 2006 which was pending in the Court of District Judge No.1, Nandurbar. The suit filed by present Respondent, Jerma Shega Gavit for relief of possession on the basis of title is decreed in his favour. Both the sides are heard.

2. The suit was filed in respect of land Gat No.6/1A,

admeasuring 1 Hectare 24 Are, situated at village Anthipada, Tahsil Nawapur. It is the case of plaintiff that Gat No.6 was owned by his grand father Jivalya. Jivalya died in the year 1949 leaving behind two sons viz. Shega and Vahanji. Shega died in the year 1956 and plaintiff is the son of Shega. It is contended that in partition between the two sons of Jivalya Gat No.6/1 came to the share of plaintiff and Gat No.6/2 went to the share of Vahanji. It is contended that defendants have no concern with the family of plaintiff and also with the suit land.

3. It is the case of plaintiff that he is an illiterate tribal person and defendant No.1 is a teacher. It is contended that as plaintiff is simpleton person, defendant created some false revenue record and showed that portion of 1 Hectare 24 Are was given to defendant from Gat No.6/1 and defendant got sanctioned the said mutation (Mutation No.59). It is contended that the said mutation is not binding on plaintiff as the mutation was made behind his back. The portion of 1 Hectare 24 Are is given number 6/1A.

4. It is the case of plaintiff that for the first time he realised about the aforesaid record when in the year

1999 the defendant tried to make encroachment. Prior to that, the defendant had made construction of one well in some portion but the plaintiff thought that it was the land of defendant and it was from different survey number. It is contended that in the suit filed for injunction in the year 1999 he realised that false record is prepared by defendant and so he was required to file suit for possession in respect of Gat No.6/1A.

5. Defendants filed joint written statement and they denied the aforesaid contentions. They contended that one Gosha was common ancestor of plaintiff and defendants and Gosha left behind two sons by name Rayala and Jivalya. It is contended that defendants are the successors of Rayala and plaintiff is successor of Jivalya. Defendants, however, admitted that Shega was father of plaintiff and Vahanji was brother of Shega.

6. It is the case of defendants that Gat No.6/1 was joint Hindu family property of plaintiff, defendants and Vahanji. It is contended that partition took place amongst these persons and area of 1 Hectare 24 Are from Gat No.6/1 was allotted to the share of defendants and accordingly mutation was made and to this portion number was given as Gat No.6/1A. It is contended that,

after entering the name of defendants in the revenue record, the electricity connection was taken, well was taken and the land was brought under irrigation by the defendants. It is contended that by concealing material information previous suit for injunction was filed by plaintiff but the suit was dismissed.

7. On the basis of aforesaid pleadings, issues were framed. Both the sides gave evidence. The trial Court decreed the suit by observing that there was a record of partition of year 1974 and so it was necessary for the defendants to prove that it was partial partition and the suit property was kept aside for some reason. The trial Court held that the suit property had come to the share of plaintiff and so there is no right to defendants to keep possession. The trial Court held that due to aforesaid mutation no title has passed to the defendant in the suit property. The first Appellate Court considered one more circumstance. Land Gat No.6 was with Jivalya, grand father of plaintiff, for cultivation purpose and under Tenancy Act he was declared as protected tenant. After the death of Jivalya the land had come to his two sons like Shega and Vahanji and then in partition plaintiff got Gat No.6/1 as successor of Shega and Vahanji got Gat

No.6/2. Thus, the first Appellate Court held that the property was exclusively owned by Jivalya, the grand father of plaintiff and Rayala, the predecessor of defendants had no right or interest in this property.

8. The learned counsel for Appellant drew the attention of this Court to some revenue record which is in respect of Survey No.106/2 and 108. This record shows that in the year 1974 report was given by Vahanji to revenue authority that in family partition these two properties were given to cousin of Vahanji viz. Nimji Rayala, the predecessor of defendants. 7/12 extract of land Gat No.108 is produced and is consistent with the mutation and it shows that the names of Vahanji and Jerma were removed and the name of Nimji was entered in the revenue record as the owner. 7/12 extract in respect of Gat No.106/2 is also similar. The record of other land from village Nangipada shows that entire Gat No.10/1 and 10/2 were divided amongst the successors of Nimji, the predecessor in title of defendants. That mutation was sanctioned in the year 1981. Thus, in the year 1974 two lands were given to the predecessor in title of defendants and these lands were partitioned amongst the successors of the said predecessor of

defendants.

9. On the other hand, there is the record of Gat No.6 showing that initially Gat No.6 was standing in the name of Vahanji. Partition was made between Vahanji and Jerma, the successors of Jivalya and Gat No.6/1 was given to the share of Jerma, plaintiff. The area of 3.64 Hectare was given to Jerma when area of 1 Hectare 84 Are was given to Vahanji. In the mutation at Exhibit-122 the reason is given that Gat No.35 was given to Vahanji and so he was getting less area in Gat No.6. This mutation was sanctioned on 19th December, 1980. There is a record of Gat No.35 which is to the effect that this property had come to the share of Vahanji and it was partitioned between the sons of Vahanji, due to their internal partition. Similarly, the names of sons of Vahanji were entered in the revenue record of Gat No.6/2. Thus, till the year 1980 Gat No.6 was with the successors of Jivalya and it was not with the predecessor of defendants like Rayala.

10. There is more record in respect of Gat No.6. It is not disputed that previous number of the suit property was Survey No.126. The 7/12 extract shows that Jivalya, predecessor of plaintiff was cultivating this land from

1933-34. Then in the year 1934 the owner made agreement with Jivalya and land remained with him in that year. In the year 1935-36 the land was with another person like Dashriya Wadwi. The land came to Jivalya again in the year 1936-37 under the agreement for cultivation and it remained with him till the year 1949-50, the death of Jivalya. After the death of Jivalya, the land was cultivated by Shega, father of plaintiff as tenant and he continued to cultivate it till year 1955-56. In the year 1956-57 the name of Vahanji, brother of Shega was entered in crop cultivation column and his name was also entered as protected tenant. The share of Jerma was shown as 8 Annas and the share of Vahanji was shown as 8 Anas. Exhibit-135, mutation entry shows that Jivalya was declared as protected tenant. In view of this record, the first Appellate Court held that Jivalya and Shega, predecessors of plaintiff and Vahanji were protected tenants and so the property was their self acquired property. Due to this circumstance also, the first Appellate Court held that no share could have been given to the predecessor of defendants namely Rayala. It cannot be said that different reason is given by the first Appellate Court. The record does not show that the

predecessor of defendants namely Rayala had taken the land for cultivation along with Jivalya. Rayala had died prior to Jivalya and there is aforesaid record in favour of Jivalya. Thus, on facts, it cannot be said that the findings are not based on record.

11. Both the sides placed reliance on many reported cases. The cases are mainly on burden of proof when various defences are taken. The relevant pleadings in the written statement is already quoted by this Court. In the present proceeding submission was made for Appellant that the circumstance that in the year 1984 mutation was made in favour of defendants and that was not challenged at any time by the plaintiff, ought to have been considered by the Courts below. It was submitted that when the report was given by Jerma Shega, the plaintiff himself to inform that suit property was given to present defendants, inference ought to have been drawn that land Gat No.6 was not partitioned in the past and it was partitioned first time in the year 1984. This submissions is not at all acceptable in view of the aforesaid record which is in favour of the predecessor of plaintiff and predecessor of Vahanji. Further, it was necessary for the defendants to explain as to why

defendants were getting only 1.24 Hectare portion when the total area of Gat No.6/1 was 3 Hectares 64 Are. Similar portion was already given to Vahanji, uncle of plaintiff, real brother of Shega. In ordinary course, as successors of brother of Jivalya, the defendants could have claimed $\frac{1}{2}$ share in Gat No.6 if in the year 1974 partial partition was effected in respect of other lands. This circumstance is not at all explained. Due to such mutation title cannot pass to the defendants.

12. Submission was made by learned counsel for the Appellant that inference can be drawn that from the year 1984 defendants have been in possession of the suit property and so the implied case of ouster ought to have been considered by the Courts below. This submission is not at all acceptable in view of the nature of case put up in the written statement and the contents of the mutation of the year 1984. Another point was argued and it was submitted for Appellant that the possession of defendants had become adverse and as the suit was not filed within 12 years from the date of mutation, the suit for possession could not have been decreed. This submission is also not acceptable as no specific pleading was there in the written statement with regard to

adverse possession. Further, in the cross examination of plaintiff a suggestion was given for defendants that for more than 5 years prior to the date of suit the defendants were cultivating the suit land. No record at all is produced to show that the possession was actually taken 12 years prior to the date of suit. In such a case not much importance can be given to the entries made in the revenue record. No original record like application was called in respect of the entry. The defendants could have called the record and could have shown that plaintiff himself had given report to the revenue authority and then the mutation in favour of defendants was made.

13. Learned counsel for the Appellant placed reliance on the following reported cases:

(i) M. Venkatesh & Ors. V/s Commissioner, Bangalore Development Authority [2016 SAR (Civil) 66;

(ii) B. Leelavathi V/s Honnamma and another [2005 SAR (Civil) 622;

(iii) Abubakjar Abdul Inamdar (dead) by L.Rs. and others V/s Harun Abdul Inamdar and others [AIR 1996 S.C. 112];

(iv) Karnataka Board of Wakf V/s Government of India and Ors. [2004 SAR (Civil) 535];

(v) Siddu Venkappa Devadiga V/s Smt. Rangu S. Devadiga and others [AIR 1977 SC 890];

(vi) Sher Singh and others V/s Gamdoor Singh [AIR 1997 SC 1333];

(vii) Sarjerao Maruti Sathe V/s Pralhad Laxman Sathe and others [2010 (2) MhLJ 970];

(viii) Annasaheb Bapusaheb Patil and others etc. etc. V/s Balwant alias Balasaheb Babusaheb Patil (dead) by L.Rs. etc. etc.];

(ix) Ramiah V/s N. Narayana Reddy (Dead) by L.Rs. [(2004) 7 SCC 541];

(x) Des Raj and others V/s Bhagat Ram (deceased by LRs) and Ors. [2007 AIR SCW 1560];

(xi) Dayaram Raghobaji Belsare V/s Vishrantibai George Lavet [1990 Mh.L.J. 227];

(xii) Abasaheb Bali Gcharge and another V/s Balaji Ramhari Gcharge [1996 (1) Mh.L.J. 209];

(xiii) Appeal No.740 of 1971 - Anant Govind Redekar and others V/s Shri Dev Hanuman Devasthan, Khed.

(xiv) L. N. Aswathama and another V/s P. Prakash [2009 SAR (Civil) 684];

(xv) Dagadu Dhondu Patil V/s Trakadu Motiram Patil and another [AIR 1957 Bombay 79 (V 44 C 31 Mar.);

(xvi) babaji Daso Deshpande V/s Jivaji Yeshvant Deshpande [AIR 1930 Bombay 333];

(xvii) Rajender Singh and others V/s Santa Singh and others [1974 Mh.L.J. 1];

(xvii) Nedunuri Kameshwaramma V/s Sampati Subba Rao [AIR 1963 SC 884].

14. On the other hand learned counsel for the Respondents placed reliance on the following cases:

(i) Baleshwar Tewari (Dead) by L.Rs. and others V/s Sheo Jatan Tiwary and others [AIR 1997 SC 2089];

**(ii) Nedunuri Kameswaramma V/s
Sampati Subba Rao [AIR 1963 SC 884];**

**(iii) Amrendra Pratap Singh V/s Tej
Bahadur Prajapati and Ors. [2004 SAR
(Civil) 9].**

15. Facts and circumstances of each and every case are always different. It appears that in one reported case, Appeal No.740 of 1971, this Court had held that for getting possession the plaintiff needs to prove not only the title but also the fact that he was in possession and he lost possession within 12 years prior to the date of suit. In view of the proposition made by the Apex Court in the case reported as 2016 SAR 66 SC (M. Venkatesh & Ors. V/s Commissioner, Bangalore Development Authority) the said proposition cannot be used in favour of the defendants. Further, no specific pleading is there of adverse possession and so this point need not be considered in detail. In view of the facts and circumstances of the present case, this Court has no hesitation to hold that both the Courts below have not committed any error in holding that plaintiff is owner of the suit property and is entitled to get the relief of possession. No substantial question of law is involved in

the matter.

16. In the result, appeal stands dismissed.

17. In view of final disposal of the appeal itself nothing further survives in the civil application for stay and the same stand disposed of accordingly.

(T. V. NALAWADE, J.)

Dt.28/03/2016.
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