

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

SECOND APPEAL NO. 526 OF 2012
WITH
CIVIL APPLICATION NO. 8838 OF 2012

Kondaji s/o. Yesu Dhatrak
Deceased through L.Rs.

1A) Kisan s/o. Kondaji Dhatrak
and Anr.

....Appellants.

Versus

Ramchandra s/o. Mahadu Dhatrak
and Ors.

....Respondents.

Mr. A.N. Nagargoje, Advocate for appellants.

Mr. S.P. Brahme, Advocate for respondent No. 2.

Mr. V.S. Bedre, Advocate for respondent No. 5.

CORAM : T.V. NALAWADE, J.

DATED : 8th June, 2016.

ORDER :

1. The appeal is filed by plaintiff of Regular Civil Suit No. 202/1985, which was pending in the Court of Civil Judge, Junior Division, Sangamner and which was filed for relief of injunction to prevent defendant No. 1 - Ramchandra Dhatrak from alienating the suit property. The suit was dismissed by the Trial Court and the First Appellate Court has dismissed Regular Civil Appeal No. 634/2000 (Old R.C.A. No. 106/1997) filed by the plaintiff. This decision is challenged by the plaintiff. Heard both the sides.

2. It is the case of plaintiff that the suit property was originally owned by plaintiff and defendant No. 1 and plaintiff started cultivating the land which was allotted to share of defendant No. 1 as a tenant from prior to the year 1957. It is his case that under the provisions of Bombay Tenancy Act, he was treated as a protected tenant, but he was deceived by defendant and order of surrender was obtained from the authority by defendant No. 1. It is the case of plaintiff that he had challenged the order made by the Tenancy Court of surrender, his challenge to the decision was allowed and the matter was remanded back to the Tenancy Court for fresh inquiry. It is contended that he does not know anything about the progress made in his tenancy appeal No. 166/1986, which was filed against the tenancy case No. 107/1958. It is the case of plaintiff that due to entries appearing in the revenue record, defendant No. 1 is trying to deprive him of his right in suit property and he has created some record to show that he has given the land to one temple by way of donation. It is his case that the temple has published a notice for auction sale of the suit property dated 16.6.1985 and so, the cause of action took place for the suit. The suit was filed in respect of land Gat Nos. 134/1, 134/2 and 126 situated at Mendhawan, Tahsil Sangamner. It is contended that the owner of this land has right to take water from the well situated on

common Bandh on Gat No. 134 and 120.

3. In plaint, it is specifically contended that plaintiff is co-sharer in the suit property along with defendant No. 1 and so, defendant No. 1 alone has no right to transfer the property and alternatively, it is also contended that the suit property was with him as a protected tenant and so, the property cannot be transferred by defendant No. 1.

4. Defendant Nos. 1 to 4 filed joint written statement and contested the matter. It is the case of defendant No. 1 that the suit property and other properties were initially owned by Chimaji Khandu and Yesu Khandu, two real brothers. It is contended that defendant No. 1 and his brothers are descendants of Chimaji and plaintiff No. 1 is descendant of Yesu Khandu. It is the case of defendant No. 1 that the property was partitioned by Chimaji and Yesu and suit property had come to share of Chimaji and so, defendant No. 1 and his brothers became owners of the suit property.

5. It is the case of defendant No. 1 that behind his back, some false record was created by plaintiff to show that he was protected tenant even when there was aforesaid relationship between plaintiff and defendant No. 1. It is contended that

inquiry was made under tenancy provisions and during inquiry, the so called rights were surrendered by plaintiff as provided by tenancy law. He has admitted that the decision given by the Tenancy Court was challenged by plaintiff, but he has denied that the appeal of plaintiff was allowed and the matter was remanded back. He has contended that after the decision of the Tenancy Court, the entries made in favour of plaintiff were deleted and the record of handing over of possession was also created in favour of defendant No. 1. It is contended that since the surrender of the land and creation of record of handing over of possession to him, he has been in possession of the suit property and the plaintiff has no concern whatsoever with the suit property. He has denied that plaintiff is joint owner of the suit property.

6. It is the case of defendant No. 1 that to challenge the order made by Tenancy Court, Civil Suit No. 55/1965 was filed by plaintiff, but the said suit was dismissed. The said suit was filed for relief of declaration and the declaration of ownership was also claimed by plaintiff. It is contended that the said decision has become final and so, the present suit is not tenable.

7. It is contended that when the notice of auction sale was published and the auction was held, plaintiff No. 2 and his

mother had participated in the auction and they had given offer of Rs. 28,000/-. It is contended that when the trust of the temple refused to sell the property at that price and other person offered higher price, plaintiff realised that he was not getting the property and so, he has filed the suit. He has contended that the property is donated by him to temple trust and some property was sold by him in the year 1980 and the suit is not tenable.

8. On the basis of aforesaid pleadings, issues were framed. Both the sides gave evidence which is mostly in the form of documents and both the Courts below have decided the matter on the basis of that record.

9. It is not disputed that in the year 1957, the entry was made in the revenue record that Kondaji Yesu Dhatrak was protected tenant. It is also not disputed that in one tenancy proceeding compromise took place and the property was surrendered by Kondani in favour of defendant Ramchandra. Copy of mutation is produced on record. Though plaintiff has contended that this decision was challenged and the matter is remanded back, there is no such mutation produced by the plaintiff and the mutation at Exh. 41 which is in favour of defendant No. 1 shows that the name of plaintiff was deleted from the record. The revenue record shows that the entry of the

name of plaintiff as protected tenant was deleted. He was shown in possession for some years as the protected tenant. At that time also, one other person like Shri. Yadav was there. These names from crop cultivation column were there till the year 1965 and after one compromise in tenancy proceeding, name of Ramchandra, defendant No. 1 was entered in crop cultivation column. Then again name of Kondaji was entered and it was continued up to the year 1968-69. In one year, name of other person was entered and again the name of Kondaji and one Pandharinath and also Yesu were recorded. These names were continued till the year 1975-76, but after that these names were deleted from crop cultivation column also. Then other names were entered in the crop cultivation column like defendant No. 1. There is mutation showing that in the year 1985, most of the portion was donated to temple trust by defendant No. 1.

10. Admittedly, one civil suit was filed by Kondaji for challenging the order made by Tenancy Court. Copy of the judgment delivered by the Appellate Court is produced and it shows that appeal was filed by Kondaji. Various issues were framed and it was held that on the date of Civil Suit No. 55/1966, plaintiff Kondaji was not in possession of the suit property. The orders made by tenancy authority are discussed and the judgment of the District Court delivered in Regular Civil Appeal

No. 257/1966 shows that initially order was made against Kondaji by Tenancy Court and in revision, Kondaji had made submission before the authority that he had settled the matter. In view of these submission, the revision was dismissed. Thus, two issues were involved in the suit filed by Kondaji like (i) whether Kondaji proved his tenancy right and (ii) whether he proved his possession on the date of the suit. Both the issues were answered against Kondaji and that decision has become final.

11. The aforesaid record shows that the dispute between the parties is finally decided and there are other circumstances which are mentioned in the pleadings in the plaint. In spite of those circumstances, the suit was filed to prevent the defendant Nos. 1 and 2 from alienating the suit property. No relief of injunction in respect of possession was claimed and it is clear that on the date of suit, plaintiff was not in possession. The revenue record also shows that he was not in possession. In view of these circumstances, there was no other alternative before the Courts below than to dismiss the suit.

12. The learned counsel for the appellants placed reliance on two reported cases like **AIR 1989 SC 2240 [Pandurang Ramchandra Mandlik (since deceased) by his**

L.Rs. and Anr. Vs. Shantibai Ramchandra Ghatge and Ors.] and AIR 1979 SC 653 [Gundaji Satwaji Shinde Vs. Ramchandra Bhikaji Joshi]. He submitted that in view of the nature of dispute, the Civil Court ought to have referred the matter to Tenancy Court. This submission is not acceptable in view of the nature of relief claimed. Further, the rights with regard to claim of tenancy are already decided. No substantial question of law as such is involved in the matter.

13. In the result, the appeal stands dismissed. Civil Application is disposed of. The learned counsel for appellants requested for injunction against the defendants for some time as he wants to challenge the decision. There are concurrent findings of the Courts below that plaintiff is not in possession. So, there is no question of giving such relief. It is, therefore, refused.

[T.V. NALAWADE, J.]

ssc/