

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

SECOND APPEAL NO. 480 OF 2018

Bhamta Tetya Padvi (Deceased)
through LR's & Ors.

... Appellants
(Orig. Plaintiffs)

VERSUS

Kamji Khetya Padvi & Ors.

... Respondent
(Orig. Defendants)

.....

Mr Amit S. Savale, Advocate for the appellants
Mr G.D. Jain, Advocate for respondent No. 1

.....

AND

CIVIL APPLICATION NO. 8042 NO. 2018

IN

SECOND APPEAL NO. 480 OF 2018

CORAM : A. M. DHAVALA, J.

DATE : 10TH DECEMBER, 2018.

PER COURT :-

1. This Second Appeal is filed by original plaintiff.
2. The plaintiff had filed Reg. Civil Suit No. 17/2009 for declaration of his title and permanent injunction. The plaintiff also challenged mutation entry No. 860 effected by Tahsildar, Akkalkuwa and Circle Officer, the defendants No. 3 and 4. Defendant No. 1 claimed that, (i) the plaintiff is not the sole owner (ii) suit is bad for non-joining of other owners and (iii) the plaintiff was not in possession. He had delivered the possession to defendant No. 1 under a Mortgage Deed. He claimed that, he was cultivating the suit land from 1974.

3. The learned trial Judge held that, the plaintiff's title and possession were not proved and the suit was bad for non-joinder of necessary parties. Hence, the suit was dismissed.

4. In Reg. Civil Appeal No. 4/2013, the appellate Court held that the plaintiffs failed to prove exclusive ownership and their cultivating possession. Hence, the suit came to be dismissed.

5. The plaintiff admitted that the land originally belonged to his father and his three uncles, but claimed that the land was allotted to his father. He and his two sisters survived his deceased-father but the parties being Adiwasi, the sisters are not entitled for any share. The suit land was mutated in the name of plaintiff's father and therefore the plaintiff alone is the owner. He also submitted that, defendant No. 1 unlawfully entered his name in the revenue record in 1988 and on the basis of revenue entries only, he is held to be in possession and therefore the suit came to be dismissed. He submitted that, only revenue record will not be proof of possession of defendant No. 1. The defendant No. 1's failure to prove the source for effecting the mutation in his name has not been proved. He has produced insufficiently stamped unregistered Mortgage Deed. Mr Savale, learned counsel for the appellant relied on the judgment of the

Hon'ble Supreme Court in the case of Avinash Kumar Chauhan Vs. Vijay Krishna Mishra reported in (2009) 4 Mh.L.J. 349 to submit that, insufficiently stamped document cannot be considered even for collateral purpose. When defendant No. 1 failed to establish his entry referable to lawful source, in the suit land, the 7/12 extract cannot prove his possession.

6. It is well settled that, in a suit for declaration and perpetual injunction to protect the possession, the plaintiff has to first prove his possession and then only the question of his title will come into picture. If the plaintiff is not in possession, neither he can claim perpetual injunction nor can he claim mere declaration. As per Section 34, if no consequential relief of possession is claimed by the plaintiff, no declaration can be granted.

7. In the present case, there are concurrent findings of both the courts below that defendant No. 1 is in possession of suit property. There are mutations and 7/12 extracts showing that, from 1998 to 2009 the land was mutated in his name and he was owner of the same. No doubt, if the mutation is effected without any legal document on record, the defendant cannot claim any lawful right in respect of the suit land. Nonetheless, when there are 7/12 extracts for a period of around 10 years showing his possession, the

presumption u/s 157 of the Maharashtra Land Revenue Code will come into picture. Whether lawful or unlawful the revenue record shows that he is in possession. There is no substance in the contention that the entries in 7/12 extract cannot be considered for proving the possession. Once the defendant is shown to be in possession of the suit land, the plaintiff ought to have filed suit for possession and then only his right to claim possession on the basis of title could have been considered.

8. It is settled that, when there are concurrent findings of both the courts on a factual aspect, this Court cannot re-appreciate the evidence to interfere with the findings of the lower courts. No glaring mistake has been pointed out to show that the finding of both the courts below regarding possession is erroneous or perverse and is arrived at without considering the material evidence. In the situation, I hold that both the courts should not have discussed the claim of the plaintiff regarding declaration of ownership. In view of the plaintiff's failure to prove possession, the dismissal of the suit by both the courts below cannot be interfered with. However, it is made clear that, if the plaintiff files a suit for his possession on the basis of his title, whatever is observed by trial Court and first appellate Court regarding the title will not come in his way.

9. With these observations, the Second Appeal is dismissed in *limine*.

10. In view of dismissal of Second Appeal, nothing is left for consideration in the connected Civil Application and same stands disposed of.

[A. M. DHAVAL]
JUDGE

Punde