

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

**SECOND APPEAL NO.789 OF 2017
WITH
CIVIL APPLICATION NO.1535 OF 2017**

- 1 Shri Natha Laxman Koli @ Vatade.
Deceased.
- 1A Smt.Anjana Natha Koli @ Vatade,
Age : 67 years, Occupation : Household.
- 1B Shri Sanjay Natha Koli @ Vatade,
Age : 42 years, Occupation : Labour.
- 1C Shri Rajiv Natha Koli,
Age : 37 years, Occupation : Labour.
- 1D Shri Vijay Natha Koli,
Age : 35 years, Occupation : Labour.
- 1E Sau.Madhuri Sanjay Koli,
Age : 37 years, Occupation : Household.
- 1F Reshma Raju Koli,
Age : 32 years, Occupation : Household.

All Residents of Chichondi Patil,
Taluka and District Ahmednagar.

...APPELLANTS
(Original Defendants)

-VERSUS-

- 1 Shri Mhatarba Nana Khadke,
Age : 54 years, Occupation : Agriculture.
- 2 Shri Sukhdeo Nana Khadke,
Age : 51 years, Occupation : Service.

Both resident of Chichondi Patil,

Taluka and District Ahmednagar.

...RESPONDENTS
(Original Plaintiffs)

...

Shri M.S.Kulkarni, Advocate for the Appellants.
Shri A.K.Gawali, Advocate for Respondent Nos.1 and 2.

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CORAM: RAVINDRA V. GHUGE, J.

Reserved on 09th January, 2018.

Pronounced on 23rd January, 2018.

JUDGMENT:

1 The Appellants / original Defendants are aggrieved by the judgment and order dated 07.10.2010 delivered by the learned 2nd Joint Civil Judge, Senior Division, Ahmednagar decreeing Regular Civil Suit No.170 of 2004 with a direction to the Defendants to deliver possession of the suit property. The Appellants/ Defendants are also aggrieved by the judgment of the Principal District Judge, Ahmednagar dated 29.06.2017 by which, Regular Civil Appeal No.415/2010 filed by the Appellants/ Defendants has been dismissed.

2 This Second Appeal filed by the Defendants is pending admission and the Defendants are without any relief or interim protection since the judgment of the Appellate Court dated 29.06.2017.

3 I have heard the learned Advocates for the Appellants / Defendants and the Respondents/ original Plaintiffs at length. I have gone through the Second Appeal paper book with their assistance.

4 It is contended that the Government had allotted land to Dagadu Bala Khadke in 1942 for a threshing Yard. The said portion was on a kaccha road connecting Ahmednagar to Jamkhed, which was abandoned after a new road was laid. Individual Kabulayats were executed by the villagers. The portion allotted to Dagadu was Plot No.3 admeasuring 57 x 45 square feet. The Kabulayats clearly evidence the fact that no right would be asserted by those villagers who have been allotted the plots. The threshing activity to be performed on the said plot was subject to the payment of yearly rent.

5 It is stated that as Dagadu was in need of financial assistance, he executed a deed on 17.04.1967 handing over the property to Laxman, Dattatraya and Vitthal in lieu of Rs.200/- to be paid over a period of five years. Dagadu is the grandfather of the original Plaintiffs. Dagadu passed away on 05.10.1977 and his son Natha also passed away in 1993. The Plaintiffs are the legal heirs of Natha and claim to be using the threshing yard for decades.

6 The Plaintiffs have contended that as there was famine in the village Chichondi Patil and an acute need of drinking water and scarcity of water occurred, the Plaintiffs sold off few cattle. It has come on record that the Defendants were allowed to reside in a thatched cottage in agricultural land Gat No.890 till October, 2003. In November, 2003, Natha sold his land admeasuring 1 Hecter 85 R to Jijabai Vasant Koli in

November, 2003. It was only on account of the scarcity of water in the said village that the Defendants were permitted to stay in the thatched cottage and the remainder land continued in the possession of the Plaintiffs. As the Defendants began misusing the land, refused to handover the thatched cottage which is described as "Chappar" in the plaint and started surreptitiously milking the Plaintiffs cattle, a complaint was lodged with the concerned Police Station and that was followed by the institution of the suit.

7 It is contended by the Plaintiffs that they were granted temporary injunction by the Trial Court and the injunctory orders were violated by the Defendants by their act of constructing two rooms with tin sheets. It was in this backdrop that the Plaintiffs were dispossessed of the said portion. The Plaintiffs have described the suit property as "Khale Wadage" meaning threshing yard. Considering the dispossession of the Plaintiffs from the suit property, they carried out an amendment to the plaint and prayed for recovery of possession.

8 The Appellants/ Defendants have contended that though the property was allotted to Dagadu Bala, they were put in possession on account of the deed executed by Dagadu on 17.04.1967 in favour of Laxman Koli, who handed over the suit property to the Defendants. The Plaintiffs are not in possession of the suit property since 1967.

9 The Trial Court has recorded the oral and documentary

evidence. In paragraph 6 of the judgment and decree of the Trial Court, the oral and documentary evidence that was adduced, has been summarized and which is as under:-

"6. In order to prove their claim, plaintiffs have examined plaintiff No.1 Mhatarba Natha Khadke as PW No.1 at Exhibit No.99, Rambhau Sadu Khadke as PW No.2 at Exhibit No.120, Court Commissioner Advocate Shri Anil D. Sarode as PW No.3 at Exhibit No.125. Whereas any of the defendants did not enter into the witness box. However, they examined an employee of Public Works Department Ravindra Sudhakar Deshmukh as DW 1 at Exhibit No.136, Pandurang Rama Desai as DW 2 at Exhibit No.142 and Sahebrao Vithoba Pawar as DW 3 at Exhibit 146. Besides this oral evidence, reliance has been placed on the documentary evidence consists of 7/12 extracts Exhibit Nos.100, 101, 104, 106, certified copy of property extract Exhibit No.105, certified copy of Map Exhibit No.106, certified copy of "Kabulayat" Exhibit No.107, Mutation Entry Exhibit Nos.108 and 109, certified copy of 7/12 extract Exhibit Nos.110 and 111, report of the Court Commissioner Exhibit No.21, panchanama made by the Court Commissioner Exhibit No.128, notice issued by PWD Exhibit Nos.137 and 140, alleged document dated 17th April, 1967 Exhibit No.144, certified copy of Gav Namuna 8 Exhibit No.114, 115, 117 and 118 and certified copy of extract of register Exhibit No.139."

10 While deciding the suit, the Trial Court has highlighted the undisputed factors, which have been narrated in the foregoing paragraphs of this judgment. The Defendants originally claimed that the suit property was delivered in their possession. The suit property is described in the plaint as has been recorded above and which is limited to the threshing

yard at Plot No.3 as per the Government record. The Defendants have claimed that they are in undisturbed possession of the suit property from 17.04.1967.

11 It requires no debate that Dagadu could not have sold or mortgaged the said property considering the Kabulayat, which was recorded with the Collector. The Kabulayat at Exhibit-107 clearly evidences that the deceased Dagadu had no right or title over the suit property and as such, he could not have dealt with the said property in the manner in which it is stated to have been done as per the records. He had no right to sell or transfer or lease out the said property and the transaction dated 17.04.1967 was, therefore, obviously an unsustainable transaction.

12 The Trial Court has considered and analyzed the oral and documentary evidence in details from paragraphs 10 till 28 of its judgment. Pandurang Desai, who was brought in as a witness of the Defendants in his capacity of being the scribe of Tabe Gahan Pavati dated 17.04.1967, deposed that he has put his thumb impression on his affidavit in lieu of examination in chief as he could not read and write. If he could have been able to read and write, he would not have put his thumb impression. Pandurang has nowhere stated that though he could read and write in Marathi language, he has still put his thumb impression. In fact, it is common knowledge that despite growing age, a literate person, who

can read and write, would never say that he cannot write even his signature. This demolishes the contention of the Defendants that because of the old age of Pandurang, he could not read and write. As such, it was proved before the Trial Court that he was not the scribe of the Tabe Gahan Pavati.

13 Insofar as the Tabe Gahan Pavati is concerned, the said document was not proved before the Trial Court. It was merely exhibited and was not duly proved by the Defendants. No where in the written statement/ pleadings of the Defendants, have they ever divulged that the document was scribed by Pandurang. There is no pleading that DW-3 Sahebrao was a witness to the preparation of the document. The Trial Court noted that Sahebrao was serving with the Defence Forces in between 1965 to 1973. No evidence was brought on record that he was on leave from the Defence Forces and had visited his village and had become a witness to the said document. In fact, Sahebrao admitted in the cross examination that he had no personal knowledge about the said document dated 17.04.1967.

14 Even if it is assumed that the document was validly proved, the issue would not rest here. The Defendants have taken a stand that Dagadu had relinquished his rights and as such, Tabe Gahan Pavati would prove the transfer of rights to the Defendants. Under Section 17 of the Indian Registration Act, a transfer or relinquishment of the right or title or

interest with regard to an immovable property, would require registration. The said document was an unregistered document and therefore, its admissibility would be struck by Section 49 of the Indian Registration Act.

15 It is also seen from the record that Dagadu had never obtained any permission from the revenue authority to transfer any right over the suit property to any person, though it cannot be disputed that he himself has no right over the suit property and hence, he could not have transferred a non existing right in favour of anybody.

16 Insofar as the contention of the Defendants set out in their Written Statement that they have erected a construction in front of the suit property is concerned, no evidence was brought on record by the Defendants to indicate that two notices dated 15.01.2001 and 19.03.2003 were issued to one of the Defendants with regard to the alleged construction on or in front of the suit property. The witness Ravindra, who is an employee of the Public Works Department, has deposed that the notices were with regard to the Takali-Kazi to Jamkhed road, where the Department noticed some encroachment. It was not established by recording evidence that Takali-Kazi portion covers the suit property and falls on the Ahmednagar-Jamkhed road. So also, the suit Plot No.3 is nowhere mentioned in the said notices. This, therefore, cannot be an evidence to indicate that the Defendants are in possession.

17 What intrigues me is that none of the original Defendants,

who are seven in number, stepped into the witness box to support their contentions and that they are in possession of the entire land of the Plaintiffs, over and above the suit property. Even during the pendency of the appeal proceedings, the Defendants did not choose to enter an application under Order 41 Rule 27 of the Code of Civil Procedure to file new documents or lead additional oral evidence.

18 It was in the above backdrop that the Trial Court concluded that except the suit Chappar (thatched cottage), which was admittedly given by the Plaintiffs to the Defendants, the suit property was never in the continued possession of the Defendants. It was only when the Defendants breached the order below Exhibit-36 and began construction over the suit property that the Plaintiffs moved the Trial Court for seeking amendment in the plaint and prayed for recovery of possession that they have illegally lost.

19 Considering the above, I do not find that the Defendants have raised any substantial question of law in these proceedings. The Second Appeal is devoid of any merit and is, therefore, dismissed.

20 The pending Civil Application does not survive and stands disposed of.