

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 815 OF 2016**

Shri Datta Pundalik Naik, age 89 years, married, agriculturist, R/o H. No. 98, Kodar, Khandepar, V.P. of Betora, Ponda, Goa.

Through his Power of Attorney holder, Mr. Kashinath Datta Naik, age 54 years, agriculturist, R/o H. No. 98, Kodar, Khandepar, Ponda, Goa.

Since deceased, through legal heirs:

1. Smt. Taramati Datta Naik, age 75 years, widow of Shri Datta Pundalik Naik, R/o H. No. 105, Pitabai Kodai, Belora, Ponda-Goa.
2. Smt. Sushila Gajanan Naik, daughter of Shri Datta Pundalik Naik and wife of late Gajanan Naik, age 60 years, R/o H. No. 1390, Maruthigad Usgao, Ponda-Goa.
- 2a. Mrs. Megha (Rajakata) Rajesh Naik, daughter of late Gajanan Naik, age 38 years, married, wife of Mr. Rajesh Raghunath Naik.
- 2b. Mr. Rajesh Raghunath Naik, son of Raghunath Naik, age 45 years, Both R/o H. No. 267, Calconda, Margao.
3. Smt. Sulochana Babuli Naik, age 58 years, wife of late Babuli Naik, R/o H. No. 1429, Chirputem, Priol, Mardol-Goa.
4. Mr. Kashinath Datta Naik age 54 years, married,
- 4a. Mrs. Sunanda Datta Naik, age 48 years, Both R/o H. No. 98, Kodar, Betoda, Ponda-Goa.
5. Mr. Rama Datta Naik, age 50 years, married,

- 5a. Mrs. Shital Rama Naik, age 42 years
Both R/o H. No. 105, Pitabhat, Kodar,
Betoda, Ponda-Goa.
6. Mr. Laxman Datta Naik, age 48 years,
married,
- 6a. Mrs. Achal Laxman Naik, age 47
years,
Both R/o H. No. 98, Gudamol-Pitabhat
Kodar, Candepar, Ponda-Goa.
7. Mr. Raghunath Datta Naik, age 47
years, married,
- 7a. Mrs. Jyoti Raghunath Naik, age 40
years,
Both R/o H. No. 98, Gudamol-Pitabhat
Kodar, Candepar, Ponda-Goa. Petitioners

Versus

1. Shri Chandrakant Hira Ghanekar,
Since deceased through his legal
heirs:
- a. Smt. Hirabai Chandrakant Ghanekar,
major of age,
- b. Shri Satish Chandrakant Ghanekar,
major of age,
- c. Shri Bhupesh Chandrakant Ghanekar,
major of age,
- d. Miss Snehal Chandrakant Ghanekar,
major of age,
- e. Miss Sulaksha Chandrakant Ghanekar,
major of age,
- f. Miss Jyoti Chandrakant Ghanekar,
major of age,
All R/o near Petrol Pump, Tisk, Ponda-
Goa. Respondents

Shri U.R. Timble, Advocate for the Petitioners.

Shri S. Desai, Senior Advocate with Shri Pavithran A.V.,
Advocate for the Respondents.

CORAM : C.V. BHADANG, J.

DATE : 29th November, 2018

ORAL JUDGMENT:

On 26.03.2018, a notice for final disposal was issued in this petition. I have heard the learned Counsel for the parties and the petition is being disposed of finally.

2. The petitioners are the legal representatives of Datta Pundalik Naik (since deceased), who was the original applicant before the Mamlatdar. The respondents are the successors of Chandrakant Ghanekar, who is the original opponent. On 15.03.1989, Datta Naik filed an application against Chandrakant Ghanekar, under Section 4, 7 and 8A of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Act, for short), for being declared as a tenant of the suit property and for permanent injunction etc. and for removal of the rubble stone wall admeasuring 30 metres constructed in the suit property. According to Datta Naik, the suit property bearing survey no. 28/0 of village Kodar, Khandepar, within the jurisdiction of the Betora Panchayat comprises of coconut garden, cashew garden, paddy field and some fruit bearing trees.

3. The case made out by Datta Naik was that he was cultivating the suit property for more than fifty years and prior to that his father was cultivating the said field.

4. Chandrakant Ghanekar resisted the application. It was denied that the original applicant or his father was cultivating the suit property and it was denied that the original applicant was a tenant or had acquired the status of a tenant.

5. The parties led evidence. The original applicant Datta Naik did not enter into the witness box, purportedly on the ground that he had a hearing loss. He examined his Power of Attorney holder, his son Kashinath Naik (AW-1) alongwith Babushi Naik (AW-2), Khushali Gaude (AW-3), Satyavan Naik (AW-4), Rohidas Gaonkar (AW-5). The original opponent examined his son Bhupesh Ghanekar (OW-1) and Tulshidas Naik (OW-2).

6. The learned Mamlatdar by a judgment and order dated 31.12.2012 dismissed the application holding that the applicant had failed to establish that he was a tenant of the suit property. The applicant challenged the same before the learned

District Judge in Tenancy Appeal No. 92/2015, which has been dismissed on 20.01.2016, which is subject matter of challenge in this petition.

7. I have heard Shri Timble, the learned Counsel for the petitioners and Shri Desai, the learned Senior Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the record.

8. Shri Timble, the learned Counsel for the petitioners submitted that essentially, the case made out by the original applicant was that he was a 'deemed tenant' under Section 4 of the Act. It is submitted that both the Courts below have misdirected themselves by considering the case as if the case made out by the original applicant was that he was a 'tenant' falling in the first part of the definition of a tenant as contained in Section 2(23) of the Act. In short, in the submission of the learned Counsel for the petitioners a person, for being a 'tenant' has to hold the land on lease and has to cultivate it personally. However, the later part of the definition of a 'tenant' shows that a tenant includes a person, who is or was deemed to be a tenant. For this purpose, reliance is placed on Section 4 of the Act. It is submitted that a person cultivating the land

belonging to other person on or after 1962, but, before the commencement of the said Act is deemed to be a tenant, if such land is not cultivated personally by the owner and/or any person falling under any of the categories as mentioned in Section 4 of the Act. It is thus submitted that the Courts below were in error in refusing to grant the declaration on the ground that the applicant has not produced any lease deed. It is submitted that the Courts below have failed to appreciate the evidence on record and particularly that of OW-2, who has admitted that the cultivation of the suit property was done by the original applicant. It is submitted that the learned Mamlatdar was in error in refusing to place reliance on the witnesses examined by the applicant, on the ground that they are interested witnesses. It is submitted that the said witnesses cannot be branded as interested witnesses. For this purpose, reliance is placed on the decision of the Supreme Court in the case of **Gangabhavani Vs. Rayapati Venkat Reddy & Others, (2013) 15 SCC 298.**

9. On the contrary, it is submitted by Shri Desai, the learned Senior Counsel for the respondents that the applicant has not made out any case of he being a tenant or a deemed tenant of the suit property, much less has proved the same. It is

submitted that the Courts below have also considered the case made out by the applicant of he being a deemed tenant. For this purpose, the learned Senior Counsel has brought to my notice the observations of the learned District Judge in para 24, wherein the learned District Judge has found that the applicant has also failed to show that the applicant was in possession of the property from the year 1962, in order to show that he was a deemed tenant. It is thus submitted that the contention that the Courts have misdirected themselves, in not considering the case of the applicant as a deemed tenant cannot be accepted. It is submitted that the petitioners have neither produced any lease deed nor any rent receipts. The oral evidence of Babushi Naik (AW-2) is also found to be shaky. The learned Senior Counsel pointed out that although, the case made out is that the applicant was in possession of the suit property, for more than fifty years and prior to that, his father was in possession, the original applicant did not enter into the witness box on the ground that he had hearing loss, which is not established on record. It is submitted that the Power of Attorney holder, who is the son of the original applicant, looking to his age, could not have personal knowledge of the cultivation of the land from the time, as claimed on behalf of the applicant. It is submitted that both the Courts below after properly appreciating the oral and

documentary evidence, including the absence of the entries in the revenue record, have declined to grant the delaration, which orders do not suffer from any infirmity. The learned Senior Counsel has placed reliance on the decision of the Supreme Court in the case of **Shalini Shyam Shetty & Another Vs. Rajendra Shankar Patil, (2010) 8 SCC 329, Radhey Shyam & Another Vs. Chhabi Nath & Others, (2015) 5 SCC 423 and Jacky Vs. Tiny @ Antony & Others, (2014) 6 SCC 508**, in order to submit that no case for interference under Article 226 or 227 of the Constitution of India is made out.

10. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

11. It transpired during the course of the arguments at bar that the land survey no. 28/0 of village Kodar, known as "Pitabhat" is a large tract of land and the original applicant claims to be in cultivating possession of only a part thereof. Significantly enough, the original applicant did not set out as to how much area out of the said property was in his possession as a deemed tenant. During the course of the arguments at bar,

the learned Counsel for the petitioner submitted that the area would be around 4,000 square metres. The contention is as vague as it can be. The original applicant produced a sketch showing the property in his possession (which is not signed and was not proved on record). Thus, in the first instance, there is no clarity as to how much portion and/or which portion of the land survey no. 28/0 was allowed to be cultivated by the original applicant, since the year 1962. A perusal of the application would make it clear that it was not even the case made out that the original applicant was a deemed tenant. The learned Counsel for the petitioners submitted that the application was filed under Section 4 of the Act. I do not find that this would be sufficient because there has to be substantive pleadings as to the material case made out by the parties. It is true that under Section 2(23) of the Act, a tenant is a person who on or after the commencement of the Act holds land on lease, and cultivates it personally and includes a person who is or was a deemed tenant under the said Act. Under Section 4 of the Act a person lawfully cultivating the land belonging to other person on or after 01.07.1962, but before the commencement of the said Act is a deemed tenant. The learned District Judge in para 24 of the impugned judgment has found and rightly so that the original applicant has failed to

show that he was in possession of the suit field from the year 1962. Thus, the contention that the Courts had misdirected themselves by not considering the case of the applicant, as being a deemed tenant, to my mind cannot be accepted.

12. Admittedly, the entries in the revenue record do not further the case of the applicant. The applicant also failed to enter into the witness box on the ground that he could not hear properly. The learned Mamlatdar found that there was no evidence of hearing loss produced. The learned Mamlatdar has placed reliance on the decision of the Supreme Court in the case of **Vidyadhar Vs. Mankikrao & Another, AIR 1999 SC 1441**, in order to find that in such a case, a presumption would arise, that the case set up by the said party is not correct. The learned Senior Counsel for the respondents is right in contending that looking to the fact that the case made out is that the applicant was in possession since 50 years prior to the filing of the application and prior to that the father of the original applicant was in possession, it was necessary for the applicant to have entered into the witness box or should have produced acceptable evidence to show his possession, which is not forthcoming.

13. I have also gone through the evidence as led and the Courts below have rightly found the same to be insufficient. The learned Mamlatdar has found that no rent receipts to prove the claim of the applicant were produced, on the spacious ground that the rent receipts were not issued. There are no particulars about the area in possession or whether, the rent which was being paid, was in cash or kind. Babushi Naik (AW-2) has been held to be an interested witness as the learned Mamlatdar has noticed that he is also having a tenancy case in respect of certain property against the respondents i.e. one of the owners and that is why the learned Mamlatdar has refused to place reliance on the said witness. No exception can be taken to the said finding.

14. Reliance placed on the decision of the Supreme Court in the case of **Gangabhavani** (supra) to my mind is misplaced. That was a case arising out of a sessions trial, in which the Supreme Court has noted its earlier decision in the case of **State of Rajasthan Vs. Smt. Kalki & Another, AIR 1981 SC 1390**, in which, it was held that merely because the witness was the wife of the deceased, she cannot be said to be an interested witness as held by the High Court. The Hon'ble Supreme Court has drawn a distinction between an interested

witness and a related witness and has held that a related witness is not always an interested witness. It is held that a witness may be called as an interested witness only when he or she derives some benefit from the result of the litigations or seeing the accused person apprehended. In my considered view, the decision turned on its own facts.

15. That apart, the evidence of Babushi Naik (AW-2) has not been discarded on the ground that he is related, but on the ground that he is also having a claim of tenancy against the respondents. Be that as it may, the finding recorded by the Courts below turned on appreciation of the evidence led. It is trite that this Court would not re-appreciate the evidence in a petition under Article 226 or 227 of the Constitution of India. In fact, the Supreme Court in the case of **Shalini Shyam Shetty** (supra) and **Radhey Shyam** (supra) has held that no writ lies under Article 226 of the Constitution of India against an order of a Court of plenary jurisdiction. Insofar as Article 227 of the Constitution of India is concerned, it is aimed at keeping the subordinate Courts and the Tribunals within the bounds of their authority. The nature of the jurisdiction exercised is neither appellate nor revisional, but essentially supervisory in nature. In exercise of that jurisdiction the Court

will not re-appreciate the evidence unless and until the findings recored are so absurd or improbable that no prudent man would reach to such a conclusion on the basis of the evidence led. The petition is without any merit and is dismissed with no order as to costs.

C. V. BHADANG, J.

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