

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 569 OF 1996
WITH
CIVIL APPLICATION NO. 7632 OF 1996
IN
SECOND APPEAL NO. 569 OF 1996**

	Yeshwant Hari Patil, Since Deceased	]	
	By his heirs & L.Rs.	]	
1.	Anusaya Yeshwant Patil	]	
2.	Bhagwan Yeshwant Patil	]	
	Both R/o. At & Post : Tirpan,	]	
	Taluka : Panhala, Dist. : Kolhapur.	]	
3.	Sou. Anjana Pandurang Pawar	]	
	R/o. At & Post : Kale,	]	
	Taluka : Panhala, Dist. : Kolhapur.	]	
4.	Sou. Sanjana Vishnu Patil	]	
	R/o. At & Post Nanundare,	]	
	Taluka : Panhala, Dist. : Kolhapur.	]	
5.	Sou. Mangal Jaysing Nikam	]	
	R/o. At & Post Bambavade,	]	
	Taluka Shahuwadi, Dist. : Kolhapur.	]	
6.	Sou. Sharda Subhash Kasote	]	
	R/o. At & Post Sangrul,	]	
	Taluka Karveer, Dis. : Kolhapur.	]	<u>... Appellants.</u>

Versus

1.	Shripati Hari Patil, Since Deceased	]
	By his heirs & L.Rs.	]
1A.	Dagdubai Shripati Patil	]
1B.	Sadashiv Shripati Patil	]
1C.	Shobha Shankar Vichare	]
	All Adults,	]

	All R/o.At & Post Majgaon,	]
	Taluka Panhala, Dist. : Kolhapur.	]
1D.	Sangeeta Vilas Chougule	]
	R/o At & Post Marali,	]
	Taluka Karveer, Dist. : Kolhapur.	]
1E.	Vaishali Naresh Udale	]
	C/o. Sadashiv Shripati Patil,	]
	R/o. At & Post Majgaon,	]
	Taluka Panhala, Dist. : Kolhapur.	]
1F.	Lalika Annaso Patil,	]
	R/o. At & Post Panhala,	]
	Taluka Panhala, Dist. : Kolhapur.	]
2.	Dattu Hari Patil,	]
	Age 55 years,	]
	R/o. Tirpan, Taluka Panhala,	]
	District : Kolhapur.	]
		<u>... Respondents.</u>

- Mr.P.D. Dalvi for the Appellants.
- Mr.Chetan G. Patil for Respondent Nos.1A to 1F.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

RESERVED ON : 13th AUGUST, 2018.

PRONOUNCED ON : 16th AUGUST, 2018.

JUDGMENT :-

1] This Second Appeal is preferred by Original Defendant No.1 challenging the judgment and decree dated 25/10/1996 passed by the 5th Additional District Judge, Kolhapur in Regular Civil Appeal No.5 of 1992, which was preferred against the judgment and decree in Regular Civil Suit No.126 of 1984 dated 29/11/1991 passed by the Civil Judge, Junior Division, Panhala.

2] Brief facts of the case are as under :-

The suit lands bearing Gat NoS.653 and 883 situated at village Tirpan, Taluka Panhala, District : Kolhapur, were owned by Shri Shahaji General Charitable Trust, Kolhapur. Father of the Plaintiff-Shripati and Defendants (Yashwant and Dattu), namely, Hari Piraji Patil, was protected tenant in the suit lands. After his death, the suit lands were in possession of the Plaintiff and Defendants in their capacity as legal heirs. Plaintiff was residing at Mumbai and visiting the village occasionally. Therefore, the suit lands were in actual cultivation and in possession of Defendant No.1. As a result, the sale-deed of the suit lands came to be executed in the name of Defendant No.1 as a "karta" of joint family. His name therefore came to be recorded in the 7/12 extract.

3] According to the Plaintiff, he was sending the 'Money Orders' to Defendant No.1 from time to time, which amount was used by Defendant No.1 for purchase of the suit lands. Hence, on this count also, he is having equal $1/3$ share in the suit lands along with Defendant Nos.1 and 2. Defendant No.1 has, however, denied the share of the Plaintiff. However, in a suit bearing Regular Civil Suit No.117 of 1983 filed by Defendant No.1 against Defendant No.2, they have

arrived at compromise, and Defendant No.2 is given some share in the suit lands. But, when the Plaintiff demanded his share in the suit lands, it was refused. Hence, the Plaintiff is constrained to file this suit for partition of his 1/3rd share in the suit lands.

4] This suit came to be resisted by Defendant No.1 contending *inter-alia* that the suit lands belong to him exclusively as he has purchased the same and he was in possession thereof as a tenant. It was contended by him that originally though his father was in possession of the suit lands as protected tenant, from the year 1951 viz. after the death of their father, the suit lands came to be entered into record of rights in the name of Daulu Jayram Ghorpade as a tenant, thereby the tenancy rights of their father Hari Piraji Patil came to an end. In the year 1954, the name of Defendant No.1 alone came to be entered into record of rights as exclusive tenant and sale-deed of the suit lands was also executed in his name alone. Hence, the suit lands no more belong or are in possession of the joint family; he being the sole owner thereof, the Plaintiff cannot claim any share in the suit lands.

5] It was submitted that at the instance of some elders in the village, in order to settle the dispute between him and Defendant No.2

amicably, he has given some portion of the suit lands to Defendant No.2 by way of 'compromise' without accepting the rights of Defendant No.2 over the same. Hence, the decree passed in Regular Civil Suit No.117 of 1983 cannot be of any help to the Plaintiff. According to Defendant No.1, he has purchased the suit lands from his own earnings. The amount which the Plaintiff has given to him as hand loan is repaid by him on 06/11/1971. Hence, on that basis also, the Plaintiff cannot claim any share in the suit lands.

6] Defendant No.2 has also supported the case of Defendant No.1.

7] On these respective pleadings of the parties, the trial Court framed the necessary issues for its consideration. In support of their rival contentions, both Plaintiff and Defendant No.1 examined themselves and on appreciation of their evidence, the trial Court was pleased to dismiss the suit, holding that the Plaintiff has failed to prove that the suit lands were belonging to the joint family. Conversely, the trial Court held that, as the sale-deed of the suit lands stands exclusively in the name of Defendant No.1 and after the death of their father, the name of Defendant No.1 was alone entered into record of rights, the Plaintiff cannot claim any share in the suit lands.

8] When the Plaintiff challenged this judgment and decree of the trial Court before the First Appellate Court, the Appellate Court however reversed the same and held that the Plaintiff has proved that the suit lands were in possession by Defendant No.1 as “karta” of the joint family as originally the suit lands were in possession of Hari Piraji Patil, the father of Plaintiff and Defendants, as protected tenant. Accordingly, the First Appellate Court decreed the suit granting 1/3rd share to the Plaintiff in both the suit lands.

9] This Second Appeal was admitted on following substantial questions of law on 19/12/1996 and my findings are recorded against them for the reasons stated below.

<u>Points</u>	<u>Finding</u>
(F) <i>Whether The learned Judge ought to have taken into consideration the documents at Exh. 40 to 46 to show that the payment of rent and the money transaction between the Appellant and Respondent No.1 was settled on 6/11/1971 and the so called amount sent by the Respondent No.1 was never utilized for the purpose of the suit properties.</i>	No

- (G) *Whether the learned Judge failed to take into consideration that after the death of Hari Piraji Patil i.e. the father of the parties in the year 1951, Mutation Entry No.2195 was sanctioned and the name of the Hari Patil which was shown as a tenant is deleted.* No
- (H) *Whether the learned Judge ought to have taken into consideration the 7/12 extracts produced at Exh.78 and 79 which showed that after the death of Hari Patil, Daulu Ghorpade is shown as a tenant for the year 1951-52, 1952-53 and the name of the Appellant is recorded as a tenant since 1953-54 onwards till the date of the sale-deed.* No

10] As stated above, the facts of this Appeal are not in the realm of the dispute. It is admitted that the suit lands were originally in possession of the father of the Plaintiff and Defendants viz. Hari, as protected tenant. His name was also appearing in the record of rights till the year 1951. However, after his death, for the year 1951-52 and 1952-53 the name of one Daulu Ghorpade came to be entered into record of rights. Thereafter from the year 1953-54 onwards till the date of the sale-deed in the year 1965, the name of Defendant No.1

alone came to be recorded. The sale-deed of the suit land was also executed in the name of Defendant No.1 alone in the year 1965.

11] On the basis of these admitted facts, according to Defendant No.1, he is the exclusive owner of the suit lands; whereas according to Plaintiff, as the suit lands were in possession of their father as tenant, even though the sale-deed came to be executed in the name of Defendant No.1 alone, it was for and on behalf of the joint family. The second case made out by the Plaintiff is that even for the purchase of the suit lands, he has advanced the money to Defendant No.1 and therefore, on this count also, he is having equal 1/3rd share in the suit lands.

12] Whereas according to learned counsel for Defendant No.1, when admittedly after the death of Hari Piraji Patil, viz.the father of the Plaintiff and the Defendants, the name of one Daulu Ghorpade was entered into record of rights, this fact goes to prove that initially may be Hari Piraji Patil was the protected tenant in the suit lands but after his death his tenancy was surrendered and accordingly, his name was deleted for two years. If the name of some third person like Daulu Ghorpade was appearing in the cultivation column of the suit lands, it follows that Hari Piraji Patil's tenancy no more remained. From Daulu

Ghorpade Defendant No.1 has received possession as a tenant and therefore, the suit lands no more remained with the joint family but they were exclusively possessed as tenant by Defendant No.1. Accordingly, the sale-deed is also entered into his name. In such circumstances, there does not arise any question of the Plaintiff getting 1/3rd share in the suit lands.

13] To substantiate this submission, learned counsel for the Appellant-Defendant No.1 has relied upon the judgment of this Court in the case of *Bhima Aba Rade & Anr. V/s. Thakubai Maruti Rade & Ors.*¹. According to him, the facts of this reported judgment are more or less similar to the facts of the present case. In that case also, the suit lands were originally in the possession of the common ancestor of the parties, their father, as protected tenant. On his surrendering the tenancy in the year 1947-48, name of Defendant No.1 alone was entered into record of rights in cultivation column as a tenant and as a result on 01/04/1957 he was found to be in exclusive possession and hence, the 32M Certificate under the Bombay Tenancy and Agricultural Lands Act, 1948 ("*B.T. and A.L. Act*" for short) came to be issued in his name. When it was challenged by the other brothers claiming their share in the suit land, on the count that their father

1 2007(6) Bom.C.R. 408

was protected tenant of the suit land, it was held that as their father has surrendered the tenancy, these three brothers cannot claim any right therein, considering the individual tenancy rights which were acquired by Defendant No.1 in that suit.

14] According to learned counsel for the Appellant, in the facts of the present case also, there is no evidence to show that after the death of Hari Piraji Patil, the tenancy continued in the name of three brothers. Conversely, the name of Daulu Ghorpade was entered as a tenant and thereafter two years the name of Defendant No.1 alone came to be mutated. As per the evidence on record, he was found to be in exclusive possession. Therefore, having regard to this reported judgment, in his submission, it has to be held that the Plaintiff or Defendant No.2 cannot claim right in the suit lands. Moreover, the Civil Court cannot have jurisdiction to decide such question, as the Certificate issued under Section 32-M of B.T. and A.L. Act is of a conclusive nature.

15] In my considered opinion, there is some subtle and vital difference between the facts of this reported authority and the facts of the present case. As observed in paragraph 18 of the said judgment, in that case, there was clear evidence proving on record that prior to his

death in the year 1950, somewhere in 1947-48, deceased Abu @ Aba Rama Rade has surrendered his tenancy rights in respect of the suit lands. The said surrender of his rights was duly verified and his name was accordingly deleted from the Revenue Record. It was found that this surrender of the tenancy rights was effected as provided under Section 15 and Rule 9 of the B.T. and A.L. Act. The name of Defendant No.1 therein was later-on recorded in the Revenue Record as ordinary tenant. In that backdrop, it was held that, in the face of clear evidence proving surrender of tenancy rights by deceased father, and further clear evidence proving that Defendant No.1 became exclusive owner thereof being in possession of the suit land as tenant on the tiller's day, 32-M Certificate was also issued in his name alone, the said suit land can no more be available for partition in view of Section 43 of the B.T. and A.L. Act, as Defendant No.1 has become the statutory owner thereof. In the facts of the present case, however, there is no evidence proving on record that deceased Hari Piraji Patil, father of the Plaintiff and the Defendants, has surrendered his tenancy rights and such surrender was duly verified as provided under Section 15 read with Rule 9 of the B.T. and A.L. Act.

16] As held in the judgment of this Court in the case of *Laxmanrao Anantrao Stardekar V/s. Bapu Satyappa Pawar* (since

*deceased) by heirs*² “the surrender of tenancy would take effect only after it is verified by Mamtaldar. The surrender of tenancy rights must be in accordance with Section 15 of the B.T. and A.L. Act as provided Rule 9 of the relevant Rules”. Here in the case, no such plea is raised by Defendant No.1 also that their father Hari Piraji Patil has surrendered his tenancy rights in the suit lands as provided under Section 15 read with Rule 9 of the B.T. and A.L. Act. In such circumstances, this judgment cannot be made applicable to the facts of the present case.

17] In the present case, the evidence on record consistently shows that only for 1 or 2 years the name of Daulu Ghorpade was entered into record of rights but after the death of Hari Piraji Patil, the names of all his three sons were entered into record of rights of the suit lands as his legal heirs. Hence, merely because for 2 years, the name of Daulu Ghorpade was entered in cultivation column does not mean that the tenancy rights were surrendered in any way. Even if there is alleged surrender, it is not as per Section 15 read with Rule 9 of the B.T. and A.L. Act. Therefore, this case of surrender of tenancy by father, Hari Piraji, cannot be accepted in any way. Once it is held that the lands were cultivated by their father as protected tenant and

after his death, the names of three sons were entered into record of rights, it follows that execution of the sale-deed in the name of Defendant No.1 alone, cannot take away the rights of Plaintiff and Defendant No.2 in the suit lands.

18] As regards the bar under Section 43 of the BT and AL Act, though in this judgment, it has been held that, in view of the said bar this land was no more available for the partition, it has to be stated that by way of the Amendment effected in Section 43 of the B.T. and A.L. Act in the year 1982, the word "partitioned" has been deleted. Therefore, the said bar or restriction on transfer of the land purchased under the provisions of the B.T. and A.L. Act is no more applicable for the partition.

19] Even as regards the conclusiveness of the 'Certificate' issued under Section 32-M of the B.T. and A.L. Act, it has to be stated that it is conclusive against the landlord but that does not prohibit the family members of the tenant who had become purchasers, from claiming their right in the said land. Even if the 'Certificate', issued under Section 32-M of the B.T. and A.L. Act, is in the name of the one legal heir, unless and until the other legal heirs had expressly communicated in writing their unwillingness to purchase the land, as

required under Section 40 of the B.T. and A.L. Act, the other legal heirs cannot be dis-entitled to get their share in the said land. This issue is also not required to be referred to the tenancy authorities, as held by this Court in the judgment of the *Vithu C. Agaskar & Ors. Vs. Rama Gajanan Agaskar & Ors.*³. In the said judgment, it was held that if the land was held in tenancy by the father of the family and as a result when the purchase is for and on behalf of the joint family, the Certificate issued under Section 32-M of the B.T. and A.L. Act would at the most be conclusive proof of purchase against the owner of the land. However, the tenancy rights of the joint tenants cannot be negated solely on the ground that the Certificate of purchase was issued in favour of “karta” or any elderly person of a joint family. Thus, the Certificate of purchase cannot be the conclusive proof of title, *vis-a-vis* the joint tenants.

20] In a suit for partition of the tenanted land, which is purchased under the provisions of the B.T. and A.L. Act, it is therefore not necessary to refer the issue to the tenancy authorities, as the question before the Court is only to find out whether the contention of the party that the name of another party was entered for and on behalf of other members of the family or not and whether they had

infact acquired necessary rights. Here, the issue is not whether the land was actually held in tenancy; but the issue is about the other legal heirs of the tenant in whose name the certificate is not standing are entitled to get their separate share from the said land. This position is very well made clear in the judgment of this Court in the case of *Adam Mohmad Darwajkar & Ors. V/s. Appa Daud Darwajkar*⁴.

21] As held in the judgment of this Court in the case of *Sarjerao Maruti Sathe V/s. Pralhad Laxman Sathe & Ors.*⁵, tenancy right which is heritable devolves upon such of heir or heirs who are willing to continue the tenancy. Merely because the land is in possession of one of the co-heirs and the Certificate is issued in his name, that will not deprive the other legal heirs from getting share in the said land. Such purchase by Defendant No.1 in the present case must therefore enure for the benefit of other members of the joint family, unless of course they have expressly communicated their unwillingness to purchase the same as required under Section 40 of the B.T. and A.L. Act. In this case, there is no such evidence on record. Conversely, the evidence on record proves that the Plaintiff has even contributed for purchase price of the suit lands, thereby expressly evidencing his interest to continue in possession and acquisition of the

4 2007(2) Mh.L.J.340

5 2010(2) ALL M.R.544

said lands.

22] In the facts of the present case, it is pertinent to note that Defendant No.1 has accepted even the rights of Defendant No.2 in the suit lands in the suit filed by him bearing Regular Civil Suit No.117 of 1983 in which he has entered into 'compromise' with Defendant No.2 and has given some portion of the suit lands to Defendant No.2 accepting his rights therein. If Defendant No.1 was the exclusive owner, he would not entered into such compromise with Defendant No.2.

23] Moreover, the evidence on record, in this case, shows that the Plaintiff has advanced the funds for purchase of these suit lands. There is various correspondence entered into between the Plaintiff and Defendant No.1 viz. Letter dated 23/12/1965 Exhibit-29 goes to show that Defendant No.1 has in this letter admitted the receipt of the amount of Rs.1,000/- from the Plaintiff and has further assured him that he will deposit this amount with the Revenue Authorities. The letter Exhibit-33 further goes to show that Defendant No.1 has admitted in this letter the receipt of the amount of Rs.1,300/- from the Plaintiff and assured him that by adding his own amount of Rs.1,700/-, he has totally paid the amount of Rs.3,000/- for purchase of the land,

locally known as “Pimpal-shet”. The 7/12 extract of the suit land bearing Gat No.883 goes to show that its local name is “Pimpal-shet”. In my considered opinion, this evidence is also more than sufficient to show that the suit lands were purchased for the joint family and not at all for the individual ownership of Defendant No.1. Even the sale-deed shows that the possession of Defendant No.1 in the suit land as a protected tenant was confirmed by this sale-deed; thereby clearly indicating that the execution of the sale-deed was not an independent transaction but it was clearly under the provisions of the B.T. and A.L. Act, as Defendant No.1 has inherited the tenancy right from his father and hence, was held entitled to purchase the same under Section 32-G of the B.T. and A.L. Act. The monetary contribution of the Plaintiff for purchase of the said lands coupled with the fact that Defendant No.1 has admitted the share of Defendant No.2 in the suit lands thereby destroying his own plea that it was his exclusive property.

24] In the light of this evidence on record, merely because the receipts of the payment of the rent (khand) Exhibit-40 to 46 stand in the name of Defendant No.1 alone, it will not be possible to hold that the suit lands belong exclusively to Defendant No.1. The First Appellate Court has considered the entire evidence on record in its proper perspective. In the Second Appeal therefore, no interference is

warranted. Hence, Second Appeal stands dismissed.

25] In view of dismissal of the Second Appeal, nothing survives in the Civil Application and hence, it also stands disposed off.

[DR.SHALINI PHANSALKAR-JOSHI, J.]