

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 211 OF 2006

LATE DEORAO S/O BAJIRAO THORAT
DECEASED THROUGH LRS. AND OTHERS
VERSUS
SHRI VIKRAM S/O DAGDOBA PADWAL AND OTHERS

.....

Mrs. M. S. Mhase-Thube, Advocate for the Petitioners.
Mr. V. D. Salunke, Advocate h/f Mr. Prashant Deshmukh, Advocate
for Respondent nos. 1, 2A to 2D

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CORAM : V. K. JADHAV, J.
RESERVED ON : 19th November, 2019
PRONOUNCED ON : 18th December, 2019

ORDER :-

1. By this Writ Petition, the petitioners are challenging the order passed by the Additional Tahsildar, Osmanabad dated 14.03.1988 while answering the reference on tenancy issue by the Civil Court in file no. 1979/Tenancy/99A/32, said order confirmed by the Deputy Collector (Land Reforms), Osmanabad dated 12.03.1993 in file No. 88/TNC/A/22 and also the judgment and order passed by the Designated Member, Maharashtra Revenue Tribunal, Aurangabad (M.R.T.) dated 03.08.1998 in case No. 55/B/93/0 thereby confirming the above mentioned order passed by the

Additional Tahsildar in file no. 1979/Tenancy/99A/32 and by the Deputy Collector (Land Reforms), Osmanabad in file no. 88/TNC/A/22 dated 12.03.1993.

2. Brief facts giving rise to the present Writ Petition are as follows:

a. One Dadarao Pandurang Thorat was the original owner and landlord of the suit land bearing survey nos. 16/3 and 16/4 situated at village Dautpur, Taluka and District Osmanabad. He had sold the suit land to respondent no.3 Narayan Abarao Shendge under registered sale deed on 03.03.1966 and thereafter, respondent no.3 sold the suit land to respondent nos. 1 and 2 in the year 1969. Though name of the original petitioner i.e. deceased Deorao Bajirao Thorat was shown in the column of protected tenant and he was in possession, the original landlord Dadarao had obstructed his peaceful possession over the suit land. So far as execution of the sale deed by landlord Dadarao Thorat in favour of respondent nos. 1 and 2 is concerned, deceased Deorao had filed three appeals before the Deputy Collector, Osmanabad, one appeal under Section 247 of Maharashtra Land Revenue Code, 1966

(MRLC) regarding Mutation Entry No. 312 against Dadarao and Narayan, another appeal under Section 98 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 against Narayan and third appeal under Section 247 of MLRC regarding Mutation Entry No. 319 against Narayan Shendge, Vikram Padwal and Vasant Ingle. Learned Assistant Collector, Osmanabad, by judgment and order dated 14.05.1978, allowed all the three appeals and quashed and set aside Mutation Entry Nos. 312 and 319 in respect of village Dautpur and further directed that the tenancy rights of deceased Deorao Bajirao Thorat (original petitioner) are not to be disturbed. It is the case of the petitioners that against the said order passed by the Assistant Collector, Osmanabad, only Narayan Shendge has filed an appeal in time and thereafter, Vikram Padwal and Vasant Ingle (respondent nos. 1 and 2 herein) also filed appeal belatedly, that is after 10 years.

b. Deceased Deorao had instituted one Regular Civil Suit No. 98 of 1975 against the subsequent purchasers respondent nos. 1 to 3 herein and also the landlord Dadarao, before Civil Judge, Senior Division, Osmanabad for a decree of perpetual injunction. Learned Civil Judge, Senior Division, Osmanabad was pleased to grant

temporary injunction in favour of deceased Deorao, however, since the tenancy issue arose in the matter, referred the said issue to the tenancy court. The said order of temporary injunction was confirmed by the appellate court.

c. On the basis of the issue referred by the Civil Judge, Senior Division, Osmanabad in aforesaid Regular Civil Suit No. 98 of 1975, initially, the Naib Tahsildar was pleased to hold that deceased Deorao is the lawful tenant of the suit land vide his order dated 29.03.1979. Being aggrieved by the said order, respondent nos. 1 and 2 herein preferred an appeal before the Deputy Collector and the Deputy Collector remanded the matter to the Naib Tahsildar for fresh and *de-novo* inquiry. Learned Additional Tahsildar, by order dated 14.03.1988 in file no. 1979/Tenancy/99A/32, recorded the finding on the issue referred by Civil Judge, Senior Division in the aforesaid suit to the effect that deceased Deorao Bajirao Thorat is not the tenant over the suit land bearing survey nos. 16/3 and 16/4. Being aggrieved by the same, deceased Deorao Bajirao Thorat preferred an appeal before the Deputy Collector, Land Reform, Osmanabad and by judgment and order dated 12.03.1993, the Deputy Collector, Land Reform,

Osmanabad has dismissed the appeal. Being aggrieved by the same, the legal representatives of deceased Deorao Bajirao Thorat (Petitioners herein) have preferred revision bearing No. 55/B/93/0 before M.R.T., Aurangabad and the learned Member, M.R.T., Aurangabad by judgment and order dated 03.08.1998, dismissed the revision application and confirmed the orders passed by the Additional Tahsildar and the Deputy Collector (Land Reforms), Osmanabad. Hence this Writ Petition.

3. On the basis of the evidence adduced by the parties, the learned Additional Tahsildar has observed that there is no evidence that deceased Deorao was cultivating the suit land as on the date of institution of the suit and on the other hand, the documents relating to the consolidation indicates possession of the respondents/defendants over the suit land. Learned Additional Tahsildar has also observed that there is no evidence about tenancy. Learned Additional Tahsildar has also held that there is blood relation between the landlord deceased Dadarao and the original petitioner deceased Deorao Bajirao Thorat. Learned Tahsildar by referring the provisions of Section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950, held that since the

original petitioner deceased Deorao Bajirao Thorat was a member of the landlord's family, he is not deemed to be a tenant and in case of an undivided Hindu family, the land shall be deemed to be cultivated personally by the landlord if it is cultivated by any member of such family. Even the Deputy Collector (Land Reforms) and the designated Member of M.R.T. have also confirmed the said findings recorded by the Additional Tahsildar.

4. Learned counsel for the petitioners submits that so far as the blood relations and deceased Deorao Bajirao Thorat/original petitioner was considered to be a member of the family of landlord Dadarao is concerned, there is no specific pleading to that effect in the proceedings initiated before the Additional Tahsildar after the Civil Court has referred the matter to decide the tenancy issue. Learned counsel submits that it is well settled that the party has to take proper pleadings and prove the same by adducing sufficient evidence and no evidence can be permitted to be adduced on issue unless factual foundation has been laid down in respect of the same. In the instant case, the respondents herein have not laid down any factual foundation and as such, the evidence laid down by them about the blood relations and that the original petitioner

deceased Deorao Bajirao Thorat was the member of the family of landlord Dadarao, is not admissible. Learned counsel submits that respondent nos. 1 and 2 were the purchasers of the suit land. While submitting their returns before the ceiling authority on 31.03.1976 regarding their holdings, they have clearly admitted that the original petitioner deceased Deorao was a tenant over the suit land since long and as such they are now estopped from taking a contrary stand that the original petitioner deceased Deorao Bajirao Thorat is not the tenant of the disputed land. Learned counsel submits that the original petitioner Deorao Bajirao Thorat was a tenant on the suit land by virtue of the lease deed and there is no prohibition to create a lease between the parties who are relatives *interse*. Learned counsel for the petitioners submits that, therefore independently also, tenancy can be created and in regard to the same, the provisions of Section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 are inapplicable. Learned counsel submits that the relationship is a basic factor for the genesis of an implicit faith and if for conveying the property a relation is chosen with open eyes, it will have to be accepted for its legal consequences. Learned counsel submits that what is required to be considered is not the relationship but satisfaction of the

conditions of the relationship as emerged in Section 105 of the Transfer of Property Act, 1882. Learned counsel submits that there is ample documentary evidence available to draw the inference that deceased Deorao Bajirao Thorat was cultivating the land as a tenant on the basis of the lease in his favour by deceased Dadarao. Learned counsel submits that lease of the immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession and the said lease can also be within the family. Learned counsel for the petitioners submits that the best evidence is withheld by the respondents as respondent no.4 Dadarao, who happened to be the landlord, had not entered into the witness box. The general power of attorney has given evidence for respondent nos. 1 to 3. Learned counsel in the alternate submits that if the original petitioner Deorao is not a protected tenant under the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950 but he is a tenant in terms of the provisions of Section 107 of the Transfer of Property Act, 1882. Learned counsel submits that the authorities below have not considered all these material aspects of the case and even the learned designated Member of M.R.T., Aurangabad, without application of mind, mechanically confirmed the orders passed by

the authorities below. Learned counsel thus submits that the Writ Petition deserves to be allowed by setting aside the orders impugned in this Writ Petition.

5. Learned counsel for the petitioners, in order to substantiate her contention, placed reliance on the following cases:

1. *Ahmedsaheb (D) by LRs & Others v. Sayed Ismail & Another*, reported in (2012)8 SCC 516,
2. *Anthony v. Kc Ittoop and Sons*, reported in (2000)6 SCC 394,
3. *The National Textile Corporation Ltd. v. Nareshkumar Badrikumar Jagad & Ors.* (Civil Appeal No. 7448 of 2011) decided by Supreme Court on 05.09.2011.
4. *Iswarbai C. Patel v. Harihar Behera*, reported in (1999) 3 SCC 457.
5. *Mohinder Kaur v. Sant Paul Singh* [Civil Appeal No(s). 2869-2870 of 2010] decided by Supreme Court on 01.10.2019.
6. *Janki Vashdeo Bhojwani v. Indusind Bank Limited*, reported in (2005) 2 SCC 217.
7. *Gnyandeo s/o Duraji Pirange v. Pandurang Jyoti Pirange*, reported in 1994 (2) Mh.L.J.1174.

8. *Ramji Dhondji Dhumal & Ors. v. Mahadu Jalbaji Dhumal & Ors.*, reported in 2009 (6) Mh.L.J. 461.

9. *Satluj Jai Vidyut Nigam v. Raj Kumar Rajinder Singh (Dead) Through Lrs. and Others*, reported in 2018 DGLS (SC) 964.

6. Learned counsel for respondent nos. 1 and 2 submits that there are concurrent findings on facts by the authorities below and further, both the authorities below also considered the legal position in terms of the provisions of Section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950. Learned designated Member of the M.R.T. has also confirmed the judgment and order passed by the authorities below. Learned counsel thus supported the judgment and orders passed by the authorities below. Learned counsel submits that though the word 'family' is not defined in the Hyderabad Tenancy and Agricultural Lands Act, 1950, the general meaning of the word used in the context of cultivation of land must be taken into consideration. The family relations do not come to an end for general purposes of blood relations by partition or separation when there was a legal status of a joint family. Mere fact that the person cultivating had separated would not alter the blood relationship and he does not cease to be a member of the family. His cultivation would also amount to personal cultivation of the

landlord in view of Section 2(1)(g) of the Hyderabad Tenancy and Agricultural Lands Act, 1950. Learned counsel submits that there are pencil entries with regard to the cultivation which are rightly discarded by the authorities below. Learned counsel submits that there cannot be any estoppel against law. Even if in the ceiling proceedings certain statements are given by the respondents herein, however, on the basis of those admissions it cannot be said that the respondents herein are estopped from denying the status of the original petitioner Deorao Bajirao Thorat as a tenant over the suit land. Learned counsel submits that those respondents in their statements before the ceiling authority have simply given reference that the original petitioner Deorao Bajirao Thorat claims to be a tenant over the suit land and he is in possession. Learned counsel submits that in a tenancy reference, it is for the tenancy court to arrive at a conclusion by considering the legal provisions and also the factual aspect. Even if the admissions given by those respondents are considered for the sake of discussion, there cannot be an estoppel against the provisions of Section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 which otherwise declines the person from the family of the landlord as a deemed tenant. Learned counsel submits that the petitioner Deorao Bajirao

Thorat in his statement before the tenancy court had denied his relations with respondent no.4 landlord Dadarao. The original petitioner Deorao Bajirao Thorat had denied that respondent Dadarao was his cousin. Learned counsel submits that the respondents have examined witness Dhondiba Ranba Raut, who happened to be the real uncle of landlord Dadarao. The original petitioner deceased Deorao Bajirao Thorat was his cousin. Learned counsel submits that deceased Deorao Bajirao Thorat had denied his relations for claiming his rights over the suit land pretending him to be a tenant. Learned counsel submits that there is no substance in this Writ Petition and it is liable to be dismissed. Learned counsel, in order to substantiate his contention, placed reliance on the following cases:

1. **Nilavabaj Sida Khajure Vs. Chanamalappa Bassappa Khajure and Others** reported in 1977 Mh.L.J. 443
2. **Shaikh Abdul Aziz Yasin (since deceased through LRs.) Vs. Shaikh Abdul Hamid Yasin & Ors.** reported in 2009 (1) ALL MR 64
3. **Sunderabai Sahebrao Shinde Vs. Balasaheb Bansi Chalak Others** reported in 1992 MCR 312

4. **Sonabai w/o Ratan Ainapure & Anr. Vs. Shankar s/o Laxman Ainapure & Anr.** (Writ Petition No. 935 of 1989 decided by this Court on 08.09.2008)
5. **Vijaysingh Vs. Sopan and Others** reported in 1997 MCr 334
6. **Shri. Mahadev Ballappa Burud & Anr. Vs. Shri. Balwant Mandrekar & Ors.** (Writ Petition No. 6309 of 2014 decided by this Court at its Principal Seat at Bombay on 11.06.2019)
7. **Narayan Laxman Patil Vs. Gala Construction Company Private Limited and Ors.** reported in (2016) 14 SCC 388
8. **Commissioner of Income-tax (Central), Calcutta Vs. B.N. Bhattacharjee and Anr.** reported in AIR 1979 SC 1725
9. **Mohansingh Uttamsing Tanwani Vs. State of Maharashtra & Ors.** reported in 2010 (5) Bom.C.R. 837
10. ***Rangrao s/o Shandarao deceased through L.Rs. & others v. Pandharinath s/o Eknath & another***, reported in 1999 (4) Bom.C.R. 180

7. It is not disputed that respondent no.4 Dadarao was the original owner and landlord of the disputed land bearing survey nos. 16/3 and 16/4 situated at village Dautpur, Taluka and District Osmanabad. Deceased Deorao Bajirao Thorat was claiming to be a protected tenant over the suit land and during his life time, he had instituted Regular Civil Suit No. 98 of 75 against the subsequent

purchasers and the original landlord Dadarao for a decree of perpetual injunction. Learned Civil Judge Senior Division, Osmanabad had referred the tenancy issue to the tenancy court and accordingly, deceased Deorao Bajirao Thorat had initiated proceedings before the Naib Tahsildar bearing case no. 96/TNC/80/38. Initially, learned Naib Tahsildar was pleased to hold that deceased Deorao is the lawful tenant of the suit land vide order dated 29.03.1979. Against the said order respondent nos. 1 and 2 preferred appeal before the Deputy Collector and the Deputy Collector remanded the matter to the Naib Tahsildar for fresh and *de novo* inquiry. After remand, learned Additional Tahsildar (Land Reforms), Osmanabad, by judgment and order dated 14.03.1988 in file no. 1979/TNC/99A/32 recorded findings and held that deceased Deorao Bajirao Thorat is not a tenant over the suit land and thus informed his decision alongwith the findings to the Civil Court. The said order passed by the Additional Tahsildar is confirmed by the Deputy Collector, Land Reforms, Osmanabad and also by the designated Member, M.R.T., Aurangabad.

8. Learned counsel for the petitioners vehemently submitted that there is no specific pleading of the respondents in the tenancy

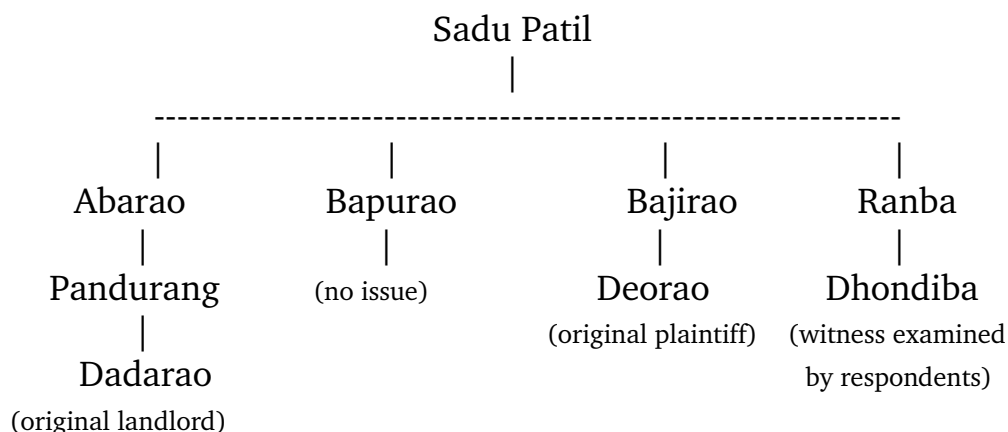
proceedings about the relationship between the landlord Dadarao on one hand and the tenant Deorao Bajirao Thorat on the other hand. Learned counsel has submitted that a party has to take proper pleadings and prove the same by adducing sufficient evidence. Learned counsel for the petitioner has vehemently submitted that no evidence can be permitted to be adduced on an issue unless factual foundation has been laid down in respect of the same. Learned counsel thus submitted that in absence of any specific pleadings, the evidence laid about the relationship as stated above is inadmissible and as such, the bar under Section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 is not attracted. I have carefully perused the pleadings of the parties in Regular Civil Suit No. 98 of 1975. Respondent nos. 1 and 2 i.e. original defendant nos. 1 and 2 have strongly resisted the suit by filing written statement Exhibit 51 in Regular Civil Suit No. 98 of 1975. They have denied that the plaintiff deceased Deorao Bajirao Thorat was in possession of the suit land as a tenant. It is their case that defendant no.2 Dadarao is the original owner of the suit land and on 03.03.1966, he had executed sale deed in favour of defendant no.3 (respondent no.3 herein) and put him in possession of the suit land. Accordingly, Mutation Entry No. 312 came to be

sanctioned in favour of defendant no.3-Narayan. The said defendant no.3-Narayan by an agreement to sale, put defendant nos. 1 and 2 (respondent nos. 1 and 2) in the actual and physical possession of the suit land by executing an agreement to sale and further executed a registered sale deed in their favour in respect of the suit land on 22.02.1969 for a valuable consideration of Rs.8,000/- and as such, Mutation Entry No. 319 came to be sanctioned in their favour by the competent Revenue authority. It is part of record that the original plaintiff deceased Deorao Bajirao Thorat had preferred two appeals under Section 247 of MLRC regarding Mutation Entry Nos. 312 and 319 before the Assistant Collector, Osmanabad and by judgment and order dated 14.05.1978 the Assistant Collector, Osmanabad allowed the appeals and set aside the Mutation Entry Nos. 312 and 319 and so far as the tenancy rights claimed by deceased Deorao Bajirao Thorat are concerned, the learned Assistant Collector has not considered the tenancy issue for want of jurisdiction and further observed that the said rights claimed should not be disturbed without due process of law. On careful perusal of the said judgment and order passed by the Assistant Collector, Osmanabad, it appears that the learned Assistant Collector, Osmanabad has

observed that the original plaintiff Deorao is not an established tenant in the letter of law and on the basis of the submissions made on behalf of deceased Deorao, observed that he was the tenant over the suit land from 1960 to 1961 and by Mutation Entry No. 166 dated 29.08.1965, deceased Deorao became the tenant of the entire suit lands.

9. Thus, the basic pleadings are their denying the status of deceased Deorao Bajirao Thorat as a tenant over the suit land. So far as the said Regular Civil Suit No. 98 of 1975 instituted by deceased Deorao is concerned, it was simplicitor suit for a decree of perpetual injunction. As such, the defendants have raised the plea to the effect as to their lawful possession over the suit land by denying the status of deceased Deorao/original plaintiff as a tenant. However, before the tenancy authority i.e. Tahsildar (Tenancy), respondents adduced the evidence to substantiate their pleadings that the plaintiff/deceased Deorao was not a tenant over the suit land. There was no occasion for them to raise a specific pleading about the relationship in a suit simplicitor for a decree of perpetual injunction and there is no question of any pleadings in the tenancy proceedings. Furthermore, evidence is not required to

be pleaded. It is not incumbent upon the parties to mention about the evidence in their pleadings to substantiate their basic pleadings. I find no substance in the submissions made on behalf of the petitioners that the evidence led by the respondents about the relationship between the landlord respondent Dadarao on one side and the petitioner deceased Deorao Bajirao Thorat/original plaintiff on the other side is without pleadings and thus inadmissible in evidence. However, it is not out of place to mention here that the original plaintiff/deceased Deorao Bajirao Thorat, to my surprise, denied the relationship with defendant no.4/landlord Dadarao Thorat. He has denied that the landlord Dadarao Thorat is his real cousin. The respondents have examined Dhondiba Ranba Thorat as witness, who happened to be the real uncle of the landlord Dadarao and the real cousin of deceased Deorao Bajirao Thorat. On the basis of the evidence led by the respondents, learned Additional Tahsildar has shown the genealogy in the impugned judgment and order dated 14.03.1988. Even the original plaintiff deceased Deorao Bajirao Thorat has also admitted in his evidence that the name of his grandfather is Sadu. The said genealogy is reproduced herein below:



10. In view of this genealogy, as explained by Dhondiba Ranba Thorat, deceased Deorao Bajirao Thorat was the real uncle of landlord Dadarao and real cousin of witness Dhondiba. Thus, in terms of the provisions of Section 5(a) and 2(1)(g) of the Hyderabad Tenancy and Agricultural Lands Act, 1950, deceased Deorao Bajirao Thorat, as rightly held by the authorities below, cannot be a deemed tenant. His cultivation amounts to personal cultivation by the landholder respondent Dadarao.

11. Learned counsel for the petitioners has vehemently submitted that in the ceiling proceedings, the respondent late Vasant Ingle has admitted that Deorao is the tenant over the suit land and he is in possession of the suit land in the capacity as a tenant. The respondent late Vasant Ingle in a statement before the ceiling authority, has therefore prayed to exclude the portion of the suit

land from his total land holding and in view of the same, he has not exceeded the ceiling limits and further contended in his statement that after excluding the said area of the suit land, his total holding does not exceed the ceiling limits. Even respondent Vikram Padwal has also admitted that the original plaintiff deceased Deorao Bajirao Thorat was the tenant over the suit land. Learned counsel submits that the respondents herein are now estopped from denying the status of deceased Deorao Bajirao Thorat as a tenant over the suit land. On perusal of the statements of the respondents recorded during the ceiling proceedings, it appears that both the respondents, as referred above, have given their statements to the effect that deceased Deorao Bajirao Thorat is the protected tenant and even he had initiated proceedings in the capacity as a protected tenant before the tenancy authority so also instituted the suit before the Civil Court. In my considered opinion, this is nothing but a factual assertion without any admission as such. It is well settled that the whole case of estoppel fails if the statement is not sufficiently clear and is unqualified. Furthermore, even assuming that the respondents herein have admitted that the original plaintiff deceased Deorao Bajirao Thorat was the tenant over the suit land. On the basis of such admission, the status of

deceased Deorao in connection with the suit land as a protected tenant cannot be determined. It is well settled that there can be no estoppel against the statute. In terms of the provisions of Section 5(a) and 2(1)(g) of the Hyderabad Tenancy and Agricultural Lands Act, 1950, if deceased Deorao cannot be a deemed tenant and if his cultivation amounts to personal cultivation of the landlord Dadarao, the application of rule of estoppel would be unwarranted and uncalled for.

12. Learned counsel for the petitioners has vehemently submitted that the best evidence is withheld and in order to substantiate the contention raised by the respondents, respondent no. 4, who happened to be the landlord, would have been the best witness. However, it is a matter of record that the respondents-purchasers have mainly contested the suit though respondent no.4 has filed his written statement. Respondent no.4 Dadarao has denied tenancy of the original petitioner Deorao Bajirao Thorat over the suit land. However, in the tenancy proceedings, the respondents/purchasers have examined Dhondiba Ranba Thorat who is the real cousin of original petitioner deceased Deorao Bajirao Thorat.

13. Learned counsel for the petitioners submits that even if the original petitioner Deorao is not considered as a protected tenant in view of the bar under Section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950, there is no bar to lease the immovable property within the relations in terms of the provisions of Chapter V (Sections 105 to 117) of the Transfer of Property Act, 1882. I have given my thoughtful consideration to these submissions made on behalf of the petitioners. In terms of the provisions of Section 107 of the Transfer of Property Act, 2nd para, all other leases of immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferer by the transferee, who accepts the transfer on such terms. According to the original petitioner Deorao Bajirao Thorat, it was an oral lease and the suit land was given in possession 10 years prior to police action. It was given on the basis of half share

in the crops to the respondent Dadarao and half share to original petitioner deceased Deorao Bajirao Thorat yearly. In the instant case, respondent no.2 Dadarao, who happened to be the landlord, has not accepted the transfer of the suit land on such terms. On the other hand, contended that the original petitioner deceased Deorao Bajirao Thorat was not a tenant of the suit land. It is to be repeated here that the original petitioner deceased Deorao Bajirao Thorat had approached the court with a specific pleading about his tenancy and he claimed to be a protected tenant, however, as discussed in the foregoing paragraphs, in terms of the provisions of Section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950, being a member of the family, it is to be presumed that he was cultivating the land for and on behalf of the landlord respondent no.4 Dadarao. Even if the contention about the lease as provided under Section 107 of the Transfer of Property Act, 1882 is considered independently, on careful perusal of the statement of original petitioner deceased Deorao in the tenancy proceedings, it appears that deceased Deorao was not sure as to when he was put in possession on the basis of the oral agreement of lease. According to him, it was only for a period of two years and thereafter, no agreement had taken place for further period. There is no evidence

available as to he was giving half of the crops to respondent no.4 Dadarao. Even assuming that there was oral agreement of tenancy, however, so far as the main ingredient about delivery of possession is concerned, there is no convincing evidence as to when the original petitioner deceased Deorao Bajirao Thorat was put in possession of the suit land in terms of the oral lease. The original petitioner deceased Deorao had stated in his statement before the tenancy authority that he is a tenant over the suit land since 1951-1952. However, he could not explain as to why it is mentioned in the suit that he was cultivating the suit land as a tenant from 1955-56. Furthermore, in the said appeals preferred by deceased Deorao Bajirao Thorat for cancellation of Mutation Entry Nos. 312 and 319 as referred in the foregoing paragraphs, deceased Deorao claimed his tenancy over the suit land from 1960-1961 and as per his case, he became the tenant over the entire suit land from 1966 and onwards. Thus, the evidence about the lease, even if considered independently under the provisions of Section 107 of the Transfer of Property Act, 1882, I do not find convincing evidence to accept the same. Furthermore, it is difficult to consider the contention about the lease when deceased Deorao was the real uncle of respondent no.4 Dadarao (landlord).

14. It is well settled that unless and until the terms of the lease are proved before the court, the contention about the lease cannot be considered. Apart from this, even the Additional Tahsildar, Osmanabad in his order dated 14.03.1988 has discussed the oral evidence led by the parties in detail and also observed that even the entries in the cultivation column are pencil entries in respect of the name of deceased Deorao and at some places *rit* no.1 is mentioned and at some place *rit* no.4 is mentioned. Furthermore, by referring the statement prepared by implementing the consolidation scheme, learned Additional Tahsildar has observed about the possession of respondent no.4 Dadarao over the suit land.

15. In the case of ***Sonabai w/o Ratan Ainapure & another vs. Shankar s/o Laxman Ainapure & another*** (supra), relied upon by learned counsel for the respondents, learned Single Judge of this Court has held that the entry regarding cultivation of the tenant being a pencil entry which has also not been verified by the higher authority, is not admissible in evidence.

16. in the case of *Vijaysing vs. Sopan and others* (supra) relied upon by learned counsel for the respondents, the Single Judge of this Court has held that interference in the concurrent finding of fact held by all the three revenue authorities below is not justifiable when there are concurrent finding of fact by the revenue authorities and no illegality in any manner nor any jurisdictional error on the part of the revenue authorities is pointed out by either of the party.

17. In the case of *The National Textile Corporation Ltd. v. Nareshkumar Badrikumar Jagad & Ors.* (supra), relied upon by learned counsel for the petitioners, the Supreme Court has crystallized the law on the issue to the effect that a party has to take proper pleadings and prove the same by adducing sufficient evidence and no evidence can be permitted to be adduced on an issue unless factual foundation has been led in respect of the same. It is well settled that the evidence led without pleadings is not admissible. However, in the instant case, there is a specific pleading denying the status of deceased Deorao as a tenant over the suit land, and to substantiate the said contention, the respondents have adduced evidence about blood relations between the landlord respondent Dadarao and the tenant deceased Deorao.

In terms of Sections 2 (1)(g) and 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950, cultivation of member of the family amounts to personal cultivation of the landlord and as such, such a person cannot be deemed to be a tenant.

18. In the case of *Iswarbai C. Patel v. Harihar Behera* (supra) relied upon by learned counsel for the petitioners, the Supreme Court has dealt with the provisions of Section 114 Illustration (g) of the Evidence Act and held that the person concerned having not entered into the witness box and having not permitted to be cross-examined, an adverse presumption has to be drawn against him. In the instant case, however, even if respondent no.4 landlord has not examined himself on oath in the tenancy proceedings, however, the respondents have examined one Dhondiba Ranba Thorat who was the real cousin of deceased Deorao who also happens to be the uncle of landlord Dadarao. As discussed in the foregoing paragraphs, the respondents purchasers have contested the tenancy proceedings and they have adduced the best evidence available with them to substantiate their contention. I do not think that any case is made out to draw an adverse presumption as provided under the Illustration (g) of Section 114 of the Evidence Act.

19. In the case of ***Gnyandeo s/o Duraji Pirange v. Pandurang Jyoti Pirange*** (supra) relied upon by learned counsel for the petitioners, in paragraph no. 14 of the judgment the Division Bench of this Court has made the following observations:

“15. Illustratively, but not exhaustively, occasions can be contemplated whereunder inspite of relationship connecting the parties to the lease even to the extent of they being the members of a family either a continuing Hindu joint family or a separated one, there are factors and occasions which would necessitate on clear understanding the formation of such relationship. The landlord may be unable to exercise his rights of ownership either he being at a far distance from the land in question, or he being unable to do agricultural jobs by reasons of his old age, infirmity or difficulties of similar character. It cannot be ignored that the relationship is a basic factor for the genesis of an implicit faith and if for conveying property, a relation is chosen with full open eyes, it will have to be accepted for its legal consequences. It would be a transfer by the transferer in favour of the transferee. What is required to be considered is not the relationship but satisfaction of the conditions of the relationship as emerged in Section 105 of the Transfer

of Property Act and a further satisfaction that such relationship is not inconsistent with the provisions of this Act.”

The Division Bench of this Court had an occasion to consider the provisions of Section 105 of the Transfer of Property Act and in the given set of facts, observed that what is required to be considered is not the relationship but satisfaction that such relationship is not inconsistent with the provisions of this Act. In the above cited case, the Division Bench of this Court distinguished the case before it with the ratio laid down in a case of ***Nilavabai Khajure v. Chanamalappa Khajure*** (1977 Mah.L.J. 443) and held as per paragraph 15 reproduced herein above.

20. Learned counsel for the petitioners, in terms of the ratio laid down as above, vehemently submitted that deceased Deorao can claim to be a contractual tenant under an oral agreement of lease and this position will have to be considered not in the context of the provisions of Section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950, but independently thereof. In the case cited above, there was a lease agreement in writing and the terms of the lease on crop share basis are specifically enumerated

in the lease deed. In the instant case, the oral evidence of deceased Deorao does not inspire confidence about the oral lease in his favour by his nephew respondent Dadarao. Furthermore, deceased Deorao Bajirao Thorat was having his own land in the suit survey no.16 which he sold to two different persons. There is nothing in the oral evidence of deceased Deorao Bajirao Thorat to infer about the relation as landlord and tenant. Even there is no factual foundation to draw inference about the contractual relations between landlord Dadarao and deceased Deorao. On the other hand, deceased Deorao Bajirao Thorat had gone to the extent of denying his blood relations with respondent Dadarao.

21. In view of the above, I am not inclined to apply the ratio laid down by the Division Bench of this Court in the case cited above to the facts and circumstances of the present case.

22. Thus, considering the entire aspect of the case, I do not think that the authorities below have committed any error. The Designated member of the M.R.T., Aurangabad has also confirmed the orders passed by the authorities below. I find no reason to interfere. Hence, I proceed to pass the following order:

ORDER

I. The Writ Petition is hereby dismissed.

23. Learned counsel for the petitioners submits that the suit instituted by the petitioner late Deorao Bajirao Thorat is still pending since the issue has been referred to the tenancy court and now this writ petition No. 211 of 2006 came to be dismissed and disposed of. Learned counsel submits that in the said suit, so far as the temporary injunction order in favour of the petitioner late Deorao Bajirao Thorat is concerned, the respondents herein have challenged the said order dated 18.03.1992 by filing writ petition No. 1443 of 2003. In the said writ petition this Court has passed order of status quo to be maintained vide order dated 25.6.2003. It is further observed by the court that the suit is not progressing as the tenancy issue has cropped up and the same is *sub judice* in this writ petition No. 211 of 2006. By order dated 18.7.2019 this court (Coram: Ravindra V. Ghuge, J.) has disposed of the said writ petition No. 1443 of 2003 and further directed the status quo order would continue subject to further orders in the pending proceedings before this Court. Learned counsel submits that now

writ petition No. 211 of 2006 is dismissed and disposed of by order dated 18.12.2019 and thus status quo order granted way back in the year 2003 and even before that in the revision application, may be continued till disposal of the suit.

24. It appears that by order dated 18.7.2019 in Writ Petition No. 1443 of 2003 this Court has directed to maintain status quo subject to further orders being passed in writ petition No. 211 of 2006. So far as the issue of tenancy is concerned, now this Court has decided the same and dismissed the Writ Petition No. 211 of 2006. In view of the same, the trial court may proceed with the pending suit.

(V. K. JADHAV, J.)

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