

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

WRIT PETITION NO.4819 OF 2021

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| <ol style="list-style-type: none"> 1. Shaikh Kalimulla S/o Niyamatmiyan [died] 2. Shaikh Sattar S/o. Shaikh Mahmood
Age :72 years, Occu. Agriculturist
R/o. Mouje Talwada,
Tq. Georai, Dist. Beed | ... | PETITIONERS
(Orig. Plaintiffs) |
| VERSUS | | |

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| <ol style="list-style-type: none"> 1. Mohammad Abdul Sattar S/o. Md. Abdul Gafur
Age : Major year, Occu: Agriculturist
R/o. House No.2-4-556/A, Khilawat
Hyderabad, Andhra Pradesh. 2. Mohammad Abdul Mansoor S/o Md Abdul Gafur
Age : Major year, Occu: Agriculturist
R/o. House No.2-4-556/A, Khilawat
Hyderabad, Andhra Pradesh. 3. Mohammad Abdul Basith S/o Md Abdul Gafur
Age : Major year, Occu: Agriculturist
R/o. House No.2-4-556/A, Khilawat
Hyderabad, Andhra Pradesh. 4. Mohammad Abdul Gafur S/o Md Abdul Saleem
Age : Major year, Occu: Agriculturist
R/o. House No.2-4-556/A, Khilawat
Hyderabad, Andhra Pradesh. 5. Mohammad Javed Jafari S/o Md Abdul Ghani
Age : 44 years, Occu: Service
R/o. House No.17-4-641, Yakuthpura
Hyderabad, Andhra Pradesh. | ... | RESPONDENTS
(Orig. Defendants) |
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Advocate for Petitioner: Mr. H.V. Tungar
Advocate for Respondents : Ms. A.N. Ansari

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CORAM : MANGESH S. PATIL, J.

DATE : 23.09.2021

ORAL JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. At the request of the parties, the matter is heard finally at the stage of admission.

2. The petitioner plaintiff submitted an Application for framing an issue regarding tenancy and its reference to the Tenancy Court as contemplated under Section 99A of the Hyderabad Tenancy and Agricultural Lands Act, 1950. The respondents defendants opposed that Application and by the impugned order the learned Civil Judge rejected the Application. Hence this Writ Petition.

3. The learned advocate for the petitioner submits that though the suit filed by them is for perpetual injunction, they have specifically asserted the source of possession as protected tenant. Though there is a delay in submitting the Application on which the impugned order is passed the issue goes to the root of the matter and can only be decided by a tenancy court.

4. The learned advocate would further point out that at initial stage when the petitioners were insisting for decision on the Application for temporary injunction the respondents by moving Application (Exhibit-47) had sought such an issue regarding tenancy to be framed and decided even before the decision on the Application for temporary injunction. When it was rejected they had approached this Court in Writ Petition No.2539/2013 and this Court dismissed the Writ Petition by the order dated 01.04.2013 thereby confirming the observations and conclusions of the trial court that that was not the stage at which a request for framing the issue and its

decision as a preliminary issue was needed. The learned advocate then refers to the decision of the Division Bench of this Court in the case of **Bhagwanrao S/o Jijaba Auti Vs. Ganpatrao S/o Mugaji Raut And Anr.; 1987 (3) Bom.C.R. 258** and submits that even if the suit is simplicitor for perpetual injunction, no sooner the issue regarding tenancy arises, a reference under Section 99A of the Hyderabad Tenancy and Agricultural Lands Act is imperative.

5. The learned advocate for the respondents Ms. Ansari submits that the Application for framing the issue and its decision by the Tenancy Court has been filed at the fag end of the suit. At earlier point of time, the petitioner had specifically taken a stand that no such issue arose and no such reference could be made. Taking a summer sault they now want the same relief. She would further point out that the petitioners have allowed the trial to commence and even their witness (Exhibit-122) admitted to have received possession of property in dispute under some agreement of sale, which stand is inconsistent with the claim of the petitioners of being tenants. It is because of such an inconsistent stand and the delay in moving the Application that the learned Judge by the impugned order has rightly dismissed the Application. There is no illegality and the Writ Petition be dismissed.

6. I have carefully gone through the pleadings.

7. The petitioners specifically claimed in the plaint to be the protected tenant in the suit property and the respondent have denied the

fact. Consequently, irrespective of the fact as to if the suit is for perpetual injunction simplicitor and does not seek any declaration as to the title, the issue as regards the tenancy of the petitioners in the suit property does arise.

8. Once it is found that the assertion of the petitioners of being protected tenant in the suit property has been controverted by the respondents, there is no escape from the conclusion that irrespective of the final relief being claimed in the suit the issue regarding tenancy does arise and consequently it is imperative that the Civil Court would have no alternative but to frame the issue and refer it for decision under Section 99A of the the Hyderabad Tenancy and Agricultural Lands Act.

9. True it is that at earlier point of time it was the respondents who were making such a request but the petitioners had opposed it and the Application (Exhibit-47) filed by the respondents was rejected. However, it is pertinent to note that while rejecting that Application, the learned Judge was alive to the fact that at some point of time such an issue needed to be framed and referred. It was his observation that the time was not appropriate for taking recourse to framing of the issue and its reference. This is what has been precisely observed and decided by this Court while dismissing Writ Petition No.2539/2013 preferred by the respondents, being aggrieved by rejection of their application (Exhibit-47).

10. As has been laid down by the Division Bench in the case of **Bhagwanrao Jijaba Auti** (supra) even if the suit is for perpetual injunction simplicitor, no sooner a dispute as to the tenancy arises, there is no escape

from following the ordeal of making a reference under Section 99A of the Hyderabad Tenancy and Agricultural Lands Act.

11. The learned Civil Judge in the impugned order seems to have got swayed away by the mere fact that there has been a delay in making the request. Needless to state that the learned Judge himself also could have taken initiative no sooner the issues were framed to go through the pleadings and frame an issue regarding tenancy which arises from the pleadings and follow the course contemplated under Section 99A of the Hyderabad Tenancy and Agricultural Lands Act. It is inconsequential if he does so on a request of a party or otherwise. He was under obligation to frame the issue and refer it for decision under Section 99A.

12. Again, the learned Judge has indulged in scrutinizing the evidence to ascertain as to if ultimately the issue regarding tenancy could be decided in favour of the petitioner or otherwise. He has referred to some admission purportedly given by one of the petitioners' witnesses about being in possession of the suit property on the basis of some agreement of sale. What is the effect of the admission cannot be prejudged. When the statute requires the issue to be referred to a Tenancy Court for decision, no comment at this stage could have been made referring to such an admission. The learned Judge has clearly erred in recording some observation referring to such admission.

13. In the result, the impugned order is erroneous and is liable to be quashed and set aside.

14. The Writ Petition is allowed. The impugned order is quashed and set aside. The Application (Exhibit-149) stands allowed. The learned Judge shall now frame the issue and refer it for decision under Section 99A of the Hyderabad Tenancy and Agricultural Lands Act. The concerned Tenancy Court shall make every endeavor to decide the issue at the earliest.

15. The Rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

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