

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 769 OF 2008

Tanaji s/o Narayandeo Pawar,
Age : 40 years, Occu : Agriculture,
R/o : Shirsi (Hangarga), Tq. Nilanga,
District Latur.

... Appellant
(Orig. Plaintiff)

Versus

Angad s/o Shamrao Suryawanshi,
Age : 46 years, Occu : Service,
R/o. Shirsi (Hangarga)
Now at Jalkot, Tq. Omerga,
District Osmanabad.

... Respondent
(Orig. Defendant)

**WITH
SECOND APPEAL NO. 770 OF 2008**

Tanaji s/o Narayandeo Pawar,
Age : 40 years, Occu : Agriculture,
R/o : Shirsi (Hangarga), Tq. Nilanga,
District Latur.

... Appellant
(Orig. Plaintiff)

Versus

Angad s/o Shamrao Suryawanshi,
Age : 46 years, Occu : Service,
R/o. Shirsi (Hangarga)
Now at Jalkot, Tq. Omerga,
District Osmanabad.

... Respondent
(Orig. Defendant)

**WITH
WRIT PETITION NO. 607 OF 1993**

Tanaji s/o Narayanrao Pawar,
Age 27 years, Occ : Agriculture,
R/o Sirshi Hangarga,
Taluka Nilanga, District Latur.

... Petitioner
(Orig. Respondent)

Versus

Angad s/o Shamrao Suryawanshi,
Age 40 years, Occ : Service and Agri.
R/o Hangarga, Taluka Nilanga,
District Latur.

... Respondent
(Orig. Applicant)

.....

Advocate for the Appellant in both Second Appeals and the
Petitioner in Writ Petition : Mr. V. D. Salunke

Advocate for the Respondent in all three matters : Ms.
Madhveshwari S. Mhase

.....

CORAM : V. K. JADHAV, J.

RESERVED ON : 21.01.2021

PRONOUNCED ON : 07.05.2021

JUDGMENT :-

1. The appellant-original plaintiff Tanaji had instituted a suit bearing R.C.S. No. 90 of 1994 for a decree of perpetual injunction restraining the defendant from obstructing his possession over the suit property i.e. the agricultural land

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Survey No. 46/B-01 (new Gat No. 18) ad-measuring 4 acres 23 gunthas (01 H. 55 Arrs.) situated at village Shirsi Hangarga, Taluka Nilanga. According to the appellant/plaintiff, he had purchased the suit land on 31.03.1990 under a registered sale deed for a valuable consideration of Rs. 55,000/-from the original owner Vithoba Nagu Surwase However, since Gudi Padwa in the year 1987, the appellant-plaintiff was in possession of the suit property on *batai* basis. On 17.04.1990, Mutation Entry No. 414 came to be sanctioned. According to him, the father of the respondent/defendant himself voluntarily surrendered his right as a protected tenant. So, on 07.11.1959, name of the father of the respondent/defendant came to be deleted from the tenancy register. Thus, since Gudi Padwa 1987 till institution of the suit, the appellant-plaintiff was in possession of the suit property. However, since 13.02.1994, the respondent-defendant had started obstructing plaintiff's possession. It is the contention of the appellant-plaintiff that the father of respondent-defendant had instituted a civil suit in respect of the northern half portion ad-measuring 10 acres 39 gunthas of Survey No. 46 against the vendor of the appellant-plaintiff. However, the said suit bearing R.C.S. No. vre/-

32 of 1958 came to be decreed to the extent of 2 acres 39 gunthas, In the said suit, it was held that the father of the respondent/defendant was not concerned with the remaining 8 acres of land. As per the judgment delivered in R.C.S. no. 32 of 1958, the original owner Vithoba Nagu Surwase (the vendor of the appellant-plaintiff) was held as the owner of the remaining 8 acres of land. Out of the 8 acres of land, the appellant-plaintiff has purchased the land ad-measuring 4 acres 23 gunthas and he is in possession of the same. Even the father of the respondent-defendant had not made any claim in his life time in respect of the suit land. Thus, the respondent-defendant has no right, title or interest in respect of the suit land, nor he is in possession of the same. The appellant-plaintiff has also filed his written statement to the counter claim at Exhibit 26 and he has almost reiterated all the contentions taken by him in the plaint. According to the appellant-plaintiff, the counter claim is not maintainable.

2. The respondent/original defendant Angad had filed a written statement along with a counter claim Exhibit 18. He had denied the entire contentions. According to him, the vre/-

alleged sale deed is null and void and not binding on him. His father was declared as a protected tenant. In the year 1955, his father had entered into a contract of sale with the original owner. His father was in possession of the suit land and now the respondent/defendant is in possession of the suit property as a tenant. It is contended that the appellant-plaintiff himself is obstructing the respondent/defendant's possession over the suit property. Therefore, he had filed a counter claim seeking perpetual injunction restraining the appellant-plaintiff from obstructing his possession over the suit property along with compensatory cost. According to the respondent-defendant, it was held by the Collector in the judgment in File No. 1990-GB-ROR-A-27 that the appellant-plaintiff is not in possession of the suit land. In view of the same, the sanction of Mutation Entry No. 414 loses its significance. According to the defendant, his father entered into an agreement of sale with the original owner and paid him Rs.2,500/- in the year 1955. Originally, the father of the defendant was in possession of the suit land as a tenant. However, subsequently, his possession was of the purchaser of that land and Mutation Entry No. 34 was also passed to that effect. The respondent-defendant has denied specifically vre/-

the surrender of tenancy on 07.11.1959 as alleged. It is further contended that the father of the respondent-defendant though requested the original owner Vithoba to execute a sale deed, but he had denied to execute a sale deed. The original owner Vithoba had no right to execute the sale deed in favour of the appellant-plaintiff. The father of the respondent-defendant, being the protected tenant of the suit land, had a preferential right to purchase the northern one-half portion out of land Survey No. 46 ad-measuring 21 acres. Even the original owner had executed an agreement to sale to that effect. According to the respondent-defendant, his father had therefore instituted R.C.S. No. 31/A of 1958. However, the said suit came to be compromised and as per the terms of the compromise, the father of the respondent-defendant got 4 acres 23 gunthas of the land i.e. the present suit land and the remaining land was sold by the original owner to one Venkatrao Patil. Therefore, the original owner Vithoba was not having any land and such, he was not competent to execute a sale deed in favour of the appellant-plaintiff. It is contended that the record created by the concerned Consolidation Officer is totally false. The defendant is in exclusive possession of the suit land.

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3. On the basis of the rival pleadings of the parties to the suit, the trial court framed issues and the parties led oral and documentary evidence in support of their rival claims. Learned 2nd Joint Civil Judge Junior Division, Nilanga, by judgment and order dated 28.09.2001, dismissed the suit with costs and decreed the counter claim with costs. The plaintiff (the defendant to the counter claim) is perpetually restrained from obstructing defendant's (the plaintiff to the counter claim) possession over the suit properties along with the compensatory costs of Rs.3,000/-.

4. Being aggrieved by the same, the appellant-plaintiff had filed R.C.A. No. 71 of 2001 against the dismissal of his suit bearing R.C.S. No. 90 of 1994 and also filed R.C.A. No. 72 of 2001 against the decree of the counter claim. The learned District Judge-1, Nilanga, by the common judgment and order dated 14.08.2008, dismissed both the appeals with costs and confirmed the judgment and decree passed by the trial court in R.C.S. No. 90 of 1994 dated 28.09.2001.

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5. Being aggrieved by the same, the appellant-plaintiff has again preferred two appeals bearing Second Appeal No. 769 of 2008 and Second Appeal No. 770 of 2008.

6. In the year 1990 itself, i.e. on 22.06.1990, said Tanaji (appellant in Second Appeal Nos. 769 and 770 of 2008) had approached the Mamlatdar, Nilanga by initiating proceedings under Section 5 of the Mamlatdar's Courts Act, 1906 in respect of the said suit land which was the subject matter of the civil suit seeking protection of his possession over the suit land. Learned Mamlatdar, Nilanga, by order dated 21.07.1990, by invoking the powers under Section 5(2) of the Mamlatdar's Courts Act, 1906, has held that Tanaji is in possession of the suit land. Being aggrieved by the same, the respondent Angad Shamrao Suryawanshi had preferred revision before the Collector, Latur and by the judgment and order dated 21.01.1993, the Collector, Latur has allowed the revision petition, directed the Tahsildar Nilanga to immediately correct the 7/12 extract of the suit land in favour of the revision petitioner i.e. Angad and to ensure that his possession over the suit land is not disturbed. The learned Collector, after noticing the alteration of the vre/-

record vide Mutation Entry Nos. 414 and 418, directed a departmental enquiry against the Additional Tahsildar (L.C.) Latur, the Circle Inspector and the Talathi. Being aggrieved by the same, said Tanaji (original petitioner before the Mamlatdar) has preferred Writ Petition No. 607 of 1993.

7. In view of the praecipe sent by the counsel for the respondent Ms. M. S. Mhase, the Senior Administrative Judge has directed to club the Second Appeals with Writ Petition No. 607 of 1993 and further directed to place the matters before the court taking the Writ Petitions of the year 1993.

8. In view of the above, the Second Appeals and the Writ petition are decided by this common judgment and order since the parties, the suit property and the cause for the dispute are the same.

9. Learned counsel for the appellant-original plaintiff submits that the appellant had instituted Regular Civil Suit No. 90 of 1994 for perpetual injunction. The respondent-defendant appeared in the said suit and filed a written
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statement and also filed a counter claim. The trial court has dismissed the suit and allowed the counter claim of the respondent-defendant by judgment and decree dated 28.9.2001. The appellant-original plaintiff had filed Regular Civil Appeal No. 71 of 2001 against the dismissal of the suit and Regular Civil Appeal No. 72 of 2001 was filed against the decree of the counter claim. Learned counsel submits that during pendency of the appeals, the learned District Judge framed three additional issues and referred the same to the trial court inviting findings. The trial court answered the issues by order dated 26.9.2007 below Exh.1. Learned counsel submits that finally the learned District Judge dismissed both the appeals by common judgment and order dated 14.8.2008. Thus, the appellant-original plaintiff has filed Second appeal Nos. 769 of 2008 and 770 of 2008 against the common judgment and order in regular Civil Appeal No. 72 of 2001 and Regular Civil Appeal No. 71 of 2001.

10. Learned counsel for the appellant-plaintiff submits that the appellant-plaintiff had filed proceedings under Section 5 of Mamlatdar's Courts Act. 1906. The Mamlatdar had vre/-

allowed the said proceedings on 21.07.1990. The respondent-defendant filed Revision under Section 23 against the order of the Mamlatdar before the Collector, Latur. The learned Collector has allowed the Revision vide order dated 21.01.1993. The appellant-original plaintiff has filed Writ Petition No. 607 of 1993 against the judgment and order dated 21.1.1993 passed by the Collector, Latur in the revision. Learned counsel for the appellant-original plaintiff submits that one more proceeding against Mutation Entry No. 414 is pending before the Divisional Commissioner.

11. Learned counsel for the appellant-original plaintiff submits that the disputed land/suit property is survey No. 46 situated at village Sirshi Hangarga, Taluka Nilanga, District Latur ad-measuring 21 acres and 38 gunthas owned and possessed by original land owner Vithoba Nagu Surwase. Learned counsel submits that the dispute is only to the extent of 4 acres and 23 gunthas purchased by the appellant-plaintiff from original land owner Vithoba Surwase by registered sale deed dated 31.3.1990. Learned counsel submits that on the basis of the registered sale deed, Mutation Entry No. 414 came to be sanctioned by the
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competent authority on 17.4.1990. The appellant-plaintiff was cultivating the suit land from Gudhi Padva 1987 on *batai* basis and then purchased it on 31.3.1990. The appellant-plaintiff is in possession of the said land and is cultivating the same. The respondent-defendant started obstruction and hence the appellant-plaintiff filed the aforesaid suit for injunction.

12. Learned counsel for the appellant-plaintiff submits that in the suit for injunction, the defendant claimed that he is a tenant in possession of the suit land. The appellant-plaintiff denied the tenancy. Considering the counter claim, the trial court was duty bound to frame issues as per the provisions of Order XIV Rule 2 of the Code of Civil Procedure, 1908. However, no issues were framed on this important aspect. Learned counsel submits that if the claim of the respondent-defendant is as a tenant, the Civil Court has no jurisdiction to decide the tenancy and by framing issue it has to be referred to the Tenancy Court as there is bar under Section 99 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (for short, "Hyderabad Tenancy Act"). Learned counsel submits that without doing the above
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legal exercise, the trial court held that the respondent-defendant is the tenant in possession, which is maintained by the District Court. Learned counsel submits that the finding of the trial court that the defendant is in possession over the disputed land as a tenant, on the face of record in respect of the compromise recorded in Special Civil Suit No. 130 of 1959 and compromise order passed thereon only to the extent of 2 acres 39 gunthas, is not sustainable in the eyes of law and the same is perverse and contrary to the evidence on record.

13. Learned counsel for the appellant-plaintiff submits that both the courts below overlooked the provisions of section 99(A) of the Tenancy Act, which ousts jurisdiction of Civil Court to determine and deal with the issues in respect of Tenancy. Learned counsel submits that both the courts below did not appreciate the evidence on record that the entry in the name of defendant's father was deleted from the final tenancy register which is a final proof of protected tenancy. The said order deleting the name of defendant's father was not challenged and has attained finality. Learned counsel submits that both the courts below did not apply
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their mind to the admitted facts in the form of decree i.e. judgment and decree dated 8.10.1959 in Special Civil suit No. 130 of 1959. The defendant's father had not claimed tenancy, but claimed ownership on the basis of the agreement to sale and then filed the said suit for specific performance of contract and finally, being satisfied by compromise, accepted only 2 acres 39 gunthas of land. If he was finally declared as a protected tenant and if at all he was tenant in possession, then there was no question of agreement to sale and suit for specific performance of contract.

14. Learned counsel for the appellant-plaintiff submits that both the courts below failed to consider that if the tenant accepted deleting his name from the tenancy register and thereby agreed to purchase the land and filed a suit for specific performance, meaning thereby he was not tenant in possession. Learned counsel submits that both the courts below failed to consider that the decree in Special Civil Suit No. 130 of 1959 was conditional on payment of Rs.800/-. There is no evidence that the defendant's father paid the said amount and there is no sale deed executed as per the decree.
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Therefore, the case of the defendant that he is owner in possession on the basis of that decree is also not proved. Learned counsel submits that both the courts below utterly failed to consider that even the defendant had filed proceedings for grant of ownership certificate as his father was a protected tenant. The same was turned down holding that the original land holder was not having land more than two family holdings. Learned counsel submits that presuming that the original land owner was having 2 acres 39 gunthas of land more than two family holdings and special civil suit permits him to purchase only 2 acres 39 gunthas, he cannot claim ownership and possession of suit property admeasuring 4 acres 23 gunthas.

15. Learned counsel for the appellant original plaintiff submits that the trial court apparently failed in framing the issues as per the provisions of Order XIV Rule 2 of the Code of Civil procedure, 1908 and the lower appellate court did not frame points for determination as required under Order 41, Rule 31(a) as on the additional issues framed and referred to the trial court during pendency of appeals. Learned counsel submits that therefore, the judgment of the
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lower appellate court is hit by the judgment of this Court reported in AIR 1985 BOM 98.

16. Learned counsel for the appellant-plaintiff submits that in any case, both the courts below illegally accepted the stand of the defendant that he is a tenant in possession of the land on the face of record that Writ Petition No. 607 of 1993 is pending against the proceedings under Section 5 of the Mamlatdar's Courts Act, 1906. Once the second appeals are admitted even on one substantial question of law, finally the court is bound to decide the second appeals on all points raised. Learned counsel submits that considering all these legal issues and the apparent illegality committed by both the courts below, the Second Appeals deserve to be dismissed or alternatively, it is a fit case for remand.

17. Learned counsel for the appellant-plaintiff, in order to substantiate his contentions, placed reliance on the following cases:-

- i) Bhagwanrao s/o Jijaba Auti vs. Ganpatrao s/o Mugaji Raut and another [1987 (3) Bom. C.R. 258]

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- ii) Sheikh Hussain vs. Hanmantrao [1963 Mh.L.J. 7]
- iii) Wamanrao Trimbakrao vs. Bhaurao Mahadu [1960 BLR 587]
- iv) Anita M. Barreto (Smt.) vs. Abdul Wahid Sanaullah [1985 (1) Bom. C.R. 130]
- v) Panchugopalbarua vs. Umesh Chandra Goswami [1997 AIR (SC) 1041]

18. Learned counsel for the respondent-defendant submits that the bar under Section 99A of the Tenancy Act is not attracted in the present case. The jurisdiction of the civil courts to try disputes involving civil rights is all pervasive. It is settled position of law that the ouster of jurisdiction of civil court should not be readily inferred unless there is an express provision, and even in the case of such provision, an enquiry has to be undertaken prima facie to find out whether the said bar applies in the facts and circumstances of the case.

19. Learned counsel for the respondent-defendant submits that the suit before the trial court was simplicitor for injunction. The question of title of this respondent was never
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a subject matter for decision before the learned civil court. Being an injunction suit, the only crucial question before the court was as to which party is in possession. The only fact of possession had to be decided and the discussion as to the source or title or the nature of possession came in as a mere ancillary to the factum of possession. The status of tenancy was not in question in a suit for injunction. If during the enquiry regarding possession of the parties an ancillary enquiry about the title has to be gone into, the enquiry does not increase the scope and does not get converted into an enquiry into the title of the party. At the most the enquiry can be of whose possession is standing on a better footing, meaning thereby the validity of source of the possession. However, even that aspect of enquiry does not result in an adverse inference if the party found in possession does not hold a superior right. Learned counsel submits that however, in the present case, the suit was for simplicitor injunction and the question of tenancy was not before the court for decision. Therefore, the bar under Section 99A cannot be said to be attracted.

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20. Learned counsel for the respondent-defendant further submits that the record in Civil Suit No. 31/A of 1958 clearly holds the respondent-defendant as a tenant under the Tenancy Act. The said suit is disposed of in terms of the compromise arrived at between the parties. Despite there being an entry in the tenancy register that the respondent-defendant has surrendered his tenancy (which is disputed by the defendant, and an enquiry by the Collector shows that there is no record of the same) the landlord has admitted in compromise pursis that the defendant is the tenant in his land. By the same compromise deed, the possession of the defendant is confirmed as a tenant and it is agreed that the landlord is willing to sell and the defendant is entitled to purchase 4 acres 23 gunthas land from Survey No. 46/B. Even when the compromise was presented before the court for passing the decree accordingly, the court had considered the sale to be a transaction between landlord and tenant, and held the tenant/defendant to be entitled to purchase 2 acres 39 gunthas land. Therefore, in the said compromise and the decree as well, the status of the respondent/defendant is acknowledged and confirmed by the landlord and the court as well. Learned counsel submits vre/-

that in view of the said compromise, the respondent-defendant has paid the purchase price in full to the landlord and accordingly an entry is recorded in the revenue register. It was the duty of the revenue officers to confirm the said entry, which however was not done by the authority despite the respondent-defendant having complied with his part of agreement.

21. Learned counsel submits that if there is an agreement between landlord and tenant to sell and purchase the land in which the person is a tenant, then the provisions of Section 38A apply wherein the price arrived by the parties is to be held to be the price of the land. The said section also makes reference and makes applicable the provisions of Sections 38(4), (5), (6), (6A), (8) and (9) *mutatis mutandis*. Section 38(6)(d) states that if the tenant fails to pay the purchase price as agreed upon, then he may forfeit his right to purchase. The very wording is clear and unambiguous that, on failure to pay, only right to purchase is forfeited, which logically would follow that the right as a tenant continues and the status of the tenant as a tenant is not affected. So also, if the authority decides that the tenant cannot purchase
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the entire land, the tenant will be entitled to purchase only as much portion of land as the authority decides, but with regard to remaining portion his status as a tenant will not be affected unless the said tenancy is surrendered. Learned counsel submits that in the case in hand, as per the compromise, the tenant has relinquished his right on 6 acres 20 gunthas in favour of the landlord. The remaining 4 acres 23 gunthas land is confirmed in favour of the tenant-respondent by the landlord. Even though the court, by the decree, has permitted the sale to be of only 2 acres 39 gunthas, the right of respondent-defendant to the extent of 1 acre 77 gunthas continues as a tenant. Thus, the right of the respondent-defendant remains intact on the entire 4 acres 23 gunthas. Learned counsel submits that the alternative pleas of sale and of tenancy can be taken by a tenant if there is apprehension of the contention of sale failing on some technical point. Therefore, the argument of the appellant-plaintiff that the respondent-defendant cannot make alternative pleas is not a sound proposition of law.

22. Learned counsel for the respondent-defendant submits that the lower courts have not committed any error in vre/-

observing that the respondent-defendant is in possession of the suit land as a tenant because, except the said mere purported entry, there is no record to back the said entry. It has come on record that the alleged judgment, or any proceeding is not there to show the validity of the said entry. Absence of the entire record, and the same not being available, casts a serious doubt about the validity and value of the said entry. More so, in view of the fact that after the said date mentioned in the said entry, the landlord has admitted before the civil court in compromise deed that the respondent-defendant is the tenant on the suit land, his possession is confirmed as such. Learned counsel submits that except the said entry, nothing else is placed on record to show that the respondent-defendant has surrendered his tenancy. The Tenancy Act lays down an elaborate procedure for surrender of tenancy, and the appellant-plaintiff has not placed any evidence to show that any such proceeding had taken place for surrender of tenancy.

23. Learned counsel for the respondent-defendant submits that whenever a right is waived by a person, the waiver has to be express, unequivocal, unambiguous, without coercion, vre/-

misrepresentation, or not under duress. So also, when the waiver of right is under any statutory provision and the statute prescribes a particular mode for the same, it has to be in the said way. Waiver cannot be presumed, cannot be inferred. In this particular case, the waiver cannot be presumed on a stray entry, which is not backed by any procedural documents to establish the said entry.

24. Learned counsel for the respondent-defendant submits that the appellant-plaintiff has failed to prove that he is vested with proprietary rights by virtue of execution of the document in his favour. The appellant-plaintiff has failed to prove that the vendor had any title to pass over the same to the appellant-plaintiff. The vendor originally owned 10 acres 35 gunthas land. The vendor has already sold land ad-measuring 6 acres 20 gunthas, the right to which was waived by this respondent by compromise in Civil Suit No. 130 of 1959 to one Venkat Patil. The remaining land of 4 acres 23 gunthas was agreed to be sold to the respondent. The respondent had also paid the entire consideration to the landlord. The Mutation Entry 89 to that effect is also taken in the revenue record. Even in absence of holding that the vre/-

sale may not have materialized, the status of respondent-defendant as a tenant is confirmed by the landlord in the above mentioned compromise. Therefore, the vendor of the appellant-plaintiff never had any saleable title vesting in him which could be transferred in favour of the appellant-plaintiff. Learned counsel submits that the best witness to prove the saleable capacity of the vendor of the appellant-plaintiff was the vendor himself. But the appellant-plaintiff did not bring the best evidence before the court, which required to draw an adverse inference against the appellant-plaintiff. Learned counsel submits that, moreover, the suit was filed after the decision by the Collector in the revision application against the order of the Mamlatdar. In the said proceeding, M.E. Nos. 414 and 418 were held to be bad and were ordered to be set aside. The plaintiff-appellant, despite having knowledge of the same, suppressed the said fact and relied upon the said entries which were no longer in existence. So also, the outcome of the said proceedings was also suppressed by not mentioning the same in the plaint.

25. Learned counsel submits that the appellant-plaintiff has failed to place on record any evidence to show his
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possession from 1987. On the other hand, there is consistent record to show that the respondent-defendant was in possession from 1950. The only period during which the name of the respondent was not there was when the same was illegally deleted and the name of the plaintiff was recorded in 1990 to 1994, whereupon the name of the respondent was restored as per the order of the Collector, Latur. The appellant-plaintiff has failed to make out any case even on the point of possession for the grant of injunction. The appellant-plaintiff has not come with clean hands before the court. Learned counsel submits that the appellant-plaintiff has not made out any case on facts and on law to cause any interference in the concurrent findings of fact and law arrived at by the learned lower courts.

26. So far as Writ Petition No. 607 of 1993 is concerned, learned counsel for the respondent-defendant submits that the chronology of the events as mentioned in the facts clearly shows that the petitioner in collusion with the revenue authorities, got effected the revenue entries in the Mutation Register and the 7/12 extract. The said entries were taken behind the back of the respondent without
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following any procedure as prescribed by law. So also, by taking disadvantage of such illegal entries the application under Section 5 of the Mamlatdar's Courts Act, 1906 was filed and an *ex parte* injunction was clamped on the respondent. The Mamlatdar also, without considering the documents in favour of the respondent-defendant, allowed the application. In the enquiry that was initiated by the Collector, Latur in revision petition filed by the respondent-defendant, it was observed that the revenue authorities have colluded with the petitioner. There is also a letter on record addressed by the Talathi to the Tahsildar, wherein a reference is made to the fault of the Tahsildar and the Circle Officer. The said communication is dated 21.05.1990. It is thus amply clear that the entire record was manipulated and a bid was made to dispossess the respondent from his lawful possession of the suit property. The learned Collector has rightly interfered and set aside the order of the Mamlatdar.

27. Learned counsel for the respondent-defendant submits that in view of the collusion and illegal altering of the revenue record, the Collector has directed to correct the entries and restore the record to its original file and position.

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The consequential mutation entries taken for correcting the record were independently challenged by the petitioner and he has lost in the said litigation up-till this Honourable Court. Mutation Entry No. 414 that was effected in favour of the petitioner was also a subject matter of challenge in 1990/ROR/20. The said appeal is also decided in favour of the respondent. An appeal therefrom to the Additional Collector by the petitioner is also rejected and now the revision is pending before the Revenue Commissioner. Learned counsel submits that the revisional authority has ample powers to discard the entries that are doubtful and the said exercise cannot be said to be re-appreciation of evidence.

28. Learned counsel for the respondent-defendant submits that looking at the peculiar facts, having come to the conclusion that the authorities have acted illegally, *mala fide*, and against their duties, the learned Collector, Latur has initiated departmental enquiry and no fault can be found in the said direction.

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29. Learned counsel for the respondent-defendant further submits that the petitioner was well aware that he has not acquired any title to the suit property. The petitioner was also having knowledge that this respondent is in long standing possession of the suit property as a tenant. Despite the said knowledge the petitioner, by misuse of the precess of the court and the *quasi judicial* forum of the Mamlatdar's Court, has filed these false and vexatious litigation only to illegally grab the property of the respondent. The proceedings therefore be dismissed with exemplary costs to be awarded in favour of the respondent.

30. Learned counsel for the respondent-defendant, in order to substantiate her contentions, placed reliance on the following cases:

1. Ramji Rai and Another v. Jagdish Mallah (Dead) through L.R.'s and Another [2007 AIR SC 900]
2. Anathula Sudhakar v. P. Buchi Reddy (Dead) by LR's and Others [AIR 2008 SC 2033]

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3. Shaikh Usman Shaikh Shaikh Burahan and Others vs. Shaikh Badruddin Shaikh Bhagan and Another [1994 (1) Mh.L.J. 838]
4. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and others [(1979) 2 SCC 409]
5. Ram Bahal and Another v. Deputy Director of Consolidation Azamgarh and Others [2015 (10) SCALE 568]

31. The following substantial questions of law are framed while admitting the Second Appeals:

A) Whether the courts below were justified in recording finding that defendant/respondent is in possession over the disputed land as a tenant on the face of record in respect of compromise recorded in Civil Suit no. 190 of 99 and order passed thereon in file number 130/1/95 holding that father of defendant is entitled to purchase land to the extent of 2 acres and 39 gunthas out of the suit land?

B) Whether the first appellate court was justified in recording finding in respect of tenancy of defendant in the civil proceedings overlooking

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the provisions of section 99(a) of the Tenancy Act which ousts jurisdiction of the civil court to determine and deal with the issue in respect of tenancy?

C) Whether the courts below were justified in recording finding in favour of the defendant in respect of alleged tenancy rights on the face of pendency of Writ Petition no. 607/93 wherein challenge is raised to the proceeding initiated under section 5 of the Tenancy Act and that no finality is attached to determination of issue in respect of tenancy as claimed by respondent?

D) Whether the courts below were justified in overlooking the order passed by Naib Tahsildar which records that name of protected tenant i.e. predecessor of the defendant stands deleted in view of the order dt. 17.11.1959 passed in file no. 3/19(1)-59?

32. The appellant-plaintiff has asserted the title and possession over the suit land on the basis of the sale deed Exhibit 64 dated 31.03.1990 executed by the original owner of the land, namely, Vithoba Nagu Surwase. The appellant-plaintiff has thus instituted Regular Civil Suit No. 90 of 1994 for a decree of perpetual injunction to restrain the
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respondent/defendant from obstructing his peaceful possession of the suit land. The appellant-plaintiff, in order to substantiate his title and possession over the suit land, has raised a specific plea that the father of the respondent/defendant himself voluntarily surrendered his right as a protected tenant and thus, on 07.11.1959, name of the father of the defendant came to be deleted from the tenancy register. It is also contended that the father of the defendant had instituted the civil suit bearing Regular Civil Suit No. 32 of 1958 in respect of the northern half portion ad-measuring 10 acres 39 gunthas of suit land Survey No. 46 against the vendor of the plaintiff. The total area of land Survey No. 46 was 21 acres 38 gunthas. However, the said suit bearing Regular Civil Suit No. 32 of 1958 came to be decreed in terms of the compromise to the extent of 2 acres 39 gunthas only. It is held that the father of the defendant was not concerned with the remaining 8 acres of land. In terms of the judgment and decree passed in the said Regular Civil Suit No. 32 of 1958, the said Vithoba Nagu Surwase (the vendor of the plaintiff) was held to be the owner of the remaining 8 acres of land and out of those 8 acres of land, the appellant-plaintiff has purchased the suit land
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admeasuring 4 acres 23 gunthas and he is in possession of the same. The respondent-defendant has no right, title or interest of the suit land.

33. The respondent-defendant has filed his written statement along with the counter claim at Exhibit 18. It is contended that the sale deed in favour of the appellant-plaintiff is sham and bogus. It is further contended that in view of the judgment delivered by the Collector, the effect of Mutation Entry No. 414 is valueless. The respondent-defendant has specifically denied the aspect of surrender on 07.11.1959 as alleged. It has been specifically pleaded that the father of the defendant had entered into an agreement of sale with the original owner way back in the year 1955 and originally, the father of the defendant was in possession of the suit land as a protected tenant. Though the father of the defendant has requested the original owner Vithoba to execute a sale deed, he had denied to execute the sale deed. The father of the respondent/defendant had a preferential right to purchase the northern one-half portion and even for that purpose, the original owner had executed the agreement of sale. Thus, the father of the defendant had vre/-

instituted the suit bearing Regular Civil Suit No. 31/A of 1958 to get executed the said agreement. The said suit is disposed of in terms of the compromise and the father of the respondent-defendant got 4 acres 23 gunthas of land that is the present suit land and the remaining land was sold by the original owner to one Venkatrao Patil. Thus, the original owner Vithoba was not having any land and therefore, he was not competent to execute the sale deed in favour of the appellant-plaintiff. Since the appellant-plaintiff has threatened the rights of the respondent-defendant over the suit land, the respondent-defendant has filed the counter claim to restrain the appellant-plaintiff perpetually from obstructing his peaceful possession over the suit land. Learned counsel for the respondent, while arguing that the case does not involve the substantial question, submitted that assuming that the respondent-defendant has failed to prove the said transaction of agreement of sale, however, the respondent-defendant can always fall back upon his right as a protected tenant if the agreement of sale fails. There is no bar for pleading tenancy as an alternative case if the party apprehends that sale may fail due to certain legal defects or otherwise. In order to substantiate the same, learned counsel

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for the respondent-defendant has placed reliance in a case **Shaikh Usman Shaikh Shaikh Burahan and Others vs. Shaikh Badruddin Shaikh Bhagan and Another** (supra).

34. I have carefully gone through the judgment and decree dated 8/11-10-1959 in Regular Civil Suit No. 32 of 1958. It appears that the father of the respondent-defendant had instituted the said suit for specific performance of contract for sale of half portion of the land Survey No. 46 to the north. In addition, in the agreement of sale dated 17.04.1955, it is specifically pleaded that the father of the respondent-defendant (plaintiff in the said suit) is in possession of the suit land as protected tenant. It is also recorded in the judgment that the appellant-plaintiff (defendant in the said suit) admitted the father of the respondent-defendant (plaintiff in the said suit) being a tenant, but alleged that he has surrendered his rights. The parties submitted a memorandum of compromise on 05.10.1959 which was duly verified and a specific reference was given in the compromise that in terms of the said compromise the appellant-plaintiff has agreed to sale the suit land Survey No. 46 to the extent of the northern portion
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ad-measuring 4 acres 19 gunthas for consideration of Rs.12,000/- and that he has no objection if the suit is decreed to that extent. Furthermore, it has also been specifically mentioned in the compromise that the father of the respondent-defendant herein is in possession of the above land as a tenant and his possession as an owner thereof is confirmed and the remaining portion from the above suit land ad-measuring 6 acres 20 gunthas would remain with the appellant-plaintiff herein. The learned Civil Judge however, despite the compromise placed on record and verified, decided the issue no. 4 independently by referring the provisions of the Hyderabad Tenancy Act and held that considering 8 acres of land as a basis holding, the land remained to be sold is 2 acres 39 gunthas and accordingly decreed the suit to the extent of 2 acres 39 gunthas of land towards the north in Survey No. 46 of village Shirsi Hangarga for a consideration. The issue no. 4, which is independently decided by the court in the said Regular Civil Suit No. 32 of 1958 is as follows:

“Is the plaintiff entitled to such in view of the provisions of the Tenancy Act?”

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The learned Civil Judge thus, by referring the provisions of the Hyderabad Tenancy Act in detail, recorded the finding as detailed above.

35. In the backdrop of the findings recorded in the said suit of the year 1958, the learned counsel appearing for the respondent-defendant has submitted that as per the said compromise decree, the father of the respondent-defendant has relinquished his tenancy rights in respect of the land ad-measuring 6 acres 20 gunthas in favour of the landlord and the remaining land 4 acres and 23 gunthas is confirmed in his favour by the landlord and even though the court has permitted the sale to the extent of 2 acres 39 gunthas, the right of the respondent-defendant as a tenant would remain intact. The alternate pleading of tenancy can be taken by the tenant.

36. I have carefully gone through the judgment and decree passed in Regular Civil Suit No. 90 of 1994. In para 10 of the judgment, the trial court has made the following observations:

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“10. In this way the documentary evidence is against the plaintiff. The revenue record shows that plaintiff’s name was entered by deleting the defendant’s name. But defendant’s name was entered in the capacity of protected tenant. Such name in the capacity of protected tenant could not have appeared unless defendant was in possession of the suit property. In Exh. 1 in Para No.4 plaintiff has stated that the defendant’s father voluntarily surrendered his tenancy rights. But no documentary evidence in that respect is available on record. On the contrary in Exh. 115 the Collector has pointed out that the record of File No.3/19/(1)/59 is not located and that from 1961-1962 till 1989-90 the name of defendant’s father is continued in 7/12 extract.”

37. Being aggrieved by the judgment and decree passed in Regular Civil Suit No. 90 of 1994, the appellant-plaintiff preferred Regular Civil Appeal Nos. 71 of 2001 and 72 of 2001 and the first appellate court in the common judgment dated 14.08.2008, has considered six points for its determination and recorded its findings thereof. In the context of the substantial points of law as formulated by the

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first appellate court, the point no.2 is relevant which reads as under:

“(ii) Whether the defendant has proved that he is in possession of the suit land as a tenant?”

The learned Judge of the first appellate court has recorded the finding with reasons in the affirmative to the said point no.(ii). In para 14 of the judgment, the first appellate court has made the following observations:

“14. The extract of tenancy register for the year 1951 of village Shirshi Hangarga is produced at Exh. 32. It is in respect of Sy. No. 46. It shows that the father of the defendant was protected tenant to the extent of 10 acres 39 gunthas. According to the plaintiff, the father of the defendant had surrendered his tenancy rights on 7/11/1959. However, plaintiff has not produced any documentary evidence to substantiate this contention. Mutation entry No. 60 is produced at Exh. 130. Perusal of it, it appears that the disputes were going on between the father of the defendant and Vithoba Surwase. Subsequently, those disputes were settled and it was decided to sell 4 acres 21 gunthas land from Sy. No.46/B to the father of defendant and remaining land was sold to

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Venkatrao. This mutation entry is dated 25/10/1959. Mutation entry No. 34, Exh. 131 shows that father of the defendant has purchased the suit land for Rs.2,500/- by way of unregistered sale deed. So it is ample clear that the defendant is in possession of suit land either as an owner on the basis of unregistered sale deed or at least as a tenant. Under these circumstances, by no stretch of imagination, it can be said that owner Vithoba Surwase was competent to alienate the suit land to the plaintiff. I have gone through the judgment of the trial Court. Learned Civil Judge took the same view.”

38. Further, there is the order dated 29.05.1990 passed by the Uppar Tahsildar, Zilla Latur Camp Nilanga in the proceedings bearing No.1989/Kul/Kavi/355 in respect of the suit land.

39. The appellant-plaintiff had filed an application under Section 5 of the Mamlatdar's Courts Act, 1906 against the respondent-defendant for issuance of injunction to protect his possession over the suit land and by judgment and order dated 21.07.1990, the Mamlatdar, Nilanga has allowed the said application. Being aggrieved by the same, the
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respondent-defendant had preferred revision under Section 23 of the Mamlatdar's Courts Act, 1906 before the Collector. During the course of argument, the above stated order passed by the Uppar Tahsildar dated 29.05.1990 was referred. The learned Collector has observed,

“Further, this sale deed effected on suit land by mutation entry no. 414 as on 17.04.1990. It appears that after mutation entry no. 414, as an afterthought, to correct the record, an order was passed by the Additional Tahsildar (L.C.), Latur dated 29.05.1990 deleting name of Angad as a protected tenant. However, this order is subsequent to the sale deed and hence cannot justify the sale deed, which was effected prior to this order dated 29.05.1990. Further, mutation entry no. 418, deleting the name of Angad, is subsequent to the date of mutation entry no. 414 (17.04.1990) by which the respondent's name was entered in the suit land. It is clear that mutation entry no. 418 and the order of the Additional Tahsildar dated 29.05.1990 are both contrived and mischievous order to deprive the revisional petitioner (respondent-defendant herein) of his possession over the suit land. The order dated 29.05.1990 of the Additional Tahsildar is ex parte order in which even though the right of Angad as protected tenant

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was adversely affected, his defence was not considered. However, the grounds on which his name is deleted as a protected tenant, have been proved. In short and for the order, no evidence has been cited by the Additional Tahsildar to indicate on which basis he has come to the conclusion that the name of the protected tenant should be deleted.”

40. In the operative part of the order, the learned Collector, Latur has directed departmental enquiry for breach of discipline against the Additional Tahsildar (L.C.), Latur, the Circle Inspector and the Talathi involved in the case, who have altered the record vide M.E. Nos. 414 and 418 and the order dated 29.05.1990. The learned Collector has directed that charge sheet should be prepared on the basis of his order.

41. In the backdrop of these observations, it would be appropriate to reproduce the provisions of Section 99 and 99A of the Hyderabad Tenancy Act which read as under:

“ 99. (1) Save as provided in this Act no Civil Court shall have jurisdiction to settle, decide or

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deal with any question including a question whether a person is or was at any time in the past a tenant or protected tenant and whether any such tenant or protected tenant is or should be deemed to be the full owner of the lands which is by or under this Act required to be settled, decided or dealt with by the Tahsildar, Tribunal or Collector or by the Commissioner or Government.

(2) No order of the Tahsildar, Tribunal or Collector or of the Commissioner or Government made under this Act, shall be questioned in any Civil or Criminal Court.

99A. (1) If any suit instituted in any Civil Court, involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as the “competent authority”) the Civil Court shall stay the suit and refer such issues to such competent authority for determination.

(2) On receipt of such reference from the Civil Court the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such Court shall

thereupon dispose of the suit in accordance with the procedure applicable thereto.

Explanation.- *For the purpose of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906."*

It is thus clear that there is an express bar of jurisdiction and if the suits involving issues required to be decided under the Hyderabad Tenancy Act in terms of the provisions of Section 99A, the Civil Court shall stay the suit and refer such issues to such competent authority for determination. On receipt of such reference from the Civil Court, the competent authority i.e. the Tahsildar, Tenancy Tahsildar or the Tribunal is required to deal with and decide such issues in accordance with the provisions of the Hyderabad Tenancy Act, and to communicate its decision to the Civil Court. The Civil Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

42. In the instant case, even in the suit of the year 1958 which was disposed of in terms of the compromise and also by recording independent findings to issue no.4 by the Civil Court, so also in the present suit bearing Regular Civil Suit No. 90 of 1994, so also in the first appellate court while deciding the appeals, though tenancy issue has been framed, instead of referring the said issue to be decided in terms of the provisions of Section 99A of the Hyderabad Tenancy Act, the trial court so also the first appellate court has decided the said issue by referring the provisions of the Hyderabad Tenancy Act. Learned Collector while deciding the revision preferred against the order passed by the Mamlatdar under Section 5 of the Mamlatdar's Courts Act, 1906, has made serious observations about the order passed by the Tahsildar (L.C.) dated 29.05.1990 and the M.E. No. 418 which was sanctioned deleting the name of the respondent-defendant as a protected tenant and also directed a departmental enquiry against the Additional Tahsildar (L.C.), Latur along with the Circle Inspector and the Talathi concerned. However, even the learned Collector has not further referred the matter to the Tenancy Tahsildar/Tribunal in terms of the provisions of Section 99A. In terms of the explanation to vre/-

Section 99A, a Civil Court shall include the Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906.

43. Further, so far as the specific plea raised about termination of tenancy by the tenant by surrender of his rights to the land holder is concerned, the Tenancy Tahsildar or the tribunal is required to determine the said issue in terms of the provisions of Section 19 of the Hyderabad Tenancy Act and the same is required to be decided notwithstanding any agreement or usage or any decree or order of a court of law. In terms of the provisions of Section 19A of the Hyderabad Tenancy Act, it is for the Tenancy Tahsildar to hold an enquiry and declare whether the whole, or what part, if any, of the land surrendered, the landholder is entitled to retain under Sub-section (1). Thus, there must be a Tenancy Tahsildar/Tribunal/authority to pronounce about a valid surrender of tenancy in terms of the provisions of the Hyderabad Tenancy Act as referred above. Further, in term of Rule 7 of the Hyderabad Tenancy and Agricultural Lands Rules, 1958, it is for the Tahsildar to satisfy himself as to the voluntary surrender of the tenancy.

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44. In the backdrop of this legal position, the learned counsel for the respondent has vehemently submitted that the said civil suit bearing Regular Civil Suit No. 90 of 1994 before the trial court was simplicitor suit for injunction and the question of title of respondent-defendant was never the subject matter for decision before the learned Civil Court. Being a suit for injunction, the only crucial question before the court was as to which party is in possession. In order to decide the factum of possession, the discussion as to the source or title or the nature of possession would be mere ancillary to the factum of possession. Learned counsel has submitted that the issue of tenancy was not in question in a suit for injunction. If during enquiry regarding possession of the parties, an ancillary enquiry of title has to be gone into, the inquiry does not increase the scope and does not convert into an enquiry into the title of the parties. At the most, the inquiry can be of whose possession is standing on better footing, meaning thereby the validity of source of the possession. Learned counsel for the respondent-defendant, in order to substantiate her contention, placed reliance on two cases i.e. *Ramji Rai and Another v. Jagdish Mallah (Dead)*

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through L.R.'s and Another (supra) and *Anathula Sudhakar v. P. Buchi Reddy (Dead) by LR's and Others* (Supra)

45. In the case of *Ramji Rai* (supra), in the facts of the said case, in para no. 10 of the judgment, the Supreme Court has made the following observations:

“10. On the finding of facts, we do not wish to interfere. There is no reason to reverse the concurring findings. However, suffice it to state that the lower appellate court should have dismissed the suit filed by the appellants only on the ground that the appellants had failed to prove that they were in possession of the disputed lands. Under Section 38 of the Specific Relief Act, 1963 an injunction restraining disturbance of possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights [See: Mulla's Indian Contract and Specific Relief Acts, 12th Edn., page 2815]”

46. In the case of **Anathula Sudhakar** (supra) in the facts of the said case, in para 10 and 11, the Supreme Court has made the following observations:

“10. On the contentions urged, the following questions arise for our consideration in this appeal:

(i) What is the scope of a suit for prohibitory injunction relating to immovable property?

(ii) Whether on the facts, plaintiffs ought to have filed a suit for declaration of title and injunction ?

(iii) Whether the High Court, in a second appeal under section 100 CPC, examine the factual question of title which was not the subject matter of any issue and based on a finding thereon, reverse the decision of the first appellate court?

(iv) What is the appropriate decision?

Re : Question (i) :

11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential

relief, are well settled. We may refer to them briefly.

(11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

(11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

(11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or

not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

47. In both the cases however, the provisions of the Hyderabad Tenancy Act, particularly Sections 99 and 99A creating an express bar about jurisdiction of the Civil Court, so also the issue regarding tenancy involved in the suit and the same is required to be referred to the tenancy court, were not the issues for consideration before the Supreme Court and those were the simplicitor suits for injunction seeking a decree for protecting possession. In view of the same, the ratio laid down in the aforesaid cases is hardly applicable to the facts and circumstances of the present case.

48. Learned counsel for the appellant-plaintiff has placed his reliance on the case of ***Bhagwanrao s/o Jijaba Auti vs. Ganpatrao s/o Mugaji Raut and another*** (supra). The following question was referred to the Division Bench of this Court:

“In a suit simplicitor for a permanent injunction, is it necessary to frame an issue of tenancy either of the plaintiff or of the defendant?”

This reference arose out of the Regular Civil Suit filed by the plaintiff Bhagwanrao in the court of Civil Judge Junior Division for permanent injunction simplicitor for restraining defendant no.1 Ganpatrao and defendant no.2 from disturbing his possession over the suit field. The plaintiff Bhagwan contended that he is a tenant in possession in respect of the suit field by virtue of a *batai patrak* executed by defendant no.1 Ganpatrao in his favour. The defendants disputed the plaintiff's possession over the suit field, much less by virtue of the alleged *batai patrak*.

The Division Bench, after referring various contrary views, referred the view expressed by the Supreme Court in a case ***Gundaji Satwaji Shinde v. Ramchandra Bhikaji Joshi*** [AIR 1979 SC 653] wherein, in para 10 of the judgment, the Supreme Court has made the following observations:

"In a civil suit nomenclature of the issue as principal or subsidiary or substantial or incidental
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issue is hardly helpful because each issue, if it arises, has to be determined to mould the final relief. Further, sections 85 and 85-A oust jurisdiction of Civil Court not in respect of civil suit but in respect of questions and issues arising therein and section 85-A mandates the reference of such issue as are within the competence of the Competent Authority. If there is an issue which had to be settled, decided or dealt with by Competent Authority under the Tenancy Act, the jurisdiction of the Civil Court, notwithstanding the fact that it arises in an incidental manner in a civil suit, will be barred and it will have to be referred to the Competent Authority under the Tenancy Act."

The Division Bench has also observed that the provisions of the Bombay Tenancy Act are *pari materia* and are almost similar to the Hyderabad Tenancy Act. There is no difference between the provisions of Section 85-A of the Bombay Tenancy At and Section 99-A of the Hyderabad Tenancy Act. In para 28 of the judgment, the Division Bench has made the following observations:

"28. In short it is the relief claimed which moulds the enquiry and raises issues and questions. A relief

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of permanent injunction necessarily leads to an enquiry as regards the nature of the rights of plaintiffs and defendants. Where, therefore, in a suit for permanent injunction, plaintiff or defendant resists the question of tenancy, the Court will have to consider that question, and since the Civil Court has no jurisdiction to deal with that question it will have first to be referred to the Tenancy Court and after receiving the decision of the Tenancy Court alone will it be possible for the Civil Court to decide whether to grant or not permanent injunction. In view of this position, and particularly in view of the clear and unequivocal mandate of law to the Civil Court, not to deal with any question or issue about tenancy which arises in a suit and which is necessary for granting or not granting the relief of permanent injunction, that even in suit simpliciter for permanent injunction an issue of tenancy be framed, when it is raised, and it be referred to the Tenancy Court for decision. We, therefore, agree with the view expressed by S.J. Deshpande, J., in 1985 (2) Bom. C.R. 617 : 1986 MLR (Revenue Section) page 1; Digamber v. Sk. Yasin, and find that the view expressed in 1983 Maharashtra Law Journal page 958, Maruti v. Parshuram is not good law.”

49. In the instant case, the trial court as well as the first appellate court, even though the suit was involving the issue required to be decided in terms of the provisions of Hyderabad Tenancy Act, dealt with the said issue and decided the same. Though this is a suit of the year 1994, I am left with no other choice but to remand the matter to the trial court for referring the tenancy issue to the tenancy court with certain directions, by quashing and setting aside the judgment and decree passed by the trial court so also the common judgment and order passed by the first appellate court. In terms of the explanation to section 99A of the Hyderabad Tenancy Act, a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906. I am again left with no other choice but to remand the matter to the Mamlatdar's Court with certain directions. Hence, the following order:

ORDER

I. Second Appeal No. 769 of 2008, Second Appeal No. 770 of 2008 and Writ Petition No. 607 of 1993 are hereby partly allowed.

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II. **(a)** The judgment and decree dated 28.09.2001 passed by the 2nd Jt. Civil Judge, Junior Division, Nilanga in Regular Civil Suit No. 90 of 1994 with the counter claim, **(b)** the common judgment and order dated 14.08.2008 passed by District Judge-1, Nilanga in Regular Civil Appeal No. 71 of 2001 and Regular Civil Appeal No. 72 of 2001, **(c)** the judgment and order dated 21.07.1990 passed by the Mamlatdar, Nilanga in Case No. 90/Jama/Kavi/1062 and **(d)** the judgment and order dated 21.01.1993 passed by the Collector, Latur in File No. 1990-GB-ROR-A-27 are hereby quashed and set aside and the matters are remanded to the trial court and the Mamlatdar's Court, respectively, with the following directions:

(i) Readmit the Regular Civil Suit No. 90 of 1994 under its original number along with the counter claim.

(ii) The evidence recorded during the original trial shall be the evidence during the trial after remand. The parties are

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not at liberty to adduce any oral or documentary evidence after remand.

(iii) The parties shall appear before the trial court on 09.08.2021.

(iv) The trial court, in terms of the pleadings of the parties, shall frame necessary tenancy issue/s and refer it to the tenancy authority in terms of the provisions of Section 99A of the Hyderabad Tenancy and Agricultural Lands Act, 1950.

(v) After such reference is made, the trial court shall direct the parties to the suit to appear before the tenancy authority on a particular date.

(vi) The tenancy authority shall decide the said reference within a period of six months after appearance of the parties before it.

(vii) On receipt of the decision of the tenancy court on such reference, the trial court shall dispose of the suit in accordance with law as expeditiously as possible, preferably within a period of three months thereafter.

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(viii) The proceedings bearing Case No. 90/Jama/Kavi/1062 be restored to its original number before the Mamlatdar's Court.

(ix) The Mamlatdar shall stay the further proceedings till the aforesaid issue/s is/are settled, decided and dealt with by the tenancy authority and communicated its decision to the Civil Court.

(x) The Mamlatdar shall dispose of the proceedings remanded to it in terms of the issue/s decided by the tenancy authority.

III. Second Appeal No. 769 of 2008, Second Appeal No. 770 of 2008 and Writ Petition No. 607 of 1993 are accordingly disposed of. Rule in Writ Petition No. 607 of 1993 is made partly absolute.

(V. K. JADHAV, J.)

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