

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.577 OF 2012

BANSI S/O KISHANRAO TAUR
VERSUS
SATISH S/O MACHINDRA SOLANKE AND OTHERS

.....
Advocate for Appellant : Mr. S. S. Deshmukh
Advocate for Respondent No.1 : Mr. S. B. Ghute
.....

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 30-11-2021

ORDER :

1. Present appeal has been filed by the original plaintiff challenging the concurrent Judgment and decree passed by the Courts below. The plaintiff/present appellant along with present respondent No.4/original plaintiff No.2 had filed Regular Civil Suit No.235 of 2007 before 2nd Joint Civil Judge, Junior Division, Ambad District Jalna, for permanent injunction. The said suit came to be dismissed on 06-08-2008. Thereafter, the said Judgment and decree was challenged by both the plaintiffs by filing Regular Civil Appeal No.173 of 2008. The said appeal came to be dismissed by learned District Judge-2, Jalna, on 16-01-2010. Hence, this second appeal.
2. Heard learned Advocate Mr. S. S. Deshmukh for appellant and

learned Advocate Mr. S. B. Ghule for respondent No.1. In order to cut short, it is stated that both of them have made submissions in support of their respective contentions.

3. The original plaintiffs had come with a case that one Pandit Deshmukh was the owner of land bearing Survey No.37 admeasuring 27 Acres 9 Gunthas situated at village Limbi Tq.Ghansavangi District Jalna. Said Pandit Deshmukh used to reside at Sonpeth in District Parbhani with his family. One Kisanrao Taur who was the father of the appellant/plaintiff was given the land on lease in 1963-1964 and 1964-1965. However, prior to that since 1962-1963 till 1970-1971 name of plaintiff No.1 was entered into as lease holder. He alone was cultivating the entire land. In fact, he was declared as owner to the extent of 8 Acres 9 Gunthas land out of the suit land in view of the procedure laid down in Hyderabad Tenancy and Agricultural Lands Act, 1950. The remaining area was also cultivated by appellant/plaintiff No.1 as tenant, however, it is further contended that a partition took place between deceased Pandit and his brother and mother in the year 1971-1972 and 9 Acres 7 Gunthas land from South-West corner was allotted to the share of brother Madhav and the other equal area was given to

mother Kashibai. It is then contended that in the year 1972-1973 plaintiff No.1 purchased the Eastern portion from said land Survey No.37 which was allotted to Kashibai to the extent of 8 Acres, thereby the holding of plaintiff No.1 as owner from the said land went up to 16 Acres 9 Gunthas. Thereafter, the consolidation scheme was implemented and certificate was issued in favour of him. In the said scheme, the share of owner Pandit and Madhav was given Gut No.90 admeasuring 19 Acres 9 Gunthas, but from that 9 Acres 7 Gunthas allotted to the share of Pandit remained in possession of plaintiff No.1 as tenant. When Tahsildar Ambad had issued notice on 01-06-1978 directing him to deposit the price of the declared land, he had deposited the same through Challan in State Bank of Hyderabad on 04-06-1980. He applied for the ownership certificate. In fact certificate of ownership which was prepared in the year 1967 and another certificate in the form No.13 was also issued to him on 07-08-1980. Possession was directed to be handed over to plaintiff No.1 by the revenue officers, however, the Circle Officer gave false report stating that deceased Pandit is not available for handing over the possession. Though the appellant had become owner and was continuously in possession, his possession was disturbed by the respondents and, therefore, he filed the suit for

permanent injunction. It is also contended that in view of the illegal entries, defendant No.1 got registered sale deed from defendants No.2 and 3 in his favour, but that was without consideration. That sale deed is not binding on the plaintiff.

4. The defendants contested the suit by filing written statement and they denied that there was any such partition. It was contended that in the year 2006-2007 defendant No.1 was cultivating the suit land. On the contrary they alleged that the plaintiffs are trying to dispossess him. Plaintiff No.1 had filed Regular Civil Suit No.314 of 2006 against defendants No.2 and 3 and had moved application for grant of temporary injunction, but that was rejected by the concerned Court on 05-01-2007. Thereafter, the said suit came to be dismissed in default. It shows that defendant No.1 is in possession of the suit property as owner.

5. After issues were framed, the Trial Court had come to the conclusion that the plaintiffs have failed to prove possession over the suit land and any obstruction at the hands of defendants to their possession. The First Appellate Court also after reassessing the evidence, came to the same conclusion.

6. It is to be noted that the case was depending on oral as well as documentary evidence in the form of revenue record. But we cannot forget that there was an earlier attempt on the part of the plaintiffs when Regular Civil Suit No.314 of 2006 was filed. The temporary injunction was then rejected and the suit was dismissed in default. That decree/order was never challenged by the appellants. The fact therefore indicates that the defendants were in possession of the suit property when that suit was filed. Under such circumstances, when this subsequent suit is filed, how it can be held that the plaintiffs are in possession is a question, and has been rightly answered by both the Courts below. Another fact to be noted is that though the oral evidence is there, yet when documentary evidence is also there in the form of revenue record which has not been challenged at all, then documentary evidence would prevail over the oral evidence. Both the Courts below have specifically take a note of mutation entry No.439 by which name of the father of the plaintiffs was deleted as tenant from the record of Survey No.37. As aforesaid, no appeal was preferred challenging the said mutation entry. On the contrary in his cross-examination PW.1 Narayan has reiterated the said fact. Further, mutation entry No.62 name of respondents No.2 and 3 as well as their mother came to be mutated

to Gut No.90, that is also not challenged. Thereafter, the suit land appears to be allotted to the brother in partition. The oral evidence of the adjoining owner adduced by the plaintiffs cannot prove their possession as it is not supported by the revenue record. Further, it cannot be forgotten that the said adjoining owner is also the relative of the plaintiffs, therefore, he was bound to support the plaintiffs. On the contrary the defendants have led evidence of DW.1 Prashant, DW.2 Indarrao Taur, DW.3 Satish Solanke, DW.4 Baban Zolbate who have stated that the defendants were in possession, they have sold the said property to defendant No.1 for valuable consideration on 10-01-2007.

7. When both the Courts below on the assessment of facts have come to the conclusion that the plaintiffs have failed to prove the possession and in spite of having every opportunity to challenge the revenue entries at appropriate time, the plaintiffs have not taken proper steps, then it leaves no scope for formulation of substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure. Hence, the second appeal stands dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-