

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.422 OF 2012

KAMLAKAR YADAV HAKKE AND ANOTHER
VERSUS
RAOSAHEB MADHAVRAO HAKKE AND OTHERS

.....
Advocate for Appellants : Mr. S. S. Jadhavar
Advocate for Respondents : Mr. S. B. Madde
.....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
29-07-2021**

**Date of Pronouncing The Order :
18-08-2021**

ORDER :

1. The present appeal has been filed by the original plaintiffs to challenge the concurrent findings. They had filed Regular Civil Suit No.12 of 2002 (Old No.329 of 1989) which was filed before Civil Judge, Junior Division, Chakur District Latur, for perpetual injunction. The suit was dismissed on 03-10-2009 and they challenged the said decree before the District Court, Latur by filing Regular Civil Appeal No.192 of 2009. It was heard by learned District Judge-1, Latur and dismissed on 24-06-2011, hence the present second appeal.

2. Heard learned Advocate Mr. S. S. Jadhavar for appellants and learned Advocate Mr. S. B. Madde for respondents.

3. It has been vehemently submitted on behalf of the appellants/ original plaintiffs that both the Courts below have not considered the evidence especially the documentary evidence in proper perspective. Out of land Gut No.78, the Northern side 1 H 24 R land is owned by plaintiff No.1 and 2 H 20 R land is owned by plaintiff No.2. Both the lands are adjacent to each other. According to them, they had got the said lands in the partition between them and their brother Gyanoba and father of plaintiffs Yadavrao. A consolidation scheme was implemented in their village Shirnal in the year 1987. Defendant No.1 was the owner of land Survey No.47/1 admeasuring 1 H 24 R prior to the consolidation. According to the plaintiffs that land belonging to defendant No.1 was given to the father of the plaintiffs and the land of the father of the plaintiffs from Survey No.47/7 admeasuring 0 H 27 R, Survey No.47/5 admeasuring 0 H 78 R and Survey No.47/2 admeasuring 0 H 14 R were given to defendant No.1 at the time of consolidation. Accordingly, the Deputy Director of Land Records had passed the transfer orders on 26-03-1984. Possession receipt (Kabja Pavti panchanama) was

executed on 19-04-1984 and then the partition had taken place. However, when the father of the plaintiffs was obstructed with his possession, the plaintiffs had filed Regular Civil Suit No.237 of 1988 and it was compromised on 16-08-1988. It is said that the father of the plaintiffs had admitted the title of the possession of the plaintiffs. This indicates that the said proceeding was between the father of the plaintiffs and the plaintiffs. According to the plaintiffs, the boundary between Survey No.47/2 and 47/3 was damaged by defendant No.1 and then he made encroachment to the extent of 0 H 14 R in Survey No.47/2. In spite of the request of the plaintiffs, he denied not to obstruct their possession and, therefore, a suit for injunction was filed. The plaintiffs had produced the exchange documents and the defendants though admitted that the scheme was implemented, contended that there was a stay by revenue authorities. That stay order was never produced and only on the basis of the entry that was taken in respect of the stay order on 7/12 extract, both the Courts below have contended that since the matter is pending before the Consolidation Officer, there is no such exchange of the properties though a possession panchanama was executed. Exhibit 71, 103, 104 and 105 are the records in respect of the implementation of the consolidation scheme. All these documents

have not been properly considered and, therefore, substantial questions of law are arising in this case. Both the Courts below cannot be said to be justified in arriving at the conclusion that the plaintiffs have not proved their possession because both the Courts have ignored the orders passed by the consolidation authorities and the scheme had become final. Learned Advocate for the appellants, therefore, prayed for the admission of the second appeal.

4. Per contra, the learned Advocate for the respondents supported the reasons given by both the Courts below in arriving at a conclusion that the suit only for an injunction will not be sufficient in this case when the fact of exchange and transferring of the title itself is challenged. The oral, as well as documentary evidence, has been considered properly by both the Courts below. Plaintiffs never took any objection in respect of the entry regarding the stay in the 7/12 extract and there was also a report given by Talathi to Tahsildar on 08-06-1989 and the copy of the panchanama of the Talathi in respect of the suit land was executed on 05-05-1989. The First Appellate Court found that those documents were public documents, they were not admitted, and it was observed that the Talathi when made an inspection of the suit land, he found that it is

in possession of defendant No.1 since prior to 10 years of his inspection. That means the factual possession of the land was different from the entries under the consolidation scheme. When the plaintiffs had failed to prove their possession, both the Courts were justified in dismissing their claim. No substantial questions of law are arising in this case. The matter is still pending before the Consolidation Officer. Under such circumstances, the appeal deserves to be dismissed.

5. At the outset, if we consider the pleadings then it is to be noted that according to the plaintiffs they had become owner of the respective lands by way of compromise that had taken place between the first plaintiff, his father, brother and mother in Regular Civil Suit No.237 of 1988 on 16-08-1988. However, prior to that itself, the consolidation scheme was implemented and completed according to the record on 26-03-1984 and then the 7/12 extracts were prepared. According to the defendant, though the panchanama of exchange i.e. handing over of the possession was drawn, yet actually it was not implemented. It was in collusion between the revenue authorities and the father of the plaintiffs those documents were executed. Defendant No.1 had never accepted the

proposal of the consolidation authority for the exchange and according to him he has not signed the receipts, he had not handed over the possession to the father of the plaintiffs and had even not taken possession of the land which was offered to him in exchange. The partition that was shown thereafter is Sham and bogus. He, therefore, approached the Deputy Director of land Records, Aurangabad and the stay is granted. That authority has remanded the case to the original authority and the report is also submitted to the said authority. During the course of inquiry into that proceeding, the panchanama was executed by Talathi and was given to Tahsildar. It was found that defendant No.1 is in possession. The appeal filed before the concerned authority is still pending. This was the contention on the date of the suit. That means the plaintiffs could have gathered that their title to the land was questioned by defendant No.1. Under such circumstances, in view of *Anathula Sudhakar Vs. P. Buchi Reddy (dead) by L.Rs. And others, reported in (2008) 4 SCC 594*, the suit for simpliciter injunction was not maintainable at all.

6. Even if we consider that on the basis of consolidation scheme when the plaintiffs contended that the title has got transferred to

them and they are in possession and, therefore, they would be justified in filing suit for an injunction only, yet the position of the fact of possession on the date of the suit was important. On this point, both the Courts below who were the fact finding Courts, have come to the conclusion that the plaintiffs have failed to prove their possession over the suit land. Now it cannot become a substantial question of law only for the sake that there is a consolidation scheme showing exchange of the lands. In spite of the exchange of lands in the consolidation scheme, both the fact finding Courts have come to the conclusion that plaintiffs have failed to prove possession over the suit land. Plaintiffs have led oral evidence and it has been considered by both the Courts below. The cross-examination of the witnesses of the plaintiffs have been considered and it appears that PW.1 i.e. plaintiff No.1 was not even aware of many things. Plaintiffs have conveniently not examined their father who could have been the appropriate person to state about the exchange. When they could have adduced best evidence, they have withheld and, therefore, on the basis of the entire evidence, that is documentary, as well as oral, both the Courts below have arrived at a concurrent finding about fact that plaintiffs are not in possession of the suit land, therefore, now on the basis of the documents,

substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are not arising. Hence, the second appeal stands dismissed at the threshold. No order as to the costs.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

**GAWADE
VIRENDRA
J**

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VIRENDRA J
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