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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7514 OF 2018

1. Shri. Ratan s/o Bhausaheb Kanade PETITIONERS
Age – 70 years,

2. Shri. Ramdas s/o Bhausaheb Kanade,
Age – 58 years,

3. Vitthal Baban Kanade (Deceased)
Through its LRs

3-a Ganesh s/o Vitthal Kanade
Age – 35 years,

All Occ – Agri
R/o Kanademala, Maliwadi
Solapur Road, Ahmednagar

3-b Bharti Nilesh Raskar
Age – 25 years, Occ – Agri & Household
R/o Behind the Sent Xavier School
Daffodil Building, Nashik Road,
Nashik, District – Nashik

4. Milind s/o Namdeo Kanade
Age – 62 years,

5. Chetan s/o Namdev Kanade,
Age – 35 years,

Both R/o Kanademala, Maliwadi
Solapur Road, Ahmednagar

6. Vaishali Prashant Fulsoundar,
Age – 45 years, Occ – Agri & Household
R/o Behind I.T.I. In front of Shinde Hospital
Ahmednagar

7. Jyoti Milind Vidhate,
Age – 43 years, Occ – Nil
Near Anandrishi Hospital

Bank Colony, Ahmednagar

VERSUS

1. Morish Albart D'Souza RESPONDENTS
Age – 53 years,

2. Agastin Albart D'Souza
Age – 70 years,

3. Sesil Albart D'Souza
Age – 50 years,

All Occ : Business,
R/o Kombdilwala Mala
Solapur Road, Ahmednagar

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Mr. V. D. Salunke, Advocate for the petitioners
Mr. R. L. Kute, Advocate for respondents No. 1 to 3

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WITH
CIVIL APPLICATION NO. 12960 OF 2021
IN
WRIT PETITION NO. 7514 OF 2018

Ajay Ramesh Nannaware and Others APPLICANTS

VERSUS

Ratan Bhausaheb Kanade and Others RESPONDENTS

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Mr. Pradeep K. Palve, Advocate for the applicants
Mr. V. D. Salunke, Advocate for respondents No. 1 to 7
Mr. R. L. Kute, Advocate for respondents No. 8 to 10

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 15th DECEMBER, 2021
PRONOUNCED ON : 31st JANUARY, 2022

JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard finally with the consent of learned advocates for the parties.

2. This petition takes exception to the judgment and order dated 7th February, 2018 passed by the Hon'ble Minister for Revenue, Maharashtra State, thereby dismissing the Revision No. RTS 3317/253/PK385/J6 and confirming the judgment and order dated 23rd August, 2017 passed by Additional Commissioner, Nashik in proceedings No. RTS/Revision/253/2016.

3. Lands Survey No.94/1, 99, 100, 110 to 114, 98A, 98B and 98C situated at village Maliwada, Taluka-Ahmednagar (for short "the lands in question") were owned by Vincent Paul D' Souza (first). On an application filed by Vincent Paul D' Souza, in the year 1978, mutation entry No. 921 was sanctioned on 31st May, 1978 by which names of his brothers were recorded to the lands in question.

4. It is the case of the petitioners that when Vincent Paul D' Souza expired on 3rd November, 1942, he could not have applied for effecting Mutation Entry No. 921, in the year 1978. So, the said Mutation Entry No. 921 was obtained by fraud and the same cannot be sustained.

5. On 15th October, 1987, Talathi, Maliwada submitted a report to the Tahsildar, Ahmednagar stating that name of Vincent Paul D' Souza was recorded in Survey Nos. 96 and 106/2, he expired on 3rd November, 1942 and on local inquiry, it was revealed that he has no legal heir. Said lands are in possession of Nannaware's since their father Kisan Sitaram Nannaware.

6. The petitioners approached the Sub Divisional Officer, Ahmednagar by filing RTS Appeal, along with delay condonation application No. 51 of 2010, seeking cancellation of Mutation Entry No.921. By condoning the delay, the Sub Divisional Officer, Ahmednagar, allowed the appeal No. 84 of 2011 filed by the petitioners, by order dated 24th February, 2014.

7. The respondents challenged the decision of the Sub Divisional Officer, before Additional Collector, Ahmednagar, by filing Second RTS Appeal No. 44 of 2014, which was dismissed by the Additional Collector, by order dated 26th April, 2016.

8. The respondents challenged said decision of the Additional Collector, before Additional Commissioner, Nashik, by filing RTS Revision No. 253 of 2016, which came to be allowed by the Additional Commissioner, vide order dated 23rd August, 2017 and the orders passed by the Sub Divisional Officer, Ahmednagar in

RTS Appeal No. 84 of 2011 and the Additional Collector, Ahmednagar in Second RTS Appeal No. 44 of 2014 were quashed and set aside.

9. The petitioners, being aggrieved by the decision dated 23rd August, 2017 of the Additional Commissioner, Nashik, filed RTS Revision No. 3317/253/PK385/J-6 before the Hon'ble State Minister for Revenue. The Hon'ble Minister for Revenue dismissed the revision filed by the petitioners vide order dated 7th February, 2018, hence, present writ petition.

10. Heard learned advocate for the petitioners, learned advocate for the respondents and learned advocate for the intervenors in Civil Application No. 12960 of 2021.

11. Learned advocate for the petitioners submitted that Mutation Entry No. 921 was obtained by fraud, as Vincent Paul D' Souza, who expired on 3rd November, 1942, could not have applied for effecting such entry, in the year 1978. Said Mutation Entry was sanctioned on 31st May, 1978, therefore, the Mutation Entry cannot be sustained. By placing reliance on Talathi's report dated 15th October, 1987 that the lands are in possession of Nannaware's and that there was no legal heir to Vincent Paul D' Souza, he submitted that names of the respondents in respect of

the lands in question could not have been taken in the revenue record. The Additional Commissioner and the Hon'ble Minister had no reason to interfere with the concurrent findings of facts, recorded by the Sub Divisional Officer and the Additional Collector. According to him, a fraud was played while taking Mutation Entry No. 921, which vitiates the said entry and the same ought to have been set aside. These aspects have been overlooked by the Additional Commissioner and the Hon'ble Minister. Therefore, the impugned orders passed by the Additional Commissioner, Nashik and the Hon'ble Minister are liable to be quashed and set aside. In support of his submissions, he relied in ***"A. V. Papayya Sastry and Others V/s Government of A. P. and Others"*** reported in ***2007 (4) SCC 221***.

12. On the other hand, learned advocate for the respondents submitted that the petitioners claim tenancy rights through Sahadu Mohnaji Kanade, however, Sahadu's name was entered as tenant in the revenue record in the year 1947. On 11th May, 1956, Sahadu Kanade voluntarily surrendered lands in question in favour of Vincent Paul and the possession of the said land was taken by Albert D' Souza on behalf of Vincent Paul D' Souza. Accordingly, Mutation Entry No. 686 was sanctioned on 10th July, 1956 and name of the tenant was deleted from the record of

rights. This surrender of tenancy is not challenged by the petitioners at any point of time. In this view of the matter, the petitioners have no *locus* to question the Mutation Entry No. 921.

13. He further submitted that the petitioners claimed right in the lands in question by filing Regular Civil Suit No. 212 of 2010. The said suit was dismissed by the competent civil court on 6th July, 2015 by holding that the petitioners have no *locus* to file the suit. By pointing out the sale deed dated 27th November, 1981, he submitted that the predecessors of the petitioners, namely, Bhausaheb Mahadu Kanade and Baban Mahadu Kanande have purchased part of property from survey No. 64/4, 97/3, 103/1, 107/1, 109/1, 117/3 and 118/3 from Albert Pinter D' Souza. Thus, the fact of surrender of the tenancy and purchase of property is suppressed by the petitioners and, therefore, it is clear that the petitioners have not come before this court with clean hands and the petition is liable to be dismissed on that ground alone.

14. He further submitted that on 4th May, 1921, a registered partnership deed was executed, in which properties in question are mentioned. The partnership deed is also placed on record by the respondents. By relying on the observations of the civil Court in RCS No. 212 of 2010, he submitted that the petitioners have

no *locus* to challenge the Mutation Entry No. 921 and to file this petition. There is no merit in the petition and the petition is liable to be dismissed.

15. In reply, learned advocate for the petitioners submitted that partnership deed dated 14th May, 1921 is not a registered document. The decision in Regular Civil Suit No. 212 of 2010 is challenged by filing appeal and the appeal is continuation of the suit. Two revision applications filed by the petitioners are pending before revenue authorities and in that view of the matter, the *locus standi* of the petitioners cannot be questioned by the respondents.

16. Learned advocate for the intervenors supported the case of the petitioners by adopting the arguments of the petitioners.

17. It is not the case of the petitioners that voluntary surrender of tenancy by Sahadu was ever challenged in any proceeding. On the basis of surrender of the lands in question by tenant Sahadu in favour of Viincent Paul D' Souza, on 10th July, 1956, Mutation Entry No. 686 was sanctioned, thereby deleting name of tenant Sahadu.

18. The petitioners filed RCS No. 212 of 2010 claiming perpetual injunction in respect of the property in question,

contending that in the year 1920, ownership of the property was transferred in favour of Vincent Paul D' Souza and till 1978, lands survey No.103/6 and 105/1 were in the name of Vincent Paul D' Souza, in the revenue record. On the basis of erroneous and void Mutation Entry No. 921, dated 31st May, 1978, name of V. Paul D' Souza was removed and names of defendants No. 1 to 7 (respondents herein) and Vincent Paul D' Souza, were recorded. In fact, Vincent Paul D' Souza died on 3rd November, 1942. He was issue-less, therefore, his name remained as owner of the suit property. It is further contended that the suit properties were handed over to Mahadu and Sahadu for cultivation in the year 1920-25. Relations between Vincent Paul D' Souza and Kanade brothers were of landlord and tenants. Thus, the plaintiffs' forefathers were the protected tenants and their rights are protected by law. Mahadu died on 23rd December, 1935 and Sahadu died on 9th October, 1968. The plaintiffs being their legal heirs, have succeeded all the rights inherited by their forefathers.

19. Vincent Paul D' Souza died on 3rd November, 1942. He was issue-less. Taking disadvantage of similarity in the names, Albert D' Souza created a record showing that Sahadu Kanade surrendered tenancy in favour of partnership firm M/s Vincent

Paul D' Souza and Sons. Possession of the suit property was handed over to General Power of Attorney Holder, Albert D' Souza, who took possession on behalf of the said firm. Said proceedings were *void ab initio*.

On the basis of these pleadings, the petitioners sought permanent injunction against the respondents from interfering in the property in question.

20. After recording evidence and hearing the plaintiffs and the defendants, the suit filed by the petitioners was dismissed with costs. While dismissing the suit, the Civil Court has recorded following findings -

> *"28. The evidence on record shows that the suit property are originally belonging to the forefathers of the defendants. The genealogy of the defendants is proved by them. Exh.133 shows that how defendants are entitled to inherit the suit property. The revenue record shows that since 1956 the suit property is in continuous possession of the defendants. The forefathers of the plaintiffs i.e. Sahadu Kanade had voluntarily surrendered his tenancy right in favour of defendants. At the time of said surrendered possession of suit property was handed over by him in favour of defendants.*
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> *29. The said surrender was voluntary. It is conclusive till today because it is not set aside by any appellate court of competent jurisdiction. On the contrary, Sahadu Kanade died issueless. There is no any question of transfer of his tenancy right in favour of the present plaintiffs being legal heirs of Mahadu Kanade. Said Mahadu Kanade was never the tenant of the suit property as per documents on record. There is no any concept of joint tenancy as alleged by plaintiffs.*

30. The evidence on record shows that the possession of suit property from deceased Sahadu was recovered by the defendants by following due process of law before the competent court in the year 1956. The said order is yet not set aside by the plaintiffs. As such said surrender of tenancy right by Sahadu and delivery of possession of the suit property by him to the landlord or the forefathers of the defendants is valid in the eye of law, unless and until it is set aside by the competent court under the Bombay Tenancy and Agricultural Lands Act. In the present case the factual possession of the suit property is not with the alleged tenant.

31. In the present case Exh.88 shows that the Mamlatdar recorded the statement of tenant and the landlord and the order passed by him shows that tenant Sahadu at that time was not willing to cultivate the suit property. Exh.88 shows that the Mamlatdar was satisfied that sahadu Kanade, tenant had surrendered his tenancy right voluntarily. It shows that after understanding the nature and consequences of the said surrender and after satisfying it to the tenancy court Mamlatdar accepted the said surrender. As said surrender is legal obtained in accordance with procedure prescribed in the law, it is valid. Therefore, the documents came on record shows that defendants are in physical possession of the suit property since 1956 in accordance with the law. Therefore, the onus is on plaintiffs to establish how they are entitle for the relief of injunction against the defendants.

32. The revenue record of the suit property shows that plaintiffs are never in possession of it as a tenant or otherwise since 1956. On the contrary, it shows that the defendants and their forefathers are in possession of the suit property. Their ownership is there. On the contrary these plaintiffs have purchased some other portion of the suit properties from the defendants by way of sale deed vide Exh.131 & 132. In said sale deeds the recitals shows that plaintiffs in the present suit have admitted the defendants ownership and possession of the suit property. As such at once they are admitting the ownership and possession of the defendants and once they are denying the same. The principle of estopple will apply to them.

33. It is the contention of the plaintiffs that the suit property was owned by Vincent Paul Desouza. He died in 1942. He was issueless. Vincent Albert Desouza started partnership firm in 1955-56 in the *name of M/s V. Paul Desouza and sons. Surrender by Sahadu was in favour of said firm and possession was obtained by Albert Desouza, who was Power of Attorney Holder of said firm. As it was not in favour of legal heirs of Vincent Paul Desouza, it is void surrender. It is contention of the plaintiffs that defendant Nos. 1 to 7 are not legal heirs of Vincent Paul Desouza. Therefore, they have no any right to succeed the suit property as their legal heirs.*

34. The oral evidence of Morrice Albert Desouza (DW-1) shows how the defendants are succeeding as legla heirs of Vincent Paul Desouza (first). This oral evidence is in consonance with the contents of registered partition deed effected by their forefathers before Sub Registrar Ahmednagar in the year 2921. The contents of Exh. 133 and registered partnership deed dated 17/08/1943 shows that the present defendants are legal heirs of deceased Vincent Paul Desouza (first). The mutation entry No. 921 is also corroborates the same. There is no any evidence contrary to it is brought on record by the plaintiffs. The onus was on plaintiffs to show that defendants are not legal heirs of Vincent Paul Desouza (first), and therefore, they are no having any right in inheir the suit property as owners.

"35. The documentary and oral evidence on record shows that the suit property was purchased by ancestors of the defendants. The present defendants are legal heirs of deceased. The issue of surrender of tenancy by the ancestors of the plaintiffs was finally decided by Tenancy court on merits. Admittedly this court is not having jurisdiction to decide the issue of tenancy but the decision of Tenancy court is in its finality. There is no any evidence showing that plaintiffs are in possession of the suit property and their tenancy was not surrendered. The documents on record shows that the suit property is already converted into non agricultural in the year 2009.

36. The above discussion makes it clear that the plaintiffs are neither in possession of the suit property nor their any right as a tenant is in existence over there. On the contrary, defendants are in lawful possession over the suit property. As owners of the suit property they are having every right to develop and alienate it as per their own whims. The permission obtained by the defendants for the use of suit property for non agriculture purpose is legal one. Therefore, I answer issue No. 1 in negative."

21. It emerges from the record that Sahadu Kanade purchased a portion of the land surrendered by him, from Albert D' Souza on 24th July, 1956 and a portion of the surrendered land was also purchased by the father and grand father of the petitioners on 27th November, 1981 from Albert D' Zouza, by registered sale deeds. It is, therefore, clear from the record that grand father and father of the petitioners have admitted ownership of D'Souza family, on the lands in question.

22. It is also clear from the record that predecessor of the petitioners, namely Mahadu was never a tenant of the lands in question. In the light of these facts, the Hon'ble Minster was justified in coming to the conclusion that the petitioners have no *locus standi* to challenge Mutation Entry No. 921. By relying on decision of the Civil Court, the Hon'ble Minister was right in coming to the conclusion that the respondents are holding the property since 1956 till date and, therefore, the petitioners have no right, title or interest in the property in question and the petitioners are not entitled to challenge the Mutation Entry No. 921.

23. In ***"A. V. Papayya Sastry"*** (*supra*), the Hon'ble Supreme Court held that fraud vitiates everything. Taking into consideration the peculiar facts and circumstances of the case in

hand, it is not possible to hold that Mutation Entry was sanctioned by the respondents by playing fraud. As the petitioners have no *locus standi* to challenge the Mutation Entry, this judgment does not support case of the petitioners.

24. For the aforestated reasons, this Court is of the considered view that the Hon'ble Minister, after properly appreciating the facts and record has passed a well reasoned order. There is no illegality or perversity in the order impugned in the present writ petition. The writ petition, being devoid of merits, is dismissed. Rule discharged. There shall be no order as to costs.

25. Civil Application No. 12960 of 2021 is disposed off.

[NITIN B. SURYAWANSHI]
JUDGE

drp/wp7514-18