

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.508 OF 2021

Vilas Laxman Sagar And Another

Petitioners

Versus

Rajendra Sudhakar Kulkarni And Another

Respondents

Mr. V.D. Salunke, Advocate for the petitioners.

Mr. S.B. Jadhav, Advocate for the respondents.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 14th SEPTEMBER, 2023

ORDER :

1. This petition filed under Article 226 and 227 of the Constitution of India, challenges the order dated 18.12.2019, passed by learned Civil Judge, Junior Division, Ausa, below Exhibit-45 in Regular Civil Suit No. 233/2017, thereby rejecting the application filed by the petitioners for referring the matter to the tenancy authority for deciding the issue of tenancy.

2. Petitioner has filed suit for declaration and injunction with a specific contention that the petitioners have given land in question for cultivation on batai basis to Irrappa Sagar in the year 1963. Accordingly, mutation entry no. 356 was effected. After the death of Irrappa Sagar in the year 1982, petitioner No. 2/Plaintiff No. 2 is in possession of the suit property as legal heir

of Irrappa Sagar.

3. Respondents/defendants appeared and opposed the suit by filing written statement. They denied that Irrappa Sagar was tenant in the suit land. In the suit, Trial Court framed issues at Exhibit-43. Petitioners thereafter moved application Exhibit-45, thereby praying for framing of issue of tenancy. Application was opposed by respondents/defendants stating that application is filed only to prolong the matter and said issue cannot be decided by the Civil Court. Competent Authority i.e. Tahsildar, has already decided the proposed issue. Trial Court after hearing the parties has rejected the application holding that Tahsildar, Ausa, has found that plaintiffs or deceased Irrappa are not tenants and batai is not tenancy. Said order is confirmed by the Sub Divisional Officer, Ausa/Renapur. Trial Court, therefore held that the issue of tenancy need not be framed in the matter. This order is impugned in the present petition.

4. Heard the learned advocate for the petitioners and learned advocate for the respondents. Perused the writ petition memo, its annexures and the impugned order.

5. Perusal of the order passed by Tahsildar, Ausa in

2010/JAMA-1/KAVI-414, shows that said proceeding was in respect of deleting the name of petitioners from the other rights column of the suit land. In that proceeding, Tahsildar has held that if Irrappa Sagar was declared as tenant or protected tenant, then such entry should have been taken in the 7/12 extract in the other rights column. Since, same is not there, application filed by the respondents was partly allowed and the respondents were directed to take recourse to the higher Court in respect of Entry No. 356.

6. In Kishan s/o Dashrath Naikwade vs. Asrabai w/o Babu Naikwade and ors., 1991(1) Mh.L.J. 68, learned Single Judge of this Court has held that;

"It is the case of the plaintiff that because of the oldness of Babu, he gave these lands for cultivating on batai basis to the plaintiff and, therefore, plaintiff is the tenant of the suit land. -----

4. Relevant portion of section 5 of the Act of 1950 reads :

"5. A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the landholder and if such person is not---

(a) a member of the land-holder's family, or Both Nilavabai's case reported in 1977 Mh.L.J. 443 and Syed Ibrahim's case reported in 1990 Mah.L.J. 631 speak about the status of near blood relations in respect of right to claim tenancy. Both these cases

go to show that if a near relation like nephew is cultivating the land and even if he is separated, he cannot be deemed to be a tenant under section 5 of the Hyderabad Tenancy and Agricultural Lands Act because he is not cultivating the land belonging to another. Therefore, in cases wherein such a relation is found to be in possession of the property belonging to another, a near relation, the deeming provision of section 5 of the Hyderabad Tenancy and Agricultural Lands Act cannot be brought into play. But this does not mean that if a nephew or a like relation is separate from the family of landlord, he can in no circumstances enter into contract of tenancy with his uncle or like relation. Such a proposition has not been laid down in any of these two cases. Only thing to be borne in mind is merely because he is cultivating the land of another person who is a relation, no tenancy can be presumed under section 5. Hyderabad Tenancy Act does not protect only deemed tenants under section 5 but also contractual tenancies. In the instant case, Shri Borde submits that there was contract of tenancy with Babu and the required details have been given in the pleadings. Therefore, it will have to be decided by the tenancy authorities whether he is a tenant of the suit land ignoring the provisions of section 5 of the Hyderabad Tenancy and Agricultural Lands Act. On this count, therefore, recalling of the reference was not proper.

5.XXX

8. The issue framed by the learned trial Judge needs modification. The issue should read as follows---

"Whether the plaintiff proves that he is cultivating the suit land on the strength of agreement of tenancy entered into with deceased Babu ?"

7. This decision is applicable to the facts of the present case as it is the pleading of the plaintiffs that Irrappa was cultivating the suit land on batai basis as tenant. Defendants have denied the tenancy of the petitioners. Prayer of the plaintiffs is also clear that the defendants should not interfere in the tenancy of the plaintiffs.

8. Considering the rival pleadings, Trial Court ought to have framed issue of tenancy. However, Trial Court has erroneously proceeded to reject the said prayer by relying on order passed by Tahsildar in an incidental proceeding. Non application of mind on the part of the Trial Court is therefore apparent on the face of record. The impugned order is therefore cannot be sustained. In the result, following order:

ORDER

- (i) Writ petition is allowed in terms of prayer clause 'B'.
- (ii) Trial Court shall frame the issue as to whether plaintiffs prove that they are cultivating the suit land on the strength of agreement of tenancy entered into with defendants?

[NITIN B. SURYAWANSHI, J.]