

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 788 OF 2003

Baheru S/o Ganpat Jamale
Age: 49 years Occ : Agri.
R/o Kasbe-Tadwale,
Tq. & Dist. Osmanabad.

..Petitioner

Versus

1. Vishwanath Keshav Jamale (Died)
Through his legal heirs.
- 1/1. Bhamabai w/o Vishwanath Jamale (Died)
deleted as per order below Exh.38 dated 30.09.2002.
- 1/2. Prabhakar s/o Vishwanath Jamale
Age: 56 years, Occ: Agri., & Service,
R/o Tadwale (K) Tq. & Dist. Osmanabad.
- 1/3. Sudam S/o Vishwanath Jamale
Age: 50, Occ: Agri
R/o Tadwale (K) Tq. & Dist. Osmanabad.
- 1/4. Ankush s/o Vishwanath Jamale
Age: 46, Occ: Agri..
R/O Tadwale (K) Tq. & Dist. Osmanabad.
- 1/5. Tanaji S/o Vishwanath Jamale
Age: 40 Occ: Agri..
R/o Tadwale (K) Tq. & Dist. Osmanabad.
- 1/6. Nilawati w/o Tukaram Aute
Age: 61, Occ: Household,
R/o Tadwale (K) Tq. & Dist. Osmanabad.
- 1/7. Suman w/o Rangath Veer
Age: 59, Occ: Household,
R/o Khed, Tq. & Dist. Osmanabad.
- 1/8. Sau. Sarada w/o Dnyandeo Rohite
Age: 42, Occ: Household,
R/o Khamaswadi, Tq. Kallam, Dist. Osmanabad.

(2)

2. Sau. Surekha Baheru Jamale
Age: 42 years, Occ: Household,
R/o Kasbe Tadwa, Tq. & Dist. Osmanabad.
3. Ranganath Ganpati Jamale
Age: 45 years, Occ: Agri..
R/o As above.
4. Sau. Chhya Ranganath Jamale
Age: 40 years, Occ: Agri..
As above.
5. Vaijanath Ganpati Jamale (died)
Through his legal heirs.
- 5/1. Salan Vaijanath Jamale
Age: 27 years, Occ: Labourer,
R/o As above.
- 5/2. Amol Vaijanath Jamale
Age : 6 years Miner, Under Gardiance
of Salan Vaijath Jamale
- 5/3. Moni Vaijanath Jamale
Age : 4 years Miner, Under Gardiance
of Salan Vaijath Jamale.

..Respondents

**WITH
WRIT PETITION NO. 992 OF 2007**

- 1) Vishwanath S/o Keshav Jamale,
died, through his L.Rs.
- 1-a) Prabhakar S/o Vishwanath Jamale,
Age: 59 years, Occu. Agri. & Service,
- 1-b) Sudam s/o Vishwanath Jamale,
Age: 54 years, Occu. Agri.
- 1-c) Ankush S/o Vishwanath Jamale,
Age: 50 years, Occu. Agri.
- 1-d) Tanaji S/o Vishwanath Jamale,
Age: 44 years, Occu. Agri.

All R/o Kasbe-Tadwale,

Tq. & Dist. Osmanabad.

- 1-e) Sou. Nilavati W/o Tukaram Aute,
Age: 64 years, Occu. Agril. & Household,
R/o Kolhegaon, Tq. & Dist. Osmanabad.
- 1-f) Sou. Suman W/o Rangnath Veer,
Age: 46 years, Occu. Household,
R/o Khed, Tq. & Dist. Osmanabad.
- 1-g) Sou. Sharda W/o Dnyandeo Rohile,
Age: 34 years, Occu. Household
R/o Khamaswadi, Tq. Kallamb, District- Osmanabad.
- 1-h) Satyabhamabai W/o Vishwanath Jamale
died, L.Rs. are already on record. ..Petitioners

Versus

- 1. Bhairu S/o Ganpati Jamale
Age: 52 years, Occu.Agril.
- 2. Sou. Surekha W/o Bhairu Jamale
Age: 41 years, Occu. Household,
- 3. Rangnath S/o Ganpati Jamale,
Age: 44 years, Occu. Agri.
- 4. Sou. Chhaya W/o Rangnath Jamale
Age: 34 years, Occu. Household,

All R/o Village Kasbe - Tadwale
Tq. & Dist. Osmanabad.
- 5. Vaijnath S/o Ganpati Jamale,
died through Legal representatives.
- 5-a) Shalanbai W/o Vaijnath Jamale,
Age: 29 years, Occu. Household,
- 5-b) Amol S/o Vaijnath Jamale,
Age: 8 years, minor, under
guardian of Respondent No. 5-a)
- 5-c) Moni D/o Vaijnath Jamale,
Age: 7 years, minor, under

(4)

guardian of Respondent No. 5-a)

No. 5-a to 5-c R/o Kasbe- Tadwale,
Tq. & Dist. Osmanabad.

- 6) The Divisional Commissioner,
Aurangabad Division, Aurangabad ..Respondents

**WITH
WRIT PETITION NO. 1008 OF 2007
WITH
CIVIL APPLICATION NO. 1250 OF 2008
IN WP/1008/2007**

- 1) Vishwanath S/o Keshav Jamale,
died, through his L.Rs.
- 1-a) Prabhakar S/o Vishwanath Jamale,
Age: 59 years, Occu. Agri. & Service,
- 1-b) Sudam s/o Vishwanath Jamale,
Age: 54 years, Occu. Agri.
- 1-c) Ankush S/o Vishwanath Jamale,
Age: 50 years, Occu. Agri.
- 1-d) Tanaji S/o Vishwanath Jamale,
Age: 44 years, Occu. Agri.
- All R/o Kasbe-Tadwale,
Tq. & Dist. Osmanabad.
- 1-e) Sou. Nilavati W/o Tukaram Aute,
Age: 64 years, Occu. Agril. & Household,
R/o Kolhegaon, Tq. & Dist. Osmanabad.
- 1-f) Sou. Suman W/o Rangnath Veer,
Age: 46 years, Occu. Household,
R/o Khed, Tq. & Dist. Osmanabad.
- 1-g) Sou. Sharda W/o Dnyandeo Rohile,
Age: 34 years, Occu. Household
R/o Khamaswadi, Tq. Kallamb, District- Osmanabad.
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- 5-a) Shalanbai W/o Vaijnath Jamale,
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Age: 8 years, minor, under
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No. 5-a to 5-c R/o Kasbe- Tadwale,
Tq. & Dist. Osmanabad.

- 6) The Divisional Commissioner,
Aurangabad Division, Aurangabad

..Respondents

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Mrs. M.A. Kulkarni, Advocate for petitioner in WP/788/2003 & respondent no.1 in WP/992/2007 & WP/1008/2007.

Mr. V.G. Mete, Advocate for respondent nos.1/2, 1/4, 1/6 & 2/7 and petitioners in WP/992/2007 & WP/1008/2007.

Mr. G.R. Jadhav h/f Mr. Avishkar S. Shelke, Advocate for respondent nos.2 to 5/1 in WP/788/2003.

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CORAM : S.G. MEHARE, J.**DATED : FEBRUARY 20, 2024****ORAL JUDGMENT :-**

1. Heard respective counsels at length.
2. The issues involved in these two petitions are a consequence of the order passed in Regular Civil Suit No.71/1994.
3. One Vishwanath Keshav Jamale had filed a Regular Civil Suit No.71/1994 before the Civil Court for an injunction against the defendants/ present petitioners. The suit was based on the title. He had a case that he is the owner of the suit land as the sale certificate under Section 32(G) of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short 'Act of 1948') was granted to him. The said certificate was duly registered and attained the finality. However, the father of the petitioners/defendants was the owner of the suit land Gat No.711. When he went to his field on 21.02.1994 to harvest the grains, the defendants disturbed him and tried to obstruct his peaceful possession. In the said suit, the present petitioner had filed a written statement. The defendants had filed an application below Exhibit-30 to frame an additional issue about who the tenant in the suit property is. The plaintiff, Vishwanath, gave no objection; hence, the issue had been framed. After the death of Vishwanath, his legal heirs filed an application Exhibit-44 to delete Issue No.3-A framed as per the order dated 24.01.1992. He had contended that nobody had a

case of tenancy. The tenancy issue was not involved. Hence, that issue should be deleted. He also argued that the reference of the tenancy issue to the tenancy Tribunal was also unsustainable. The Court of the first instance allowed his application, deleted issue No.3A, and the reference under Section 99-A of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (for short 'Act of 1950') was dropped.

4. In view of the reference under Section 99-A, the Tahsildar proceeded to determine the tenancy issue. The Tahsildar registered File No.2000/TNC/WS/117, arraigning the plaintiff Vishwanath as an applicant through legal heirs. By order dated 12.03.2001, the Tahasildar by order declared that there is no tenant in the suit property. The legal heirs of Vishwanath and non-applicant No.1 Bhairu had impugned the said order by two separate appeals before the Deputy Collector, Osmanabad. The Deputy Collector, Osmanabad, passed separate orders in those appeals. Both orders are replicas of each other. He passed the order on 07.02.2002, allowed the appeal partly, set aside the Tahsildar order dated 12.03.2001, and remitted the matter to the Trial Court for fresh enquiry. The order of the Sub-Divisional Officer was also challenged by two revisions before the Divisional Commissioner, Aurangabad. The Divisional Commissioner also passed two separate orders on the same dates i.e. 30.11.2006. He allowed both petitions and passed a stereotyped order. He set aside the order of the Tahsildar and the Sub-Divisional Officer and remitted

the matter to the Tahsildar with a direction to get the issue of tenancy framed afresh from the Civil Court as per the provisions of Bombay Tenancy and Agricultural Lands Act, 1948 and may pass the order within three months by giving an opportunity to both the parties. These two orders have been impugned by two separate writ petitions bearing Nos.992 of 2007 and 1008 of 2007 by the legal heirs of Vishwanath.

5. Learned counsel for the petitioner in Writ Petition No.788 of 2003 has argued that the Revenue Authorities held that the defendant was not the tenant in the suit land. The sale certificate under Section 32-G was issued under the Bombay Tenancy Act, 1948. Thereafter, there was a bifurcation of Latur District, and the village in which the suit land is situated has been attached to Osmanabad District, which was in Marathwada. In the Marathwada, the Hyderabad Tenancy Act was applied. Therefore, the Revenue Authority has correctly held the enquiry. Her tone of argument was that the certificate issued under the Bombay Tenancy Act 1948 was ineffective since the villages were brought under the jurisdiction of the Marathwada, where the Hyderabad Tenancy Act was applied.

6. Another limb of her arguments was that the Court, under Order 14 Rule 5 of the Civil Procedure Code, cannot strike once the issue has been framed. Therefore, the impugned order is illegal. She has also argued that once the issue of tenancy arose in the civil suit,

the jurisdiction of the Civil Court was ousted under Section 85 of the Bombay Tenancy Act, 1948. The only remedy in such a suit is to refer the issue to the tenancy Tribunal. Since the issue of tenancy came up before the Court, the Court had correctly referred the issue to the tenancy Tribunal. The tenancy Tribunal has acted as per the directions of the Civil Court. She also argued that there is a variance in the description of the fields in the plaint and the sale certificate issued to the original plaintiff. The documents which the learned counsel for the respondents has referred are brought for the first time before the Court. The description of the suit properties was amended after Issue No.3(b) was framed. Therefore, the Court was right in framing the issue and referring the matter to the tenancy Tribunal. She added that the matter may be remitted, directing the Civil Court to examine the legality and validity of the sale certificate issued under Section 32-G of the Tenancy Act, 1948. Her anxiety is the Civil Court should decide the issue of the tenancy. The matter is old and unnecessarily kept in abeyance. Therefore, the petition may be allowed.

7. Per contra, learned counsel Mr. Mete for the respondents/original plaintiff vehemently argued that the suit was a simpliciter for the injunction. Therefore, Section 85 of the Tenancy Act does not apply. To bolster his arguments, he relied on the case of Maruti Sambha Surve Vs. Parshuram Krishna Koratkar and another, 1984 MH LR 54. He also argued that Ganpati, the father of the

defendants, had contested the tenancy proceeding. He had knowledge about the tenancy proceeding and granting the sale certificate under Section 32-G of the Tenancy Act, 1948. The sale certificate was acted upon. The mutation entries were taken, and the plaintiffs' names were inserted in the 7/12 extract. The proceedings under the Tenancy Act have attained finality. Therefore, it could not be reopened by a Civil Court. Before the Civil Court, none of the parties has a pleading about the tenancy dispute. Therefore, the Court of the First Instance has correctly deleted the issue and dropped the order of reference. Since the order of reference to the tenancy Court was dropped, all the proceedings before the tenancy Court were infructuous. The issue framed as per the order below Exhibit-30 was vague. Therefore, the Tenancy Court was also confused. None of the Revenue Authority has the power to ask for the Civil Court to re-frame the issue. Therefore, the order of the Divisional Commissioner, Aurangabad, issuing such directions to the Tahsildar is illegal and against the law. He also argued that initially, the villagers were under the Bombay province and governed under the Act of 1948. Merely bifurcating the villages and bringing them under the Hyderabad Tenancy Act, the certificate granted under Section 32-G would not be invalid. Therefore, there is no force in the submission of the learned counsel for the petitioner that the purchase certificate under Section 32-G has been ineffective, and the Civil Court should examine the validity of

the said certificate fresh. He also assailed the orders of the Tahsildar, Sub-Divisional Officer and Additional Commissioner and argued that since the order direction to decide the tenancy was dropped, the entire order became infructuous and ineffective. Hence, Writ Petition Nos.992 of 2007 and 1008 of 2007 may be allowed, and Writ Petition No.788 of 2003 be dismissed.

8. It is not disputed that Vishwanath fought against Ganpati, the father of the defendants of a tenancy dispute under the Act of 1948. It also appears that Ganpati took every opportunity to oppose the tenancy claimed by Vishwanath. After hearing the parties and verifying the facts, a certificate under Section 32-G was finally granted to Vishwanath. Pursuant to the said certificate, the revenue record was also changed. The certificate under Section 32-G grants or confers a title to the holder. Hence, on the basis of that title, he had filed a simple suit for injunction restraining the defendants from not disturbing his peaceful possession of the suit land. The plaint and written statement were silent, raising any dispute about the tenancy. However, the defendants applied to frame the issue of who is a tenant. This issue itself was vague. The issues are not framed like this. The issues are framed under Order 14 Rule 4 of the Civil Procedure Code when one party asserts, and another denies. As discussed above, the plaint and written statement were silent about asserting and denying the tenancy. The suit was based on the title. The

arguments of the learned counsel, Ms. Kulkarni, that once the issue has been framed, it cannot be struck down are exactly against Order 14 Rule 5 of the Civil Procedure Code. The said rule confers the power on the Court either to amend the issues or frame additional issues at any time before passing the decree. It also empowers the Court to strike out any issue that appears to be wrongly framed or introduced at any time before passing the decree. It seems that after hearing the respective parties, the Court has considered that Issue No.3-A, which was wrongly framed, has no relevance to the facts in dispute, there was no assertion and denial of the tenancy right, and that order was correctly deleted.

9. In view of the deletion of Issue No.3-A, the consequential order dropping the enquiry of the tenancy has also been passed. Learned counsel Mrs. Kulkarni is right in arguing that the Civil Court has no jurisdiction to decide the rights under the tenancy. The Tenancy Act 1948 applies to the Bombay province region, and the Tenancy Act 1950 applies to the Marathwada region. In both Acts a similar provision for referring the issue to the tenancy Court has been inserted. In the circumstances where, in any suit in a civil court, the issue involves that required to be settled, decided, or dealt with by any authority competent to settle, decide, or deal with such issue, it should be referred to the tenancy Tribunal. In short, where any issue about the tenancy has been involved in a suit since the jurisdiction of

the Civil Court has been barred, the only option that lies with the Civil Court is to refer the issue to the Tenancy Court. Both sections, which are similar, indicate that there should be an issue involved in a suit about the tenancy right. Whether such an issue has been involved would be seen from the plaint and the written statement. Barely raising a point or raising a defence is not sufficient. The Court that frames the issue has to consider the allegations made in the plaint and the contents of the documents placed on record by either party.

10. A perusal of the plaint and written statement indicates nowhere that the issue of tenancy was involved. The plaintiff /Vishwanath had filed a simple suit for injunction claiming the title on the basis of the certificate under Section 32-G of the Act of 1948. The issue of tenancy was set at rest in previous litigation between the same parties. Therefore, this Court is of the view that though any dispute about tenancy has been raised by the defendant/original owner of the suit land, the Court could not refer the issue to the tenancy Tribunal. Apart from that, the Division Bench of this Court, in the case of Maruti (supra) has laid down the law that in a suit simpliciter for injunction based on the possession reference under Section 85, becomes completely without jurisdiction because the issue of tenancy cannot said to be involved in the suit and that must prevent the Court from exercising its jurisdiction under the section which was conditional upon an issue and being involved in the suit.

11. In view of the above facts and the prepositions of law, this Court is of the view that framing the issue of who is a tenant was vague and wrong. The party to the suit has a right to apply for striking down this issue at any time before passing the decree. The legal heir of Vishwanath has correctly applied to the Court for striking off or deleting that issue. The Court of first instance has correctly applied the mind and passed the legal and proper impugned order.

12. The submission of Mrs. Kulkarni that she has anxiety that the Civil Court should examine the legality and validity of the certificate under Section 32-G also appears as an argument for argument. When the Special Court finally decided the issue, no other Court had jurisdiction to re-examine those issues. Obviously, such re-examination is barred under Section 11 of the Civil Procedure Code. Hence, this Court did not find any water in her argument. The arguments of Mrs. Kulkarni that there is a discrepancy in the land described in the plaint and the certificate is also unfounded.

13. The Tahsildar has observed that there is no tenant in the suit land. Prima facie, his findings were correct. He has acted upon as per the issue framed and directions issued. Since the plaintiffs were the owners of the suit land, there was no question of having any other person tenant in the said land. However, the appellate and revisional authority have, without applying the mind as usual, remitted the matter. Remittance of the suit is not a formality. There should be some

material before the appellate or revisional authority that has not been dealt with or considered by the Court below. In such circumstances only, there shall be a remittance. The law is crystallized on the power of the appellate and revisional Court to remit the matter. It is a settled law that where the material before the appellate and revisional Court is sufficient to decide the matter on merit, the remittance of the matter shall be avoided.

14. The Divisional Commissioner went a step ahead directing the Tahsildar to ask the Civil Court to re-frame the issue and then decide the matter afresh. Learned counsel for the plaintiff is right that the Divisional Commissioner has no jurisdiction as such.

15. The Court held that Issue No.3-A framed by the Court was incorrect, wrong and improper. Therefore, the reference in view of that order becomes redundant. Whatsoever the revenue authorities recorded the findings does not affect the right of the plaintiff nor create the right in favour of the defendants. Those proceedings ought to have been dropped, but it did not happen.

16. In view of the law laid down by this Court in the case of Maruti (supra), the reference to the tenancy Tribunal itself was not good in law and out of the jurisdiction of the Civil Court. In view of that matter, the orders impugned in these two writ petitions must be quashed and set aside. Hence, the following order :

ORDER

- (i) Writ Petition No.788 of 2003 stands dismissed.
- (ii) Rule stands discharged.
- (iii) Writ Petitions Nos.992 of 2007 and 1008 of 2007 stand allowed.
- (iv) The impugned orders of the Tahsildar, Osmanabad passed in File No.2000/TNC/WS/117 dated 12.03.2001, Deputy Collector (L.R.), Osmanabad in File No.2001/TNC/99-A/A/3 dated 07.02.2002 and Divisional Commissioner, Aurangabad Division, Aurangabad in Revision No. 53/B/2002/Osmanabad and Revision No. 16/B/2002/Osmanabad dated 30.11.2006 stand quashed and set aside.
- (v) No order as to costs.
- (vi) Rule is made absolute in the above terms.

(S.G. MEHARE, J.)