



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 625 OF 1992

1. Shankar Shivram Gunjale
Since Deceased Through LRs
- 1-a. Durgabai wd/o Shankar Gunjale
Age : 80 yrs, occ : household
- 1-b. Shivlal Shankar Gunjale
(Already arrayed as appellant No.5)
2. Hiranman Punjaji Gunjale
Age : 54 yrs, occ : agri.,
3. Ramchandra Chagan Gunjale
Age : 49 yrs, occ : agri.,
4. Babulal Ramchandra Gunjale
Age : 29 yrs, occ : agri.,
5. Shivlal Shankar Gunjale
Since Deceased Through LRs
- 5-I. Tulsabai wd/o Shivlal Gunjale
Age : 65 yrs, occ : household
- 5-II. Keshavrao Shivlal Gunjale
Age : 42 yrs, occ : agri.
6. Sonaji Hiranman Gunjale
Age : 25 yrs, occ : agri.,

All r/o Harsul, Taluka and
District Aurangabad

Appellants.

Versus

1. Dhansing Raoji Rathod
Age : 59 yrs, occ : agri.,
2. Dhanaji Dhansingh Rathod
Age : 32 yrs, occ : agri.,
3. Waman Dhansingh Rathod
Age : 26 yrs, occ : agri.,
4. Narayan Dhansingh Rathod
Age : 23 yrs, occ : agri.,

5. Khemchand Dhansingh Rathod
Age : 19 yrs, occ : agri.,

All above r/o Harsul, Taluka and
District Aurangabad
6. Bhausingh Sitaram Gunjale
Since deceased through LR's
- 6-a. Dhanabai wd/o Bhausingh Gunjale
Age : 75 yrs, occ : household
R/o Harsul, Taluka and District
Aurangabad
- 6-b. Gangadhar Bhausingh Gunjale
Age : 52 yrs, occ : agri.,
R/o as above.
- 6-c. Ramdas Bhausingh Gunjale
Age : 48 yrs, occ : agri.,
R/o as above.
- 6-d. Heerabai w/o Maniram Harne
Age : 58 yrs, occ : agri.,
R/o as above.
- 6-e. Meerabai w/o Harichandra Wani
Age : 56 yrs, occ : agri.,
R/o Padegaon, Taluka and
District Aurangabad.
- 6-f. Sundarabai w/o Subhash Pachlore
Age : 46 yrs, occ : agri.,
R/o Harsul, Taluka and District
Aurangabad.
- 6-g. Kaduba s/o Bhausingh Gunjale
Since deceased through LR's
- 6-i. Yamunabai wd/o Kaduba Gunjale
Age : 60 yrs, occ : agri.,
- 6-ii. Sanjay Kaduba Gunjale
Age : 39 yrs, occ : agri.,
- 6-iii. Raju Kaduba Gunjale
Age : 37 yrs, occ : agri.,
- 6-iv. Sunita w/o Ramkrishna Harne
Age : 35 yrs, occ : household

6-v. Anita w/o Suresh Bakle
Age : 33 yrs, occ : household

6-vi. Kavita w/o Swami Dubey
Age : 30 yrs, occ : household

All above r/o Harsul Sawangi,
Tal. and District Aurangabad

Respondents

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Mrs. Pooja V. Langhe, Advocate holding for Mr. N.D. Zinzurde
Patil, Advocate for the appellants.

Mr. A.S. Bajaj, Advocate for respondent Nos. 1 to 5.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 06.02.2024

Judgment Pronounced on : 25.04.2024

Judgment :

1. The appellants, who are the original defendants, have preferred this appeal challenging the judgment and order passed by the first Appellate Court i.e. the learned 2nd Additional District Judge-Aurangabad dated 30.10.1992 in R.C.A. No. 151/1977. Under the said judgment and order, the learned first Appellate Court has reversed the judgment and decree passed by 2nd Joint Civil Judge (Junior Division), Aurangabad (hereinafter referred to as "the learned trial Court") on 2nd May 1992 whereby the suit of the present respondents/plaintiffs has been dismissed.

2. Brief facts leading to this appeal are as under :

Present respondents/plaintiffs had filed suit for simplicitor injunction against the present appellants/defendants by contending that they are cultivating the lands Survey Nos. 280 and 283, both admeasuring 20 Acres 30 Gunthas known as "Mullacha Inam" situated at Harsul, Taluka and District Aurangabad. According to the respondents/plaintiffs, they are cultivating the suit lands in capacity of tenant of Mutawalli of Dargah Banemiya Shri Arifuddin s/o Amiruddin. According to respondent No.1, he had taken the suit lands on lease since 1975-76, but subsequently he took his sons, who are the other respondents, alongwith him as tenant with the consent of Mutawalli from 1984-85. Respondents/plaintiffs claimed that the present appellants/defendants were cultivating adjacent land and they were nowhere concerned with the suit lands. However, the appellants/defendants interfered possession of the respondents/plaintiffs and also forcibly harvested crop from the suit lands and therefore, due to their such interference on 30.11.1988 the respondents/plaintiffs were constrained to file suit for perpetual injunction against the appellants/defendants.

3. On the contrary, the appellants/defendants

resisted the suit by filing written statement (Exh. 30) and thereby contended that they were in fact cultivating the suit lands since the time of their forefathers as tenant with permission of the then Mutawalli Ramzali. According to them, respondent No.1 being their servant, was looking after the suit lands and falsely shown him tenant and cultivator of the suit lands. Accordingly, they prayed for dismissal of the suit.

4. Learned trial Court, on the basis of pleadings, framed issues and tried the suit, and pleased to dismiss the same on the ground that the respondents/plaintiffs could not adduce satisfactory documentary evidence in respect of their possession over the suit land and so called Mutawalli Arifuddin, son of earlier Mutawalli Amiruddin also failed to produce certain documents which could have been established the tenancy as alleged by the respondents/plaintiffs. However, the learned first Appellate Court reversed the dismissal of suit of the respondents/plaintiffs and allowed the same. Hence, this Second Appeal.

5. Learned Counsel for the appellants submits that the first Appellate Court has not properly appreciated the documentary evidence on record. According to her, when the

plaintiffs had claimed tenancy over the suit lands, the learned trial Court as well as learned first Appellate Court should have held that the claim of plaintiffs is not maintainable before the Civil Court. She claimed that respondent No.1 was cultivating the lands on behalf of the appellant Bhausing Gunjale, but fraudulently got entered his name in the record of rights of suit lands as cultivator. She also claimed that the suit property being Waqf property, the jurisdiction of Civil Court is totally barred. The learned Counsel for the appellants specifically pointed out that the learned first Appellate Court did not give any weightage to the documents at Exhs. 80 to 87 showing cultivation of appellants from the year 1989 to 1992. Besides oral submissions she relied on the following judgments :

- (i) **Bhagwanrao s/o Jijaba Auti vs Ganpatrao Mugaji Raut**
1987 (3) Bom.C.R. 258
- (ii) **Tanaji Narayandeo Pawar vs Angad Shamrao**
Suryawanshi, 2022 (1) ALL MR 270
- (iii) **Balasubramanian and another vs M. Arockiasamy**
(2021) 12 SCC 529
- (iv) **Basharatulla s/o Syed Asraf Mohiuddin vs The State**
of Maharashtra & ors, 1997 (4) ALL MR 303
- (v) **Judgment of Hon'ble Apex Court in Civil Appeal Nos.**
5575-5576 of 2021 (Kayalulla Parambath Moidu Haji
vs Namboodiyil Vinodan) decided on 07.09.2021

**(vi) Amrutrao Shankarrao Deshmuky and another vs
Laxman Tulshiram Pawar and others
2011 (6) Bom.C.R. 13**

6. On the contrary, learned Counsel for respondents/ plaintiffs supported the judgment of the learned first Appellate Court. According to him, though initially the injunction was granted in favour of plaintiffs for certain part of the suit lands, but the then appellate Court granted injunction in favour of respondents/ plaintiffs in respect of the entire suit land. Even this Court had maintained the said injunction as it is while dismissing Civil Revision Application No.705 of 1989. Moreover, police aid was also granted to the respondents/ plaintiffs to safeguard the injunction order. He pointed out that since 1989 upto now the injunction is operating in favour of present respondents/ plaintiffs, and therefore, the documents showing possession of the appellants over the suit land from Exhs. 80 to 87 have no significance at all. Further, according to him, since the suit lands are service Inam lands, the same are exempted from the provisions of Hyderabad Tenancy and Agricultural Lands Act, 1950, as per Section 102A (c). According to him, when the plaintiffs/respondents have not claimed any declaration as tenant in the instant matter, no issue regarding tenancy is

required to be decided. Moreover, the Waqf Act also came in force in the year 1995 and the Tribunal came in existence in the year 2000, and therefore, the bar under Waqf Act is not at all applicable to the instant matter. As such, he prayed for dismissal of the appeal. He also placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Narayan Rajendra and another vs Lekshmy Sarojini and others*** in ***Civil Appeal No. 742 of 2001***, wherein it is observed that re-appreciating the evidence in Second Appeal is not permissible.

7. Heard rival submissions. Also perused documents on record.

8. It is significant to note that the learned Counsel for the appellants pointed out that Ground Nos. 3, 4, 5, 9, 20 and 22 raised substantial questions of law in the present appeal. On going through the aforesaid grounds from appeal memo, following substantial questions of law being raised in this appeal, can be summarised :

- (i) Whether the first Appellate Court justified in holding possession of the respondents/ plaintiffs over the suit lands by ignoring the evidence of adjacent lands owner?

- (ii) Whether the first Appellate Court drew wrong inference that the respondents / plaintiffs are cultivating the suit lands on behalf of Inamdar Arifuddin on Thoka basis at the rate of Rs. 1500/- per year?
- (iii) Whether the learned first Appellate Court has not properly appreciated the documents on record and discarded the possession of appellants over the suit lands wrongly?

9. Learned Counsel for the appellants/defendants submitted that jurisdiction of the Civil Court is barred in the instant matter since the issue of tenancy is involved in this matter. For that purpose, she relied on various judgments. In the judgment of this Court in the case of ***Bhagwanrao vs Ganpatrao*** (supra), it is observed that as per Hyderabad Tenancy and Agricultural Lands Act, 1950, if any issue of tenancy is involved in the suit, it has to be decided by Competent Authority under the aforesaid Act and for that jurisdiction of the Civil Court is barred. Similar observation is there in the judgment of this Court in the case of ***Tanaji vs Angad*** (supra) that the suit involving the issue as to the tenancy required to be decided in terms of the provision of Hyderabad Tenancy Act only. Further, this Court in the of ***Basharatulla vs State of Maharashtra*** (supra) has discussed the same issue. Further, the judgment of this Court in the

case of *Amrutrao vs Laxman* (supra) involves similar issue i.e. whether the status of occupant under 1954 Act can be determined by Civil Court?

10. Admittedly, the respondents/plaintiffs in the instant case have based their possession over the suit lands in the capacity of tenant of Mutawalli. However, the nature of present suit is only a suit for perpetual injunction i.e. the injunction simplicitor suit. The respondents/plaintiffs have not claimed any declaration as regards their tenancy. It is settled that the bar under both the aforesaid Acts namely the Waqf Act as well as Hyderabad Tenancy and Agricultural Lands Act is only in respect of adjudication of tenancy rights and when there is no such obligation to adjudicate the issue of tenancy as to who is the real tenant, the bar does not apply. As such, injunction simplicitor suit without adjudication of tenancy of the parties is very well maintainable in the Civil Court. As such, the objection to the jurisdiction raised by the learned Counsel for the appellants/defendants is not at all sustainable in the instant case.

11. Learned Counsel for the appellants also relied on the judgment of Hon'ble Apex Court in the case of *Kayalulla*

vs Namboodiyil (supra) wherein it is observed as follows :

“it has been clearly held that if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction”

As stated earlier, the present suit is not at all for declaration in respect of title of the parties. On the contrary, the respondents/plaintiffs have only based their possession over the suit lands in the capacity of tenants of Mutawalli. As such, this being a simplicitor injunction suit, the Court on its own cannot force the parties to seek any additional relief in a particular manner. As such, the observation of the Hon'ble Apex Court is totally inapplicable in the instant case. The learned Counsel for the respondents/plaintiffs though relied on the observation of the Hon'ble Apex Court in the case of **Narayanan vs Lekshmy** (supra) observing that re-appreciation of evidence in the Second Appeal is not permissible, but the Hon'ble Apex Court in the case of **Balasubramanian vs M. Arockiasamy** (supra) has held as follows :

“The restraint against inference with findings of fact of the courts below in second appeal is not absolute rule. When there is perversity in findings of the court which are not based on any material or when appreciation of evidence suffers from material irregularity, the High Court would be entitled to interfere on a question of fact as well”.

12. Here, in this case, there are divergent views taken by the courts below. Moreover, the learned Counsel for the appellants has also raised substantial questions of law mentioning that the learned first Appellate Court did not consider the documentary evidence favouring the appellants. In view of the same, the documents on record can be gone into, to ascertain the rival contentions of the parties.

13. It is significant to note that nobody can give evidence in civil proceeding contrary to the documents on record, and therefore, the oral evidence adduced by rival parties needs to be discussed in the light of the documents on record. So far as the case of the respondents / plaintiffs is concerned, they are claiming that initially respondent No.1 alone was cultivating the lands on Thoka basis from the then Inamdar Amiruddin. However, there is no documentary evidence to that effect as regards the said Thoka or lease basis. It appears that the learned trial Court refused to accept the possession of respondents/plaintiffs over the suit lands merely because they could not produce the said document and that the subsequent Inamdar Arifuddin also could not produce the receipt of those Thokas. However, it is significant to note that the learned trial Judge had granted ad-interim

injunction in favour of the respondents/plaintiffs which was made absolute to the extent of certain portion of suit lands. However, the respondents/plaintiffs had preferred R.C.A. No. 12/1989 before the then District Judge, Aurangabad and in the said appeal, injunction was granted in favour of respondents/plaintiffs in respect of the entire suit lands. Moreover, the Civil Revision Application No. 705 of 1989 preferred by the present appellants before this Court was also rejected on 20.02.1992. As such, the injunction granted in favour of the present respondents/plaintiffs is still in force.

14. Further, the 7/12 extracts at Exhs. 44 and 45 which are from 1960-61 to 1987-88 filed by the respondents/plaintiffs indicate that respondent No.1 Dhansingh was possessor and cultivator of the suit lands since 1974-75 to 1983-84 and since 1984-85 to 1987-88. Besides respondent No.1, Dhansingh has also specifically deposed that Inamdar of the suit lands i.e. Amiruddin got possession of the suit lands from Jail Authority and then gave those lands to him on Thoka basis. According to him, after the death of Amiruddin, his son Arifuddin also continued his possession over the suit lands. It is not in dispute that during certain period the Government had attached the suit lands and the same were

given in the possession of Central Jail Authorities for cultivation. Certified copy of letter Exh.47 issued by Marathwada Waqf Board requesting the Collector to release the lands which were attached by the Government is on record. Further, Exh. 48 is the certified copy of the letter dt. 25.07.1972 issued by Collector to the Tahsildar in connection with the letter (Exh.47). In the said letter Tahsildar was directed to release the suit lands alongwith other to Inamdar Amiruddin. Thus, there is reliable documentary evidence on record to show that Amiruddin got possession of the suit land after the same were released by Government. Moreover, a copy of notice issued by Tahsildar to respondent No.1 Dhansingh dated 16 December 1983 is on record at Exh. 49 and certified copy of report submitted to Tahsildar by the concerned Talathi dated 26 June 1984 is also on record at Exh. 50. Both these documents clearly indicate that respondent No.1 Dhansingh alone was in possession of the suit lands.

15. On the contrary, the present appellants had claimed that one Ramzali Kasam Ali was Inamdar of the suit lands. However, from Khasra Patrak filed by the appellants at Exhs. 66 and 68 in the trial Court had in fact indicated

Amiruddin as Inamdar of the suit lands. As such, the claim of the appellants that they were tenants of one Ramzali Inamdar is not supported by reliable documentary evidence. The appellants also tried to interpret the entry of respondent No.1 alongwith others in the cultivation column of 7/12 extracts for the year 1984-85 to 1987-88 by contending that the word “others” in fact represented them as cultivator of the suit lands. However, such inference cannot be drawn since respondent No.1 had specifically deposed that he under the permission of Inamdar of the land included his sons as cultivators of the suit lands, and therefore, it is quite probable that the word “others” might have represented his sons and not the appellants.

16. Learned Counsel for the appellants also raised grievance that the learned first appellate Court did not appreciate the documents at Exhs. 80 to 87 filed by the present appellants showing their alleged cultivation over the suit lands. However, those documents are relating to the period from 1989 onwards i.e. after filing of the suit. It is significant to note that injunction is operating in favour of the present respondents/plaintiffs since inception of the suit till today, and therefore, even if such documents are showing

possession of the appellants over the suit lands, it is contrary to the order of this Court. Therefore, it cannot be considered for holding possession of the appellants over the suit lands. Thus, considering all these aspects and even on re-appreciation of evidence on record, it is evident that the respondents/plaintiffs have established their possession over the suit lands through Inamdar Amiruddin and thereafter Arifuddin, and therefore, they are entitled for injunction as prayed for. As such, the substantial questions of law as raised by the appellants, do not survive. Accordingly, the Second Appeal being devoid of merit, stands dismissed.

(SANDIPKUMAR C. MORE, J.)