

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.289 OF 2016
WITH
CIVIL APPLICATION (ST) NO.306 OF 2018**

Smt. Sitabai Murlidhar Boradhe (Since Decd. Thr.

Lrs.)

...Appellants

V/s.

Shankar Dhondi Jadhav & Ors.

...Respondents

Mr. P. N. Joshi for the Appellants.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 30th JANUARY 2024.

P. C.:-

1. Being dissatisfied by the Judgment dated 7th October 2015, passed by the Appellate Court in Regular Civil Appeal No 34 of 2010 declaring the Respondents-Original Defendant Nos 3 to 7 as owners of the suit property described in paragraph 1 of the Plaint, the original plaintiff is before this Court.

2. Regular Civil Suit No.34/2001 was instituted by the plaintiff seeking declaration of title relating to agricultural land bearing Gut No.742 and for injunction restraining the defendants from causing obstruction to the possession of the plaintiff. In addition the relief of declaration of civil

death of defendant Nos.1 and 2 was also sought. It was the case of the plaintiff that original plaintiff deceased Sitabai was the daughter of Murlidhar Aher who was in possession of the suit land from 1930 till his death in the year 1975. That the suit land was governed by the provisions of Bombay tenancy and Agricultural Lands Act("Tenancy Act") and was acquired by Murlidhar under Section 32 G of Tenancy Act. It was pleaded that after his death Sitabai came in possession of the suit land. It was pleaded that defendant Nos.1 and 2 were unheard since last 50 years and no proceedings were initiated under the Tenancy Act by Defendant Nos 1 and 2. That, defendant Nos.3 to 7 without any concern with defendant No.1 claims to be relatives of defendant Nos. 1 and 2 and causing obstruction in possession of the plaintiff.

3. The suit came to be resisted by defendant Nos. 3 to 7. The case of the defendant Nos. 3 to 7 was that the original owners of the suit land were Bayaji Rama and Pandurang Tulsa, who had mortgaged the suit land in favour of defendant No.1. Later on the mortgage was redeemed and accordingly Bayaji Rama and Pandurang Tulsa became the owners of the suit land. That, after their demise the suit land was recorded in the name of defendant No.2-Yeshwant Hari Pagare, who was the nephew of Defendant No 1. It was pleaded that whereabouts of defendant Nos. 1 and 2 are not

known and they are heirs of Yeshwant Pagare and as such they are having title over the suit property. That, they have perfected their title over other land -Gut No 335 being heirs of Yashwant Pagare. By way of counter claim they sought declaration of title and recovery of possession of suit land from the Plaintiffs.

4. The parties went to trial and the Trial Court framed the issues and answered them as follows:

Sr. No.	ISSUES	FINDINGS
1.	Whether plaintiffs prove their title over suit land ?	In the negative.
2.	Whether plaintiffs prove that defendant No.1 and 2 dies before 50 years, they have no heirs ?	In the negative.
3.	Whether plaintiffs prove obstruction ?	In the negative.
4.	Whether counter claimant defendants 3 to 7 proves their title over suit land ?	In the negative.
5.	Whether plaintiffs are entitled for declaration and perpetual injunction ?	In the negative.
6.	Whether counter claimant defendants No. 3 to 7 entitled for recovery of possession ?	In the negative.

5. Trial Court considered the 7/12 extract of the suit land and the statement of the original owners recorded before the Competent Authority and observed that the documents showed that the plaintiffs and their

predecessors in interest are in possession of the suit land in capacity of tenant. As regards the claim of the plaintiffs that they became owners of the suit land by adverse possession, the claim was negated by the Trial Court as the necessary ingredients to prove the title by adverse possession were not satisfied by the plaintiffs. As regards the title of the Plaintiffs, the Trial Court held that the plaintiffs and predecessor in title were not owners of the suit land as they had not purchased the land under Section 32 G of the Tenancy Act. As regards the title of defendant Nos. 3 to 7, the Trial Court held that the defendants have failed to prove that Defendant Nos 1 and 2 have died and that Defendant Nos 3 to 7 are their legal heirs. The Trial Court held that when evidence on record proves that Plaintiffs are tenants over the suit land, the Defendant Nos 3 to 7 have to acquire their rights under Tenancy Act. As regards declaration of civil death, the Trial Court held that the Plaintiffs have not led cogent and reliable evidence to prove the civil death of Defendant Nos 1 and 2 and dismissed the suit and counter claim.

6. Against dismissal of the Suit, the plaintiff did not prefer any appeal and Defendant Nos 3 to 7 preferred an appeal against the dismissal of their counterclaim. The Appellate Court framed the following points for determination:

Sr. No.	POINTS	FINDINGS
1.	Whether the appellants/defendant No.3 to 7 have proved their title over the suit property and they are entitled for the reliefs claimed by them in their counter-claim ?	In the affirmative.
2.	Whether the judgment and decree passed by the learned trial Court in R. C. S. No.34/2001 dated 2/1/2010 requires interference at the hands of this Court ?	In the affirmative.
3.	What order ?	Appeal is allowed as per final order.

7. The Appellate Court considered the admission of original Plaintiff during her cross examination that in respect of other properties of Defendant Nos 1 and 2 the names of Defendant Nos 3 to 7 have been mutated in the revenue records. That Appellate Court considered the various revenue entries which showed that there were three branches of the joint family of the defendants and their predecessors and that defendants are relatives in Class II heirs and as such were entitled to succeed to the property left by deceased Yeshwant. The Appellate Court on the basis of documentary evidence held that the defendant Nos. 3 to 7 are entitled for declaration of ownership over the suit property and that the plaintiffs had no right, title or interest over the same.

8. As regards the rights claimed by the plaintiff on the basis of tenancy rights as also by adverse possession, the Appellate Court noted that there is no purchase certificate which is issued in favour of plaintiffs or their predecessors in title and there are no documents to show that they are protected tenants. The Appellate Court also negated the claim of the plaintiffs as regards the adverse possession. The Appellate Court noted that the plaintiffs have not preferred any Appeal against judgment and decree of the Trial Court nor filed any counter objections to the claim in the appeal to claim their right over the suit property. Based on the evidence the Appellate Court held that defendant Nos.3 to 7 are owners of the suit property as successors of Yeshwant and therefore they are entitled for the relief claimed. The Appellate Court applied the maxim that the ownership follows the possession and as such held that defendant Nos. 3 to 7 were entitled to recover possession from the plaintiffs.

9. Heard Mr. Joshi, learned Counsel appearing for the appellants.

10. Mr. Joshi submits that the Trial Court rendered a specific finding in their favour that they are in possession of the suit property in the capacity of tenant. He submits that despite Section 32M certificate not being

issued in favour of the plaintiff or their predecessors in title, for the purpose of recovery of possession, the defendant No.3 to 7 have to take recourse to the provisions of the Tenancy Act. He submits that the substantial question which arises in the present case is that jurisdiction of Civil Court is barred under Section 85 and 85A of the Tenancy Act as regards the issue of tenancy which is required to be decided under the provisions of Tenancy Act.

11. Considered the submissions and perused the record.

12. The suit was filed seeking declaration of their ownership in respect of the suit property which was premised on the ground of acquisition of the property by their pre-decessors in proceedings under Section 32 G of Tenancy Act and on ground of adverse possession. As against the ownership claim of the Plaintiffs, rival claim of ownership was put up by the Defendants along with relief seeking recovery of possession. The Trial Court was therefore concerned with the issue of ownership of the suit property. The issue as to whether the Plaintiffs or their pre-decessors was tenant/protected tenant/permanent tenant could not be gone into by the Civil Court and the adjudication was restricted to the claim for ownership. It was not the case of the Plaintiffs that they are protected tenants of the suit

property but their claim was of ownership. Considering the counter claim of the Defendants seeking recovery of possession, it was incumbent upon the Plaintiffs to adopt necessary proceedings before the Authority under the Tenancy Act to decide the issue of tenancy of the Plaintiffs, which was not done. As there was no issue of tenancy raised, the Civil Court could not have referred the dispute to the authority under the Tenancy Act.

13. The Plaintiffs did not file Appeal against the dismissal of their suit and the Appellate Court was only considering the counterclaim of the Defendant Nos 3 to 7. The contention of Mr. Joshi that the Plaintiffs was satisfied with the finding of the Trial Court that the Plaintiffs are in possession of the property in capacity of tenant does not hold any force as the jurisdiction of Civil Court is barred as regards the issue of tenancy. In any event the plea of tenancy is not shown to have been raised in response to the counter claim. The Appellate Court has considered that the suit property was previously owned by one Yeshwant Pagare and other members as joint family property and that various entries are in favour of owners of the suit property. The Appellate Court considered the genealogy of defendant's branch and held that as there is no Class I heir, the relatives specified in Class II heir have a right to succeed to property left by deceased Yeshwant. It also needs to be noted that the original Plaintiff has admitted in

her cross examination that the names of the Defendant Nos 3 to 7 have been mutated in the revenue records as regards other properties of Defendant Nos 1 and 2. On considering the evidence on record has held that the Defendant Nos 3 to 7 are the owners of the suit property. As no plea of tenancy was raised and the only claim of the Plaintiffs in support of their possession was of ownership which the Plaintiffs had failed to establish, the Appellate Court held that ownership follows possession and directed possession to be handed over.

14. As regards the provisions of Sections 85 and 85A of Tenancy Act, on which much reliance has been placed by learned counsel for the appellant, the bar of jurisdiction of Civil Court operates to decide any question which under the Act is required to be decided by the authorities specified in the Tenancy Act. The bar operates to decide a question whether a person is or was at any time a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him. In the present case, the Plaintiffs had instituted the suit claiming ownership of basis of Section 32 G proceedings. The Civil Court was not called upon to determine the issue whether the Plaintiff by virtue of being the legal heirs of Murlidhar were the tenants in respect of the suit property in which case the bar of Section 85 and Section 85A would have operated.

There was no inquiry contemplated as to whether the Plaintiff was a tenant or had purchased the property from the landlord. In the present case, it is not demonstrated that in reply to the counter claim of the defendant Nos.3 to 7 seeking recovery of the possession any reply has been filed by the plaintiff raising the bar of tenancy. As such the the bar of jurisdiction under Section 85 and 85A of the Bombay Tenancy & Agricultural Lands Act does not arise.

15. Having regard to the discussion above, no substantial question of law arises in the present case. However, as the Civil Courts have only decided the issue of ownership of the suit property, it is open for the Plaintiffs to approach the concerned Authority under the Tenancy Act and seek appropriate relief as regards their tenancy rights.

16. Appeal stands dismissed. In view of the dismissal of the Appeal, the Civil Application does not survive and stands disposed of.

(SHARMILA U. DESHMUKH, J.)