



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

920 SECOND APPEAL NO. 393 OF 1994

NATHU BAPURAO KHILLARE LRS.BHAGWAJ NATHU KHILLARE
VERSUS
BHAUSAHEB GULABRAO BHOSALE

Mr. S. D. Jaybhar h/f Mr. D. R. Jaybhar, Advocate for the appellant
Mr. N. K. Kakade with Mr. A. N. Kakade, Advocate for respondent nos.1A
to 1F.

CORAM : R. M. JOSHI, J.

DATE : 10th JANUARY, 2025

PER COURT :-

1. This appeal filed under Section 100 of the Code of Civil Procedure (for short 'CPC') takes exception to the concurrent findings recorded by the Trial Court in R.C.S. No. 22/1978 and its confirmation by the First Appellate Court in R.C.A. No. 161/1990.
2. Parties are referred to as 'plaintiffs' and 'defendants' for the sake of convenience.
3. While admitting this appeal by order dated 23/11/1994, the following substantial question of law was framed that "whether the findings recorded by the Trial Court as well as First Appellate Court is without appreciating the material evidence on record and are based on extraneous circumstances."

4. In order to appreciate the case of rival parties and contentions sought to be made across the bar it would be relevant to take note of certain material facts as they appear from the record.

5. Plaintiffs filed suit seeking declaration and injunction in respect of the suit property being survey no. 15/A/1 admeasuring 1 acre 12 R and survey no. 16/A/1 24 Acres 18 R situated at Sangvi Patan, Tal. Ashti. It is the case of the plaintiffs that grandfather of defendant no.2 Bhausahab was original owner of the suit property. Plaintiffs claimed themselves to be protected tenant in respect of the same. It is further claimed that the name of Nathu (original plaintiff) was recorded as a protected tenant in the register under Section 38/E of the Hyderabad Tenancy Act and he became owner of the suit land since 01/12/1957. Plaintiffs further claimed that Bhausahab as well as defendant no.1 Jadabai had raised objection to the tenancy of Nathu before the Deputy Collector and their objections were rejected. It is also claimed that writ petition filed by Govindrao was also rejected on 17/04/1965. Even defendant no.1 Jadabai filed civil suit in respect of very same subject property against Govindrao being Civil Suit No. 15/1965 seeking permanent injunction and the said suit was dismissed on 30/04/1968. No appeal is filed in respect of the said decree and as such it has attained finality.

6. Defendant no.2 Bhausahab filed written statement at Exhibit 49 and resisted the claim. He disputes plaintiffs to be protected tenant of suit land. There is further denial that the plaintiffs were declared as tenant of the suit land by preliminary proclamation dated 01/02/1957. It is claimed that the said proclamation in the name of plaintiffs was incorrect. He claims ignorance about the proceedings initiated by his grandfather so also proceedings filed before this Court. It is claimed that since he was not party to the proceedings, therefore, the same are not binding upon him. There is, however, no dispute about the fact that Bhausahab is grand son of original owner Govindrao. It is claimed that principle of res judicata would not apply to the present case. He claims title in respect of suit land on the basis of sale deed executed in his favour by Jadabai.

7. Trial Court framed issues. Parties led their respective evidence. Trial Court dismissed the suit by holding that the plaintiffs have failed to prove possession over the suit land. In appeal said findings came to be confirmed.

8. Learned counsel for the plaintiffs submits that there is no dispute about a certificate issued by Competent Authority under the Hyderabad Tenancy Act in favour of predecessor of the plaintiffs i.e. Nathu under Section 38E of the Hyderabad Tenancy and Agricultural

Lands Act (for short 'Act'). He further argued that the possession of the suit properties was handed over by the Competent Authorities pursuant to the order passed in Spl.C.A. 52/1964. He referred to the order of this Court so also the panchnama prepared by the authorities while handing over the possession of the suit land to Nathu. It is his submission that once the said aspect is proved by the plaintiffs, their possession must be held over the suit properties unless it is shown by the defendants that they were dispossessed at any point of time from the suit land. On the point of declaration of ownership in respect of entire suit properties it is his submission that the certificate issued under Section 38E of the Act indicated that the plaintiffs are tenants of entire suit lands. It is his submission that the subsequent certificate issued by the authorities is not legal and valid and as such the plaintiffs are entitled for the declaration. He claims that the Trial Court as well as First Appellate Court committed serious error in appreciating the evidence on record so also, the position of law while dismissing the suit and since the said findings are perverse, they deserve interference.

9. Learned counsel for the defendants supported the impugned orders submitting that there are concurrent findings of both Courts below which do not require any interference at the hands of this Court in the second appeal. It is submitted that the Competent Authority had issued

fresh certificate under Section 38E of the Act indicating that the plaintiffs are not tenants in respect of the entire suit property. It is his submission that plaintiffs took objection to the said certificate newly issued by the authorities but were unsuccessful. It is thus his contention that in view of the fact that there is a certificate issued indicating that plaintiffs are not owners of the entire suit properties, no declaration in this regard could have been granted by the Trial Court and the refusal thereof needs no interference. He further argued that the Trial Court has rightly taken into consideration the entire evidence on record and has arrived at the finding that the plaintiffs have failed to prove their possession over the suit property. It is his submission that the appreciation of document Exhibits 61, 62 and 63 is perfect is legal and not being perverse. It is his submission that the contesting defendants has derived title on the basis of registered sale deed executed by Jadabai and as such no order of injunction could have been passed against defendants. He, therefore, seeks dismissal of the appeal.

10. Following questions of law arise for consideration of this Court.

- (i) Whether the Trial Court as well as First Appellate Court have committed error in appreciating the evidence i.e. Exhibits 117, 118 and 119 in proper perspective and arrived at perverse findings.
- (ii) Whether the Courts below were justified in discarding these documents by giving preference to the oral evidence of one witness

over documents on record.

(iii) Whether the plaintiff in view of the issuance of new certificate of tenancy in the year 1970 can claim the declaration in respect of the entire Survey nos. 16-1/A and 15-1/A.

(iv) Whether the plaintiffs have succeeded in proving possession over the suit property and the whether entitled for injunction.

11. Learned counsel for both sides are heard specifically on above questions of law.

12. There is no dispute about the fact that in the year 1967 certificate was issued in favour of predecessor of the plaintiffs under Section 38 of the Act in respect of Survey nos. 15 and 16. The said certificate was modified and new certificate came to be issued in the year 1970. Admittedly, the said new certificate holds field as the same has not been set aside by any Competent Authority. In view of this, the plaintiffs would not be in a position to seek declaration of their title in respect of the entire suit properties on the basis old certificate issued in the year 1967. The dismissal of the suit therefore to that extent is justified. So also refusal of other reliefs except relief of injunction requires no interference.

13. The plaintiffs have claimed to be in possession of the suit property, since time of their predecessor and relied upon the document Exhibits 117, 118 and 119 to support the case. It would be material to go through the said documents, only with a view to appreciate whether

the Courts below erred in considering these documents correctly or there is perversity in the findings recorded to their extent.

14. These documents are duly proved and exhibited. They clearly show that on 25/08/1965 the possession of survey nos.16 and 15 was handed over to the predecessor of plaintiff from the original owner of the property i.e. Govindrao. These documents leave no room for doubt that the possession was with Nathu of suit lands, w.e.f. 25/08/1965. The Trial Court as well as First Appellate Court have committed serious error in appreciating the said documents when it is recorded that these documents do not indicate the date on which the possession was given. Thus both Courts below recorded finding contrary to the evidence and hence it is a perverse finding.

15. The said documents as well as the contention of the plaintiff get further support from application Exhibit 81 filed by original owner Govindrao before Tahasildar with specific contention that the subject property i.e. survey nos. 15 and 16 were handed over to Nathu Khillare i.e the predecessor of the plaintiff on 15/08/1965. Thus, no other evidence is required in order to hold that in the year 1965 the predecessor of the plaintiff was put in to the possession of survey nos. 15 and 16. There is no case made out before the Trial Court by defendants that plaintiffs were ever dispossessed from suit properties or

lost their possession thereon.

16. Defendant no.2 herein claims his title and possession in respect of the suit property on the basis of sale deed executed by Jadabai in his favour. He has also placed reliance on one witness who is said to be adjoining land owner. The question arises as to whether any weightage can be given to the oral evidence of this adjoining land owner over the conclusive documentary evidence which indicates the possession of the suit property being with predecessor of plaintiff since 1965. Apart from this, pertinent to note that learned Trial Court has held that Jadabai might have got title to transfer the suit land to the defendant no.2. Such observation in order to hold title of defendant no.1 and possession is wholly perverse and hence cannot sustain.

17. As far as settlement arrived at between some of the plaintiffs before Trial Court is concerned, the same would not bind Appellants herein as they are not party to the same. Thus the settlement by some plaintiffs would not disentitle appellants to get relief of injunction.

18. Once the plaintiff filed suit claiming that he is in possession of suit property and he proves his possession on the basis of cogent evidence on record, it becomes obligatory for the defendants to show that the plaintiff had lost possession at any point of time. There is

absolutely no evidence on record to that effect. In such circumstances, having regard to the evidence led before the Trial Court, there was no other option for the Trial Court but to decree the suit partly to the extent of granting injunction against the defendants in favour of plaintiff in respect of the suit property.

19. In view of the above discussion, substantial questions no.(i), (ii) and (iv) of law are answered in affirmative. Question of law (iii) stands answered in negative. Impugned judgment and decree passed by the Trial Court and confirmed by the First Appellate Court are hereby set aside. R.C.S. No. 22/1978 stands decreed partly in following terms:

- (i) Suit is partly decreed with cost.
- (ii) Defendants No.1 and 2 their servants and agents are restrained from causing obstructions to the plaintiffs (appellants in Second Appeal) possession over suit properties, in any manner.

20. Appeal stands allowed partly in above terms.

(R. M. JOSHI, J.)

ssp