



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 407 OF 2003

1. Hausu Dhondba Uike,
aged about 66 yrs., Occp. Agriculturist,
2. Ganba Dhondba Uike
aged about 51 yrs., Occp. Agriculturist,

Both r/o Wai (Bz.), Tah. Katol,
District – Nagpur. ::

APPELLANTS
(Original Plaintiffs)

..Versus..

1. Sahebrao Chintaman Salam
aged about 36 yrs., Occp. Agriculturist,
2. Ashok Chintaman Salam
aged about 30 yrs., Occp. Agriculturist,

Both r/o Wai (Bz.), Post Kachari Sawanga
Tah. Katol, Distt. Nagpur. ::

RESPONDENTS
(Original Defendants)

.....
Shri V. A. Dhabe, Advocate for the appellants.
Shri A. P. Kalmeghe, Advocate for the respondents.
.....

CORAM : S. B. SHUKRE, J.
DATE OF RESERVING THE JUDGMENT : OCTOBER 23, 2013
DATE OF PRONOUNCING THE JUDGMENT : JANUARY 15, 2014.

J U D G M E N T

1. This appeal is preferred against judgment and decree

passed on 03/5/2003 in Regular Civil Appeal No.217 of 2002 by Second Additional District Judge, Nagpur thereby reversing judgment and decree passed in Regular Civil Suit No.17 of 1999 on 22/4/2002 by Civil Judge, Junior Division, Katol.

2. The appellants are the brothers, so also the respondents are brothers. Respondent No.1 is cousin of the appellants. The appellants owned agricultural field bearing Survey No.110 situated at village Wai, as particularly described in plaint paragraph-1. The financial condition of the appellants being poor and respondent No.1 being cousin of the appellants, the appellants decided to allow respondent No.1 to cultivate the field in stead of letting it lie fallow. Therefore, about 7 to 8 years prior to filing of the suit, the suit was filed in the year 1999, the appellants permitted respondent No.1 to cultivate the said field (hereinafter referred to as 'the suit field') and that was how the respondents came to be in possession of the suit field. During the year 1999, the appellants, upon enquiry, learnt that the Government had given fertilizers bags to the respondents to facilitate cultivation of the suit field effectively and, therefore, they demanded half of the fertilizers bags from the respondents. The respondents, however, refused to part with the same and even asserted that they had become the owners of the suit field and that the

appellants were no longer its owners. Upon further enquiry, it was learnt by the appellants that the respondents had also mutated their names in the revenue record as owners of the suit field on the basis of alleged sale deed executed on 02/01/1991 in their favour by the appellants. The appellants submitted that they had never executed any sale deed of the suit field in favour of the respondents nor had received any consideration from them. Therefore, they demanded back the possession of the suit field from the respondents and on being denied the same by the respondents, the appellants filed the suit for declaration and possession against the respondents.

3. The respondents resisted the suit. They submitted that by virtue of the sale deed executed on 02/01/1991, they became the owners of the suit field and thus were in lawful possession of the suit field. However, they submitted that for some reason, the document of sale deed dated 02/01/1991 remained to be registered. Further, they submitted that as a part of the agreement to sell, possession of the suit field was delivered by the appellants to them. They alternatively submitted that since they were in lawful possession of the suit field and cultivating the same and they being not the members of the owners' family or servants on wages payable in cash or kind or without being hired labourers, were deemed tenants as per the

provision of Section 6 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (hereinafter referred to as, 'the Tenancy Act'). On these grounds they urged for dismissal of the suit.

4. After considering the evidence available on record and hearing both the sides, the trial Court found that the appellants were the owners of the suit field, who had permitted respondent No.1 to cultivate it and that the respondents were not the deemed tenants. With these findings, the trial Court decreed the suit by its judgment and decree passed on 22/4/2002. The respondents preferred the appeal against the said judgment and decree in which, learned Additional District Judge recorded a finding that the respondents had proved their ownership, being in lawful possession of the suit field on the basis of sale deed dated 02/01/1991 and accordingly set aside the judgment and decree of the trial Court and allowed the appeal by his judgment and decree passed on 03/5/2003. It is this judgment and decree, which are under challenge in the present second appeal.

5. This appeal was admitted by this Court on 28/4/2004 on two substantial questions of law. The substantial questions of law that arise for my consideration are stated as below.:

(1) Whether the respondents/original defendants could claim ownership of the suit field on the basis of

sale deed dated 02/01/1991 which was unregistered?

(2) Whether the respondents/original defendants could take alternative plea of deemed tenancy when they had already set up plea of their becoming owner on the basis of sale deed?

6. Learned Counsel for the appellants has forcefully argued that the first appellate Court has committed serious error of law in applying presumption under Section 110 of the Indian Evidence Act for the reason that the presumption under this Section would arise only when the initial ownership of the plaintiff is denied. On the other hand, learned Counsel for the respondents has submitted that, ordinarily burden of proving a fact is upon that party which asserts the fact. In support, he placed his reliance upon the case of Anil Rishi Vs. Gurubaksh Singh reported in **(2006) 5 SCC-558**.

7. It is seen from the impugned judgment and decree of the first appellate Court that it has drawn presumption under Section 110 of the Evidence Act to reach the conclusion that the respondents being in lawful possession of the suit field and the appellants having proved their case of permissive possession, the presumption of ownership under Section 110 of the Evidence Act was raised in favour of the

respondents and it stood unrebutted. Thus, the first appellate Court found that the respondents proved their ownership over the suit field by virtue of sale deed dated 02/01/1991.

8. No doubt, Section 110 of the Indian Evidence Act, 1872 lays down a rule that when the question is, whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that fact. This rule has been elaborated by Manipur High Court in its decision given in the case of Heisnam Nilakantha Singh & others Vs. Heisnam Ningol Thokchom Ongbi Thambal Devi & others reported in **AIR 1970 Manipur 50** and which has been relied upon by the first appellate Court. It is held by Manipur High Court that presumption under Section 110 of the Evidence Act would arise, if two conditions are satisfied, namely; (1) that the possession is not prima facie wrongful, and (2) that the title of the other contesting party to the property is not proved by direct evidence.

9. There can be no doubt about the above referred two conditions necessary for drawing of presumption under Section 110 of the Evidence Act. The second condition referred to above is more relevant in the instant case. Needless to say, the appellants themselves have submitted that they had delivered possession of the

suit field to the respondents for cultivation and that was in the nature of a permissive possession, thereby meaning that the possession over the suit field of the respondents was not at all wrongful. The question that has remained to be considered is; 'as to whether the title of the appellants, the contesting party in the instant case, has been proved by direct evidence or not?' Therefore, as stated earlier, the second condition referred to above is most relevant for the purposes of this appeal. In this case, the ownership of the appellants in respect of the suit field has never been denied by the respondents. What they have submitted is that the appellants have transferred the title to the suit field by virtue of a document which they called as sale deed dated 02/01/1991.

10. It is clear that these pleadings show that the respondents did not deny the title of the appellants to the suit field and, therefore, the appellants would have to be held as owners of the suit field and the burden to prove their title to the suit field by producing on record necessary evidence would shift to respondents. In the case of *Anil* (supra) relied upon by the respondents it has been held by the Hon'ble Apex Court that ordinarily burden of proving of a fact rests on that party which substantially asserts the affirmative of the issue. Here, in this case, the respondents have asserted that the suit field's

ownership has been transferred to them by the appellants by virtue of the sale deed and so, as per the law laid down by the Hon'ble Apex Court in the said case of *Anil*, the burden to prove it would rest upon the respondents and as such there would be no question of drawing the presumption under Section 110 of the Indian Evidence Act. The first appellate Court has misread the law laid down in the case of *Nilkantha Singh* (supra) and wrongly applied presumption under Section 110 of the Evidence Act.

11. Now, it would have to be seen whether the respondents proved their ownership to the suit field or not. They have admitted that the sale deed dated 02/01/1991 was not a registered instrument. Therefore, the respondents have effectively contended that transfer of ownership of the suit field is on the basis of an unregistered instrument. Under Section 54 of the Transfer of Property Act, transfer of immovable property by sale having value of Rs.100/- and upwards must be by a registered instrument of sale. Admittedly, document dated 02/01/1991 being not a registered instrument of sale, it cannot be said that the suit field was validly transferred by sale to the respondents. Thus, the respondents failed to discharge the burden of proving their title to the suit field. In such a situation, the first appellate Court could not have concluded that failure to prove

permissive possession of the respondents by the appellants was enough to presume title of the respondents to the suit field. The title was required to be proved by respondents, and as said earlier, presumption under Section 110 was not applicable to their case because they had admitted title of appellants and had only contended that it was transferred to them by sale. This contention required proof as per law, which was in the nature of registered document of sale, and which was not there. In the absence of registered instrument of sale, no immovable property of the value of ₹100/- and upwards can be transferred and this is the mandate of law under Section 54 of the Transfer of Property Act. Accordingly, the first substantial question of law is answered as in the negative.

12. The first appellate Court has not dealt with the question of deemed tenancy in its judgment and decree passed on 03/5/2003. However, it has been considered and also answered by the trial Court in its judgment and decree passed on 22/4/2002. According to the learned Counsel for the appellants, the trial Court could not have recorded contradictory findings on the aspect of deemed tenancy. He points out from the judgment of the trial Court that on one hand the trial Court found alternate plea of deemed tenancy, it being inconsistent with the plea of ownership on the basis of sale deed,

cannot be taken and on the other hand, it dealt with the same issue recording a finding that defendant No.1 was cultivating the suit field as per the permission given by the appellants and not as the tenants of the appellants. According to him, this approach of the trial Court was absolutely incorrect, especially when no issue of tenancy was framed by the trial Court.

13. Learned Counsel for the respondents has submitted that the respondents were not members of the appellants' family nor were hired labourers nor the servants on wages and were in lawful possession of the suit field. Therefore, he further submits, they were deemed tenants under the provision of Section 6 of the Tenancy Act. He has placed reliance upon the case of Jagan @ Jagannath Umaji Vs. Gokuldas Hiralal Tewari reported in **AIR 1987 SC 2429** in support of his arguments.

14. No doubt, under Section 6 of the Tenancy Act, a person who lawfully cultivates land belonging to another person and who is not a member of the owner's family or who is not a servant on wages payable in cash or kind, not being paid in crop share or who is not a hired labourer cultivating the land under the personal supervision of the owner, is a deemed tenant. This is what has been laid down by the Hon'ble Apex Court in the said case of *Jagan* (supra).

15. In the instant case, there is no dispute about the fact that the possession of the respondents was lawful as they were permitted to cultivate the suit field by the appellants. It is also not in dispute that they were cultivating the suit field for a period of about 7 to 8 years immediately before filing of the suit. Therefore, now, it would have to be seen whether the respondents, as submitted by them, fulfilled the remaining conditions required for giving them status of 'deemed tenants' under Section 6 of the Tenancy Act. Definitely, there would be an issue in this regard which would require adjudication in accordance with law. This issue would be; **"Whether the defendants are deemed tenants as per Section 6 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958?"** This issue, under Section 125 of the Tenancy Act, is required to be settled and decided by the Competent Authority and the Civil Court would have no jurisdiction to decide the same and till the time it is settled and decided, the suit would have to be stayed by the Civil Court. But, before giving any finding as to whether or not this issue ought to be framed and referred to the Competent Authority by the Civil Court, it would be necessary for this Court to consider whether the issue, being in the nature of alternative plea, could be raised at all by the respondents in the facts and circumstances of this case.

16. The said issue, one must say, is in the nature of an alternative plea, pure and simple, not really destructive of the first plea taken by the respondents that they have become the owners of the suit field by virtue of document of sale deed dated 02/01/1991. It is well settled law that even mutually inconsistent pleas could be raised in defence by the defendants (See *Arundhati Mishra (Smt.) vs. Sri Ram Charitra Pandey (1994) 2 SCC 29*). The only prohibition, as held in the case of *Vimal Chand Ghevarchand Jain vs. Ramakant Eknath Jadoo (2009) 5 SCC 713*, is that alternative pleas should not be destructive of each other. They should be capable to co-exist with each other and should not be so inconsistent as to make it impossible to prove one plea unless the other is given up. Such a situation, as for example, could be found when plea of adverse possession is taken and simultaneously plea of transfer of title by virtue of sale or exchange is taken. The plea of adverse possession is based upon the assertion of one's possession with an intention to occupy it adversely to the true owner and whereas, the plea of ownership based upon sale or exchange essentially admits title of another. In such a scenario, period of prescription required for perfecting the title by adverse possession would not begin till the time the plea of transfer of title, by sale or exchange is given up. The plea of deemed tenancy based upon claim

to remain in possession and enjoy the rights of a tenant, is obviously not destructive of plea of ownership as it is not of such a nature that it cannot be proved unless the latter is given up. Therefore, it could have been very well set up as an alternate defence by the respondents. With this, the second substantial question of law would have to be answered as in the affirmative and accordingly, I do so.

17. After having answered the second substantial question of law in the affirmative, I find that there is a need for framing of an additional issue and it's being referred by the trial Court to the Competent Authority under the provisions of the Tenancy Act for its adjudication. Therefore, I find that this is a fit case for remanding the matter to the trial Court for deciding the whole case afresh, in accordance with law.

18. In the result, the appeal deserves to be allowed.

- i. The appeal is allowed with costs and the impugned judgments and decrees of both the Courts below are hereby quashed and set aside.
- ii. The matter is remanded to the trial Court for decision afresh, in accordance with law.
- iii. It is directed that the trial Court shall frame an issue on the lines suggested in the judgment and

refer the same to the Competent Authority in accordance with the provisions of Section 125 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 and after receipt of the decision of the Competent Authority, the trial Court shall dispose of the suit after considering the evidence available on record and hearing both the sides, in accordance with law.

- iv. The trial Court is directed to expedite the final disposal and the Competent Authority is also directed to render its decision upon reference to it, as far as possible, within three months from the date of receipt of reference.
- v. Parties to appear before the trial Court on **17/02/2014.**

JUDGE

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