

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.967 OF 2014

1. Vitthal Namdev Thorbole,
Age : 62 years, Occu. Agri.
R/o Pimpalgaon Kol. Tal. Washi,
Dist. Osmanabad
2. Devidas Namdev Thorbole,
Age : 58 years, Occu. Agri.
R/o Pimpalgaon Ko. Tal. Washi,
Dist. Osmanabad

..PETITIONERS
(Orig. Defendant No.1 & 2)

VERSUS

1. Haribhau Bhaurao Gaware
Age : 77 years, Occu.Aгри.,
R/o Selu, 77 years, Occu.Aгри.,
R/o Selu, Tal. Washi,
Dist. Osmanabad
(Original Plaintiff)
2. Jotsna Devidas Thorbole,
Age : 51 years, Occu.Aгри.,
R/o Pimpalgaon Ko. Tal.Washi,
Dist. Osmanabad
3. Mangesh Devidas Thorbole,
Age : 22 years, Occu. Aгри.,
R/o Pimpalgaon Ko. Tal. Washi,
Dist. Osmanabad

..RESPONDENTS
(Orig. Defendants No.3 & 4)

Mr V.S. Undre, Advocate for petitioners;
Mr N.L. Jadhav, Advocate for respondent no.1

CORAM : N.W. SAMBRE, J.

DATE : 25th March, 2015

ORAL ORDER

The present petition is by defendants No.1 and 2 to Regular Civil Suit No.114 of 2011, which was filed for declaration and injunction. In the said suit, it is claimed by respondent No.1/original plaintiff that the holding of the petitioners/original defendants no.1 and 2 is excess than that of mentioned in the title deeds and it is also claimed that the holding was disturbed after the scheme of consolidation was implemented.

2. In the wake of the claim made in the suit, an application Exh.60 came to be filed by the present petitioners/original defendants No.1 and 2 pointing out the provisions of section 36-A of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as the "Act", for the sake of brevity), claiming bar of jurisdiction of Civil Court and sought framing of preliminary issue to that effect .

3. Learned Counsel appearing on behalf of the petitioners would urge that by way of said application the petitioners have prayed for framing of a preliminary issue as regards tenability of the suit, as according to them, the power to restore excess holding after implementation of the consolidation scheme vests with the authority identified under the said statute. He would further urge that in view thereof, the jurisdiction of the Civil Court is barred.

3. While countering the above referred submissions, learned Counsel appearing on behalf of respondent submits that the stage at which the application for framing of preliminary issue was moved was not provided under the statute, as according to him, the same was moved after the application for injunction was decided. He would further urge that the said application was not tenable as moved at a stage which is not permissible in law and submits that the order impugned is strictly in accordance with the provisions of the Act and sought rejection of the application Exh.60.

4. Having considered rival contentions of the parties and having perused the provisions of sections 36-A and 36-B of the Act, it is noticed that though the Court below was aware about the fact as regards provisions, ousting of the jurisdiction of the Civil Court, particularly in view of provisions of section 36-A of the Act, however, has proceeded to entertain the suit on the ground that the suit is for simpliciter injunction.

5. If we look into the prayers made in the suit, the present respondent No.1/plaintiff has specifically prayed for a declaration, that the suit property is owned by him and an injunction be ordered against the present petitioners, restraining them from interfering in his peaceful possession over the suit property. As such, the suit filed by respondent no.1 is for

declaration and injunction. If we consider the prayer made herein, in the light of the provisions of section 36-A of the Act, it is required to be noted that this Court had an occasion to consider the said scheme in the judgment rendered in the matter of **Ashok Yeshwant Dhumal, deceased by heirs and legal representatives vs. Shankar Maruti Dhumal & anr.**, reported in **2001 (3) BCR 27**, as is rightly pointed out by the petitioner. In paragraphs 10 and 11 of the said judgment, this Court has observed thus :-

“10. From the facts of the present case, the suit filed by the appellants is for possession of Survey No. 199/4-B which is in the possession of the respondent No. 1. It is clear that in view of the fact that this holding forms part of Gat No. 1429 and has been allotted to the respondent No. 2, who would naturally be entitled to be in possession of the said land. The appellant No. 1, who is an allottee of 50% of Gat No. 1428 would therefore not be entitled to possession of the suit land. In any case, it is clear that the appellants and the respondent Nos. 1 and 2 are all allottees of lands governed by the consolidation scheme, though, they ought to be in possession of, under the scheme. In fact, because the respondent No. 1 has not handed over possession of the land which respectively belonged to the appellants to the respondent No. 2, the respondent No. 2, in turn, has not handed over possession of his land for formation of Block No. 1428 as a result of which the appellants and the respondent No. 1, who are half owners of Block No. 1428 are not in possession of their rooms. I am of opinion, that the power to

put the owners, in possession of the holding, to which they are entitled under the scheme is a power which is exclusively conferred on the Consolidation Officer under section 21 of sub-section (3) of the Act, which reads as follows :

"21(3) The Consolidation Officer shall, from the commencement of the agricultural year next following the date of publication of the notification in the Official Gazette, under sub-section (1) and in the prescribed manner, put the owners in possession of the holding to which they are entitled under the scheme and for doing so may, in the prescribed manner, evict any person from any land which he is not entitled to occupy under the scheme:

Provided that, if two-thirds or more of the owners affected by the scheme agree to enter into possession of the holdings to which they are entitled under the scheme, the Consolidation Officer may put them in possession of such holdings from such earlier date as may be decided upon by such owners."

It is clear from the section that the Consolidation Officer puts the owners in possession from the commencing of the agricultural year next following the date of publication of the notification in the Official Gazette. It is not disputed before me that it is being under sub-section (1) published long ago having regard to the facts of the case. I am therefore of view that since the appellants and the respondents are both allottees under the Consolidation Scheme, the question as to who should be in possession of any portion of land which is covered by the Consolidation Scheme is a question, that can only be decided by the Consolidation Officer under section 21 (3) of the Act.

11. It is settled law that the question of jurisdiction of a Civil Court must not be readily inferred unless it is expressly excluded or must be taken to be so excluded by necessary implication. Having regard to the scheme of the present Act, the relevant provisions of which have been reproduced above, I am of view that the jurisdiction of Civil Courts is barred by section 36-A of the Act where the question is one relating to putting a owner in possession of the holding to which he is entitled under the scheme."

6. This Court, having already taken a view that the question of jurisdiction of the Civil Court though must not be readily inferred unless unless it is expressly excluded or must be taken to be so excluded by necessary implication. The Court was alive to the powers of the Consolidation Officer to order restoration of possession, in view of the provisions of section 21 (3) of the Act.

7. In my opinion, the Court below has failed to consider the very scheme of sections 36-A and 21 (3) of the said Act.

8. The issue, in my opinion, since is covered by the judgment in the matter of Ashok (cited supra) and also another judgment in the matter of **Narayan S. Bite & ors. vs. Mahadeo Shripati Pise & ors.**, reported in **2001 (3) Bom. C.R. 262**, this Court is left with no other option but to

exercise extra-ordinary jurisdiction for quashing the impugned order dated 3.1.2014.

9. The fact that the suit at the behest of the present respondent no.1 is not tenable is well within his knowledge as is reflected from his conduct because he has initiated parallel proceedings before the Consolidation Officer as is reflected from page 45 of the present proceedings.

10. In view of above discussion, I pass the following order :-

The order dated 3rd January, 2014, passed by Joint Civil Judge Junior Division, Washi, below Exh.60, in Regular Civil Suit No.114 of 2011, is set aside.

For the reasons stated herein above, the application Exh.60 stands allowed.

The preliminary issue, i.e. "whether the Civil Court is competent to try, settle and decide the suit" is answered in favour of the petitioners/defendants and it is held that the Civil Court has no jurisdiction to entertain the suit.

(8)

wp967.14.

Writ Petition stands allowed in above terms with no order as to costs.

(N.W. SAMBRE, J.)

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