

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.
APPELLATE SIDE JURISDICTION

WRIT PETITION NO. 5173 OF 2012

AHMEDNAGAR SAHAKARI BHADEKARU MALAKI
GRAHANIRMAN SANSTHA MARYADIT,
MOREWADI, THROUGH ITS SECRETARY
VERSUS
BABU FAKIRA MENDKE AND OTHERS

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Advocate for Petitioner : Mr. S.S. Choudhary.

Advocate for Respondents : Mr. Anil M. Gaikwad.

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CORAM : **N. W. SAMBRE, J.**

DATE : 01st April, 2015.

Per Court:

1 The Petitioner – Plaintiff filed Regular Civil Suit No.196 of 2007, for possession, declaration of ownership, perpetual injunction and damages in the Court of 3rd Joint Civil Judge (Junior Division), Ambajogai, against the Respondents.

2 The Respondents raised a preliminary objection to the tenability of the suit after the issues were framed. As according to the Respondents, the Issue Nos. 4A and 4B are pertain to valuation of the suit property and go to the root of the matter. Based on the same, an application came to be moved by the Respondents for framing a preliminary issue vide Exhibit – 75. The said application came to be granted by the learned trial Court by its order dated 6th January, 2012. As such, the present petition by the

Petitioner – Plaintiff.

3 Mr. Chaudhary, learned counsel for the Petitioner – Plaintiff while questioning the legality of the order impugned dated 6th January, 2012, passed by the 3rd Joint Civil Judge (Junior Division), Ambajogai, would urge that the suit filed by the present Respondents for injunction was dismissed as withdrawn. In addition to above, he would urge that if the issues which are framed at Exhibit – 49/B and the additional issues, according to him, the same are mixed question of facts and law. He would urge that in view of above, after recording the evidence, the trial Court has every authority to decide the said issues on merits and consequences thereof will follow for the liability of the Petitioner to pay Court fees. He would submit that the order passed by the learned Court below is not sustainable and is liable to be interfered with. In support of his contention, he has placed reliance on the judgment of the Rajasthan High Court in the case of **Cheni Ram and another Vs. Shanti Devi and another**, reported in **AIR 1980 Rajasthan 192**, so as to canvass that if an issue raised before the Court is a mixed question of facts and law, such an issue cannot be decided as a preliminary issue. In support thereof, he has relied upon the provisions of Order 14, Rule of 2 of the Code of Civil Procedure.

4 Mr. Gaikwad, learned counsel for the Respondents – Defendants

would urge that based on the plea of the parties, in accordance with the provisions of Order 8, the learned trial Court has framed the issues. The Court felt that the issue as regards valuation was required to be dealt. He would further urge that if the said issue is answered in favour of the present Petitioner – Plaintiff, of course his suit will be tenable. However, in case if the said issue is answered against the Plaintiff, the said would oust the jurisdiction of the learned trial Court and the decree, if any, passed will be without jurisdiction. According to him, so as to avoid multiplicity, it will be appropriate that the issue as is ordered to be framed as a preliminary one, be decided before deciding other issues.

5 Upon considering the contentions raised by the respective parties, it is required to be noted that as is rightly pointed out by the learned counsel for the Respondents, the issues are framed based on the pleadings of the parties. Framing of issue Nos.4A and 4B is not objected by the Plaintiff, but what is objected is deciding of the same as a preliminary issue. The objection while deciding of such a preliminary issue as is sought to be placed in service by Mr. Choudhary is that it is a mixed question of facts and law.

6 If we look into the claim of the Petitioner in the suit, the stand taken by the Defendant in the application Exhibit – 75, prima-facie, it is required to be inferred that the said issue i.e. valuation of the suit in no case can be termed as mixed question of facts and law. Particularly having regard

to the steps taken by the Defendants by bringing on record the valuation from the office of Sub-Registrar in the matter of suit property.

7 Once it is concluded that the said issue cannot be treated as a mixed question of facts and law, in my opinion, the learned trial Court was right in exercising the jurisdiction vested in it by ordering framing of said issue Nos.4A and 4B as preliminary issues.

8 In view of above observations, no case for interference is made out. The petition lacks merit and the same stands dismissed.

[N. W. SAMBRE, J.]

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