

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.27 OF 2006

Tulsiram Chima Pawar (Since Deceased)	]	
Changunabai Tulsiram Pawar and Ors.	]	... Petitioners

Versus

Shri Shivram Haribhau Pawar and Anr.	]	... Respondents
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Mr. S. R. Kulkarni for Petitioners.

Mr. R. V. Govilkar for Respondent Nos.1 and 2.

CORAM :- M. S. SONAK, J.

DATE :- MAY 06, 2015

P. C. :-

1. This Revision Application challenges order dated 19/11/2005 made by the 8th Joint Civil Judge, Senior Division, Pune, dismissing Petitioner's application under Order 7 Rule 11 of the CPC seeking rejection of the plaint instituted by Respondent Nos.1 and 2 (original Plaintiffs).

2. The Petitioners urge rejection of the plaint on the following three grounds :-

(a) that the suit was barred by *res judicata* on account of dismissal of previous Civil Suit No.1004 of 1992 based upon the same cause of action;

- (b) that the suit, in the light of statements in the plaint, was barred under the provisions of Section 85 of the Maharashtra Tenancy and Agricultural Lands Act, 1948 ('the said Act');
- (c) that the suit was under-valued, inasmuch as though the relief of possession was applied for, neither the valuation nor the payment of court-fee were on the basis of the market value of the suit property.

3. Insofar as the plea of *res judicata* is concerned, it is extremely doubtful whether such a plea can be considered at the stage of deciding an application under Order 7 Rule 11 of the CPC. *Res judicata*, is a defence, which perhaps, shall have to be raised by the Defendants in their Written Statements. Only when such a defence is duly raised in the Written Statement and material in support thereof placed before the Court, could possibly, occasion arise for consideration of such a plea. For rejection of a plaint by resort to provisions contained in Order 7 Rule 11 of the CPC, the Court is required to go by statements in the plaint.

4. That apart, Civil Suit No.1004 of 1992 was dismissed for want of prosecution. Accordingly, the decision in the said suit cannot be said to be a decision on merits. Section 11 of the CPC provides that no Court shall try any suit or the issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, in a Court

competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The expression '*heard and finally decided*' contemplates a decision on merits and not merely dismissal of the suit for want of prosecution.

5. Mr. S. K. Kulkarni, learned Counsel for Petitioners, however, made reference to the provisions contained in Order 9 Rule 9 of the CPC which provide that where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. In order that the bar under Order 9 Rule 9 of the CPC is attracted, it is necessary that the fresh suit must be in respect of the same cause of action. This would involve the examination of factual issues as to whether or not the cause of action in the two suits is the same. Again, it is doubtful as to whether such an exercise can be undertaken at the stage of deciding an application under Order 7 Rule 11 of the CPC.

6. Be that as it may, the plaints in the two suits are a part of the record in the present proceeding. In Civil Suit No 1004 of 1992, the cause of action, as indicated in the plaint, made reference to the contents of notice dated 10/06/1992. In contrast, the present suit purports to draw its cause of action on the basis of contents of public notice dated 03/03/2004. There is some difference in the reliefs applied, as well. Accordingly, it is not possible to accept the plea that the suit is barred under the principles of *res judicata* or for that matter, the provisions contained in Order 9 Rule 9 of the CPC.

7. Insofar as the issue of under-valuation of the suit is concerned, reference shall have to be made to the provisions contained in Section 6(v) of the Bombay Court Fees Act, 1959, which provisions are required to be considered along with the provisions of the Suit Valuation Act, 1887 and the Maharashtra State Valuation (Determination of Value of Land for Jurisdictional Purpose) Rules, 1983. Section 6(v) of the Bombay Court Fees Act, 1959, provides that in suits for the possession of land, houses and garden, the computation of Court fees has to be according to the value of the subject matter and such value shall be deemed to be, where the subject matter is a house or a garden according to the market value of the house or a garden. However, where the subject matter is land, Court fees are to be computed on basis of the following :-

- (a) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to the Government a sum equal to [forty times] the survey assessment;
- (b) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government a sum equal to [eighty times] the survey assessment; and
- (c) where the whole or any part of the annual survey assessment is remitted a sum computed under sub-paragraph (a) or sub-paragraph (b) as the case may be, in addition to [eighty times] the assessment or, the portion of assessment, so remitted.

8. In the present case, there is no serious dispute that possession has been applied for in respect of agricultural land. Accordingly, the computation of Court fees is not required to be made on the basis of market value of the agricultural land but rather, the principles, as aforesaid, shall have to be applied and employed. Further, Rule 2 of the Maharashtra State Valuation (Determination of Value of Land for Jurisdictional Purpose) Rule, 1983 provides that in suit for possession of land, houses and garden mentioned in para (v) in sub-Section 6 of the Bombay Court Fees Act, 1959, for the purposes of jurisdiction, the value of property shall be determined as follows :-

- “(a) *where the subject-matter is a house or garden – according to the market value of the house or garden, as the case may be;*
- (b) *where the subject-matter is land – a sum equal to two hundred times of the assessment payable in respect of the land.*

Explanation – Where any land is partially or wholly exempt from the payment of land revenue, the full assessment leviable in respect of such land shall be deemed to be the assessment payable in respect of such land for the purposes of this rule, as if the land was not exempt from the payment of land revenue either partially or wholly.”

9. From the aforesaid, it is clear that where the subject matter of the suit property is land, the value of the property has to be a sum equal to 200 times of the assessment payable in respect of the land. If the valuation clause in the present suit is perused, it is clear

that the value of the suit for the purposes of jurisdiction has been computed with reference to the provisions contained in Rule 2 of the 1983 Rules. Accordingly, it is not possible to accept the Petitioners' contention that there is any under-valuation of the suit for the purpose of Court fees or jurisdiction or both.

10. This takes us to the third question as to whether the suit, as instituted, is parred under the provisions of Section 85 of the said Act. Section 85 of the said Act provides that no civil Court shall have jurisdiction to settle, decide or deal with any question, including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him, which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Maharashtra Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of control. Further, no order of the Mamlatdar, the Tribunal, the Collector or the Maharashtra Revenue Tribunal or the State Government made under this Act shall be questioned in any Civil or Criminal Court.

11. In the plaint as instituted, the Plaintiffs claim through Moraya Pawar, one of the sons of Bala Chimaji Pawar. The Defendants, on the other hand, claim through Chima Pawar, also one of the sons of Bala Chimaji pawar. The statutory certificate of purchase under Section 32G of the said Act came to be issued in

favour of Chima Pawar sometime in the year 1961. It is the case of the Plaintiffs that Chima Pawar was not the exclusive tenant in possession on the tillers day but rather all the legal representatives of late Bala Chimaji Pawar were the tenants in possession of the suit property on the tillers day and consequently, the certificate of purchase notwithstanding, even they are entitled to some share in the suit property which forms the subject matter of the statutory certificate under Section 32G of the said Act. In the plaint, although there is no direct relief applied for in respect of the certificate under Section 32G, there are averments that Chima Pawar played a fraud in obtaining such certificate in his exclusive name.

12. Mr. Kulkarni, the learned Counsel for Petitioners, by placing reliance on the decision of this Court in the case of ***Bhima Aba Rade (since deceased through his Lrs) V/s. Thakubai Maruti Rade and others***¹ and of the Hon'ble Supreme Court in the case of ***Saraswatibai Trimbak Gaikwad V/s. Damodhar D. Motiwale and others***², submitted that a suit which virtually questions a certificate under Section 32G of the said Act is not at all maintainable by virtue of the provisions contained in Section 85 of the said Act. In particular, the learned Counsel relied upon the certain observations in case of ***Bhima V/s. Thakubai*** (*supra*) which read thus :

“10. The First Appellate Court completely ignored statutory conditions enumerated at bottom of the certificate would show that the suit land was

1 2008 (1) Mh. L. J. 192

2 2002 (3) Mh. L. J. 69

impartiable estate in the hands of original defendant No.1. He could not have subjected the suit land to partition without prior permission of the Collector. The decree for partition could not be rendered as it would cause breach of Section 43 of the BT & AL Act. The Civil Court has no jurisdiction to examine the questions which are required to be dealt with and settled under provisions of the BT & AL Act. There is bar of jurisdiction under provisions of Section 85 of the BT & AL Act to deal with any question, including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord, the land held by him. Obviously, the Civil Court could not have gone into the question as to whether deceased defendant No.1 alone was entitled to purchase the suit land or that it was purchased by him for and on behalf of joint Hindu family for himself and his brothers. The Civil Court could not have examined whether it was a joint tenancy of the four brothers or that it was exclusive tenancy created in favour of deceased defendant No. 1 - Bhima.”

13. In the present case, as noted earlier, the suit seeks relief of partition and recovery of possession. Although Mr. Kulkarni is, *prima facie*, correct in his submission that the Civil Court would lack jurisdiction to decide the issue as to whether the statutory certificate under Section 32G of the said Act was correctly issued or not, nevertheless, it is apparent that the authorities under the said Act may not eventually be in a position to grant relief of partition or recovery of possession, even if they were to come to the conclusion that there was some infirmity or error in the issuance of statutory certificate under Section 32G of the said Act in the exclusive name of Chima Pawar. Accordingly in the suit as instituted, although certain issues are bound to arise, which are required to be adjudicated upon or determined by the authorities under the said Act, it cannot be said that the suit as instituted, is for the purposes of exclusively settling, deciding or dealing with questions which by or under the said Act, are required to be settled, decided or dealt with by the authorities under the said Act.

14. Precisely to deal with situations of this kind, Section 85A was introduced in the said Act which provides that if any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under the said Act, the Civil Court shall stay the suit and refer such issues to such competent authority for determination. On receipt of such reference from the Civil Court, the competent authority shall deal with and decide such issue in

accordance with the provisions of the said Act and shall communicate its decision to the Civil Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

15. In the aforesaid circumstances, and upon taking into consideration the averments in the plaint, it therefore cannot be said that the suit is *per se* barred under Section 85 of the said Act. However, it is clear that certain issues may arise in the suit, which are adjudicable exclusively by the authorities under the said Act. Accordingly, the Civil Court may be required to adopt the procedure described under Section 85A of the said Act. In the case of ***Bhima V/s. Thakubai*** (*supra*), the observation upon which Mr. Kulkarni placed reliance, were in the context of certain findings rendered by the Civil Court upon issues which were exclusive adjudicable by the authorities under the said Act. Accordingly, ***Bhima V/s. Thakubai*** (*supra*) is not the authority for the proposition that the moment some issues which are exclusively adjudicable by the competent authority under the said Act arise, the jurisdiction of the Civil Court is completely barred. Rather, ***Bhima V/s. Thakubai*** (*supra*) is an authority for the proposition that issues of such nature are to be adjudicated by the competent authority under the said Act, if necessary by resort to the provisions contained in Section 85A of the said Act.

16. The decision of the Hon'ble Apex Court in the case of ***Saraswatibai V/s. Damodhar*** (*supra*) is quite clear in this regard. At

para 18, the Hon'ble Supreme court, after reference to the provisions contained in Section 85 of the said Act, proceeded to observe that even if such a question was to be raised in a proceeding before it, the Civil Court would have to refer the issue to the authority under the said Act. The suit would then have to be disposed of in accordance with the decision of the authority. Obviously, such procedure was referred to, in the context of provisions contained in Section 85A of the said Act.

17. In the result, although there is no necessity to interfere with the impugned order, it is made clear that the Civil Court, in proceeding with the suit, shall be conscious of the provisions contained in Section 85A of the said Act and further, as and when any occasion arises therefor, adopt the procedure prescribed therein.

18. Subject to the aforesaid observation, Rule is discharged. There shall be no order as to costs.

(M. S. SONAK, J.)