

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 47 OF 2010**

Mrs. Elba Maria D'Souza, Major, Married,
Housewife, r/o H. No. 1068, Grande Carona, Appellant
Carona, Aldona, Bardez, Goa.

Versus

1. Mr. Vasant Gangaram Parab Mahambre,
major, married, r/o Olaulim, Pampurpa,
(since deceased) through his legal heirs:
 - 1(a) Mrs. Vimal Vasant Mahambre, Major,
Widow,
 - 1(b) Mr. Gangaram Vasant Parab
Mahambre, major, son of late Vasant
Mahambre,
Both r/o Olaulim, Pomburpa, Bardez, Goa. Respondents

Shri J.P. Mulgaonkar with Shri J.J. Mulgaonkar, Advocates for the
Appellant.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 2nd DECEMBER, 2016

PRONOUNCED ON:- 15th DECEMBER, 2016

JUDGMENT:

The challenge in this appeal is to the judgment and order dated 09.07.2009 passed by the learned District Judge at Mapusa in Regular Civil Appeal No. 24/2009. By the impugned judgment, the appeal filed by the respondent has been allowed and Regular Civil Suit

No. 2/2004/D filed by the appellant has been remanded to the Trial Court.

2. The brief facts are that the appellant filed the aforesaid suit for mandatory and prohibitory injunction in respect of land admeasuring 2,425 square meters surveyed under no. 96/3 of village Pomburpa. The case made out in the plaint is that the appellant is the owner of the suit property, which is in his possession.

3. The respondent contested the suit. It was inter alia contended that the defendant-Vasant Parab is a protected tenant of the land under the Tenancy Act and has to be considered as a deemed owner.

4. The learned Trial Court framed the following issues:

1. Whether the plaintiff proves that the suit property is owned and possessed by the plaintiff bearing survey no. 96/3 of Village Pomburpa ?

2. Whether the plaintiff proves that the defendant has illegally and unauthorisedly constructed structure having dimension 6 x 14 square metres with laterite stones and roof of asbestos sheets ?

3. Whether the defendant proves that the suit property is in physical possession of the defendant and cultivation has been done by the defendant and

the defendant is enjoying the yield of the trees ?

4. Whether the defendant proves that the existing house is raised and constructed several years back as godown ?

The learned Trial Court answered issue nos. 1 and 2 in the affirmative and issue nos. 3 and 4 in the negative and proceeded to decree the suit directing the respondent to demolish the suit structure, which is on the northern portion of the suit property, including an area of 12 square metres on the rear side of the house and restore the land to its original condition and restraining the defendant or anybody on his behalf from interfering in any manner in the suit property or putting any construction thereon.

5. Feeling aggrieved, the respondent challenged the same before the learned District Judge. The learned District Judge framed the following points:

1. Whether Civil Court has jurisdiction to try and entertain this suit ?

2. Whether the plaintiff is entitled to an order of mandatory injunction directing the defendant to demolish the suit structure as well as illegal construction covering an area of 12 square metres ?

The learned District Judge answered point no. 1 in the

negative and consequently found that point no. 2 does not arise in view of the findings on issue no. 1. In that view of the matter, the appeal has been allowed and the suit has been remanded back to the Trial Court, with a direction to frame an issue regarding tenancy and then "act in accordance with law". It is this judgment, which is subject matter of challenge in this appeal.

6. I have heard Shri Mulgaonkar, the learned Counsel for the appellant. None appears for the respondent.

7. It is strenuously urged on behalf of the appellant that the lower Appellate Court was not justified in remanding the matter with a direction for framing an issue of tenancy. It is submitted that the Civil Court is not obliged to frame and remit the issue of tenancy for mere asking. It is submitted that a plea of tenancy raised by a party has to be supported by clear pleadings, as to inception and manner of the creation of tenancy and other particulars, including quantum of rent payable and the mode of payment thereof. In short, it is contended that such an issue cannot be framed on vague pleadings. The learned Counsel has pointed out that there are no particulars of alleged tenancy in favour of the respondent-Vasant Parab in this case.

Reliance is placed on the decision of this Court in the case of

Mahableshwar P. Halankar Vs. Damodar P. Halankar and Others, 2015(5) Bom C.R.312; Rama Krishna Arolkar and Others Vs. Kumud alias Kusum Yeshwant Bhobe, 2015(7) Bom.C.R. 255; Shri Sebastiao Fernandes Vs. Shri Manuel Santana D'Cruz and Others, 1991(2) Goa L.T. 249; Mrs. Sonia Z. Almeida Vs. Mr. Abaji R. Vanzari and Another (dated 23.11.2007 passed in Writ Petition No. 135/2007), **Smt. Saraswati M. Pilgaonkar Vs. Shri Limo Y. Gavade** (dated 06.02.1997 passed in Civil Revision Application No. 114/1996) and **Mr. Rabindra A.L. Dias Vs. Smt. Eliza D'Silva and Another** (dated 02.09.2016 passed in Appeal from Order No. 59/2015).

It is submitted that mere entry in Form I & XIV would not be sufficient to remit the matter back with a direction to frame an issue of tenancy.

8. I have carefully considered the circumstances and the submissions made. The legal position as to whether, an issue in fact arises before the Civil Court, which would require a reference, is now well settled as it is subject matter of several judgments of this Court. The Division Bench of this Court in the case of **Pulmati Shyamlal Mishra and Another Vs. Ramkrishna Gangaprasad Bajpai and Others, BCI (1981) 25**, in paras 34, 35 and 36 of the judgment has held thus:

"34. It is also not correct to assume that the Court is under any obligation to frame and remit the issue of tenancy mechanically, merely on of its necessity and justification. Cases can be conceived, when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itseif attract sections 85 and 85A of the Tenancy Act. The remittance of any such tenancy issue and the trial thereof by the Mamlatdar and higher authorities in appeal and revision, is known to have become a long winding and time consuming process. This delay enures for the benefit of the person in possession of the land. This, not unnaturally, prompts and tempts him to claim to be the tenant out of sheer anxiety to perpetuate his unmerited possession, even if no basis exists for the claim. Nothing can thus prevent a defendant from claiming to be tenant (1) even if his plea to that effect is overruled specifically or constructively by the Tenancy Court in some earlier proceedings in between himself and the landlord or their predecessor-in-title or (2) even if the plea so set up happens to be irreconcilably inconsistent with his defence of being mortgagee, purchaser or owner of the land by inheritance or adoption, in the earlier stage of the same proceedings or in the earlier round of another litigation. A plea to that effect as an integral part of any other fraudulent defences is yet

another specie of the same category. Unwarranted remittance of such issue for trial in literal and mechanical compliance with the above provisions, enables the litigants to abuse the process of the Court and cause grave miscarriage of justice. This indeed makes mockery of the judicial process causing damage to the confidence of the litigating public in its efficacy and utility.

35. This only highlights the danger of any literal or mechanical construction of these provisions in disregard of their content and context and any casual approach in the matter. Order 14 of the Code of Civil Procedure contemplates framing of issues by the Court on application of mind, not only to the pleading but also to the documents produced, while Rule 4 thereof empowers it to examine any person and enforce production of additional . documents for that purpose. These provisions thus enable the Courts to (1) seek clarification of the bald pleadings, (2) insist on production of documents in doubtful cases, and (3) get explanation for the adverse factors even where the litigant is driven to rely on oral evidence, with a view to frame correct issues and restrict the trial of the case only to the same. There is nothing in section 85 or 85A or in any other provisions of the Tenancy Act, robbing the Courts of these powers so indispensable for the effective adjudication and, relieving it of its duty imposed thereunder. These

sections provide for remittance of issues only if and when the same are framed on being found to arise on such scrutiny and it is after that stage that the Civil Court ceases to have jurisdiction with regard to the same till the find-ing is certified by the Tenancy authorities. The process contemplated under Order 14 does not contemplate any trial of such issue but it does involve nipping of any such plea in the bud, if the Court, subject to any contrary decision in appeal and revision, judicially concludes against its framing and raising. This is implicit in the separate provision for framing issues and the trial thereof. This process does not thus involve any conflict between Order 14 of the Code of Civil Procedure or sections 85 and 85A of the Tenancy Act nor any question of any lack or excess of jurisdiction. Such scrupulous compliance with these provisions alone can prevent such possible abuse of its process.

36. The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and malafide. It is obviously not easy to draw a dividing line between such frivolous and malafide pleas on the one hand and the ones turning out to be false at the end of the trial on the other. Facts of a given case, however, would rarely fail to furnish the required indication to the judicially trained mind."

(Emphasis supplied)

Thus, it cannot be disputed that the Civil Court is not obliged to frame and refer such an issue for mere asking and would be entitled to examine the pleadings in this regard and then decide as to whether an issue is required to be framed and referred for such decision. The question would depend on the facts and circumstances of each case. The insistence of having clear pleadings, incorporating the particulars of such tenancy, is in order to see whether, *prima facie*, the plea raised is bonafide or not.

9. In the present case, the learned District Judge has accepted in para 10 of the judgment that 'no detailed particulars', about the time of creation of tenancy and the terms on which it was created are given in the written statement. The learned District Judge has found that the reading of the written statement/additional written statement in their entirety gives clear indication that the defendant was claiming tenancy rights in the suit property and was claiming that he was paying rent in cash and also in kind in favour of the plaintiff, who never issued any rent receipts. After noticing this, the learned District Judge has relied upon the entry in Form I & XIV, in which the name of the defendant is shown in the tenant's column. The learned District Judge has relied on the

presumption attaching to such entry, which is a rebuttable presumption. In that view of the matter, the learned District Judge has found that it would not be proper to hold that the defendant has taken a vague plea of tenancy in his written statement and this being the situation, it was incumbent upon the learned Trial Judge to frame the tenancy issue and refer the same to the competent Authority for its decision.

10. The whole thrust of the argument on behalf of the appellant is that the pleadings of the defendants are lacking in respect of the particulars of the tenancy. However, as noticed earlier the insistence of such particulars is only to see whether prima facie the plea is a bonafide one. Thus, whether such an issue needs to be framed and referred to the competent Authority, would depend upon facts and circumstances of each case, which would include the nature of the pleadings and the documents, if any, produced. In the present case, admittedly, there is an entry of the name of the defendant in the tenant's column of the suit property, which has prompted the learned District Judge to remand the matter. Having carefully gone through the impugned judgment of the Appellate Court, I do not find that any case for interference is made out. The principle apart, which is now well settled, the cases cited on behalf of the appellant, turned on their own facts. It is necessary to mention here that the Hon'ble Apex Court in the case of **Narayanan Vs.**

Kumaran and Others, 2004 4 SCC 26, has held that an appeal of the present nature, challenging the order of remand (which lies under Order 43, Rule 1(u) of CPC), lies only on substantial questions of law. In my considered view, the appeal does not involve any substantial question of law. The appeal is without any merit and is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

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