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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1020 OF 2014

Monika Pascoal Ludrik @ Rodrigues & Ors. ...Appellants
V/s.
Emerciana P. Rodrigues & Ors. ...Respondents

Mr.G.S. Godbole with Mr.Akshay Petkar i/b Mr.Rajan Joshi for the Appellants.
Mr.P.K. Dhakephalkar, Senior Counsel i/b Mr.Amol Mhatre for the Respondent Nos.1/1 to 1/8 and 1/8/1 to 1/8/3.
Mr.Atul Damle, Senior Counsel i/b Mr.Jayesh Joshi for the Respondent Nos.3, 6 and 7.

CORAM : R.D. DHANUKA, J.
DATE : 14TH DECEMBER, 2016.

P.C. :-

1. By this appeal from order, the appellants (original defendant nos.1 to 5) have challenged the order dated 2nd May, 2014 passed by the learned Civil Judge, Senior Division, Vasai, allowing application (Exhibit – 5) filed by the respondent no.1 (original plaintiff) *inter-alia* praying for an injunction in a partition suit.

2. There is no dispute that the original plaintiff was born on 19th January, 1927 and a birth certificate was issued on 30th September, 1927. The plaintiff was married on 16th February, 1943. The plaintiff claims to be sister of Philip Pascoal Ludrik alias Philya Pasku Ludrik, who was the son of Pascoal Caitan Rodrigues and Philipa (Putlibai) Pascoal Rodrigues. Insofar as the appellants are

concerned, the appellants are claiming through Pascoal Philip Rodrigues, who was one of the son of Philip alias Philya Pascoal Rodrigues.

3. Before the learned trial Judge, the defendant nos.1 to 5 had disputed the relationship of the plaintiff with the common ancestor Philip Pascoal Rodrigues alias Philya Pasku Ludrik.

4. It was also the case of the defendant nos.1 to 5 before the learned trial Judge that some of the properties, which are included in the schedule annexed to the plaint filed by the respondent no.1 were not their self-acquired properties or that they were not concerned with some of the properties.

5. The defendant nos.1 to 5 also filed a written statement before the learned trial Judge and raised various issues.

6. The learned trial Judge passed an order on 2nd May, 2014 thereby allowing Exhibit – 5 application filed by the plaintiff and granted injunction against the defendants, their agents, servants and the persons claiming through them from creating any third party rights in respect of title and interest in the suit properties appearing in the revenue records in the names of the defendants alone except survey nos.230/1,232/3, 132, 133 and 135 till the disposal of the suit. This order of the learned trial Judge is impugned by the defendant nos.1 to 5 in this appeal from order.

7. Mr.Godbole, learned counsel appearing for the appellants (defendant nos.1 to 5) invited my attention to the averments made in

the plaint, the averments made in the written statement filed by his clients and also *prima-facie* observations made by the learned trial Judge in the impugned order date 2nd May, 2014.

8. It is submitted by the learned counsel that even if it is proved by the plaintiff that she was the sister of Philip alias Philya Pasku Ludrik, she being not a legal heir, was not entitled to inherit the tenanted property. It is submitted by the learned counsel that since most of these properties were devolved on the predecessors of Philip alias Philya Pasku Ludrik under the provisions of the Bombay Tenancy Act, 1939 as well as under the provisions of the Bombay Tenancy & Agricultural Land Act, 1948, the dispute in respect of the tenancy claimed by the plaintiffs could not be tried by the Civil Court but could be tried only by the Mamlatdar or the Tribunal as the case may be. In support of this submission, Mr. Godbole, learned counsel for the appellants invited my attention to some of the provisions of the Bombay Tenancy Act, 1939 and the provisions of the Bombay Tenancy & Agricultural Land Act, 1948. He also placed reliance on the following judgments :-

i). The judgment of the Supreme Court in case of – **Mudakappa vs. Rudrappa & Ors., (1994) 2 SCC 57,**

ii). The judgment of the Supreme Court in case of – **Ishwaragouda & Ors. vs. Mallikarjun Gowda & Ors., (2009) 1 SCC 626,**

iii). The judgment of this Court in case of **Bhima Aba Rade, since deceased through His L.Rs. - vs. Thakubai Maruti Rade &**

Ors. 2008(1) Mh.L.J. 192, and

iv). The judgment of the Supreme Court in case of – **Rama Hariba Khavale vs. Gopika Ramling Survase & Ors., AIR 2003 Bom. 449.**

9. It is submitted that since the Civil Court has no jurisdiction to entertain the suit which touches the issue of tenancy in respect of the properties which were governed by the provisions of the aforesaid two Acts, the learned trial Judge could not have granted any interim injunction in favour of the plaintiff.

10. Mr.Dhakephalkar, learned senior counsel appearing for the original plaintiffs and the Mr.Damle, learned senior counsel appearing for the respondent nos.3, 6 and 7 invited my attention to the averments made in the written statement filed by the defendant nos.1 to 5 before the learned trial Judge. The emphasis is also led on paragraph 2 of the written statement by which the defendant nos.1 to 5 had requested the learned trial Judge to frame preliminary issue in respect of the issue whether the suit as framed was maintainable, whether the suit was barred by limitation, whether the suit was properly valued and whether the plaintiff had paid the proper court fees. It was also urged that the Civil Court has no pecuniary jurisdiction to try and entertain the suit and is liable to be returned by the Civil Court to appropriate Court.

11. It is submitted by the learned senior counsel that the issue of jurisdiction of the trial Court was not raised in the written statement nor this submission was urged by the appellants before the learned

trial Judge. My attention is also invited to the grounds raised in the appeal from order in support of the submission that it is also not the case of the appellants that though the issue of jurisdiction of the Civil Court was raised during the course of argument, the same is not considered by the learned trial Judge.

12. Learned senior counsel distinguished the judgments relied upon by Mr.Godbole, the learned counsel for the appellants, on the ground that since the issue of jurisdiction was not raised, the learned trial Judge has rightly not considered the said issue in the impugned order and cannot be allowed to raise this issue across the bar in this appeal from order.

13. Insofar as the issue as to whether the plaintiff is the sister of Philip alias Philya Pasku Ludrik and the daughter of Pascoal Caitan Rodrigues and Philipa Pascoal Rodrigues or not, Mr.Godbole did not pursue this issue at this stage in this appeal from order. I therefore, need not go into this issue though the same was raised before the learned trial Judge.

14. Insofar as the issue of jurisdiction of the Civil Court raised across the bar is concerned, learned counsel for the appellants could not point out any averments made in the written statement. Various other issues were though raised in the written statement did not include the issue of jurisdiction under section 85 of the Maharashtra Tenancy Act. A perusal of the grounds raised in the appeal from order also clearly indicates that it is not the grievance of the appellants that though such grounds were urged before the learned trial Judge, but the same was not even considered by the learned trial

Judge. In my view, these grounds cannot be allowed to be urged across the bar in this appeal from order.

15. Insofar as the judgments relied upon by Mr. Godbole is concerned, each of those judgments were delivered after considering oral as well as documentary evidence. The impugned order passed by the learned trial Judge is on the application filed below Exhibit – 5, and thus those judgments do not assist the case of the appellants in this appeal from order.

16. Insofar as the submission of Mr. Godbole, learned counsel for the appellants that some of the properties though did not belong to the appellants, the learned trial Judge has granted injunction in respect of those properties also is concerned, in my view, if according to the appellants some of the properties in respect of which injunction is granted by the learned trial Judge did not belong to the appellants, obviously the appellants would not be affected by that order and no prejudice would be caused to the appellants.

17. The impugned order passed by the learned trial Judge is passed on 2nd May, 2014. No *ad-interim* relief is granted by this Court since the date of filing of this appeal from order. The suit is of the year 2013. The written statements are already filed by all the defendants.

18. The parties can proceed with the trial of the suit and can make an application for expeditious hearing of the suit before the learned trial Judge.

19. I am thus not inclined to interfere with the impugned order passed by the learned trial Judge on 2nd May, 2014 in this appeal from order. The appeal is devoid of merits and is accordingly dismissed. It is made clear that the learned trial Judge shall decide the suit on its own merits without being influenced by the observations made by the learned trial Judge in the impugned order.

20. There shall be no order as to costs.

(R.D. DHANUKA, J.)