

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.139 OF 2016

Mukund Pratap Patel and another ... Applicants
Vs.
Shobha Suresh Patil and others ... Respondents

Mr. Rakesh V. Misar i/b. Kachwala Misar & Co. for Applicants.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 28, 2016

P.C. :

Heard Mr. Misar, learned Counsel for applicants.

2. Mr. Misar states that applicants have challenged the order dated 10.10.2015 passed by the learned trial Judge rejecting the application filed by the defendants for framing preliminary issue as to the jurisdiction of the Court. As the learned trial Judge has rejected the application, he seeks permission to convert this C.R.A. into Writ Petition.

3. On the motion made by Mr. Misar, Application is allowed to be converted into Writ Petition. Amendment shall be carried out within one week from today.

4. In support of this Petition, Mr. Misar strenuously contended that the learned trial Judge should have allowed the application exhibit-46 made by the defendants. He submitted that on behalf the defendants No.1 and 2, application exhibit-46 is made under Section 9-A of C.P.C. He has taken me through the application exhibit-46 and contended that from the perusal of the plaint itself, it is evident that plaintiffs are

claiming their derivative rights based on the tenancy. The tenancy proceedings are pending before S.D.O., Kalyan. So long as the tenancy proceedings are pending, plaintiffs could not have instituted the Suit. In any case, the Civil Court has no jurisdiction to entertain and try the Suit. He, therefore, submitted that the Suit is clearly hit by the provisions of Bombay Tenancy and Agricultural Lands Act, 1948 (for short 'Act') as the plaintiffs have raised issues about tenancy adjudication and the said issues can be decided only under the Act. It is not possible to accept this submission. Even accepting the case of the defendants No.1 and 2 that the plaintiffs have raised issues under the Act, Section 85-A thereof empowers the Civil Court to refer the tenancy issues to the authorities constituted under the Act. While rejecting the application, the learned trial Judge has categorically recorded a finding that the issues which the defendants seek to be framed as preliminary issues are not pure questions of law. Order XIV, Rule 2(2) reads thus,

“2. Court to pronounce judgment on all issues.-

(1) ...

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

5. The learned trial Judge, therefore, held that the issues raised by the defendants are mixed questions of law and fact, and therefore, cannot be decided as preliminary issues. For the reasons recorded in paragraph 5 of the impugned order, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Petition fails and the same is dismissed. However, it is made clear that

where a decree is challenged by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the proposed proceedings as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

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