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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.812 OF 2017

Uttam Asaram Kalawane (Died) PETITIONER
Through Karbhari Uttam Kalawane,
Age - 36 years, Occ - Agriculture
R/o Kasabkheda, Taluka - Khultabad
District - Aurangabad

VERSUS

1. Gangubai w/o deceased Uttam Kalawane RESPONDENTS
Age - 50 years, Occ - Household
R/o Maliwadgaon, Taluka - Gangapur
District - Aurangabad
2. Mohd. Abdul Samad s/o Mohd. Abdul Mabud
Age - 45 years, Occ - Business,
R/o Salim Manjil, Central Naka Road,
Jaswantpura, Aurangabad

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Mr. Fulchand R. Tandale, Advocate for the petitioner
Mr. Vinod I. Thole, Advocate for respondents No. 1 and 2

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 19th JULY, 2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. Petitioner - original plaintiff in Regular Civil Suit No. 6 of 2012 instituted primarily seeking declaration that sale deed dated 20th December, 2011 executed by defendant No. 1 in

favour of defendant No. 2 to be null and void, contending that in matrimonial dispute suit land had been given to defendant No. 1 who is wife of the plaintiff under a compromise and registered sale deed dated 28th August, 1989 had been executed accordingly. Plaintiff contends that it was a security transaction. However, thereafter, defendant No. 1 - wife had got her name mutated in respect of sold land and revenue record since then had been continuously in her favour. It is around 2012, as referred to above, she has executed sale deed in favour of defendant No. 2, which according to the plaintiff is without possession contending that he is still in possession of suit land. However, after sale deed has been executed in favour of defendant No. 2, his possession over suit land is getting disturbed and therefore, the suit ensued.

3. Plaintiff moved application Exhibit-76 to have issues framed with regard to tenancy and sending the same for adjudication to tenancy court claiming that there is sufficient basis for the same in the pleadings along with same claiming that defendant No. 2 is not an agriculturist, which also is a province of revenue authorities to be decided. Said application accordingly ought to have been decided and allowed, yet instead the same is rejected erroneously and, therefore, the writ

petition. Learned advocate submits, there is sufficient material showing claim is referable to the same.

4. On the other hand, it is the case of defendants that sale deed executed in favour of defendant No. 1 by plaintiff has been an absolute sale without any reservation and condition. Defendant No. 1 has been absolute owner and had been wielding such power accordingly. Her name has been entered into requisite revenue register and record. It is in her capacity as absolute owner she has parted with the property as absolute owner. It is further being referred to that mere bald statement with regard to tenancy is not sufficient to give rise to issues and rights to tenancy proceedings as observed under several judgments of this court. Learned advocate for the defendants submits, an issue arises out of pleadings and not by material. Even otherwise, there is no authentic material worth consideration lending credibility to claim being made. It is further being submitted that as far as other aspect is concerned, it is not the matter between defendants No.1 and 2. Defendant No. 1 has sold property in capacity of absolute owner to defendant No. 2. The questions sought to be raised are not the questions in respect of transaction among defendants No. 1 and 2. It is further being submitted that plaintiff has not chosen to challenge

authenticity and validity of sale deed executed by plaintiff in favour of defendant No. 1, way back in the year 1989. In the circumstances, title is indeed held by defendant No. 1 and in absence of challenge to 1989 sale deed, challenge to sale deed of 2011 is untenable and in all certainty would fail. It is further submitted that application Exhibit-76 had been moved at the stage of hearing and that too after matter has lingered on for hearing from quite a while. It is further referred to that trial court has observed that objection raised by the plaintiff has no nexus with the relief claimed. In the suit, claim is only in respect of declaration and permanent injunction.

5. During the course of submissions, learned advocate for the petitioner has referred to and relied on a decision of Supreme Court in the case of *“Pandurang Ramchandra Mandlik V/s Shantabai Ramchandra Ghatge and others”* reported in 1989 AIR 2240 in order to support his submission that whether a person is a tenant or not would be an issue to be decided by competent authority under tenancy act and civil courts would not have jurisdiction to decide on the same and shall refer the issue to competent authority.

6. However, one may have to give regard to the position as would be emerging from several judicial pronouncements.

Looking at the series of decisions on the point, particularly decisions of this court in the cases of "*Sadanand Vithal Naik and Others V/s Rashmi Dinesh Naik and Others*" reported in 2010 (4) ALL MR 83, and "*Mohammad Hayatkhan Karimkhan and Another V/s Taramati Sadhu Khindkar and Others*" reported in 2011 (2) Mh.L.J. 653 and the one which has been fairly referred to may be with an intention to support case of the petitioner, yet the decision referred to by petitioner in the case "*Rama Krishna Arolkar and Others V/s Kumud @ Kusum Yeshwant Bhobe and Others*" reported in 2015 (3) Mh.L.J. 949 do refer to that for framing of issues particulars for the same have to be given and if pleadings are short of the same, issue in that respect cannot be framed. These aforesaid judgments in turn refer to several other judgments of this court.

7. Perusal of the pleadings on either side, though statements as appearing in paragraph No. 7 and 8 and stated to be averments in respect of the same, yet requirements to frame an issue of tenancy do not appear to be contained in the same and can be said to be satisfied.

8. As such, it does not appear to be such a case wherein it can be said that trial court has committed any error in rejecting application Exhibit-76 filed at the stage of hearing.

9. In the circumstances, writ petition is not being entertained and is dismissed. Rule stands discharged. It is, however, made clear that observations hereinbefore made are for the purpose of rejection of writ petition and have no binding efficacy.

[SUNIL P. DESHMUKH, J.]

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