

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.**

APPEAL FROM ORDER NO.53 OF 2016

1. Prakash S/o Bhimashankar Khadke
Age : 51 years, Occu : Agril,
2. Pratap S/o. Bhimashankar Khadke,
Age : 47 years, Occu : Agril,
3. Mahendra S/o Bhimashankar Khadke,
Age : 43 years, Occu : Agril,
All R/o. Kolhar - Bhagwatipur,
Tq. Rahata, Dist. Ahmednagar

.. APPELLANTS

VERSUS

1. Vishwasrao S/o Shankarrao Dhumal,
Age : 70 years, Occu : Nil,
Administrative Director,
R/o. Cidco, Bandra, Cidco Bhavan,
New Bombay - 400 714.
2. Bhimashankar S/o Thakuji Khadke,
Age : 71 years, Occu : Nil,
R/o. Kolhar - Bhagwatipur,
Tq. Rahata, Dist. Ahmednagar
3. Smt. Narmada W/o Bhimashankar Khadke
Age : 63 years, Occu : Nil,
R/o. Kolhar - Bhagwatipur,
Tq. Rahata, Dist. Ahmednagar

.. RESPONDENTS

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Advocate for Appellants	:	Shri. R.R. Karpe
Advocate for Respondent No.1	:	Shri. G.G. Deshpande
Advocate for Respondent No.2	:	Shri.S.S.Gangakhedkar

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CORAM : P.R. BORA, J.

Dated: July 20, 2017

ORAL JUDGMENT :-

1. In the present appeal, the appellants have assailed the order passed by the District Judge - 1 Kopergaon in Regular Civil Appeal No.40/2006 on 28.08.2015, whereby the appeal has been dismissed filed against the order dated 23.08.2002 passed by Jt. Civil Judge, Jr. Division, Shrirampur in Regular Civil Suit No.17/1997. The parties to the resent appeal, hereinafter are referred to by their status in the civil suit.

2. The plaintiffs had filed the aforesaid civil suit seeking declaration that, the decision rendered by the Tahsilder in Tenancy Case No.15/1973 was *void ab initio* and without jurisdiction and hence not binding on the plaintiffs.

3. Record reveals that, the evidence was adduced by the plaintiffs in the civil suit. Thereafter the learned Civil Judge by recording a conclusion that, the proper remedy for the plaintiff was to prefer an appeal before Tenancy Tribunal, returned the plaint to the plaintiffs under Order - 7, Rule -10 of the Code of Civil Procedure to file it before the proper court. The aforesaid order was challenged by the plaintiffs by filing Reg. Civil Appeal No.40/2006 before the District Court. The learned District Judge after having considered the submissions advanced by the learned Counsel appearing for the parties, dismissed the appeal vide the order passed on 28.08.2015. Both the aforesaid orders are assailed by the plaintiffs in the present appeal.

4. Shri. Karpe, learned Counsel appearing for the appellants-

plaintiffs submitted that, the orders passed by the Courts below are apparently unsustainable in view of the law laid down by the full bench of this Court in the case of **Gopinath s/o Ganpatrao Pensalwar Vs. State of Maharashtra and another** reported in **[2007 (1) Mh.L.J.] 819**. The learned Counsel also placed reliance upon the Judgment delivered by the learned Single Judge of this Court in **State of Maharashtra Vs. Chintal Maisayya s/o Mallayya and others** reported in **[2011 (3) Mh.L.J.] 677**. The learned Counsel submitted that, when it was the specific contention of the plaintiffs in the civil suit filed by them that, the orders passed by the Tahsildar were *void ab initio* and without jurisdiction, plaintiffs were having every right to seek such declaration from the civil court and seek further declaration that, the said orders are not binding upon them. The learned Counsel submitted that, the trial Court has misconstrued the provisions and recorded a wrong conclusion that, the proper course for the plaintiffs was to prefer an appeal against the said decision before the Tenancy Tribunal. The learned Counsel further submitted that, the learned District Judge has also committed the same mistake of misinterpreting the relevant provisions, which has resulted in dismissal of the appeal filed by the plaintiffs. Relying upon the aforesaid Judgments the learned Counsel submitted for setting aside both the aforesaid orders and direct the Civil Court to decide the civil suit filed by the appellants – plaintiffs on its own merit.

5. Shri. G.G. Deshpande, the learned Counsel appearing for the defendants opposed the submissions made on behalf of the plaintiffs. The learned Counsel submitted that, vital admissions given by plaintiff in the cross examination led the court to record the aforesaid conclusion. The learned Counsel submitted that, unless the record & proceeding is called, the present appeal cannot be decided. The learned Counsel submitted

that, the trial Court after having considered the pleadings has rightly passed an order returning the plaint holding that, the proper remedy for the plaintiffs was to file an appeal before the Tenancy Tribunal. The learned Counsel submitted that, no error has been committed by the trial Court and hence prayed for dismissal of the appeal. The learned Counsel further submitted that, in fact, Regular Civil Appeal No.40/2006 preferred by the plaintiffs was not maintainable and could not have been entertained by the District Court, however ultimately the same has been rejected by the Court and the order passed by the trial Court has been confirmed, which does not require any interference.

6. After having considered the submissions advanced by the learned Counsel appearing for the respective parties, in light of the judgments relied upon by the learned Counsel for the appellants, apparently it appears to me that, the impugned order passed by the learned Civil Judge, Jr. Division which has been confirmed by the District Court may not be sustained. When it was the contention of the plaintiffs that, the order passed by the Tahsildar in Tenancy Case No.15/1973 was *void ab initio* and without jurisdiction and hence was not binding on the plaintiffs, the Civil Court was expected to record a finding on the objection so raised and could have been recorded a finding either way on the basis of the evidence, which may have been brought before the said court and of course after having considered the relevant legal provisions in that regard. In view of the law laid down by the Full Bench of this Court in the matter of **Gopinath s/o Ganpatrao Pensalwar Vs. State of Maharashtra and another** (cited supra), it is evident that, if an allegation is made that, order passed by the authority is without jurisdiction, the Civil Court will have jurisdiction in such matters. In the Judgment delivered by the learned Single Judge in **State of**

Maharashtra Vs. Chintal Maisayya s/o Mallayya (supra), the same view has been reiterated stating that, when the illegality in the action is alleged and the some relief is sought, the suit cannot be said to be non - maintainable merely because an appeal is provided against such act.

7. Having considered the law laid down in the aforesaid Judgments, the decisions rendered by both the Courts below cannot be sustained and deserve to be set aside and are accordingly set aside.

8. The Civil Judge shall expeditiously decide the matter on its own merit by giving due opportunities to the parties concerned.

9. The appeal stands allowed in the aforesaid terms.

10. Pending Civil application, if any, stands disposed of.

(P.R. BORA, J.)

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