

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

SECOND APPEAL NO. 97 OF 2017

Laxmibai W/o. Pandurang Wagh

... Appellant
(Orig. defendant)

VERSUS

Kalawatibai W/o. Sahebrao Ubale & Anr.

... Respondents
(Orig. plaintiffs)

.....

Mr S. A. Dhengle, Advocate for the appellant
Mr G. C. Navandar, Advocate for respondents No. 1 & 2

.....

CORAM : A. M. DHAVAL, J.
DATE : 27TH NOVEMBER, 2018.

PER COURT :-

1. This is an appeal by the original defendant. Both the parties herein are the three real sisters and the daughters of Niloba Bhutekar, who was admittedly protected tenant of the suit land in Gut No. 186, adm. 2H 51R at village Nhava, Dist. Jalna. He died on 09.03.1988 and his wife who was cultivating the suit land died shortly thereafter. The plaintiffs filed suit contending that, the defendant Laxmibai was residing in the same village and was cultivating the suit land but she was giving shares to them. Thereafter she stopped giving shares to them and therefore the plaintiffs filed suit for partition.

2. The defendant - Laxmibai admitted the relationship but claimed that, her father had bequeathed the tenancy rights in the suit property by way of will. The Landlord has taken out proceedings against her as a tenant in which the plaintiffs were not made parties. The tenancy proceedings were pending.

3. The trial Court held that the suit was barred by Section 99 of the Hyderabad Tenancy & Agriculture Lands Act, 1950 (hereinafter referred to as "HT&AL Act"). The suit was therefore dismissed. The plaintiffs preferred RCA No. 52/2010 before the District Court, Jalna. Learned Ad-hoc District Judge-3, Jalna, did not specifically frame the points for his determination. He only framed the points for determination as to whether the decision of the trial Court needs any interference. He answered it in the affirmative. He relied on the decision of the Dy. Collector rendered under the HT&AL Act dt. 25.04.2007, whereby the defendants claim for tenancy, was rejected. He therefore allowed the appeal, set aside the judgment of the trial Court and granted decree for partition and separate possession of 1/3rd share each.

4. On hearing learned counsel for the parties, the appeal is

admitted on the following substantial question of law.

“Whether both the courts below erred in not following the provisions of Section 99A of the HT&AL Act?”

5. By consent, the matter is taken up for final hearing at admission stage.

6. As per the admitted facts, Niloba, the father of the plaintiffs and of the defendant was the protected tenant. In normal course, three daughters would have inherited his interest in the suit property as a tenant by virtue of Section 40 of HT&AL Act.

7. The definition of 'tenant' will not only include the tenant but also include after his death, the person who is entitled to tenancy rights. Section 40 lays down that, where a tenant dies, the land holder shall be deemed to have continued the tenancy. Sub-clause (b) of said Section lays down that, if such tenant was not a member of an undivided Hindu family, continuation of tenancy will be to his heirs on the same terms and conditions on which such tenant was holding it at the time of his death. Now the issue before the trial Court was whether Laxmibai would be the sole legal heir by virtue of the alleged will executed in her favour by her father. The second

issue was; whether said will was duly proved. The plaintiffs had filed suit for partition and delivery of separate possession. The civil court has jurisdiction to consider the case of partition and separate possession. The competent authority under the HT&AL Act has no jurisdiction to pass a decree for partition and separate possession. Therefore, the dismissal of the suit on the ground that civil court has no jurisdiction by the trial Court is not sustainable. However, in the situation, the questions involved are required to be settled, decided or dealt with by the competent authority under the HT&AL Act as to whether the tenancy can be bequeathed by the tenant to anybody or to any of the legal heirs or whether after the demise of Niloba, all the three sisters would inherit the tenancy rights? This issue, as per Section 99A, was required to be referred to the Tenancy Court. Section 99A reads as follows:

S. 99A. Suits involving issues required to be decided under this Act.:-

- (1) If any suit instituted in any Civil Court involves any issues which, are required to be settled, decided or dealt with by any authority competent to settle, decided or deal with such issues under this Act (hereinafter referred to as the "competent authority") the Civil Court shall stay the suit and refer such issues to such competent authority for determination.
- (2) On receipt of such reference from the Civil Court, the competent authority shall deal with and decide such issues

in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

8. Neither the trial Court nor the first appellate Court has followed this procedure. Reference to the Tenancy Court u/s 99A by a Civil Court when any issue regarding the tenancy requires to be decided, dealt with or settled by the competent authority under the HT&AL Act is mandatory, the Civil Court has no jurisdiction. Both the courts below could not have decided the said issue of their own.

9. The first Appellate Court relied on one judgment of revenue authorities to hold that the present appellant (orig. defendnat) has failed to prove her tenancy but the ld. advocate for the appellant - Mr. Dhengale submitted that the dispute is still pending and the Maharashtra Revenue Tribunal, Aurangabad Bench, in Revision No.7/B/2016/Jalna has remanded the matter to the Dy. Collector.

10. The tenancy proceedings presently pending will not be a substitute for reference by Civil Court to the Tenancy Court as contemplated under Section 99(A) for the simple reason that the plaintiffs herein are not parties therein. They had no right to contest the claim of defendant regarding the execution of will by their father. It was therefore necessary that the issue should have been framed

about exclusive tenancy claimed by the defendant Laxmibai and the same should have been referred u/s 99(A) to the competent authority. Since this has not been done, the judgment of the trial Court needs interference whereas, the first appellate Court has relied on a decision which had not attained a finality. The matter is still pending, therefore, it cannot be said that the claim of exclusive tenancy raised by the defendant was without any substance. No judgment has been cited before me to show that the point involved regarding bequeath of interest in tenancy rights by the tenant to one of the legal heirs has been decided by the Apex Court or this Court. In this situation, I answer the substantial question of law framed by me in the affirmative and allow the appeal and pass the following order.

ORDER

- (i) The Second Appeal is partly allowed.
- (ii) The impugned judgments of both the courts below are set aside. The suit is remanded to the trial Court with direction to number it at the same number, frame the issue regarding the exclusive tenancy of the defendant by virtue of alleged will and regarding the proof of will and refer the issue u/s 99(A) of the HT&AL Act to the competent authority. After the Tenancy Court

gives finding and in case of challenge to the same when it attains finality, the trial Court shall proceed to decide the suit on the basis of such findings.

(iii) In view of the above, as per Section 15 of the Maharashtra Court Fees Act, the appellant (orig. defendant) is entitled for refund of court fees.

(iv) The parties are directed to appear before the trial Court on 17.12.2018.

[A. M. DHAVAL]
JUDGE

Punde