

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

913 WRIT PETITION NO. 3808 OF 2017

TULASHIRAM S/O BHAURAO BORASE AND ANOTHER
VERSUS
DEPUTY SUPERINTENDENT OF LAND RECORD, KHULATABAD
AND OTHERS

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Advocate for PetitionerS : Mr. Tandale Fulchad R.
AGP for Respondent-State : Mr. S. P. Tiwari
Advocate for Respondent No. 2 : Mr. S. M. Kshirsagar
Advocate for Respondent No. 3 : Mr. S. B. Patel

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CORAM : V. K. JADHAV, J.
DATED : 15th FEBRUARY, 2018

PER COURT:-

1. Heard the matter finally with consent at admission stage.
2. The petitioners-plaintiffs have instituted a suit for recovery of possession in respect of the suit property. The respondent-defendants have strongly resisted the suit by filing their written statement. In the pending suit the respondent no.3-original defendant no.3 has filed an application Exhibit 21 under Section 9-A of the Civil Procedure Code for framing preliminary issue of jurisdiction. Respondent-defendant no.3 has pointed out in the

said application that as per the pleadings of the plaintiffs, a relief is sought to correct and verify the record which was prepared under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short, “the Act of 1947”), and also sought a relief that the consolidation officer may be directed to correct the said mistake and hand over possession of the land ad-measuring 51 R from the suit property. In the said application, certain provisions of the Act of 1947 have been brought to the notice of the Court which create a bar of jurisdiction of the Civil Court to entertain and deal with such an issue, which, under the provisions of the aforesaid Act, is required to be dealt with and decided by the State Government/any officer or authority appointed by the State Government under the said Act of 1947. The present petitioners-plaintiffs have strongly resisted the said application. It is the contention of the petitioners-plaintiffs that they are ready to carry out necessary amendment in the plaint and if such amendment is permitted, the very purpose of filing the application under Section 9-A of the Civil Procedure Code would be rendered meaningless. The learned Judge of the trial court, by the impugned order dated 21.06.2016, has allowed the said

application Exhibit 21 and so far as the application Exhibit 24 seeking amendment in the plaint is concerned, passed the order to keep the said application for decision after the application Exhibit 21 under Section 9-A of the Civil Procedure Code is decided. Hence this Writ Petition.

3. The learned counsel for the petitioners submits that in view of the provisions of Section 36-B of the Act of 1947, even in a suit, if such an issue is raised, the Civil Court or the Mamlatdar's Court shall refer such issue for determination to the authority competent to settle, decide or deal with the same. The learned counsel submits that in that way, there is no absolute bar to exercise jurisdiction by the Civil Court and the order impugned is thus, incorrect, improper and illegal. The learned counsel submits that the petitioners being the plaintiffs, can file an application under Order VI Rule 17 of the Civil Procedure Code for amendment at any stage of the proceedings. In the instant case, the trial is yet to be commenced and thus, the petitioners-plaintiffs have every right to amend the plaint if the proposed amendment does not change the nature of the suit. The learned counsel submits that in the instant case, the trial court has not

carried out said exercise to find out whether the proposed amendment can be allowed, but kept the said application in abeyance illegally.

4. The learned counsel appearing for the respondents submit that as per the pleadings, the suit itself is not maintainable for the reason that the Civil Court has no jurisdiction to deal with the issue as raised by the plaintiffs in view of certain provisions of the Act of 1947. The learned counsel submit that in view of the State amendment in the form of Section 9-A of the Civil Procedure Code, it is incumbent upon the Civil Court to decide the issue of jurisdiction as a preliminary issue. If such an amendment is permitted before deciding the application under Section 9-A of the Civil Procedure Code, the very purpose of filing the application would be defeated.

5. On careful perusal of the impugned order dated 21.06.2016 passed below Exhibit 21, it appears that by referring to the provisions of the Act of 1947, the trial court has thought it fit to decide the issue of jurisdiction as a preliminary issue and the same is in consonance with the provisions of Section 9-A of

the Civil Procedure Code. If such objection is raised by other side precisely under the provisions of Section 9-A of the Civil Procedure Code, it is incumbent upon the Civil Court to decide the said issue as preliminary issue. It is also well settled that the court is not precluded from entertaining any other application seeking any interim relief. However, in the instant case, since the proposed amendment is nullifying the effect of application Exhibit-21 filed under Section 9-A of the Civil Procedure Code, the trial court has rightly said that the application Exhibit 24 would be considered after deciding the issue of jurisdiction. It is to be noted here that in view of provisions of Section 36-B, the Civil Court is not precluded from exercising jurisdiction in its entirety and in appropriate case the Civil Court may refer the issue to the authority under that Act having jurisdiction to deal with the same. Since the trial court has only allowed application Exhibit-21, the petitioners are always at liberty to point out to the trial court the provisions of Section 36-B and to submit that the Civil Court has jurisdiction to entertain the suit by referring such an issue to the concerned authority as provided under Section 36-B of the Act of 1947.

6. The learned counsel for the petitioners placed reliance on a decision in the case of *Pramod s/o Manoharrao Konge vs Shantaram Balkrushna Dhok*, reported in **2017 (3) Mh.L.J. 233**. However, in the said case, the question of rejection of the plaint as provided under Order VII Rule 11(a) is considered and accordingly, this Court has held that pending such an application, if an application seeking amendment in the plaint is filed, the same requires to be considered before rejection of the plaint. In view of the same, the above cited case cannot be made applicable to the facts and circumstances of the present case.

7. In view of the above, I find not substance in the Writ Petition. Hence, I pass the following order:

The Writ Petition is hereby dismissed. No costs.

(V. K. JADHAV, J.)

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