IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10705 OF 2017

Abdul Faijubhai Shaikh and others ...Petitioners

versus

Subhan Kamubhai Shaikh and others ...Respondents

.....
Mr. A.P. Bhandari, advocate for the petitioners
Mr. S.P. Chapalgaonkar, advocate for respondent Nos. 1 to 6
.....

CORAM : V. K. JADHAV, J.

Date of Reserving the Order : 24.04.2018

Date of pronouncing the Order: 03.05.2018

O R D E R:-

1. By consent of parties, heard finally at admission stage.

2. Being aggrieved by the order date 25.05.2017 passed by the learned Joint Civil Judge, Junior division, Rahata below Exh.1 in Regular Civil Suit No. 544 of 2014 the petitioners-original defendant Nos. 1 to 3 have preferred this writ petition.

3. Brief facts giving rise to the present writ petition are as follows:-

a) The respondent Nos. 1 to 6 herein filed Regular Civil Suit No. 544 of 2014 thereby praying for relief of partition and separate possession in respect of the landed property bearing Gat No. 266 admeasuring 2 Hector 21 R situated at Pimplas, Tq. Rahata, District Ahmednagar and Gat No. 324/13 ad-measuring 9R situated at Rahata, District Ahmednagar. The plaintiffs and defendants are brothers and sisters and they claim share in the suit properties. The petitioners resisted the suit by filing written statement. The petitioners had also filed application Exh.31 praying for framing issue of jurisdiction as preliminary issue, in view of the fact that suit properties are not properly valued and valuation will ultimately affect the jurisdiction of the court. The learned Judge of the trial court, by order dated 8.12.2015 has been pleased to frame the preliminary issue of jurisdiction, in relation to valuation of the property. The petitioners herein have also examined a clerk in the office of Sub Registrar, Rahata viz. Anil Jagdhane, who has pointed out the rate of the property.

b) The petitioners have also produced on record copy of ME No. 22913, which clearly indicates that as per Gunthewari scheme, residential use of property bearing survey No. 324/13 is regularized by the order of Chief Executive Officer. Furthermore, the petitioners have also produced on record Index-II of various transactions in respect of the property. The Municipal Council, Rahata, on 7.7.2011, has also granted construction permission to the petitioners. The petitioners have placed on record an occupancy certificate and ready reckoner valuation of the property. By order dated 17.2.2016, the learned Judge of the trial court held that valuation of the property made by respondent Nos. 1 to 6 is incorrect. The learned Judge further held that the court has jurisdiction to try and decide the suit.

c) The petitioners being aggrieved by the order dated 17.2.2016, as aforesaid, filed writ petition No. 3984 of 2016 in this Court and this court by order dated 20.1.2017 allowed the said writ petition and remitted the matter back for fresh consideration. After remand, vide impugned order dated 25.05.2017, the learned Judge of the trial court held that the property need not be valued for non agricultural use and that the valuation will not affect the jurisdiction. Hence this Writ Petition.

4. The learned counsel for the petitioners/original defendants submits that the impugned order is passed on the basis of assumptions and presumptions, conjectures and surmises and hence deserves to be quashed and set aside. The learned judge of the trial court has flouted the cardinal principles of civil jurisprudence and settled position of law in rejecting the application filed by the

petitioners. The learned judge of the trial court has failed to consider the observations made by this Court while remitting back the proceedings. The learned counsel submits that it is settled position of law that the evidence need not be pleaded. The learned judge, while passing the impugned order, is pleased to observe that there is no pleading regarding non agricultural use of the property as per the evidence on record. The learned counsel submits that it has been specifically spelt out in the written statement that the property is not properly valued. The evidence is also led to that effect. In such circumstances, the observation of the court below that there is no pleading is not sustainable in the eyes of law.

5. The learned counsel further submits that the suit is instituted for partition and separate possession. The suit property was put to non-agricultural use in the year 2011 i.e. prior to filing of the suit and this fact is unequivocally established by the documents on record. The respondents/plaintiffs have also not led any evidence to contradict the facts brought on record by the petitioners. While passing the impugned order, the learned judge made a reference to the subsequent revision of lay-out, however, the fact that the property was put to non agricultural use prior to filing of the suit is not denied. The learned counsel submits that in view the provisions of Section 6 (v), (vi) and (vii) of the Maharashtra Court Fees Act (Act No. 36 of

1959), market value of the land is required to be considered to the extent of the party claiming share in the property and the respondents/plaintiffs are duty bound to pay the court fees in relation to the alleged share claimed by them in respect of the property. In such circumstances, when it is established on record that the construction on the property was regularized in the year 2010 itself, the valuation of construction also needs to be considered. The assessment for the purpose of payment of tax in respect of the suit property is @ Rs.1,23,553/- and in view of the said assessment, appropriate valuation needs to be done. The learned counsel submits that the provisions of Sections 8 and 10 of the Act No. 36 of 1959 empowers the court to initiate inquiry and depute the commissioner for determination of valuation of the property. However, though the learned judge has recorded a *prima facie* finding that the valuation of property is not correctly done, the learned judge has not adopted the procedure as contemplated by the said provisions. Non adoption of the said procedure amounts to failure to exercise jurisdiction. The learned counsel submits that the property bearing Survey no. 134/13 is put to non-agricultural use in the year 2010 itself and that is the reason why the provisions regarding Gunthewari regularization are applied by the Municipal council and the construction is regularized. Furthermore, the construction permission was granted in the year 2011 itself. In such circumstances, valuation of the property ought to have been for entire construction over the property and not for the land only.

6. The learned counsel also submits that the jurisdiction of the court is dependent on valuation. The suit is presently pending before the learned Civil Judge, Junior Division and in case the valuation is corrected, the same would lie before the Civil Judge, Senior Division. Therefore, as the entire issue affects the jurisdiction of the court, the same deserves to be considered in writ jurisdiction of this Court. The learned counsel thus submits that the impugned order is illegal and suffers from perversity and the same may be quashed and set aside.

7. The learned counsel for the petitioners, in order to substantiate his contentions, placed reliance on the following two cases:

1. **Writ Petition No. 1659 of 2005 (Smt. Tarabai Bhausaheb Deokar vs Jaywant Mahepati Balwadkar & Ors.)** decided on 15.12.2009 by this Court at its Principal Seat at Bombay (Coram : Abhay S. Oka, J.) and

2. **Civil Appeal No. 2758 of 2013 (Santosh Ramchandra Tadsare vs Subhash Ramchandra Gujjar & Ors.)** decided by the Supreme Court on 18.03.2013.

8. The learned counsel for the respondents/plaintiffs submits that the provisions of Act No. 36 of 1959 do not make out any difference in the agricultural land and non agricultural land. Section 6(vii) read with Section 6(v) of the said Act talk only about land and no such particulars have been added. Such differentiation in the use of land cannot be a criterion to value the said land. He further submits that the sanctioned lay-out dated 07.07.2011 will have no value in view of subsequent sanctioned layout dated 14.01.2015 and in view of the admissions made by defendant no.3. The learned counsel submits that the petitioners/defendants have produced two different sanctioned lay-outs on record. However they are relying only on the earlier sanctioned layout dated 07.07.2011 given by the Municipal Council, Rahata. Immediately thereafter, there is one another sanctioned layout dated 14.01.2015 - exhibit 78 which has been admitted by defendant no.3 in his cross-examination. The learned counsel submits that in view of the sanctioned layout dated 07.07.2011, subsequent sanctioned layout dated 14.01.2015, the occupancy certificate and the admissions made by defendant no.3 in his cross-examination, the trial court has rightly held that it cannot be stated that the construction was completed even prior to filing of the present suit on 25.09.2014. The trial court has rightly held that the suit will have to be valued in terms of Sections 6(vii), 6(v) and 6(iv)(j) and more particularly Section 6(v)(b) of Act No. 36 of 1959 and not

as per the market value as contended and argued by the petitioners/defendants. No interference is required and the Petition is liable to be dismissed.

9. I have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, I have perused the pleadings, grounds taken in the petition and the annexures thereto.

10. Respondent nos. 1 to 6-original plaintiffs have instituted the suit bearing R.C.S. No. 544 of 2014 for partition and separate possession in respect of two properties. The petitioners/defendants have raised the dispute of valuation of the property only in respect of the suit land as detailed in para 1B of the plaint i.e. the land bearing Gat No. 324/13 ad-measuring 0.9 R situated at village Rahata. Initially, the trial court, by order dated 17.02.2016, has held that the court has pecuniary jurisdiction to try and decide the suit, however, directed the plaintiffs to correct the valuation clause as per the observations made in the order. Being aggrieved by the same, the petitioners herein preferred Writ Petition No. 3984 of 2016.

11. By order dated 20.01.2017, this Court (Coram : S. B. Shukre, J.) has disposed of Writ Petition No. 3984 of 2016 with the following observations in para nos. 2 and 3 of the order:

> *“2. It is seen from the impugned order that the learned Civil Judge has not considered appropriately the effect of regularisation order dated 5/3/2010 and the permission granted for construction, dated 7/7/2011 in their proper perspective. If the regularisation is done and sanction to make construction on the property is also accorded, the property which has already lost its character as an agricultural land would gain in its valuation, manifold. The regularisation order dated 5/3/2010 clearly states that the property in question was converted into non-agricultural user w.e.f. 5/3/2010. The learned Civil Judge, however, has not considered this material fact in determining the valuation of the property and relied upon the revenue assessments, which in fact were irrelevant at a time when the property lost its agricultural character. The matter, therefore, deserves to be remanded back for fresh consideration in accordance with law.*
>
> *3. In the result, the Writ Petition is allowed. The impugned order is quashed and set aside. The matter is remanded back to the learned Civil Judge for fresh consideration and decision in accordance with law within three months from the date of receipt of this order. Rule is made absolute in above terms. No costs.”*

12. This Court has observed that if the regularisation is done and sanction to make construction on the property is also accorded, the property which has already lost its character as an agricultural land

would gain in its valuation, manifold. The regularisation order dated 05.03.2010 clearly states that the property in question was converted into non-agricultural user w.e.f. 05.03.2010. The learned Civil Judge, however, has not considered this material fact in determining the valuation of the property and relied upon the revenue assessments, which in fact were irrelevant at a time when the property lost its agricultural character. This Court has accordingly remanded the matter back to the trial court for fresh consideration in accordance with law. After remand, the trial court has passed the impugned order dated 25.05.2017. The learned Judge of the trial court has passed the same order and held that the trial court has pecuniary jurisdiction to try and decide the suit and the plaintiff shall correct their valuation clause as per the observations in the order.

13. The trial court has relied upon the ratio laid down by this Court in the case of ***Tarabai Bhausaheb Deokar vs Jaywant Mahepati Balwadkar & Ors***. alongwith connected Writ Petitions (supra), relied upon by the learned counsel for the petitioners. The trial court, in para 14 of the impugned order, has observed that the ratio in the aforesaid case is clear enough and in view of the same, the valuation of such land, though it is put to agricultural or non-agricultural use, has to be done as per Section 6(v) sub-clauses (a), (b) or (c). Now these clauses deal with the valuation as per the survey assessment

and they do not speak about marked valuation of such land as time and again submitted, argued and deliberated by the learned advocate for the defendants. Indeed, the suit land 1B has been put to non agricultural use as per the said order dated 05.03.2010 and its prices may have increased, but such non agricultural use cannot be the criteria to value this suit land 1B in view of the ratio cited supra. Hence, the submissions in respect of increase in the valuation of the land due to non agricultural use do not survive.

14. On careful perusal of the order passed by this Court (Coram : Abhay S. Oka, J.) in the case of ***Tarabai Bhausaheb Deokar vs Jaywant Mahepati Balwadkar & Ors***. (supra), it appears that this Court had an occasion to deal with two groups of Writ Petitions;

(1) in Writ Petition Nos. 3182,3183 and 3187 of 2008. The lands subject matter of the suit are plots carved out of the larger land which was admittedly an agricultural land assessed to payment of land revenue. The finding of the trial court is that the plots were converted for non-agricultural use. In the result, the petitioner is claiming to be the owner of the suit lands. The petitioner is claiming to be in possession thereof. The substantive prayer in the suit is of a perpetual injunction restraining the respondents from interfering with the possession of the petitioner. The prayer in the alternative is for passing a decree for possession in the event it is found that the

respondents are in possession. In the remaining two suits, a prayer is also incorporated, in the alternative, for removal of the encroachment allegedly made by the 4th respondent. This Court has observed that, therefore it can be stated that the substantive prayer is for perpetual injunction and the prayer made in the alternative is for a decree of possession and the court fee will be payable on the higher of the two alternative claims and

(2) in the suit subject matter of the Writ petition No. 1659 of 2005, the first prayer is for declaration that the deed of release dated 02.06.2003 executed by the petitioner in favour of the first respondent is illegal, null and void and not binding on the petitioner and the second prayer is for partition and separate possession of the petitioner's share in the suit property. The third prayer is for perpetual injunction. The suit property comprises of agricultural lands which are subject to payment of land revenue. There is no declaration claimed in respect of the property.

15. So far as the first group of Writ Petitions is concerned, in para 16 of the order, this Court (Coram: Abhay S. Oka, J.) has made the following observations:

> *“16. Hence, in a suit for possession of the land which is assessed to payment of land revenue under the Revenue Code, irrespective of the fact whether it is put to*

agricultural or non-agricultural use, the valuation for the purposes of court fees will be governed by clauses (a), (b) or (c) of Section 6(v) of the said Act of 1959."

However, turning to the other Writ Petition, in para 19 of the order, this Court (Coram: Abhay S. Oka, J.) has made the following observations:

"19. Now turning to Writ Petition No. 1659 of 2005, the first prayer is that the deed of release executed by the petitioner is null and void and is not binding on the suit property. Therefore, the declaration claimed is as regards right or title in respect of immovable property. Hence, the said prayer will be governed by section 6(iv)(d) of the said Act of 1959. The second prayer for partition will be governed by section 6(vii). The third prayer for perpetual injunction is a prayer consequential to the first prayer for declaration. The learned trial Judge has committed illegality by holding that section 6(iv)(ha) of the said Act of 1959 will apply. It is true that the valuation of the suit in so far as it relates to first prayer needs modification. Therefore, the petitioner will have to be directed to value the suit properly. After the petitioner values the suit, the valuation will be no doubt subject to scrutiny of the trial court."

16. It appears that the trial court, in its impugned order, has considered the observations made by this Court in respect of the first

group of Writ Petitions wherein the valuation is considered in respect of the suit claiming possession of the land.

17. in view of the above, it is necessary to reproduce the provisions of Section 6(vii) of the Act of 1959, which are relevant for the present discussion. Section 6(vii) of the Act of 1959 reads as under:

> "**6 Computation of fees payable in certain suits**
>
> The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:
>
> (i) to (vi) …..........
>
> **(vii) for share in joint property**
>
> In suits for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property whether or not the plaintiff is in actual or constructive possession of the property of which he claims to be a co-parcener or co-owner according to the value of the share in respect of which the suit is instituted;
>
> Explanation.- For the purposes of this paragraph, if the property in which a share is claimed consists of or includes any land assessed to land revenue for the purposes of agriculture, the value of such land shall be deemed to be the value as determined under paragraph (v) of this section;"

In terms of the explanation provided to clause (vii) of Section 6, the provisions of Section 6 clause (v) are also required to be reproduced, which are as below:

> “**6(v) for possession of lands, houses and gardens**
>
> In suits for the possession of land, houses and gardens according to the value of the subject-matter; and such value shall be deemed to be, where the subject-matter is a house or garden according to the market value of the house or garden and where the subject-matter is land, and-
>
> (a) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government a sum equal to forty times the survey assessment;
>
> (b) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government a sum equal to eighty times the survey assessment; and
>
> (c) Where the whole or any part of the annual survey assessment is remitted a sum computed under sub-paragraph (a) or sub-paragraph (b) as the case may be, in addition to eighty times the assessment or, the portion of assessment, so remitted;”

18. In terms of the provisions of Section 6(vii), in a suit for partition and separate possession of a share of joint family property, the amount of court fee payable shall be computed according to the value of share in respect of which the suit is instituted. In terms of the explanation provided to clause (vii) Section 6, if the property in which a share is claimed consists of or includes any land assessed to land revenue for the purposes of agriculture, the value of such land shall be deemed to be the value as determined under para (v) of this Section. In terms of para (v) of Section (6), in a suit for possession of the land, the amount of court fees shall be computed in terms of clauses (a) to (c) of para (v) of Section 6.

19. In the instant case, the trial court has committed an error by observing in para 22 of the impugned order that clause (b) of Section 6(v) of the said Act will be applicable for valuation of the suit land 1B and the plaintiffs will have to value the suit accordingly and not as per the market value as contended and argued by the defendants.

20. In the case of ***Santosh Ramchandra Tadsare vs Subhash Ramchandra Gujjar & Ors.*** (supra), the Supreme Court, after reproducing the provision of Section 6(v) and 6(vii) of the Act of 1959, has made the following observations:

"A reading of the above-reproduced provisions make it clear that in terms of the explanation appearing below Section 6(vii), the value of the land assessed to land revenue for the purpose of agriculture shall be deemed to be the value as determined under Section 6(v).

If the land sold by respondent No.2 to the appellant was agricultural, then the view taken by the trial Court and the learned Single Judge cannot be faulted. However, the averments contained in paragraphs 2, 4, 5 and 6 of the plaint leave no manner of doubt that despite the assertion of respondent No.1 that the suit property continues to be agricultural, it is clear that the same had already been converted into non-agricultural. The statement contained in paragraph 5 of the plaint unmistakably shows that respondent no.2 had converted the suit property from agricultural to non-agricultural and the same was sold to the appellant as non-agricultural property. If that was not so, the competent authority would not have given permission to the appellant to raise construction over the suit property.

In the premise aforesaid, we hold that the trial Court and the High Court committed grave error by holding that the valuation of the suit property done by the respondent No.1 was correct and the trial Court had the jurisdiction to entertain the suit.

In the result, the appeal is allowed, the impugned order as also the one passed by the trial Court are set aside and the matter is remitted to the trial Court for deciding the issue of jurisdiction afresh after requiring

> *respondent No.1 to pay court fees keeping in view the fact that suit property was non-agricultural.......”*

21. In the instant case, while disposing of the earlier Writ Petition bearing Writ Petition No. 3984 of 2016, this Court (Coram: S. B. Shukre, J.), by order dated 20.01.2017 has specifically observed that the regularisation order dated 05.03.2010 clearly states that the property in question was converted into non-agricultural user w.e.f. 05.03.2010 and the learned Civil Judge, however, has not considered this material fact in determining the valuation of the property and relied upon the revenue assessments, which in fact were irrelevant at a time when the property lost its agricultural character. Though the suit lands have been converted for non-agricultural use, the trial court has given unnecessary weightage as to when the construction was completed or whether it was prior to filing of the present suit on 25.09.2014 ignoring the sanctioned plan dated 07.07.2011.

22. In the result, the Writ Petition deserves to be partly allowed. This Court is left with no other alternative but to remand the matter again to the trial court for deciding the issue of jurisdiction afresh after requiring the respondents/plaintiffs to pay the court fees, keeping in view the fact that the suit property is a non-agricultural property. Hence the following order:

ORDER

I. The Writ Petition is hereby partly allowed. No costs.

II. The matter is remitted to the trial court for deciding the issue of jurisdiction afresh, after requiring the respondents/plaintiffs to pay the court fees keeping in view the fact that the suit land is a non-agricultural property.

III. The Writ Petition is accordingly disposed of.

(V. K. JADHAV, J.)

vre/