

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION No. 486 OF 2013

Ashok Rajaram Pise & Anr. ... Applicants
Vs.
Sunil Bhujangrao Pise & Ors. ... Respondents

Mr. Shriram S. Kulkarni, Advocate for the applicants.
Mr. S.M. Oka i/b. Sagar Joshi, Advocate for the respondents.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 9th July, 2018.

P.C.:

This Civil Revision Application is directed against the order dated 26th March, 2013 passed by the 2nd Joint Civil Judge Junior Division, Baramati below Exhibit 122 in Regular Civil Suit No. 255 of 2010. On Application Exhibit 122 filed by the defendant nos. 1 and 2, the preliminary issues on the ground of maintainability of the suit were framed as follows:

- (i) Whether the suit is barred by Order 2 Rule 2 of Code of Civil Procedure in view of earlier suit bearing R.C.S. No. 434 of 1985?
- (ii) Whether the instant suit is maintainable in view of pleadings and judgment in Regular Civil Suit No. 161 of 1985?

The trial Court answered both the issues in negative and dismissed

the Application of the defendants giving challenge to maintainability of the suit. Hence, this Civil Revision Application.

2. The applicants are the defendant nos. 1 and 2 and the respondent no. 1 is his cousin. Earlier the respondent no. 1/original plaintiff, whose father Bhujangrao Pise has filed Regular Civil Suit No. 434 of 1985 for injunction against the father of the applicants. In the suit for injunction, it was stated by the father of the respondent no. 1/plaintiff that a partition has taken place between the parties in the year 1970 and on the basis of that partition, he sought injunction and the defendants not to encroach upon his land. The suit was dismissed. Thereafter the respondent no. 1 filed Regular Civil Suit No. 255 of 2010 for partition, declaration and injunction. In the said suit, the Application on the ground of maintainability was challenged.

3. The learned counsel Mr. Kulkarni appearing for the applicants/defendant nos. 1 and 2 has submitted that he is not pressing the first issue of Order 2 Rule 2 of CPC but he is pressing the issue of maintainability on the ground that the suit is barred under Order 7 Rule 11(d) of Code of Civil Procedure where the suit appears from the statement in the plaint to be barred by any law. The learned

counsel has submitted that father of the respondent no. 1/plaintiff has filed the suit for injunction based on the averments of partition. He relied on the averments made in the plaint of R.C.S. No. 434 of 1985. Similarly, the admissions given by the plaintiff's father in the cross that the suit land was partitioned in 1970. He submitted that once the respondent no. 1/plaintiff has taken a stand in one suit that the suit property was partitioned in 1970 and now he cannot file the present suit for partition and take a contradictory stand to his earlier statement. The learned counsel has submitted that the suit is barred under the principle of estoppel. In support of his submissions, he relied on the following decisions:

- (i) Judgment of Single Judge of this Court in the case of Mario Shaw vs. Martin Fernandez & Anr., reported in 1996 (1) Mh. L.J. 564.
- (ii) Judgment of the Supreme Court in the case of Jai Kishan vs. Mumtaz Begum, reported in (1984) 4 SCC 623.
- (iii) Judgment of Single Judge of this Court in the case of Rajaram Bhau Kadam & Ors. vs. Babu Shankar Kadam & Anr., reported in (1976) 1 Mh. L.J. 425.

4. The learned counsel for the respondent supported the order passed by the learned trial Judge and has argued that the suit cannot be barred under the estoppel which is defined under Section 115 of the Evidence Act. The learned counsel has submitted that in view of Section 115, the applicants have not acted upon the statement and therefore, it is not barred under the issue of estoppel.

5. I have gone through all these three judgments, which are culled out as follows:

In the case of **Mario Shaw** (*supra*), the disputant has withdrawn unconditionally his application from the Cooperative Court on the ground that it has no jurisdiction and filed proceedings before the Competent Authority under the Bombay Rents, Hotels and Lodging House Rates Control Act. In the Revision, he again took up the stand that the dispute before the Cooperative Court was maintainable and the proceedings filed without taking leave of the Cooperative Court are not maintainable. The Single Judge has, by invoking Section 115 of the Evidence Act and by applying the principle of estoppel, held that the party cannot at the same time affirm and disaffirm the same transaction for his benefit.

6. In the case of **Jai Kishan**(*supra*), the suit was filed by the landlord for bonafide requirement. There was a concurrent finding about the bonafides. In the Supreme Court, the appellant/tenant raised the ground that in the suit in fact the eviction was maintainable under section 12(1)(h) of the Act but there was no requirement of the provision and so the decree and eviction passed against him is to be set aside. However, the Supreme Court held that the appellant cannot take this stand before the Supreme Court because who himself in terms contended before the Appellate Court that Section 12(1)(h) did not apply. Under such circumstances, the party cannot invite the Court to hold otherwise in the said Appeal by special leave.

7. In the case of **Rajaram Bhau Kadam** (*supra*), the plaintiff has obtained the certificate under section 88C of the Bombay Tenancy and Agricultural Lands Act. The defendants have taken a stand earlier that they were not tenants but the owners in the suit land and thereafter they pleaded that they are tenants, therefore, the Civil Court will have no jurisdiction to recover possession from them. In the said judgment, the Single Judge has referred other Supreme Court cases and held that if parties have taken up a particular position before the Court at one stage of litigation, it is not open to

them approbate and reprobate and to resile from that position. In the judgment, the Single Judge relied on the ratio laid down in the case of **Dwijendra Narain vs. Joges Chandra, reported in AIR 1924 Cal. 600** wherein following observation is made:

“It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent. This doctrine applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first”.

8. The ratio laid down in these cases are binding and cannot be disputed. However, all these three cases are distinguishable on facts from the present case. Earlier suit was filed by the respondent no. 1/plaintiff's father for injunction simplicitor and it was on the ground that there was a partition. However, the applicants/defendant nos. 1 and 2 in the written statement have taken stand that in the year 1970 it was not a partition but it was only a family arrangement. The said suit was dismissed. 25 years thereafter the plaintiff has filed the suit for partition, declaration and injunction against the children of the same defendants. The plaintiff is consistent in the stand that he is entitled to partition. In the earlier suit, the defendants themselves

have refuted the fact of partition and therefore, the plaintiff has no option but to file the suit for partition, if he wants to settle the property dispute in respect of their ancestral property.

9. On perusal of the judgment of the trial Court in R.C.S. No. 434 of 1985, it is found that the trial Court has specifically mentioned that he is not touching the issue of partition because it was not before the said Court. Under such circumstances, when a party claims his right and it is denied by the other, the party has no option but to file a suit and pray relief. The plaintiff has not claimed the ownership in the property by way of self-acquired property but demands partition of the ancestral property. There is no question of any contradictory statement or approbation or reprobation of the facts. Moreover, as submitted by the learned counsel for the respondent, the applicants have not taken steps or have not acted upon the statement of the partition made by the respondent no. 1/plaintiff and hence, the present suit cannot be covered within the scope of Section 115 of the Evidence Act. Thus, the objection taken under Order 7 Rule 11(d) of CPC is not sustainable. However, it is made clear that whatever evidence tendered by the parties in the earlier suit can be used in evidence

before this Court for the purpose of contradiction under the Evidence Act and any admission given by one party is always open for the other party to use it and the Court will appreciate it on merit.

10. With this, Civil Revision Application is dismissed.

(MRIDULA BHATKAR, J.)