

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 475 OF 2015
WITH
CIVIL APPLICATION NO. 1009 OF 2015

Shri Mahipati Dhondi Gaikwad and anr. .. Appellants

Vs.

Bhagwan Ganpati Gaikwad .. Respondent

Mr.Rahul S.Kadam, for the Appellants.

Mr.S.R.Ganbavale, for the Respondent.

CORAM : M.S.KARNIK, J.

DATE : 16th JULY, 2019

P.C. :

. Heard learned Counsel for the appellants and learned Counsel for the respondent.

2. The appellants are the original defendants. The respondent - original plaintiff filed the Suit for partition which was decreed. From the judgment and decree of the trial Court, the First Appellate Court concurred with the findings of the trial Court and confirmed the judgment and decree of the trial Court against which present Second Appeal came to be filed. This Court by order dated 13/10/2016 dismissed the Second Appeal.

The appellants filed Special Leave Petition before the Supreme Court challenging the order passed by this Court. The Supreme Court granted liberty to appellants to withdraw the Special Leave Petition and to file Review Petition as regards the plea raised under the provisions of the Prevention of Fragmentation and Consolidations of Holdings Act, 1947 (hereinafter referred to as 'the said Act' for short). Accordingly, Review Petition No. 2 of 2017 came to be filed seeking review of the order dated 13/10/2016.

3. This Court recalled the order dated 13/10/2016 insofar as the effect of the provisions of the said Act on the dispute between the parties is concerned and for determining the effect on the subject matter of the dispute between the parties. This Court however observed that all other issues which were raised by the review petitioner in the Second Appeal and which were already decided in paragraphs 1 to 8 of the order dated 13/10/2016 stand concluded and cannot be reopened.

4. Learned Counsel for the appellants Shri Kadam invited my attention to the written statement and pointed out that a specific plea that the land in question is covered by the provisions of the said Act has been raised and therefore, the trial Court should have framed an issue which it has failed to do. He relied upon the provisions of Section 8 of the said Act which provides that no land in any local area shall be transferred or partitioned so as to create a fragment. He would also invite my attention to the provisions of Section 8AA of the said Act which provides for restriction on partition of land. Shri Kadam relying upon Section 36B of the said Act would contend that if any suit instituted in any Civil Court or Mamlatdar's Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act, the Civil Court or Mamlatdar's Court shall stay the suit and refer such issues to such competent authority for determination. Shri Kadam would therefore submit that the issue whether the lands are covered by the provisions of the said Act and therefore no partition can be effected, in view of Section

36B of the said Act, cannot be gone into by the Civil Court and it is only the Competent Authority which can decide the issue on a reference to be made by the Civil Court.

5. Shri Kadam would therefore submit that the matter needs to be remitted back to the trial Court for framing appropriate issues as the lands in question cannot be partitioned so as to create a fragment.

6. Shri Ganbavale on the other hand submitted that the prohibition imposed by Section 8 of the said Act applies only to the lands which are situated in the local area to which Section 8 has application. He would therefore invite my attention to clause 6 of Section 2 of the definition clause of the said Act which defines “local area” to mean any area notified as such in the Official Gazette under Section 3. Shri Ganbavale would submit that the suit lands in question do not fall in the local area and therefore question of prohibition as contained in Section 8 does not arise. Shri Ganbavale relied upon certificate dated

30/01/2017 issued by the Deputy Superintendent of Land Records, Hatkanangale certifying that the said lands are not within the local area and consolidation scheme is not applicable.

7. Heard learned Counsel for the parties. No doubt, the defendants have raised a specific plea in the written statement that the prohibition as contained in Section 8 of the said Act would apply to the suit lands and the contention therefore was taken that the partition of the suit lands cannot be effected. However, considering the certificate dated 10/01/2017 issued by the Deputy Superintendent of Land Records, when the suit lands do not fall within the 'local area' as defined by the provisions of the said Act, the question of prohibition contained in Section 8 of the said Act is not attracted. Learned Counsel for the appellants has not been able to bring any material on record to indicate that the suit lands fall within the local area as defined by the said Act. On the contrary, learned Counsel for the respondent has relied upon the certificate dated 10/01/2017 clearly indicating that in respect of the area where suit lands are

situated, the consolidation scheme is not applicable.

8. In this view of the matter, though plea is raised in the written statement contending that in view of the provisions of the said Act partition cannot be effected, remanding the matter back to the trial Court for framing issue on this aspect, in the light of the certificate dated 30/01/2017 will be a futile exercise. There is nothing on record to indicate that the suit lands fall within local area as defined by the said Act so that prohibition as contained in Section 8 of the said Act is attracted. In the light of the observations made by this Court in the order dated 10/04/2017, it is not possible for me to consider any other issue. In this view of the matter, I do not see any substance in the Appeal. The plea now raised does not involve any substantial question of law. The same is therefore dismissed.

9. In view of dismissal of the Second Appeal, Civil Application does not survive and the same shall stand disposed of accordingly.

(M.S.KARNIK, J.)