

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
AURANGABAD BENCH, AURANGABAD

WRIT PETITION NO. 390 OF 2017

Bapusaheb Gitaram Kardile
Age: 50 years, Occ.: Agril.,
R/o. Kolgaon, Tq. Shrigonda,
Dist. Ahmednagar

.... APPELLANT

// VERSUS //

1. The State of Maharashtra
Through the Collector, Ahmednagar
(copy to be served to the Government Pleader
High Court of Bombay Bench at Aurangabad)
2. The District Superintendent of Land Record
Ahmednagar, Dist. Ahmednagar
3. The District Superintendent of Land Record,
Nashik, Dist. Nashik.
4. The Deputy Superintendent Land Record,
Shrigonda, Tq. Shrigonda, Dist. Ahmednagar.
5. The Gramsevek,
Grampanchayat Office, Kolgaon,
Tq. Shrigonda, Dist. Ahmednagar.
6. Rushali Vitthal Sake
Age: 30 years, Occ. : Business,
7. Bansi Dhondiba Chandan
Age: 65 years, Occ. : Business,
8. Balasaheb Arjun Dalvi,
Age : 55 years, Occ. : Business
9. Sanjay Sukhdev Jagtap
Age : 40 years, Occ.: Business,
10. Ramchandra Prabhakar Shelar
Age: 65 years, Occ. : Business,
Respondent No. 6 to 10 are residing at
Kolgaon, Tq. Shrigonda, Dist. Ahmednagar.

....RESPONDENTS

Mr. D.A. Bide, Advocate for appellant.
Mr. K.N. Lokhande, AGP for respondent Nos.1 to 4.
Mr. A.D. Ostwal, Advocate a/w Mr. K.D. Jadhav, Advocate for the
respondent Nos.6 to 10.

CORAM : ANIL S. KILOR, J.
JUDGMENT RESERVED ON : 22.11.2019.
JUDGMENT PRONOUNCED ON: 04.05.2020.

JUDGMENT:

1. In a suit for declaration and perpetual injunction filed by the plaintiffs/respondent Nos.6 to 10, on apprehension of their dispossession from the suit shops, the learned trial Court after framing a preliminary issue relating to maintainability of the suit, held in favour of the plaintiffs vide its order below Exh.1 dated 17.12.2016, which is under challenge in the present petition.

2. It is the case of the plaintiffs that land Survey No.941 admeasuring 410.7 was recorded in the name of Government in the Revenue record, on which the five shops which are in possession of the respective plaintiffs, have been constructed long back and are the subject matter of the suit.

3. It is the further case of the plaintiffs that the

plaintiffs are regularly paying taxes to the Gram Panchayat and they have been doing business in those shops since last many years. The plaintiffs further pleaded that the defendant No.6/petitioner approached to the respondent No.3, claiming the ownership over the land Survey No.941 which was recorded in the name of Government. The respondent No.3 vide its order dated 14.12.2011, *inter alia* held that out of 410.7 sq.metre land 162.25 sq.metre of land is owned by the father of defendant No.6/petitioner.

4. The plaintiffs alleged that without issuing notice to the plaintiffs and other concerned parties in collusion with the respondent No.4, the petitioner obtained the order in its favour. It is also alleged that taking advantage of the said order, the petitioner is trying to remove the plaintiffs/respondent Nos.6 to 10 and therefore, the suit for declaration and perpetual injunction was filed.

5. The defendant No.6/petitioner vide Exh.32 filed its written statement denying the case of the plaintiffs and thereby also preferred counter claim for damages and permanent injunction. In the counter claim, the defendant

No.6 admits that out of 400.10 sq.metre land 162.25 sq. metre of land is recorded in the name of his father, in view of the orders passed by the respondent Nos.3 & 4. He further admits in paragraph No.3 that the alleged encroachment of the plaintiffs is on the land owned by the Government.

6. The defendant No.6/petitioner thereafter moved an application for framing of preliminary issue relating to maintainability of suit, in view of the fact that the plaintiffs have sought declaration that the order dated 14.12.2011 passed by the respondent No.3 and order dated 20.04.2013 passed by the respondent No.4 are ultra virus as such there is a bar under the provision of Section 36(c) of the Maharashtra Land Revenue Code to entertain any suit wherein the order of the Revenue Officers made under Section 36, 36(A) and 36(B), is under challenge.

7. The learned trial Court considering the said application framed the preliminary issue vide its order dated 15.12.2016 as regards the maintainability of the suit.

8. The learned trial Court thereafter, on 17.12.2016,

passed the order below Exh.1, holding that the suit is maintainable, the said order is impugned in the present petition.

9. Heard, Shri Dnyaneshwar Bide, learned counsel for the petitioner and Shri Abhaykumar Ostwal, learned counsel for respondent Nos.6 to 10, Shri Kiran Jadhav, learned counsel for respondent No.10 and the learned Assistance Government Pleader for respondent Nos. 1 to 4, authorities.

10. Shri Bide, the learned counsel for the petitioner, submits that the learned Trial Court failed to appreciate the provisions of Maharashtra Land Revenue Code, particularly, Section 36 (c), which creates bar to question the order passed by the Revenue Officer or the Tribunal, in any Civil Suit.

11. He further submits that any order passed under the provisions of Maharashtra Land Revenue Code, including the order of correction of Revenue Record, which is the subject matter of the suit, the appeal is provided against such order, thus the suit is not maintainable.

12. The learned counsel for the petitioner in support of his contention has placed his reliance on the judgment of this Court in a case of ***State of Maharashtra and Sub-Divisional Officer Vs. Bhikulal Mahadeo Agrawal, Smt. Banarabai Bhikulal Agrawal and others***, reported in ***2015 (2) All MR 282*** and submits that if an act or omission on the part of the Revenue Officer of the Government, is alleged in the Civil Suit, unless the remedies provided by the Maharashtra Land Revenue Code are exhausted, the jurisdiction of Civil Court, is barred.

13. He has further placed reliance on the judgment of the Hon'ble the Supreme Court of India, in the case of ***Dhulabai etc and others Vs. State of Madhyav Pradesh and another***, reported in ***AIR 1969 SCC 78*** and submits that where there is an expressed bar of the jurisdiction of the Court and where under the Scheme of the Act, adequate and sufficient remedies are provided, the Civil Court's jurisdiction held to be excluded.

14. Per contra, Shri Ostwal, learned counsel for the respondent Nos.6 to 10, supports the impugned order

below Exh.1 and submits that the lower Trial Court has rightly held that the issue relating to jurisdiction needs to be considered on the basis of the pleadings made in the plaint and from the pleadings made in the suit, the Civil Court has jurisdiction. Thus, he submits that no case is made out by the petitioner under Articles 226 and 227 of the Constitution of India, to interfere by this Court.

15. The learned counsel for the respondent Nos.6 to 10 has placed his reliance on the judgments of this Court in a case of ***Sambhugir Sansthan Trust and others vs. Gopal Tulshiram Vidhate and others*** reported in **2012 (2) Mah.L.J. 86.**

16. To consider the rival contention of the learned counsels for respective parties, I have gone through the record and relevant provisions of law.

17. This Court after considering the various judgments of the Hon'ble Supreme Court of India and High Courts, in the case of *Sambhugir Sansthan Trust and others vs. Gopal Tulshiram Vidhate and others* (supra) has held thus:

"16. As to question no.5:- As to the bar of entertaining civil suit by Civil Court, the law is well settled and it would be appropriate to cite the Statement Of Law made by the Hon'ble Chief Justice Mr. M.C. Chagla in the case of Husein Miya Dosumiya...Versus...Chandubhai, reported in 1955 Bom. L.R. 946.

"In Husein Miya Dosumiya... versus.... Chandubhai, the order of the Mamlatdar passed under the said Act was challenged as ultra vires. In that case, an application was made by the landlords for possession against their tenant under section 29 of the said Act to the Mamlatdar and a consent order was taken on 24th August, 1948, by which the tenant agreed to hand over possession to the landlords. According to the tenant in that case, there was fresh tenancy agreement between him and the landlords and that was in July 1949 and by reason of the fresh tenancy the tenant continued to remain on the lands and the landlords never took possession of them. It was further the case of the tenant that in July 1950 he exchanged with the consent of the landlords the lands demised to him with the same area of the lands which had been demised to another tenant. On 15th February 1952, the landlords applied to the Mamlatdar to execute the order of 24th August 1948. On 22nd March 1952, the tenant filed an application before the Mamlatdar stating that he was a tenant of the landlords under a new agreement and that he should not be dispossessed. On 17th March 1952, the Mamlatdar ordered the tenant to hand over possession of the lands, in execution of the order dated 24th August 1948 and on 20 March 1952 the landlords took possession of the lands from the tenant. On 22nd March 1952, the tenant applied to the Mamlatdar under section 29 (1) for possession alleging that he was a tenant of the landlords, and on 9th August 1952, the Mamlatdar made an order in favour of the tenant and he directed that possession be given to him on 16th August 1952. On 15th August 1952 the landlords filed a suit in the Civil Court contending that the order passed by the Mamlatdar on 9th August 1952 was invalid and ultra vires and asked for an injunction against the tenant preventing him from taking possession of the lands from them. While interpreting section 85 of the said Act ousting the jurisdiction of the Civil Court, the learned

Chief Justice Mr. M.C. Chagla observed:-

“It is clear that the jurisdiction of the Civil Court has been only ousted in respect of valid orders made by the Mamlatdar. It is only when the Mamlatdar makes an order with jurisdiction, or, in other words, makes an order for the purposes of the Act or an order required by the Act, that that order cannot be questioned in a Civil Court. If the Mamlatdar while passing a valid order deals with any of the matters under section 70, then those matters cannot be dealt with by the Civil Court. But if the order made by the Mamlatdar is not for the purposes of the Act or not required by the Act and the order is incompetent or ultra vires, then the order is a nullity and it can be challenged in a Civil Court.”

While dealing with the argument in that case that it was open to the landlords to prefer an appeal against the decision of the Mamlatdar and that instead of preferring an appeal they had filed a suit in a Civil Court, the learned Judges posed a question whether the fact that a statute provides for a right of appeal against an order made by an authority set up under that statute would make any difference to the position when the order made by the authority is an invalid or ultra vires order. The learned Judges answered that question and the arguments as follows:-

“It is clear that if the order itself is ultra vires it is a nullity and there is no obligation upon a party against whom the order is made to prefer an appeal against that order. The appeals that are provided for under section 74 are strictly appeals against valid orders made by the Mamlatdar and orders made with jurisdiction. It may be that the Collector could have corrected the Mamlatdar and could have held that the order of the Mamlatdar was ultra vires. But the question is not whether the opponents (landlords) could have appealed to the Collector and could have got the necessary relief. The question is whether the opponents (landlords) are bound to appeal and prevented or precluded from going to a Civil Court. In our opinion, on principle it is erroneous to argue that merely because a statute provides for a right of appeal, the party against whom the order is made is bound to appeal although the

order made is a nullity. If the order is a nullity, the party is entitled to ignore it, to treat it as waste paper, and to go to a Civil Court for a declaration that the order is a nullity and no action should be taken against the party under that order which would prejudice his rights."

In the case of Shri Gopinath s/o Ganpatrao Pensalwar...Versus...State of Maharashtra & Anr. reported in 2007 (1) Mh.L.J. (F.B.) 819 = 2006 (6) ALL MR 504, Full Bench of this Court in paragraph nos.13 and 14 held thus:

"13. Section 11 of the Act of 1876 can not, in our view, be said to create a bar in entertaining the suit relating to an action of the Revenue Officer, where he purports to do an act which is without jurisdiction. It goes without saying that where an authority acts without jurisdiction or purports to pass an order, that is without jurisdiction, such order is void, non est and nullity. We do not think it is necessary for us to deal with this aspect at length, as we are benefited by the Full Bench decision of this Court in the case of Abdullamiyan Abdulrehman Vs. The Government of Bombay, Vol.XLIV (1942) Bombay Law Reporter 577. The Full Bench of this Court had an occasion to consider section 11 of the Act of 1876. The Full Bench considered few decisions of this court in the case of Surannanna Vs. Secretary of State for India, 2 Bom.L.R. 261; Malkajeppa Vs. Secretary of State for India, 14 Bom.L.R. 332; Rasulkhan Hamadkhan Vs. Secretary of State for India, 17 Bom.L.R.513; Dhanji Vs. the Secretary of State, 23 Bom.L.R. 279; Patdaya Vs. Secretary of State, 25 Bom.L.R. 1160; Sulleman Vs. Secretary of State, 30 Bom.L.R.431 and Manibhai Vs. Nadiad City Municipality, 28 Bom.L.R. 1465, and concluded the legal position thus:

"Those cases have established the principle that where an authority which purports to pass an order is acting without jurisdiction, the purported order is a mere nullity, as Sir. Lawrence Jenkins puts it, it is mere waste paper; and it is not necessary for anybody who objects to that order, to apply to set it aside. He can rely on its invalidity when it is set up against him, although he has not taken steps to set it aside. The Advocate General does not dispute the proposition established by those cases, but he says that the principle does not apply to S.11 of the

Bombay Revenue Jurisdiction Act, which operates when an appeal is possible, and not merely when it is obligatory. I find it difficult to see why the principle should not apply. If the true principle be, as those cases decided, that an order, or what purports to be an order, passed without jurisdiction, is a nullity, it cannot give rise to any right whatever, not even to a right of appeal."

14. It was held by the Full Bench that on a strict use of language an order which is invalid, is not an order. It was further held that where the revenue officer purports to do an act or pass an order which is invalid, his action does not operate to raise a bar under section 11 of the Act of 1876.

In the case of Dhulabhai etc....Versus...State of Madhya Pradesh and another, reported in 1969 Mh.L.J. (S.C.) 1 = AIR 1969 Supreme Court 78, the Apex Court in paragraph nos.32 (1), 32 (2) and 32 (7) held thus:

"32 (1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

18. In this matter, there is no dispute that the land Survey No.941 admeasuring 410.25 sq.metre was earlier recorded in the name of the Government and on the appeal preferred by the defendant No.6/petitioner, the respondent No.3 and 4 vide their orders dated 14.12.2011 and order dated 20.04.2013 respectively, held that the land to the extent of 162.25 sq. metre is owned by the father of the petitioner and be recorded accordingly in the revenue record.

19. The petitioner himself in paragraph No.3 of his counter claim has admitted that the alleged encroachment made by the petitioners is on the Government land and the plaintiffs are trying to encroach upon the land owned by him. Thus, the said admission makes it clear that there is no alleged encroachment made by the plaintiffs over the land of the petitioner/defendant No.6.

20. After going through the plaint, it is clear that the plaintiffs have come with a case that without issuing notice

and without following due procedure, the order dated 14.12.2011 has been passed by the respondent No.3 in favour of the petitioner. The petitioner also claiming that the orders dated 14.12.2011 and 20.04.2013 are ultra virus and illegal, for the reasons that the said orders were passed without issuing notice to the plaintiffs and further without following due procedure. Thus, according to the plaintiffs, the defendant No.6 is trying to dispossess the plaintiff on the basis of the orders which are not tenable in the eyes of law as they are ultra virus.

21. The learned trial Court considered all these aspects and has observed that the pleadings made in the plaint by the plaintiffs are sufficient to entertain the suit and further there is no relief claimed in the plaint as contemplated under Sections 36, 36-A and 36-B of the Maharashtra Land Revenue Code and therefore, bar under Section 36(c) would not apply to the present case as such, the suit is maintainable.

22. This Court in a case of ***Sambhugir Sansthan Trust and others vs. Gopal Tulsiram Vidhate and***

others reported in **2012 (2) Mah.L.J. 86** has held in clear terms, that if the order is ultra virus the parties entitled to ignore it and to go to the Civil Court for declaration that the order is a nullity and no action should be taken against under that order, which would prejudice his right.

23. In the present matter, in view of the specific allegation that without following due procedure and without following principals of natural justice, the revenue authorities have passed the orders in favour of the defendant No.6/petitioner and further in view of the other reliefs prayed in the plaint, other than declaring the orders of the Revenue Officers as ultra virus, which are very well permissible in a civil suit, I do not find any merit in the present petition. Further I have no hesitation to hold that no infirmity of law or error has been committed by the learned trial Court while holding that the suit is maintainable.

24. The judgments cited by the learned counsel for the petitioner, are distinguishable and are of no help to the

petitioner.

25. Accordingly, the petition is dismissed. No order as to costs.

JUDGE

Prity