

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7838 OF 2018

Bhimrav Bapuso Chavan .. Petitioner
Versus
Manisha @ Suman Mohan Golivadekar
and others .. Respondents

...

Mr. Anilkumar Matle with Archana P. Gaikwad for the petitioner.
Mr. Drupad S. Patil for respondent no.1.

CORAM: BHARATI DANGRE, J.
DATED : 17th DECEMBER, 2021

JUDGMENT:-

1 The petitioner, who is the plaintiff in Regular Civil Sui No. 149 of 2013 is aggrieved by the two orders passed by the Joint Civil Judge, Sr. Division, Kolhapur on 7/12/2017 and 1/2/2018. Under the impugned orders, the learned Judge has rejected the applications filed by the plaintiff vide Exhibit-69 and 72 and also below Exhibit-73, which is an application filed by the plaintiff under Order 6 Rule 17 of the Code of Civil Procedure.

2 The plaintiff filed the Suit for perpetual injunction and he pleaded that he was cultivating the agricultural land described in the plaint, as a tenant since the year 1985 and from

last 28 years, he is in possession and cultivating the said land which is owned by defendant nos.1 and 2. However, it is pleaded that the defendant no.1, who is owner of the suit land illegally transferred her share by a sale deed in favour of defendant no.3 and since it was perceived by the plaintiff as violation of his right as tenant, he instituted the Suit where he sought perpetual injunction against the defendants, or any persons claiming through them. He also sought restrain orders against the defendants for creating any further interest in the property which was cultivated by him in the capacity as a tenant.

3 In the Suit instituted by the plaintiffs, he filed an application for interim injunction vide Exhibit-5 which was allowed on 29/7/2013 and the Appellate Court in Miscellaneous Civil Appeal No.182 of 2013 confirmed the said order of injunction in favour of the plaintiff when it dismissed the Appeal filed by the defendants. The finding rendered by the Appellate Court is to the effect that respondent no.3 is not the bonafide purchaser. The said order of injunction has attained finality.

4 The trial Court framed the issues on the basis of the rival pleadings and issue nos.1 and 3 which is the bone of contention between the parties, is framed as under :-

- (1) Does the plaintiff prove that he is in possession of the Suit land as a tenant ?

(3) Does the plaintiff prove that the defendants are trying to alienate the Suit land by denying his tenancy right ?

The issues being framed on 13/9/2013 vide exhibit-45, the plaintiff filed an application vide Exhibit-46 where he prayed that the Suit be transferred to the revenue authorities as per provisions of Section 85-A of the Bombay Tenancy and Agricultural Land Act, 1948 (for short 'BTAL'). The said application is rejected on 22/9/2016 by recording that the present Suit is for simplicitor injunction and therefore, who is in possession of the suit property is the relevant consideration and to determine the said issue of possession, it is not necessary to go into the issue whether he is in possession as a tenant or not. By a reasoned order, the Application filed vide Exhibit-46 seeking a relief of referring the matter to the Revenue Court came to be rejected.

5 Resultantly, the issue nos.1 and 3 as quoted above, arose for determination in the Suit. The respondent no.3 made an unsuccessful attempt for rejection of the plaint by filing the application under Order 7 Rule 11, which was turned down on 6/7/2017. While rejecting the said application, the plaintiff is also directed to delete prayer clauses (b) and (c), wherein the plaintiff had sought relief of restrain order and reference for tenancy under the BTLA Act, 1948.

6 This prompted the plaintiff to take out two applications vide Exhibit-69, praying for recasting of the issues by placing reliance on Order 14 Rule 5 of the Code of Civil Procedure and seeking a relief of rectifying the issues which were framed earlier, being whether the plaintiff prove that he is in possession of the Suit land as a tenant and deleting the issue framed on 22/10/2016. Another application was taken out by him vide Exhibit-72, which sought rectification of the order passed below Exhibit-61 on an application filed by the defendant no.3 for rejection of plaint and it was pleaded that while rejecting the application, the Court has given a finding that plaintiff has not claimed any declaration regarding sale deed in favour of defendant no.3. The plaintiff has therefore, filed an amendment application, seeking substantive relief of declaration in respect of sale deed and tenancy rights and it was prayed, the order directing deletion of prayer clauses (b) and (c) may be recalled.

On consideration of the said applications, a detailed order is passed on 7/1/2/217 and both the applications are rejected.

7 The learned Judge recorded that the plaintiff has filed a suit for declaration and injunction and according to him, Civil court has no jurisdiction to decide the issue i.e. his capacity as a tenant and therefore, reference should be made to the tenancy court as per the BTAL Act. The Court recorded that by an order

passed below Exhibit-46, it has been clarified that there is no need to frame issue of tenancy as the Suit is filed for simplicitor injunction and the said order passed below Exhibit-46 on 22/9/2016 has attained finality. This very prayer cannot be again sought by filing an application vide Exhibit-72 and projecting the same to be filed under Section 151 of CPC. It is also recorded by the learned Judge that the plaintiff has not claimed any declaration regarding sale deed in favour of defendant no.3 and he has filed an amendment application, claiming substantive relief of declaration of his tenancy rights.

On consideration of the application, it is apparent that the plaintiff wanted the issue to be framed about his possession in the capacity as tenant. By moving an application vide Exhibit-72, the plaintiff sought review of the order passed below Exhibit-46, particularly, when while rejecting the application preferred by defendant no.3, by invoking Order 7 Rule 11 clause (d), the plaintiff was directed to delete the prayer clauses (b) and (c), so as to avoid the rejection of plaint on the ground of improper valuation of the suit. The learned Judge returned a finding to the effect that when a Suit is filed for simplicitor injunction, the issue of tenancy may not be of relevance and a material one, which would warrant an issue to be framed to that effect and a reference to be made to the competent authority under the BTAL.

By referring to the decision of Apex Court in case of Thomas Antony Vs. Varkey Varkey, AIR 2000 SC 1 where it has been held that a reference to the Land Tribunal need to be made only if such question 'arises' in the Suit, and a Civil Court is not obliged to make reference to the Tribunal only because a party has raised a contention that he is a tenant, but the Civil Court has power to consider whether such contention is raised without any legal foundation or with an intention to protract the litigation, the learned Judge has rejected the application by recording that the Suit is for perpetual injunction and there is no necessity to refer the matter to the tenancy court as the issue framed as regards possession of the plaintiff is the core issue for determination. The Application came to be rejected on the said ground.

8 On consideration of the rival submissions, I concur with the view expressed by the learned Judge, particularly when my attention is invited to a decision of this Court in Maruti Sambha Surve Vs. Parsuhuram Krishna Koratkar, 1983 Mh.LJ 958, where the following observations are :

“4 At the very outset, it has to be made clear that, civil Courts seem to be following a practice of referring the issue of tenancy to the Tahsildar straightway without ascertaining whether the decision of that issue is material for the decision of the suit. Section J5-A of the Bombay Tenancy and Agricultural Lands Act, 1948 permits only such issue to be referred as is involved in the suit. When Section 85-A refers to an

issue being involved in the suit, it obviously means that the issue is relevant for the decision of the suit.

5. *Now, in a suit for injunction simpliciter by a plaintiff who claims to be in possession, the plaintiff will be entitled to injunction only if he proves his possession on the date of the suit. If the plaintiff proves his possession on the date of the suit, the status of the defendant, who is alleged to be disturbing the possession of the plaintiff, is wholly irrelevant, because a tenant is not entitled to forcibly dispossess any person in possession against whom the tenant may have a right to claim possession. On the other hand, if the plaintiff in a suit for injunction simpliciter fails to prove his possession on the date of the suit, again, the status of the defendant becomes immaterial. In such a case, it may be that the plaintiff might like to amend the plaint, but till such amendment is prayed for and granted, the question as to whether the suit for possession can be decreed against the defendant who claims to be a tenant cannot arise. It is only if a claim for possession is to be inquired into that the status of the defendant as a tenant will become relevant. However, in either case, when a suit for injunction simpliciter is filed, as issue with regard to the tenancy of the defendant is not required to be decided at all and it is not material or relevant for the purposes of the suit. Consequently, in my view, the whole reference made by the civil Court was uncalled for and the proceedings under reference were all irrelevant for the decision of the suit. In a sense, the reference becomes completely without jurisdiction because the issue of tenancy cannot be said to be involved in the suit at the present stage and this must prevent the Court from exercising its jurisdiction under Section 85-A of the Bombay Tenancy and Agricultural Lands Act, which is conditional upon an issue being involved in the suit. Consequently, the orders of all the three*

authorities, namely, the Tahsildar, the Sub-Divisional Officer and the Maharashtra Revenue Tribunal, are all quashed. The reference itself is quashed. The civil Court is now directed to deal with the suit expeditiously. It is made clear that if at some stage after the finding with regard to possession an issue of tenancy becomes relevant for the decision of the suit, it will still be open to the trial Court to make such a reference. As the suit is fairly old, it should be given priority”.

Further, another decision in case of Pulmati Shamlal Mishra and Anr Vs. Ramkrishna Gangaprasad Bajpai & ors, 1981 Mh.L.J 321, the observation in para 9 and 10 is relevant, which are reproduced here :-

9 *It is also not correct to assume that the Court is under any obligation to frame and remit the issue of tenancy mechanically, merely on the same being raised. Cases written statement, without judicial satisfaction of its necessity and justification. Case can be conceived, when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itself attract sections 85 and 85A of the Tenancy Act. The remittance of any such tenancy issue and the trial thereof by the Mamlatdar and higher authorities in appeal and revision, is known to have become a long winding and time consuming process. This delay enures for the benefit of the person in possession of the land. This, not unnaturally, prompts and tempts him to claim to be the tenant out of sheer anxiety to perpetuate his unmerited possession, even if no basis exists for the claim. Nothing can thus prevent a defendant from claiming to be tenant (1) even if his plea to that effect is*

overruled specifically or constructively by the Tenancy Court in some earlier proceedings in between himself and the landlord or their predecessor-in-title or (2) even if the plea so set up happens to be irreconcilably inconsistent with his defence of being mortgagee, purchaser or owner of the land by inheritance or adoption, in the earlier stage of the same proceedings or in the earlier round of another litigation. A plea to that effect as an integral part of any other fraudulent defences is yet another specie of the same category. Unwarranted remittance of such issue for trial in literal and mechanical compliance with the above provisions, enables the litigants to abuse the process of the Court and cause grave miscarriage of justice. This indeed makes mockery of the judicial process causing damage to the confidence of the litigating public in its efficacy and utility.

10 There is nothing in section 85 or 85A or in any other provisions of the Tenancy Act, robbing the Courts of these powers so indispensable for the effective adjudication and, relieving it or its duty imposed thereunder. These sections provide for remittance of issues only if and when the same are framed on being found to arise on such scrutiny and it is after that stage that the Civil Court ceases to have jurisdiction with regard to the same till the finding is certified by the Tenancy authorities. The process contemplated under Order 14 does not contemplate any trial of such issue but it does involve nipping of any such plea in the bud, if the Court, subject to any contrary decision in appeal and revision, judicially concludes against its framing and raising. This is implicit in the separate provision for framing issues and the trial thereof. This process does not thus involve any conflict between Order 14 of the Code of Civil Procedure or sections 85 and 85A of the Tenancy

Act nor any question of any lack or excess of jurisdiction. Such scrupulous compliance with these provisions alone can prevent such possible abuse of its process. The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and mala fide. It is obviously not easy to draw a dividing line between such frivolous and mala fide pleas on the one hand and the ones turning out to be false at the end of the trial on the other. Facts of a given case, however, would rarely fail to furnish the required indication to the judicially trained mind. Facts of the present case, in our opinion, leave no manner of doubt that tenancy plea is a part of the fraudulent defence strategy and does not call for any remittance for trial. The approach could not have been different even if the Defendant No. 5 had pleaded the tenancy specifically. The same picture would have emerged in the careful scrutiny at the preliminary stage contemplated under Order 14 of the Code of Civil Procedure”.

On perusal of the proceedings in hand which include multiple applications filed by the plaintiff and its rejection on two occasions, it is apparent that the plaintiff is adopting delaying tactics. His Suit being filed simplicitor for injunction do not warrant framing of an issue, whether he is in possession of the Suit property in the capacity as tenant and his further objection that since his claim is so, the Civil Court has no jurisdiction to decide the same and it must be made over to the tenancy Court is but just an attempt to evade the trial of the issue that arise in the Suit, since he is enjoying injunction in his favour. The plaintiff is seeking deletion of the issues which are framed as germane, to

determine his prayer for perpetual injunction for which the issue of possession is the only issue. The learned Judge has rightly appreciated the prevalent legal position and concluded that the issue of tenancy is not a relevant issue for determination in the suit of the plaintiff and reference to the Revenue Authorities become necessary only when an issue is required to be settled or decided for the purpose of determination of the Suit. Accordingly, the learned Judge has rejected the applications by his order dated 7/122017 which do not warrant any interference.

9 Another order assailed in the petition is the one passed below Exhibit 73 by invoking Order 6 Rule 17 of CPC. The said application is based on the observations made by the learned Judge while rejecting the application filed by defendant no.3 seeking rejection of plaint where the observation made is that the plaintiff has not claimed any declaration about cancellation of the sale deed. Promptly the plaintiff sought amendment in his plaint by seeking a declaration to the effect that the sale deed executed between defendant no.1 and defendant no.3 be declared as illegal and not binding upon him.

On consideration of the said application, the learned Judge has recorded that the application filed by the defendant no.3 was rejected with an observation that the plaintiff never claimed declaration in respect of the sale deed in favour of defendant no.3 and therefore, there is no need to affix the Court

fee based on the said relief. The learned Judge recorded that he had never suggested the plaintiff to amend the plaint and moreover, this application is filed after four years, when the plaintiff was aware about the sale deed being executed by the defendant no.1 in favour of defendant no.3. Recording that allowing such an amendment at a belated stage, would hit by limitation, since no fresh Suit can be instituted, seeking the said relief, the amendment has been rejected by the impugned order passed on 1/2/2018.

The learned Judge is perfectly justified in his endeavour since the attempt on part of the plaintiff is to delay the proceeding in the suit particularly when there is an injunction operation in his favour from 29.7.2013 and he is enjoying the fruits of the property claiming to be in possession of the same. The attempt on part of the plaintiff is to protect the proceedings by continuing the interim injunction in his favour. The case of the petitioner / plaintiff do not warrant any consideration on merits, which has convinced me to uphold the impugned orders and dismiss the writ petition.

Noting that the Suit filed by the plaintiff is of the year 2013, the learned trial Judge is requested to culminate the proceedings in the Suit within a period of six months from today.

No order as to costs.

SMT. BHARATI DANGRE, J