

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRA NO.126 OF 2022

SANJAY KERBA KADAM AND ANOTHER
VERSUS
MANCHAK KONDIBA KADAM AND ORS

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Mr. M. P. Kale, Advocate for Applicants.
Mrs. P. V. Diggikar, AGP, for Respondent Nos. 8 to 10.
Mr. M. P. Tripathi, Advocate for Respondent Nos. 1 & 2.

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CORAM : R.M. JOSHI, J

DATE : MARCH 08, 2023

PER COURT :

1. This application is filed taking exception to order dated 06.10.2022 passed below Exhibit 34 by C.J.S.D., Gangakhed in R.C.S. No. 307/2021 rejecting application filed by defendants under Order VII, Rule 11 of the Code of Civil Procedure (for short 'CPC'). Parties are referred to by their nomenclature in suit.

2. It is the case of the defendant that the plaintiffs admittedly have challenged the order of Tehsildar, Gangakhed, before Sub-Divisional Officer and Deputy Collector, Parbhani. In view of the same, suit is barred by Section 143(4) of the Maharashtra Land Revenue Code (for short 'the Code')

3. The learned Trial Court rejected the application with observations that the plaintiffs have

filed suit for perpetual injunction against the defendants for restraining them for disturbing stream of water channel flowing from North to South in the suit property. It is further observed that the plaintiff has not exclusively claimed relief in respect of the order of Tehsildar but relief also pertains to obstructions of the plaintiff with the stream of water channel. Application came to be rejected with further observation that the entire suit said to have been barred by law to reject plaint under Order VII, Rule 11(d) of the CPC.

4. Learned Counsel for the Applicants drew attention of the Court to the admitted facts in the plaint stating that the order passed by the Tehsildar dated 19.07.2019 has been taken exception before the competent authorities as provided under the Code. According to him, the order passed by the Tehsildar could have been subject matter of challenge before the Civil Court, provided same has not been taken exception in any appeal or revision under Code. He further contends that as the plaintiffs herein have already challenged the said order in Appeal, bar is created in

view of Section 143 of the Code. Thus, according to him, Order VII, Rule 11(d) CPC has application to this case. In support of his contentions he placed reliance on judgement of this Court in C.R.A. No. 117/2017, in case of Krushna Ganpatrao Dongare and Ors Vs. Ramdas Fakirji Dongare and Ors. According to him, in the similar set of facts, this Court has held that suit could not be maintained, in view of challenge to the order passed by the Tehsildar before the Appellate Authority under Code.

5. Learned Counsel for the Respondent supported the impugned order.

6. Perusal of Section 143(5) of the Code states that where a civil suit has been instituted under sub-section (4) against the Tahsildar's decision, such decision shall not be subject to appeal or revision. Sub-section (4) provides that any person, who is aggrieved by a decision of the Tahsildar under this section may, within a period of one year from the date of such decision, institute a civil suit to have it set aside or modified. Section 247 of the Code provides for another remedy i.e., an appeal may be preferred before

the competent Revenue Authority. It is thus, clear that whichever remedy is availed that can only be taken to its logical end by following further permissible remedies.

7. As admitted in the present case the order passed by the Tehsildar has been taken exception by filing Appeal under Section 247 of the Code. Thus, suit filed for challenge to the order of Tehsildar may not be maintainable. The question however arises in this case as to the application of Order VII, Rule 11 when the entire plaint cannot be rejected, on that ground.

8. Law on the point of rejection of plaint under Order VII, Rule 11 of CPC is fairly settled to say that plaint cannot be partly rejected. In this regard, reference can be made to judgement of Hon'ble Apex Court in case of Madhav Prasad Aggarwal and Another Vs. Axis Bank Limited and Another, (2019) 7 SCC 158, wherein after adverting to the several decisions on the point, it is held that plaint survives as a whole or not at all.

9. Perusal of the plaint shows that the suit is filed for perpetual injunction against defendant and

the order of Tehsildar is also taken exception to. Perusal of application filed before the Trial Court by defendant indicates that only on the sole ground of bar under Section 143(4) of the Code, rejection of plaint under Order VII, Rule 11 of CPC is sought. Pertinently, defendants even do not challenge the maintainability of the suit in respect of perpetual injunction sought by the plaintiffs. Thus, this is not the case wherein entire plaint can be rejected under Order VII, Rule 11 of CPC. Learned Trial Court has rightly held that since the entire suit cannot be said to be barred by any law, Application under Order VII, Rule 11 is not tenable. This Court does not find any infirmity in the said finding recorded by trial Court.

10. In the result, the Application stands dismissed. It is clarified that the contentions of both sides are kept open for determination by the Trial Court.

(R.M. JOSHI, J.)