

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 354 OF 2023.

VENKATESH SHRIPAD NAIK AND ANR. ... Petitioners
VS
SAJU DHARMA SHETYE AND 7 ORS. ... Respondents.

Mr. S. S. Kantak, Senior Advocate with Mr. Dinesh Naik, Ms. Saicha Dessai, Ms. Neha Kholkar, Mr. Kher C. J. Simoes, Advocate for the petitioners.

Mr. Ashwin D. Bhobe and Ms. Annelise Fernandes, Advocate for the respondents.

CORAM: PRAKASH D NAIK, J

DATED: 17th AUGUST 2023

ORAL ORDER:-

1. The petitioners have assailed the order dated 10.6.2020 passed by the Administrative Tribunal of Goa ("Tribunal" for short) in Tenancy Revision Application no. 2/2019.
2. Facts necessary to adjudicate the issues involved in this petition are as follows:
 - i. Shri Dharma Tukaram Shetye and Harichandra Tukaram Shetye filed application dated 27.11.2002 before the Mamlatdar of Sattari at Valpoi being heirs of Tukaram Ladu Shetye for

declaration of tenancy and purchase under Section 7, 14 and 18-C of Goa Daman and Diu Agricultural Tenancy Act 1964 (“the Act” for short) which case was registered as case No.MAM/JM/SAT/TNC/16/2002. Shri Arun Keshav Naik, Venkatesh Shripad Naik and Shashikant Shripad Naik were impleaded as opponents. It was prayed that applicants therein be declared as tenants of suit property bearing survey no. 62/2 of village Poriem and purchase price be determined and applicants be allowed to deposit purchase price and Sanad be issued to them.

(ii) The opponents filed their reply dated 6.3.2003 opposing the relief sought in the tenancy application and also raised objections including non-joinder of necessary parties.

(iii) Mrs. Anusuya Rohidas Mamlekar, Shri Rohidas Vinayak Mamlekar, Smt. Vijaya Shridhar Mamlekar, Mrs. Gulabi Ramesh Shakhalkar and Shri Ramesh Sakhalkar filed an application under Order 1 Rule 10 of C.P.C, in the said proceedings on 17.2.2003 for joining them as opponents.

(iv) Dharma Tukaram Shetye and Harichandra Tukaram Shetye were not diligent in pursuing the proceedings before the Mamlatdar.

(v) Vide order dated 20.2.2004, the Mamlatdar observed that

none remained present for applicants. Reasonable opportunities and time have been granted for the applicants to proceed with the case. From this gesture of the applicants an inference can be drawn that they are not interested in proceeding with the case. Hence, the proceedings dropped for default.

(vi) Smt. Saju Dharma Shetye, widow of Dharma Tukaram Shetye, Shri Sanjay Dharma Shetye, Smt Asmita Sanjay Shetye, Shri Ajay Dharma Shetye, Shri Uday Dharma Shetye, Smt. Rutuja Uday Shetye and Shri Milin Dharma Shetye filed application under Section 7 of Goa Agricultural Tenancy Act, 1964 on 12.5.2016 before the Court of Civil Judge, Junior Division at Sattari Goa. The petitioners and respondent no.8 were arrayed as respondents. It was claimed that, property “Oddachi Faddo” bearing survey no. 62/2 of village Poriem of Sattari Taluka belonged to Sitaram Keshav Naik and Shripad Jivaji Naik. They created tenancy in favour of Tukaram Ladu Shetye. Tukaram Ladu Shetye expired leaving behind two sons named Sharma and Harishchandra. Subsequently, Harishchandra expired. The applicants in that application prayed that they be declared as inherited tenancy of said property in their favour after the demise of Tukaram Ladu Shetye. The respondents be restrained by an order of

permanent injunction from interfering with the said property in any manner whatsoever.

(vii) Petitioners filed application dated 14.2.2017 under Order 7 Rule 11(d) and Section 151 of CPC and contended that tenancy application was barred by law of limitation and that Dharma Tukaram Shetye and Harichandra Tukaram Shetye had filed similar application for the same cause of action in the year 2002 before the Mamlatdar of Sattari at Valpoi and said application was dismissed for default and hence application is barred by law of limitation.

(viii) Application was opposed by the respondents by filing reply dated 17.11.2016 contending that Civil Procedure Code is not applicable to the tenancy proceedings. Tenancy Act, 1964 is having its own rules of 1965 which governs procedure to be followed in conducting tenancy proceedings. The applicants in second application were not the party to the earlier proceedings and were not aware of such proceedings or its dismissal. No order passed in any such proceedings is binding on applicants. Dismissal for default not being on merit and not being against the applicants has no bearing on the proceeding initiated by them. It is denied that in view of dismissal of similar application for same cause of action, the present application is barred by

limitation.

(ix) In view of the amendment to Goa Daman and Diu Agricultural Tenancy Act, 1964 proceedings were transferred to the Court of Mamlatdar at Valpoi numbered as JM/SAT/TNC/1/2017.

(x) The respondent no.1 filed application for adding party in the cause title on 3.1.2017. The application filed by petitioners dated 23.2.2017 for rejection of application filed by the respondents was allowed and application filed by respondents was dismissed on 21.12.2017.

(xi) Order dated 21.12.2017 was challenged by respondents by preferring Revision before the Deputy Collector and SDO at Bicholim. Vide Judgment dated 3.9.2018, the Deputy Collector dismissed the Revision preferred by the respondents.

(xii) Respondents preferred Tenancy Revision Application before the Tribunal along with application for condonation of delay. Petitioners filed reply opposing application for condonation of delay. Delay was condoned by order dated 17.9.2019 and vide order dated 10.6.2020 Tenancy Revision Application was allowed and order dated 3.9.2019 passed by the Deputy Collector and SDO was set aside and the tenancy case was restored to the file of the Mamlatdar of Sattari at Valpoi for

decision on merits in accordance with law. The said order is subject matter of challenge in this petition.

3. Learned Senior Advocate Mr. Kantak, representing the petitioners submitted as under:-

(i) The impugned order dated 10.6.2020 is contrary to law.

(ii) Questions urged before the Tribunal were not adjudicated in proper perspective.

(iii) Respondents have suppressed the fact that Dharma Tukaram Shetye and Harichandra Tukaram Shetye had preferred similar application dated 27.11.2002 before the Mamlatdar of Sattari at Valpoi for declaration of tenancy and purchase under the Act which was dismissed for default.

(iv) Second application was preferred after a period of about 12 years. Application was barred by law of limitation.

(v) Since previous application for similar relief was dismissed for default, the second application for same relief was not maintainable in view of Order 9 Rule 9 of CPC.

(vi) Tribunal has not decided the issue relating to applicability of Order 9 Rule 9 of the CPC.

(vii) Tribunal had erroneously set aside the order dated 3.9.2018 passed by the Deputy Collector and Order dated 21.12.2017 passed by the Joint Mamlatdar of Sattari rejecting the

application preferred by the respondents.

(viii) The Tribunal has not considered scope of Order 7 Rule 11 of CPC.

(ix) The order dated 20.2.2004 passed by Mamlatdar was not challenged by applicants therein.

(x) The application filed by respondents is time barred.

(xi) Section 5 of the Civil Procedure Code shows the applicability of the Code to Revenue Courts.

(xii) The Revisional Court ought not to have disturbed the concurrent findings of Mamlatdar and Deputy Collector.

(xiii) Order 9 Rule 9 of CPC bars filing of any fresh suit against same cause of action, whether wholly or partly dismissed.

(xiv) Principles analogous to provisions of CPC can be applied with full force to this proceedings.

(xv) The decision in the case of ***New India Assurance Co. Ltd Vs. R. Srinivasan(2000) 3 SCC 242*** can be distinguished on facts and some of the observations therein supports the submission of the petitioners.

4. Learned Advocate Mr. A. Bhobe, appearing for the respondents, submitted that there is no infirmity in the order dated 10.6.2020. Provisions of Order 9 Rule 9 of CPC or Order 7 Rule 11 of the CPC cannot be applied to the present proceedings.

The Goa, Agricultural Tenancy Act, 1964 is a code in itself which provides a procedure for preferring tenancy application. Provisions of CPC are not applicable to the issues involved in the present proceedings. Merely on the ground that previous application preferred by Dharma Tukaram Shetye and Harichandra Tukaram Shetye was dismissed for default, there is no bar for preferring second application. Previous application was not dismissed on merits. Application preferred by the respondents was based on different cause of action and thus cannot be dismissed on the ground that previous application was dismissed for default. Principles analogous to CPC cannot be applied. The Goa Tenancy Act is a beneficial legislation for tenants. The scope and intent has to be looked into. Section 45 of the Tenancy Act relates to powers of Tribunal. It provides that the Tribunal have the same powers in making inquiries under the Act as vested in Courts in respect to matters under CPC. The matters referred to therein are in respect of proof of facts by affidavit, summoning and enforcing the attendance of any person and examining him on oath, compelling production of documents, awarding costs and such other powers may be prescribed. The Tribunal has rightly set aside the orders of the authorities below. Order dated 21.12.2017 passed by the

Mamlatdar was cryptic. Order passed by the Deputy Collector was unreasoned. Provisions of Civil Procedure Code could not have been attracted to the present proceedings. No grounds were made out for rejection of the application preferred by the respondents. Principles of *res judicata* or *constructive res judicata* was not applicable in the present proceedings.

5. Mr. Bhole has relied upon decision of the Supreme Court in the case of Indian ***Machinery Company Vs M/s Ansal Housing and Construction Ltd.***¹

6. To summarise the factual matrix germane to the present proceedings, Shri Dharma Tukaram Shetye and Harichandra Tukaram Shetye being legal heirs of Tukaram Ladu Shetye preferred an application under Sections 7, 14 and 18-C of the Act before the Mamlatdar of Sattari at Valpoi on 27.11.2002 seeking declaration that said applicants be declared as tenants of the suit property bearing survey no.62/2 of village Poreim. Legal heirs of Sitabai Keshav Naik namely Arun Keshav Naik and legal heirs of Shripad Jivaji Naik namely Venkatesh Shripad Naik and Shashikant Shripad Naik were impleaded as opponents. Vide order dated 20.2.2004, application was dismissed for default. Smt. Saju Dharma Shetye and others

¹ AIR 2016 SC 2209.

preferred another application on 12.5.2016 before the Court of Civil Judge, Junior Division at Sattari Goa and prayed that said applicants be declared to be tenants of property bearing survey no.62/2 of village Poriem of Sattari Taluka and that they be declared as inherited tenancy of the property in their favour after the demise of Tukaram Ladu Shetye. The Joint Mamlatdar of Sattari Taluka, Valpoi Goa vide order dated 21.12.2017 rejected the application preferred by the respondents under Section 7 of the Act, 1964. Petitioners had objected to the maintainability of the application preferred by the respondents on the ground that application was barred by law of limitation; Similar application was dismissed for default by Joint Mamlatdar; Respondents did not prefer an application for restoration of the previous application which was dismissed for default; Order 9 Rule 9 of the Civil Procedure Code bars filing of fresh suit on the same cause of action whether wholly or partly dismissed; provisions of Civil Procedure Code are applicable to the Revenue Court. Joint Mamlatdar while allowing the application preferred by the petitioners observed that previous application preferred by relative of the respondents herein was dismissed by the Mamlatdar of Sattari in the year 2002. The point raised by respondents that provisions of Civil Procedure

Code are not applicable to the Act, 1964 cannot be considered as provisions are applicable even to Revenue Court and it is nowhere specified that provisions of the Civil Procedure Code do not apply to the Act. The point raised by respondents that they were not aware of the proceedings filed in the year 2002 and were not parties to the proceedings cannot be considered. The application under Section 7 was filed by their relative. Application for restoration of previous application was not preferred. Second application is barred by law of limitation as it is filed on the same cause of action and by legal heirs of the applicants in the previous application. The Deputy Collector confirmed the order of Joint Mamlatdar, vide order dated 3.09.2018. The appellate authority had observed that late husband of the appellant had already filed an application under Section 7 and 14 of the Act and the same was not pursued by Shri Dharma Tukaram Shetye and it was dismissed for default in appearance. After the dismissal of the said application Shri Dharma Tukaram Shetye had not taken any initiative to restore the said application at any point of time. Revision application preferred by respondents challenging the previous order has been allowed by Administrative Tribunal vide order dated 10.6.2020.

7. The Tribunal, in its order dated 10.6.2020 referred to the submission advanced by respondents that the proceedings under Tenancy Act, 1964 were required to be adjudicated in terms of said Act and the provisions of Order 7 Rule 11 of the Civil Procedure Code were neither attracted nor applicable to the proceedings under the Act. Tribunal also recorded the submission of the respondents that earlier application was dismissed for default and *res judicata* is not applicable. The Tribunal also recorded objection of petitioners that previous application preferred by Dharma Shetye was dismissed by Mamlatdar in 2002 under Order 9 Rule 8 of CPC. The respondents did not file application for restoration and order 9 Rule 9 bars filing of fresh suit for same cause of action. Tribunal referred to the decision of this Court in the case of ***Mrs. Bernadette Maria C. Mascarenhas and anr. Vs Mr. Kanta N. Morajkar and ors. (Writ Petition No. 317 of 2016)***.

8. The Tribunal referred to Section 11 of Civil Procedure Code which deals with *res-judicata* and observed that application in the present case was dismissed for default and hence Section 11 of the Civil Procedure Code would not be attracted. It was further observed that there can be lapse on the part of litigant

and lawyer concerned. That alone is not enough to turn down the plea and shut the door of justice to the litigant in absence of anything showing malafides or deliberate dilatory tactics. In order to balance equities between parties the constant endeavour must be to ensure that everyone gets just and fair treatment/opportunity. Apparently, Tribunal has proceeded on the principle of giving an opportunity to the litigant to contest the proceedings. The Tribunal has not adjudicated on the issue of applicability of Order 9 Rule 9 of Civil Procedure Code and Order 7 Rule 11 of Civil Procedure Code to the present proceeding. Order reflects non application of mind.

9. Learned Counsel for the petitioners has urged that principles enumerated under Order 9 Rule 9 of Civil Procedure Code can be made applicable to the tenancy proceedings with full force. Unfortunately, Tribunal has not dealt with the said issue and proceeded on the general principles of law. Learned counsel for respondents has also urged that application preferred by respondents is based on new cause of action. Apparently said point was not urged before the Tribunal nor dealt by Tribunal. The Tribunal has also not adjudicated on the applicability of order 7 Rule 11 of Civil Procedure Code.

10. Order IX Rule 8 and 9 of Civil Procedure Code read as

follows:-

“Order IX - Appearance of Parties and Consequence of Non-appearance

8. Procedure where defendant only appears.

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit.-

(1) Where a suit is wholly or partly dismissed under [rule 8](#), the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. and shall appoint a day for

proceeding with suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

11. Order 7 Rule 11 of Civil Procedure Code is as under:

*“ORDER VII
PLAINT*

1 to 11 (c)

11(d) Where the suit appears from the statement in the plaint to be barred by any law;”

12. Learned Senior Counsel Mr. Kantak submitted that since the Tribunal has not adjudicated on the relevant issues of applicability of the aforesaid order and Rule, matter could be remanded back to the Tribunal for deciding the said issue.

13. In the case of ***New India Assurance Co. Ltd*** (Supra), it was observed that the provisions of Order 9 have not been made applicable to the proceedings under the Consumer Protection Act. Learned Senior Counsel Mr. Kantak, however submitted that the said decision can be distinguished on several issues one of them being the fact that the application for restoration of the complaint which was dismissed for default was rejected by the State Commission. Mr. Kantak also submitted that in paragraph

19 of the said decision it is observed that the District Forum or the State or National Commission would not be helpless and it would be open to them to dismiss the fresh complaint on the ground of abuse of the process available under the Act. They can, in that situation, legitimately invoke the principles of Order 9 Rule 9 C.P.C.

14. In the case of ***Indian Machinery Company*** (Supra), the Apex Court has referred to the decision in the case of ***New India Assurance Co. Ltd*** (supra) and it was observed that there was no rule familiar to Order 9 Rule 9 of the Civil Procedure Code under the Consumer Protection Act.

15. Be that as it may, the Tribunal has set aside the concurrent findings of two authorities and without adjudicating the prime issue as stated above and hence, without expressing any opinion on merits of issues, it would be appropriate to direct the Tribunal to decide issues relating to applicability of Order and Rules referred to hereinabove including the contention of respondents whether the application preferred by them relates to fresh cause of action after giving opportunity of hearing to both sides.

ORDER

(i) Writ petition No. 354 of 2023 is allowed.

(ii) Order dated 10.6.2020 passed by Administrative Tribunal, Goa in Tenancy Revision Application No.2/2019 and restoring the Tenancy Case no.2/2016 is quashed and set aside.

(iii) The Administrative Tribunal is directed to decide the Tenancy Revision Application a fresh after giving hearing to both the parties and in the light of the observations made in this order.

(iv) Parties are directed to appear before the Administrative Tribunal on 6.9.2023 at 11.00a.m.

(v) Writ Petition stands disposed of.

16. At this stage, learned counsel for the respondents submitted that vide order dated 4.5.2023, this Court passed an interim order wherein statement of the learned counsel for the petitioners was recorded on instructions that the petitioners will not change the status quo of the suit property bearing survey no. 62/2 of village Poriem during the pendency of the petition. Statement was accepted as an undertaking to this Court. Said protection may be continued till the disposal of the Tenancy Revision Application no. 2/2019.

17. Learned counsel for the petitioners, on instructions,

submitted that statement recorded vide order dated 4.5.2023 would be abided by the petitioners till the final disposal of the Tenancy Revision Application no. 2/2019.

PRAKASH D NAIK, J.