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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.129 OF 2023

Shashikala Rajendra Pai	... Applicant
V/s.	
Arjun Changa Surte & Ors.	... Respondents

Mr. A. R. Pai a/w Mr. Atharva Sane i/by Ms. Maansi R Gupta, for the Petitioner.

Mr. P. D. Dalvi i/by Mr. Dinesh U Masurkar, for Respondent Nos.1 to 4 & 6.

CORAM : AMIT BORKAR, J.

DATED : AUGUST 31, 2023

P.C.:

1. By this application under **Section 115 of the Code of Civil Procedure, 1908**, the applicant (original defendant No.1) is challenging the order of rejection of application below Exhibit 56 requesting the Trial Court to frame additional issues as prayed in clause (7-a) of the application and to decide the said issues as preliminary issue and to dismiss the suit.

2. Respondent Nos.1 to 8 are the plaintiffs who filed suit bearing RCS No.180 of 2008 seeking relief of declaration that the sale deed dated 22 November 1995 executed in favor of defendant No.1 be declared as bogus and for cancellation of sale deed. However, relief of injunction not to disturb plaintiffs possession

over the suit property and not to create third party right over the suit property has also sought.

3. The applicant, therefore, filed an application under Order 14, Rule 2 of the Code of Civil Procedure, 1908 for framing following issues:

(i) Whether the Suit is barred under the provisions of Section 85 of the Bombay Tenancy and Agricultural Land Act, 1948 as it seeks to nullify the operation and effect of Order dated 01/11/1995 bearing no. tenancy/SR/742/95 (Agriculture) U/s. 43 of the Bombay Tenancy and Agricultural Land Act, 1948 passed by Ld. Sub Divisional Officer, Panvel Division?

(ii) Whether this Hon'ble Court has jurisdiction for cancelling and setting aside the Deed of Conveyance dated 22/11/1995 bearing No.PVL/4037/1995 without challenging the Order dated 01/11/1995 bearing no. tenancy/SR/742/95 (Agriculture) U/s. 43 of the Bombay Tenancy and Agricultural Land Act, 1948 passed by Ld. Sub Divisional Officer, Panvel Division?

(iii) Whether the above suit is maintainable even if the Order dated 01/11/1995 bearing no. tenancy/SR/742/95 (Agriculture) U/s. 43 of the Bombay Tenancy and Agricultural Land Act, 1948 passed by Ld. Sub Divisional Officer, Panvel Division is subsisting?

4. The additional prayer was made for decision on the said issues as preliminary issue and for dismissal of the suit.

5. The Trial Court rejected the application.
6. Learned Advocate for the applicant submitted that the relief sought in the plaint is merely a consequential relief based on the declaration of invalidity of order under Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short 'BT & AL Act'). According to him, unless authority in BT & AL Act declares permission under Section 43 BT & AL Act as illegal, the consequential sale deed executed in favor of defendant No.1 being consequential relief, in the absence of such relief cannot be allowed. In support of his submission, he relied on judgment of this Court in the case of **Tukaram Dhondiba Chopade vs Andappa Genu Walekar since deceased through L.Rs. And Others**, reported in 2012 (3) Mh. L. J. 150.
7. The issue of maintainability or jurisdiction under Order 14 Rule 2 of Code of Civil Procedure, 1908 is concerned, it is well settled that such an issue can be framed by the Trial Court as preliminary issue if, such issue is a pure question of law. Such question can be decided at preliminary stage, however, the exercise of power of Civil Court to decide the issue of jurisdiction or maintainability of the suit at the threshold of proceedings has been deprecated by the Constitution Bench of the Apex Court in the case of **Major S.S. Khanna Vs. Brig. F.J. Dillion**, AIR 1964 SC 496. The Apex Court in the said judgment in paragraph No.18, has observed as under:

“18. ... Under Order 14 Rule 2, Code of Civil Procedure, where issues both of law and of fact arise in the same suit,

and the court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. *Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit.*”

(emphasis supplied)

8. On perusal of the plaint, it appears that the relief of declaration of sale deed as bogus and false is based on two factors: (i) order under Section 43 being invalid; (ii) fraud played by defendant No.1.

9. Assuming that defendant No.1 is right in his submission that declaration of sale deed being consequential relief, in absence of declaration of principal relief of invalidity of order under Section 43 of the Act such consequential relief cannot be granted; however, the declaration as sought is not based solely on the invalidity of order under Section 43 of BT & AL Act. Additional pleading of fraud is raised by plaintiffs which requires leading of

evidence by the parties. Therefore, at this stage, the Trial Court was justified in refusing to frame preliminary issues prayed by the defendant No.1.

10. Moreover, in the written statement, defendant No.1 has not raised specific pleading as regards issue sought to be framed; however, that will not preclude applicant from raising such issues, if the Trial Court at the final hearing of the suit finds that such issues are pure question of law.

11. On overall consideration of the facts of the case and the law laid down by the Apex Court, in my opinion, no interference **is called for.**

12. The civil revision application stands disposed of in above terms. No costs.

13. On the request made by the learned advocate for the applicant, interim relief granted by this Court during pendency of the revision application shall continue for a period of four weeks from today.

(AMIT BORKAR, J.)

Note: This order is modified to carry out corrections in paragraphs 1 and 11 and inserting paragraphs 12 and 13. The corrections are shown in bold.