



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

41 SECOND APPEAL NO.288 OF 2024

Vijesingh Nimji Gavit And Another
VERSUS
Jerma Shegya Gavit Died Through L Rs. Mamata Jerma Gavit
And Others

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Advocate for Appellants : Mr. A.S. Abhyankar a/w Mr. N.S.
Shah h/f Mr. S.V. Natu

CORAM : S. G. CHAPALGAONKAR, J.

Dated : December 16, 2024

FINAL ORDER :-

1. The appellants/original defendants impugn the judgment and decree dated 5.1.2024 passed by the Principal District Judge, Nandurbar in Regular Civil Appeal No.28 of 2018, upholding the judgment and decree dated 2.11.2018 passed by the learned Civil Judge Jr. Division, Nandurbar on objection to execution of decree filed at Exhibit 18, in Regular Darkhast No.2 of 2012, which has been filed seeking execution of decree passed in R.C.S No. 44 of 1999 and confirmed up to Supreme court of India thereby, directing present appellants to deliver possession of suit property to respondents.

The Summery of basic facts is as under

2. Appellants were original defendants in Regular Civil Suit No.44 of 1999. Suit was decreed in favour of respondents/plaintiffs thereby directing defendants to hand over possession of the suit property to plaintiffs. Defendants preferred Regular Civil Appeal No.4 of 2006 before the District Judge. The same was dismissed. The defendants then filed Second Appeal No.298 of 2012 which was summarily dismissed. Special Leave Petition filed by defendants before the Hon'ble Supreme Court is also rejected.

3. Plaintiffs/respondents filed Regular Darkhast No.2 of 2012 for execution of the decree. Defendants/J.Ds. filed application at Exhibit-18 thereby raising objection to execution of the decree on the ground that decree is not executable as Civil Court had no jurisdiction to decide title of the party in light of provisions of section 85 and 85 (a) of the Bombay Tenancy and Agricultural Lands Act (for short "the Act") as Tenancy Court is only competent to decide validity of the partition of new tenure agriculture land. Secondly, in light of provisions under section 36 (c) of the Maharashtra Land Revenue Code, the order passed by the competent authority in respect of new tenure land cannot be challenged before the

Civil Court. Executing Court rejected aforesaid objection vide order dated 2.11.2018 and directed issuance of possession warrant against the defendant/J.Ds., The defendant/J.Ds. assailed the order dated 2.11.2018 passed in R.D. No.2 of 2012 by filing Regular Civil Appeal no.28 of 2018 before District Judge, Nandurbar. However, said appeal came to be dismissed vide order dated 5.1.2024. Hence this second Appeal.

Oral and Written Submissions

4. Learned advocate Mr. Abhyankar a/w Mr. Shah h/f Mr. S.V. Natu, appearing for appellant submits that both the Courts have failed to appreciate scope of inquiry under section 21 Rule 97, 98, 101 of the Civil Procedure Code while dealing with objections of appellants to the execution of decree. Neither issues were framed by Executing Court, nor has Appellate Court framed necessary points for consideration. Mr. Abhyankar submits that, defendants derived title in the suit properties on the basis of tenancy right and consequential purchase of the suit land as a separate property. Consequently, section 85 and 85-A of the Act bars jurisdiction of the Civil Court. Decree under execution is therefore nullity. Similarly, partition sanctioned by the revenue authorities in the year

1985 could not have been challenged in the suit after twelve years.

5. The Jurisdiction of the Civil Court was barred in view of section 36 (C) of the Maharashtra Land Revenue Code as parties are Scheduled Tribes. He would further submit that prior to institution of R.C.S 44 of 1999, plaintiffs had instituted R.C.S. No.13 of 1999 seeking decree of perpetual injunction. In that suit, relief claimed in R.C.S 44 of 1999 could have been claimed. However, they failed or omitted to claim such relief. Therefore, R.C.S. No.44 of 1999 was not maintainable or suit was barred by Order II Rule 2 of Code of Civil Procedure. In support of such objection, certified copies of documents were tendered before First Appellate Court in R.C.A. No.28 of 2018, but appellate court failed to appreciate and consider this aspect.

6. Mr Abhyankar in support of his submissions relies upon the following judgments :-

- i. Shripati Ganpati Jadhav and ors. Vs. Chandrakant Ganpati Jadhav and ors. Reported in 2011 (2) Mh.L.J. 689.

- ii. Brahmadeo Choudhary Vs. Rishikesh Prasad Jaiswal and another reported in 1997 (1) Mh.L.J. (SC) 817.
- iii. Mani Nariman Daruwala (deceased) and ors. Vs. Phiroz N. Bhatena and ors. Reported in 1991 (1) Mh.L.J. 376.
- iv. Foreshore Co-operative Housing Society Ltd. Vs. Praveen D. Desai (D)through L.Rs. And ors. Reported in 2015 SAR (Civil) 789.
- v. Nusserwanji E. Poonegar and ors. Vs. Mrs. Shirinbai F. Bhesania and ors reported in AIR 1984 Bombay 357.
- vi. Bhandara Zilla Sahakari Shetki Kharedi and ors. Vs. Damodar and ors. Reported in AIR 1984 Bombay 362.
- vii. Saraswatibai Trimbak Gaikwad Vs. Damodhar D. Motiwale and ors. Reported in 2002 (3) Mh.L.J. 69.
- viii. Shakuntala Devi Vs.Kamla and ors. Reported in 2005 SAR (Civil) 400.
- ix. Sarup Singh and Anr. Vs. Union of India and Anr. Reported in 2011 SAR (Civil) 40.
- x. Arulmighu Nellukadai Mariamman Tirukkoil Vs. Tamilarasi (dead) by Lrs. Reported in 2019 SAR (Civil) 704.
- xi. Narayan Gramani and ors. Vs. Mariammal and ors. Reported in 2019 SAR (Civil) 52.
- xii. Dadu Dayaly Mahasabha, Jaipur (Trust) Vs. Mahant Ram Niwas and Anr. Reported in 2008 SAR (Civil) 468.
- xiii. Pramod Kumar and Anr. Vs. Zalak Singh and ors. Reported in 2019 Supp. (2) SAR (Civil) 77.

Analysis of Submissions

7. Apparently all these contentions are raised by way of objection to the execution of decree, which has been confirmed up to the Supreme Court of India. All such objections were available to be raised in original proceeding of suit or appeal; if the judgment debtor who contested suit but failed to take up such plea in proceeding of suit or before first and second appellate court, he cannot be permitted to raise the same by way of objection to execution of decree, unless, it is demonstrated that decree under execution is nullity, non est or without jurisdiction.

8. So far as contention that section 85 and 85(A) of Act bars jurisdiction of the Civil Court to determine the title derived from the Tenancy Land, both the Courts have observed that such a plea was not raised in the suit. Even there was no issue framed on this point. It can be observed that Jivlya Ghonya was conferred with certificate under the provisions of the Act. Two sons of Jivalya were allotted land in gat no.6/1 and 6/2 and then mutation entry was effected. However, record in RCS no.44 of 1999 demonstrate that there was no whisper in the pleadings and evidence as regards to Tenancy Right of either of the parties in respect of the suit property.

The issue of bar of jurisdiction was never been raised or pressed into service. In fact, it has come on record that Ghosha was common ancestor. He died leaving behind two sons namely Jivalya and Raylya. The Jivalya was in possession of land as Tenant since 1936 onward. He was declared as protected Tenant. Consequential ownership certificate was issued. Therefore, Rahilya / predecessor of defendants had no right in land. It is observed by this court while disposing off Second Appeal no.298 of 2012 that no right of Rahilya has been brought on record in respect of the suit property. Courts nowhere dealt with the issue of tenancy nor any such issue was involved in the suit. Further, it is settled that once the certificate of ownership of land is issued under the Tenancy Act, land vests with tenant as owner. Revenue Record clearly shows that the plaintiff's predecessor Jivalya was tenant over the suit land. Certificate of ownership granted to him under the provisions of Tenancy Act is final and conclusive. Therefore, issue of title of plaintiffs father needed no reference to Tenancy Court. Even from pleading of defendants in suit, it can be observed that no claim based on tenancy was ever asserted by them. They pleaded that suit land is ancestral property of plaintiff and defendants and claims right based on

partition and consequential Mutation Entry. There is nothing on record to show that any issue required to be dealt with and decided under section 85 or refereed under section 85(A) of the Act was ever arose in R.C.S. No.44 of 1999. As observed by Supreme Court in case of **Balawwa VS Hasanabi reported in 2000 (9) SCC 272**, civil court cannot be said to be ousted of the jurisdiction, in granting the relief sought for. It is too well settled that when special Tribunal is created under a special statute and the jurisdiction of the civil court is sought to be ousted under the said statute, it is only in respect of those reliefs which could be granted by special Tribunal under special statute, the jurisdiction of the Civil Court can be said to be ousted.

9. Second contention is that R.C.S. No.44 of 1999 was not maintainable or it was barred Under Order II Rule 2 of the Civil Procedure Code as relief of possession, though available as cause of action in the previous suit, same was not raised. The First Appellate Court dealt with this objection and specifically observed that the suit property in previous suit i.e. R.C.S. 13 of 1999 was different than suit property in R.C.S. No.44 of 1999. Therefore, the bar of jurisdiction as sought to

be raised would not attract for R.C.S. No.44 of 1999. Apparently objection regarding bar under Order II Rule 2 was never raised in R.C.S. No.44 of 1999 or before the First or Second Appellate Court. First time such objection is sought to be pressed into service in execution of the decree. The Appellate Court on perusal of record of both the suits observed that subject matter of R.C.S. no.13 of 1999 was land gat no.6/1-B admeasuring 2H 40R, whereas land gat no.6/1-A admeasuring 1H 24R is the subject matter of R.C.S. No.44 of 1999. Nothing is placed before this Court to dislodge correctness of observations made by the First Appellate Court in R.C.A. no.28 of 2018.

10. The last objection is based on section 36 of MLR Code 1966. Admittedly both parties to suit are Tribal. It is not the case of Transfer of land owned by Tribal to Non-Tribal. As rightly held by first appellate court no issue covered under section 36, 36-A or 36-B was directly or indirectly arose in suit to attract bar of jurisdiction 36-C of M.L.R Code 1966.

11. Although, there cannot be quarrel on prepositions of law espoused in cases cited by Mr Abhyankar, in light of

factual scenario as discussed above, none would help appellant to advance his cause.

12. Hence, Second Appeal stands **dismissed**. No costs.

(S. G. CHAPALGAONKAR)
JUDGE

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