

(1997) 08 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 5153 of 1995

Bhimrao Sambhaji Linge and others

APPELLANT

Vs

Hanumant Anandrao Pawalkar and another

RESPONDENT

Date of Decision : 29-08-1997

Acts Referred:

Bombay Irrigation Act, 1879 — Section 26
Civil Procedure Code, 1908 (CPC) — Section 9
Maharashtra Irrigation Act, 1976 — Section 103, 104, 109, 32, 42
Specific Relief Act, 1963 — Section 37, 38

Citation : (1998) 2 ALLMR 193 : (1998) 3 BomCR 298 : (1997) 3 MhLj 769

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : S.S. Patwardhan, for the Appellant; Abhay S. Oka, for the Respondent

Judgement

F.I. Rebello, J.—This petition is directed against the order dated 5th October, 1995 passed by the Joint Civil Judge Junior Division, Pandharpur which decided the issue as to whether a Civil Court has jurisdiction to decide a suit wherein the prayer for permanent injunction has been prayed for in respect of some acts done by the respondents herein of interfering with the free flow of water in the canal. The Court answered the issue in the affirmative.

2. It was contended that in view of the provisions of the Maharashtra Irrigation Act, 1976 the Civil Court would have no jurisdiction, Learned Counsel contends that in so far as the canal is concerned, there is a specific statute viz. Maharashtra Irrigation Act, 1976 which deals with the flow of water in the canal and all other incidental issues. It is pointed out that in terms of section 42 of the Maharashtra Irrigation Act in an event a dispute arises, such dispute has to be decided by a Canal Officer in terms of the said provision. A person aggrieved by the said order has a remedy by way of an Appeal or Revision in terms of section 103 of the said Act. It is, therefore, pointed out that though there is no express bar in the Act, nonetheless such right having being created under the Act not

being a common law, right and a remedy having being provided therein, in such circumstances it must be construed that the jurisdiction of the Civil Court u/s 9 has been implicitly barred. Learned Counsel further draws my attention to the provisions of section 26 of the Bombay Irrigation Act, 1879 wherein in respect of a similar provision, the section specifically provided that a decision of the Collector would remain in force until set aside by Decree of a Civil Court. It is pointed out that in the earlier Act it was made expressly clear that the decision of the Canal Officer would not be final. It is as such sought to be contended that since these words are absent in section 42 it must be construed to mean that a decision taken u/s 42 cannot be challenged in a Civil Court. My attention has also been invited to a judgment of a Division Bench of this Court in the case of Vishnu Vinayak Vaze v. The Secretary of State for India, reported in 24 Bom.L.R. 264. In that case the Court was considering the provisions of sections 36, 35 and 31(d) of the Bombay Irrigation Act. The Division Bench after considering the said provisions which pertain to compensation came to the conclusion that as power has been conferred on the Collector to decide the compensation and considering the language of the statute the jurisdiction of the Civil Court was ousted.

3. On the other hand learned Counsel for the respondents contends that there is no bar to a Civil Court deciding the issue. It is contended that jurisdiction of the Civil Court can be barred by an express provision or it can be implied. In the instant case, it is pointed out that section 104 of the Maharashtra Irrigation Act clearly sets out that no suit shall lie in any Civil Court, to contest the validity of a Canal Officer's order u/s 32, 70 or 71. It is, therefore, contended that only in so far as these sections are concerned, there can be no challenge to the said orders before a Civil Court. It is further pointed out that apart from the said order in respect of the other orders under the Act, clearly the Civil Court would have jurisdiction and it cannot be said that the jurisdiction is implicitly barred. For that matter it is contended if it was so, legislature need not have enacted section 104. In support of his contentions learned Counsel relies on the judgements of the Apex Court in the case of Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, , in the case of Abdul Waheed Khan Vs. Bhawani and Others, and in the case of Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, .

4. .The suit as filed by the respondent herein was for a perpetual injunction to restrain petitioners from felling trees and demolishing the wall on the field channel and canal and further from in any manner obstructing the flow of water from the canal and from doing such acts which could result in destroying the canal, changing the nature of the canal or peaceful user and maintenance of the said canal by the respondents. On the petitioners contending that the Civil Court had no jurisdiction, the trial Court was pleased to frame the following two Issues :--

(1) Whether the suit is maintainable in this Court ?

(2) Whether this Court has jurisdiction to entertain and try this suit ?

Considering the two issues in sum and substance the issue was whether on the pleadings of the parties and the cause of action pleaded the Court had jurisdiction to hear and decide the suit.

5. The principal contention is based on the construction of section 42 of the Maharashtra Irrigation Act, 1976. Sub-section (1) of section 42 sets out that whenever a dispute arises between two more persons in regard to their mutual rights or liabilities in respect of the use, construction or maintenance of a field channel or among joint owners of a field channel, as to their respective shares of the expense of constructing or maintaining such field channel or as to the amounts severally contributed by them towards such expenses; or as to failure on the part of any owner to contribute his share, a person interested in the matter of such dispute may apply in writing to a Canal Officer duly empowered to receive such application, stating the matter in dispute. The other sub-sections of section 42 further provides as to who can decide the dispute and the further requirement of notice to all the parties and hearing by giving a reasonable opportunity at the stage of deciding the dispute. Any order passed by the Canal Officer or superior Canal Officer is subject to appeal or revision in terms of section 103 of the Act. In terms of section 109 of the Act, a Canal Officer empowered to conduct an inquiry can exercise all such powers of summoning and examining witnesses and production of documents as are conferred on the Civil Court by the Code of Civil Procedure, 1908. In other words certain powers pertaining to summoning and examining witnesses and production of documents which are conferred on the Civil Courts by the CPC are alone conferred on the Canal Officer. A plain reading will therefore mean that other powers contained in the CPC have not been so conferred on the Canal Officer.

6. The Civil Court u/s 9 of the CPC has jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The question of when the Civil Court's jurisdiction has been ousted has been settled by a long line of decisions. Suffice it to say that exclusion of jurisdiction of a Civil Court is not to be readily inferred but such exclusion must be necessarily expressed or clearly implied. In *Bharat Kala Bhandar Ltd.* (supra) the Apex Court was pleased to observe as under :-

"Further, one of the corollaries flowing from the principle that the Constitution is the fundamental law of the land is that the normal remedy of a suit will be available for obtaining redress against the violation of a constitutional provision. The Court must, therefore, lean in favour of construing a law in such a way as not to take away this right and render illusory the protection afforded by the Constitution."

The Apex Court while considering the provisions of laws relating to assessment under the M.B. Sales Tax Act laid down principles regarding exclusion of jurisdiction of Civil Court in the case of *Dhulabhai* (supra). The principles as enunciated by the Apex Court are as under :

"(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts" jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the Scheme of the particular Act must be examined because it is relevant enquiry.

(7) An exclusion of jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply; case law discussed."

In the case of Abdul Waheed Khan (supra) the Apex Court was pleased to observe as under :---

"It is settled principle that it is for the party who seeks to oust the jurisdiction of a Civil Court to establish his contention. It is also equally well settled that a statute ousting the jurisdiction of a Civil Court must be strictly constructed."

7. On a consideration of the law laid down by the Apex Court in the aforementioned judgements can it be said that the arguments advanced on

behalf of the petitioners can be accepted. Learned Counsel tried to point out the distinction in section 26 of the Bombay Irrigation Act, 1879 and the provisions of section 42 of the Maharashtra Irrigation Act, 1976. I have already set out the contentions advanced on behalf of the petitioners based on the said two sections. In sum and substance the argument is that omission by the legislature in not including the word "any order passed by the Collector under these sections shall remain in force until set aside by the Decree of the Civil Court", in section 42 of the Maharashtra Irrigation Act, 1976 would mean that the Legislature while enacting the said Act which Act has repealed the Bombay Irrigation Act, 1879 has deliberately excluded the word, meaning thereby that there would be finality to the order passed by the Canal Officer. A perusal of the Bombay Irrigation Act, 1879 shows that there is no other provision, whereby an order passed under the Act becomes final.

8. Considering section 26 let us now examine further the provisions of the Maharashtra Irrigation Act, 1976 for the purpose of finding out whether the arguments advanced on behalf of the petitioners has any merit. An order passed u/s 42 is subject to appeal and revision u/s 103 of the same Act. However, what is important is section 104 of the said Act, which sets out that no suit shall lie in any Civil Court contesting the validity of a Canal Officer's order under sections 32, 70 or 71. What this means is that in so far as specific orders passed u/s 32, 70 and 71 they cannot be called in question in a Civil Court. It must therefore follow that in respect of other orders under the Act there is no such bar. Therefore, an order passed u/s 42 does not fall within the ambit of section 104 of the Maharashtra Irrigation Act, 1976. In the Bombay Irrigation Act, 1879 in section 26 the language was that an order passed u/s 26 would continue to remain in force until set aside by a Decree of a Civil Court. In section 42 of the Maharashtra Irrigation Act, 1976 there is no such language. However, section 104 takes out certain orders from the ambit of challenge in a Civil Court. It is, therefore, to be held that there is no express provision in the Act whereby the jurisdiction of the Civil Court has been expressly ousted in so far as section 42 of the Act of 1976 is concerned.

9. The next question is whether there is implied ouster of the jurisdiction of the Civil Court. The entire argument is based on the contention that the rights under the Act are a creation of the said Act and not a common law right and as remedies have also been provided therein, it must be concluded that the rights under the Act can only be agitated before the Authorities created by the said Act and there is an implicit exclusion of jurisdiction of the Civil Court.

10. In the instant case, we are dealing with the provisions of section 42 of the Maharashtra Irrigation Act, 1976. Admittedly in terms of section 109 of the Act certain powers of the Civil Court which are conferred on it by the Code of Civil Procedure, 1908 have also been conferred on the Canal Officer conducting an enquiry under the provisions of the said Act. There is no power in the Canal Officer either to grant a permanent injunction or for that matter a temporary

injunction. What section 42 contemplates is that when a dispute arises and not a case of apprehension of a dispute in regard to mutual right or liability in respect of use, construction or maintenance of a field channel or among joint owners of the field channel as to their respective shares of the expenses of construction, etc. A person aggrieved on such a dispute arising may apply in writing to a Canal Officer. The mandate is therefore may and not shall. On receiving such a complaint the Canal Officer himself or such other Superior Officer to whom the matter is transferred may pass thereon orders as he thinks fit. A reading or sub-section (3) of section 42 may create an impression that passing such orders therein would include an order for the purpose of resolving the dispute as contained in section 42. However as already pointed out section 42 can be resorted to whenever dispute arises between two persons. The language of section 42 does not give scope for holding that even in a case of a threatened dispute there is such a power. If such power was conferred, including of threatened disputes the language of the section would not have been whenever dispute, arises. A plain reading of the section will mean that there is a dispute or disputes. In the absence of this it cannot be inferred that apprehended disputes would also fall within section 42 of the Act. If this be the case then clearly the matter would not be covered by section 42 of the Maharashtra Irrigation Act, 1976. The jurisdiction of the Civil Court in the absence of any provisions excluding jurisdiction would not be ousted.

11. However, assuming that section 42 would envisage a threatened dispute also, then recourse to such a remedy is purely optional. The Mandate of the section as already pointed out is not shall but may. For the purpose of deciding such a dispute limited powers of a Civil Court as set out u/s 109 of the Act alone are conferred on the Authority. An appeal lies against an order passed u/s 42 as provided u/s 103 of the Act to such Officer as may be prescribed. In so far as the order passed by such Authority, there is no finality to the said order as can be seen in respect of the orders passed under sections 32, 70 and 71. In other words such orders can be challenged before a Civil Court. If such a power is there in a Civil Court ultimately can it be said that the Civil Court cannot assume jurisdiction without the party exhausting the procedure followed u/s 42. My attention was invited to a judgment of the Division Bench of this Court in the case of V. V. Vaze (supra). That was a case under the provisions of the Bombay Irrigation Act. What was in Issue in the said case were consideration of the provisions of sections 31, 34, 35 and 36. A perusal of the said provisions would show that in so far as the said provisions are concerned section 36 sets out that the decision of the Collector u/s 34 or section 35 determining the amount of compensation to be awarded, such a decision of the Authority to whom the appeal lie shall be conclusive. It was this language that was being construed and it is in these circumstances that the Division Bench of this Court in the case of V.V. Vaze (supra) was pleased to hold that there is an ouster of jurisdiction of the Court. In the present case in so far as section 42 is concerned, though, an appeal has been provided u/s 103 of the Maharashtra Irrigation Act, the said section

does not provide for any finality as provided in so far as the orders passed under sections 32, 70 and 71 alone. Thus clearly there is no implied ouster of the jurisdiction of the Civil Court.

Thus from a consideration of discussions above what emerges is that it is only in respect of orders passed under sections 32, 70 and 71 that the jurisdiction of the Civil Court is expressly ousted. In so far as section 42 is concerned, there is no ouster either by an express provision or by necessary implication. In a case of relief of a preventive nature as in the present case the jurisdiction of the Civil Court will not be ousted.

12. For the aforesaid reasons, there is no merit in this petition and as such interim relief granted on 8th November, 1995 is vacated. Rule discharged. Considering the facts of the case, there shall be no order as to costs.

13. Petition discharged.