

(2015) 04 BOM CK 0054

In the Bombay High Court

Case No : Appeal Against Order No. 98 of 2011

Kalavati Gulabrao Lihitkar

APPELLANT

Vs

Bapurao

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 125
Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1(u)

Citation : (2015) 04 BOM CK 0054

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : D. Biyani, Advocate holding for A.M. Ghare, for the Appellant; M.P. Khajanchi, Advocates for the Respondent

Final Decision : Allowed

Judgement

1. This appeal filed under provisions of Order 43 Rule 1(u) of the Code of Civil Procedure 1908 (for short the Code) takes exception to the order passed by the first Appellate Court remanding the proceedings to the trial Court with a direction to frame an issue regarding tenancy on the basis of pleadings of the parties with a further direction to refer said issue to the competent authority for decision.

2. The facts giving rise to the present appeal are that the present appellant is the original plaintiff who was the owner of field Gat No. 29 admeasuring 2 Hectares 73R. According to the appellant, the respondent had filed Regular Civil Suit No. 40/2001 for specific performance of an agreement under which it was claimed that the present appellant had agreed to sell the suit field to the respondent. Said suit had been dismissed by the trial Court after which the appellant had issued notice to the respondent to hand over possession of the same. As the possession of the suit field was not handed over, the appellant filed Regular Civil Suit No. 19/2008 for possession and perpetual injunction.

3. The respondent in his written statement stated that on 11-6-2001 an agreement was entered into between the parties wherein the respondent had

agreed to purchase the suit field. He further pleaded that he had taken aforesaid suit field on Theka for a period of three years and had paid an amount of Rs. 50,000/-. He, therefore, claimed that as he continued in possession thereafter, he had become a tenant under provisions of Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (for short, the said Act).

4. After the parties led their evidence, the trial Court held that the appellant had proved her ownership and hence, was entitled for possession of the suit field. The suit accordingly came to be decreed on 31-8-2009. Being aggrieved, the respondent filed Regular Civil Appeal No. 57/2009. The Appellate Court held that the respondent was in possession of the suit land on the basis of Theka and as he was claiming that he was a tenant of the suit field, the trial Court ought to have framed an issue regarding tenancy and it ought to have referred the same to the tenancy Court. Hence, by the impugned order, the Appellate Court set aside the decree passed by the trial Court and remanded the proceedings to the trial Court for framing the issue as regards tenancy with a direction to refer such issue to the tenancy Court.

5. Shri D. Biyani, learned Counsel appearing for the appellant submitted that the Appellate Court erred in remanding the proceedings for framing the issue on tenancy. He submitted that a vague plea regarding tenancy was raised by the respondent only with a view to protract the proceedings. According to him, on such a vague plea it was not necessary to frame an issue regarding tenancy and refer the same for adjudication. He further submitted that no grievance was ever made by the respondent before the trial Court regarding non-framing of such issue and hence, the Appellate Court was not justified in doing so. He referred to the grounds raised in the memorandum of appeal before the first Appellate Court in that regard. In support of his submissions, the learned Counsel relied upon the following judgments:

[1] D.M. Deshpande and Others Vs. Shri Janardhan Kashinath Kadam (Dead) by Lrs. and Others, (1998) 8 AD 282 : AIR 1999 SC 1464 : (1998) 6 SCALE 194 : (1998) 8 SCC 315 : (1998) 2 SCR 669 Supp : (1999) 1 UJ 500 : (1998) AIRSCW 3986 : (1998) 8 Supreme 473 .

[2] Uttam Sambha Deshmukh and others Vs. Yamunabai Bhojar and others, (1998) 3 ALLMR 625 : (1998) 4 BomCR 441 : (1998) 3 BOMLR 625 : (1998) 2 MhLj 144 .

[3] Judgment in Second Appeal No. 51/1999, Ganpat Janu Wagh v. Vanmala d/o Rambhau Sarap.

6. The aforesaid submissions were countered by Shri M.P. Khajanchi, learned Counsel appearing for the respondent. It was urged that the Appellate Court was justified in directing the trial Court to frame the issue of tenancy. According to him, as the respondent had claimed that he had been put in possession on the basis of Theka, said plea went to the root of the matter and was, therefore, required to be adjudicated. He further submitted that the appellant in her cross

examination had denied that possession of the suit field has been given to the respondent in pursuance to the agreement of sale. It was open for the defendant to take inconsistent pleas in his written statement and merely because the respondent had failed to prove the agreement for sale, he was not precluded from raising a plea that he was a tenant of the suit field. He then submitted that necessary details had been pleaded in the written statement and the plea as raised was not vague. According to him, no substantial question of law arose in the present appeal. He placed reliance upon the following judgments in support of his submissions:

[1] Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc., AIR 2006 SC 2832 : (2006) 7 JT 139 : (2006) 7 SCALE 517 : (2006) 6 SCC 498 : (2006) 4 SCR 259 Supp : (2006) AIRSCW 3956 : (2006) 5 Supreme 943 .

[2] Pandurang R. Mandlik v. Shantibai R. Ghatge, 1988 Supp (2) SCC 627.

[3] Gundaji Satwaji Shinde Vs. Ramchandra Bhikaji Joshi, AIR 1979 SC 653 : (1979) 2 SCC 495 : (1979) 2 SCR 586 .

7. The following substantial question of law has been framed in this appeal:

Whether the appellate Court was right in remanding the matter back to the trial Court to frame an issue of tenancy and to refer it to the tenancy Court for a decision?

8. At the outset, it may be noted that the suit for specific performance being Regular Civil Suit No. 40/2001 based on the agreement dated 15-7-2000 came to be dismissed by the trial Court. The first Appellate Court confirmed the findings recorded by the trial Court. In Second Appeal No. 150/2011 filed by the present respondent, this Court held that the agreement dated 15-7-2000 had not been duly proved and that no error had been committed by both the Courts in denying the relief of specific performance to the respondent. Said second appeal came to be dismissed on 13-3-2015. It is thus clear that the agreement dated 15-7-2000 which was claimed to be an agreement for sale of the suit field has been held to be not proved.

9. In the suit filed by the appellant for possession, the trial Court held that the appellant had proved her ownership in respect of the suit land. It further observed that the respondent had not taken any such stand regarding tenancy in the suit for specific performance filed by him. It further held that there were no remarks found in Exhibit-17 which was a revenue record in relation to the respondent's tenancy rights. The trial Court, therefore, did not find it fit to accept the plea of the respondent regarding tenancy and thereafter decreed the suit for possession.

The Appellate Court considered the admission of the plaintiff that she had not given possession to the respondent on the basis of the agreement for sale. On that basis, it observed that said version of the appellant showed that the respondent was in possession of the suit field on the basis of Theka. The

appellate Court thereafter was of the view that the trial Court ought to have framed the issue of tenancy and should have thereafter referred said issue to the competent Court for decision. It is, therefore, necessary to consider whether such conclusion of the appellate Court is justified in the facts of the present case and is in accordance with law.

10. It is not in dispute that the Civil Court has no jurisdiction to decide those issues that are required to be decided by the competent Court in view of provisions of Section 125 of the said Act. In *Gundaji Satwaji Shinde (supra)*, the trial Court and the High Court had proceeded to examine a document certifying that the plaintiff therein was an agricultural labourer. The Courts thereafter held that said document had no evidentiary value and the Civil Court had jurisdiction to entertain the suit for specific performance. The Supreme Court held that if an issue arises even in an incidental manner which cannot be tried by the Civil Court, then it is obligatory on the Civil Court to refer such issue to the competent authority under the Tenancy Act.

In *Pandurang Ramchandra (supra)*, proceedings initiated under provisions of the Tenancy Act had been dismissed holding that the provisions of the Act were not applicable. Thereafter, in the civil suit the High Court had remanded the proceedings to the tenancy authorities to decide issues relating to jurisdiction of said authorities. The Supreme Court after noticing the earlier proceedings between the parties under the Tenancy Act maintained the order of the High Court

11. In *Noor Mohd. Khan Ghouse Khan Soudagar Vs. Fakirappa Bharmappa Machenahalli and Others*, AIR 1978 SC 1217 : (1978) 3 SCC 188 : (1978) 3 SCR 789 while considering the issue as regards exclusion of the jurisdiction of a Civil Court, it was held that the Civil Court must be satisfied that such an issue arises before it for being determined by the competent authority. In para 35 of its judgment, the Supreme Court observed thus:-

"35... The position, therefore, is even though the defendant may plead that he is a tenant, the Court must be satisfied that an issue whether the defendant is a tenant or not arises before it could be referred for determination by the Tribunal and the question of jurisdiction will not be decided mainly on the plea of the defendants."

It has been the consistent view of this Court that before making a reference to the competent authority for deciding the issue of tenancy, the alleged tenant must disclose in his pleadings details about tenancy and the exact nature of right which is claimed by him. It has been held that an issue of tenancy cannot be raised on a vague plea. This view taken by the Division Bench in *Nilesh Construction Company and another Vs. Gangubai Choudhary and others*, (1982) MhLj 664 . Said view has been affirmed by the Supreme Court in *D.M. Deshpande (supra)*. The Supreme Court therein held that necessary particulars are required to be given by the party claiming the right of tenancy. On similar

lines is the view taken in Uttam Samba Deshmukh (supra).

12. In the present case as noted above, the defendant has stated in his written statement that possession of the suit field bearing Gat No. 29 was given to him on Theka for three years for which he had paid a sum of Rs. 50,000/-. It is then stated that in the year 1997 or sometime thereby, the land was in possession of the defendant as a tenant. In his cross examination, the defendant stated that though he had applied to the Tenancy Court for declaration of his tenancy rights, said documents were not filed on record. The trial Court had considered the document at Exhibit-17 which was a revenue record to observe that there was no entry whatsoever to show any tenancy right of the defendant.

It is pertinent at this stage to refer to Ground A in the memorandum of appeal in Regular Civil Appeal No. 57/2009 preferred by the defendant. The relevant portion reads thus:

"It is pertinent to note that, there is no evidence on record to show that, the defendant/appellant was placed in possession of the suit field under the contract or Theka. In spite of that, the learned lower court without any basis concluded that, the suit field was delivered in possession of defendant/appellant under Theka."

It is thus clear that even according to the defendant there was no evidence to show that he was placed in possession of the suit field under any contract or Theka. It is also necessary to point out that there is no ground raised in the said memorandum of appeal that the trial Court ought to have framed the issue of tenancy and should have thereafter referred it to the Tenancy Court. Hence, considering the law as laid down in Noor Mohd Khan (supra), it can be said that the trial Court was satisfied that no such issue regarding tenancy of the defendant arose. The first appellate Court, however, without considering said aspect of the matter remanded the proceedings to the trial Court on the ground that the version of the plaintiff in her deposition indicated that the defendant was in possession on the basis of Theka. Though it cannot be disputed that it is open for the defendant to raise an inconsistent defence as held by the Supreme Court in Baldev Singh and others (supra), in the present case, it is clear that there is no sufficient material on record either in the form of pleadings or documents to indicate that any such issue as regards tenancy of the defendant arises.

13. In view of aforesaid discussion, the judgment of the appellate Court remanding the proceedings to the trial Court cannot be sustained. Hence, the following order is passed:

(1) Judgment dated 28-1-2011 in Regular Civil Appeal No. 57 of 2009 is set aside.

(2) The proceedings are remanded to the appellate Court for deciding the appeal in accordance with law. It is clarified that this Court has not examined the merits of the rival claims of the parties.

(3) Reference of the issue of tenancy if made by the trial Court shall stand recalled.

(4) The appeal is allowed in aforesaid terms with no order as to costs.