

(2007) 09 BOM CK 0002
In the Bombay High Court
Case No : Second Appeal No. 605 of 2005

Mr. Narayan Yeshwant Pednekar and Others	APPELLANT
Vs	
Mr. Sabaji Vishram Chamankar since deceased by his heirs	RESPONDENT

Date of Decision : 24-09-2007

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 2, 32H(1), 63, 70, 85
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 4, Order 18 Rule 5, Order 41 Rule 27

Citation : (2008) 3 ALLMR 120 : (2008) 2 BomCR 309 : (2007) 109 BOMLR 2356 : (2008) 2 MhLj 318

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : G.R. Rege, instructed by S.A. Mudbidri, for the Appellant; V.B. Naik, instructed by I.M. Khairadi, for Respondent Nos. 1A to 1E, for the Respondent

Judgement

Anoop V. Mohta, J.—The appellants being aggrieved by the judgment and decree dated 10th January, 2005 passed by the District Judge, Sindhudurg in Regular Civil Appeal No. 123 of 1987, confirming the judgment and decree dated 16/10/1987 passed in Regular Civil Suit No. 21 of 1983 by the Civil Judge, Junior Division, Vengurla and allowing the cross objection filed by the respondent, preferred this appeal on questions of law and various other grounds.

2. The appellants and respondent to 5 are original defendants in regular Civil Suit No. 21 of 1983 filed by, respondent Nos. 1 to 5, the heirs of original plaintiff, who died during the pendency of proceedings. The said suit was filed for a declaration that original plaintiff/respondent 1 to 5 are the owners and are in possession of the suit lands and are cultivating the same and the appellants/defendants be restrained from interfering with their possession.

3. In the year 1984, the appellants/defendants filed their say-cum-written statement and resisted the suit and contended that they are in continuous use, occupation and in possession of the suit lands and are cultivating the same and/

or are "Vahiwatdar" and are enjoying the yields therefrom. In the alternative the appellants also contended that they are the tenants of the suit lands much prior than the tillers day and are protected tenants and, therefore, the issue is required to be considered by the court in proper perspective. Several other contentions were raised and it was prayed that the suit be dismissed.

4. On 16/10/1987, after framing issues and recording the evidence, the trial court decreed the suit in favour of the plaintiff.

5. The appellants preferred the Regular Civil Appeal No. 123 of 1987. The plaintiff also preferred cross objections. On 03/12/1993, the appeal filed by the appellants was allowed and the suit was remanded for retrial before the trial Court.

6. In the month of June, 1994 against the judgment and order dated 03/12/1993 of the Lower Appellate Court, the appellants preferred appeal and respondent Nos. 1 to 5 also filed appeals.

7. On 07/06/2004, both the appeals from order preferred by the appellants and respondent Nos. 1 to 5 came to be disposed of by the order of this Hon''ble Court dated 07/06/2004 by which the order dated 03/12/1983 as passed by the Lower Appellate Court in Regular Civil Appeal No. 123 of 1987 was set aside and the same was restored to the file of the Lower Appellate Court to be disposed of on merits in accordance with law.

8. After the order dated 07/06/2004 came to be passed by this Hon''ble Court in Appeal from Order No. 222 and 259 of 2004, the appellant preferred an application below Exhibit 36 before the Lower Appellate Court, for bringing additional evidence on record under Order 41, Rule 27 of the CPC (for short, "CPC") which application also came to be rejected by the Lower Appellate Court by impugned order dated 05/11/2004.

9. In the year 2004, the appellants filed Writ Petition Stamp No. 10159 of 2004, which was pending against the order of rejection of their above application.

10. On 10/01/2005, without waiting for the result of above writ petition, the learned appellate Judge proceeded to hear the Appeal on merits and dismissed the appeal filed by the Appellants and allowed the Cross objections filed by the respondents.

11. Hence this second appeal.

12. The relevant amendment of the Bombay Tenancy and Agricultural Lands Act (for short, "the Tenancy Act") pertaining to Ratnagiri & Sindhudurg districts, is reproduced as under:

4. Persons to be deemed tenants:....

(2) Notwithstanding anything contained in Sub-section (1), where any land in the Ratnagiri and Sindhudurg districts is being cultivated by a person (other than the

person who, according to the Records of Rights, has right to cultivate), for not less than 12 years, such person shall be deemed to be a tenant for the purposes of this section if there is circumstantial evidence that he has been uninterruptedly cultivating the land personally, and the Sarpanch, Police Patil, the cultivator of the adjoining land and any other respectable person from the village state on affidavit that, the said land is in the possession of, and is being cultivated by, such person, uninterruptedly for not less than 12 years, accompanied by a resolution to that effect passed by the village Panchayat in whose jurisdiction the land is situated.

Explanation I. - For the purpose of this sub-section, the expression "land" includes the "warkas land."

Explanation II.- For the purpose of this sub-section, the expression "circumstantial evidence" includes extract of voters list, ration card, electricity bill or house assessment receipt from the same village or any receipt in respect of sale of agricultural produce or any document regarding permission of felling of trees or excavation of minor mineral or any such permission granted with respect to such land.

(3) Notwithstanding anything contained in Sub-clause (a) of Clause (ii) of Sub-section (1) of Section 32H, the purchase price in such cases shall be 200 times the assessment. Sub-sections (2) and (3) were added by Mah. 10 of 2001, Section 2.

13. Admittedly, though vaguely specific plea of tenancy was taken by the appellant arising out of the Tenancy Act, however, the trial Court, as there was no material about the same on record, decreed the suit in favour of the plaintiff and the issue of tenancy was not considered.

14. The lower appellate Court has specifically framed the issue of tenancy of appellant Nos. 1, 2 and 3 on one hand and appellant No. 4 on the other. However, answered the said issue against the appellants, basically on the ground that the appellants did not request the trial Court to frame the issue of tenancy though they had the opportunity to do so and; even before the earlier proceedings in Regular Appeal No. 123 of 2007 when the matter was remanded. In the effect for want of necessary pleadings and material, the issue of tenancy went against the appellants.

15. Admittedly, the writ petition Stamp No. 10159 of 2004 against the order of rejection of appellants application Exh. 36 before the lower appellate Court, for bringing additional evidence on record, under Order 41 Rule 27 of the CPC, on the date of disposal of the First Appeal, the writ petition as referred above was pending. The appellate Court, however, inspite of the said pendency, by the impugned order disposed of the said appeal by allowing the cross objection and dismissing the appeal filed by the appellants. The application as filed by the appellant could not attend the finality on merit at any point of time. The issue of tenancy, therefore, as raised in view of the amendment referred above, and as

the applicants have made positive averments and ready to file the affidavits of neighbourers to justify their rights of tenancy on the land in question just cannot be overlooked. The said amendment is very crucial irrespective of any other circumstances. The applicants or such other tenants are entitled to be brought on record the material like affidavits of neighbourers to show that they have been cultivating the land uninterruptedly for more than 12 years alongwith the resolution of the Grampanchayat of the particular village to that effect, to justify the right of tenancy on the land.

16. The averments made about the tenancy in the application, therefore, completely overlooked while passing the order dated 05/11/2005 by the District Judge and rejected the application Exh. 36, basically on the ground that mere affidavits cannot be treated as evidence under Order 18 Rule 5 of the CPC. The pending challenge to the order of rejection also, therefore, at the time of decision of the first appeal ought to have been considered. The Appellate Court, if case is made out pursuant to the Order 41 Rule 27 of the CPC, need to consider such additional evidence on record.

17. In the civil application No. 1021 of 2007, in Second Appeal, the applicants, therefore, have moved the same application with additional affidavit and material to show that pursuant to the above amendment to the tenancy Act. They have resolution of the Grampanchayat-Ubhadanda of District Sindhudurg in support of their case of tenancy. These exhibits 1 and 2 to the said application, therefore, further support the case of the applicants as contended already in the application Exh. 36 which was rejected by the Lower Appellate Court.

18. After considering the rival contention and as opposed by the learned Counsel appearing for the respondent, in so far as these applications and issue about the tenancy are in question, I am of the view that the amendment to the Tenancy Act is very crucial. It is to be noted that the appellants are not raising such pleas for the first time in the Second Appeal. This issue was raised but rejected by the Appellate Court. At the time of disposal of the First Appeal, the writ petition was pending in the High Court against the said order of rejection. The subsequent disposal of the writ petition on the ground that the appeal itself was disposed of is of no consequence. The fact remain that the important issue of tenancy as raised, remained unattended.

19. The combined effect of Sections 70, 85, 85A and 63 of the Tenancy Act has been elaborated by the Apex Court in Gundaji Satwaji Shinde Vs. Ramchandra Bhikaji Joshi, in following way.

The legislative scheme that emerges from a combined reading of Sections 70, 85 and 85-A appears to be that when in a civil suit properly brought before the Civil Court an issue arises on rival contentions between the parties which is required to be settled, decided or dealt with by a competent authority under the Tenancy Act, the Civil Court is statutorily required to stay the suit and refer such issue or issues to such competent authority under the Tenancy Act for determination.

20. In *Rama Hariba Khavale v. Gopika Ramling Survase and Ors.* 2003 (4) All. M.R. 554 this Court after considering Order 14 Rule 4 of the CPC further observed as to whether a person is a tenant or not, the issue need to be decided by the tenancy Court but such reference cannot be made by the Civil Court mere by asking.

21. It means there should be a material on record to justify such plea for a reference. In the present case, the appellants in my opinion have placed on record two applications basically alongwith affidavit of neighbours and now the resolution of the Grampanchayat as contemplated under the Tenancy Act. Therefore, full opportunity should be given to the appellants to justify their case about the tenancy as claimed. The application as filed shows that earlier there is no such copy of resolution available with them during the trial and even at the time of filing of such application Exh. 36. Now, they have obtained the certified copy without any intentional delay to justify their case of tenancy. The copy of resolution could not be annexed with the said application at the earlier point of time. Therefore, it was not filed alongwith the application Exh.36. As noted, the said resolution passed by the Grampanchayat is vital and important document to decide and adjudicate the claim of the applicants. These documents goes to the root of the controversy involved in the present Second Appeal also. Therefore, taking all this into consideration, the present application No. 1021 of 2007 is allowed in terms of prayer Clause (a).

22. The applications are disposed of accordingly.

23. Having once allowed this application, the important facet now remains is that, let the Appellate Court re-hear this matter only in reference to the issue of tenancy i.e. issue No. 3, after giving opportunity to both the parties. The appellate Court to pass appropriate order. Therefore, by consent of the parties the matter is remanded back to the Appellate Court to re-decide the issue No. 3 of tenancy as framed. The Lower Appellate Court to dispose of the matter after receipt of the order, preferably within six months. The lower Appellate Court is at liberty to take all such necessary steps or pass such orders after giving full opportunity to both the parties. In view of this, the impugned judgment and order is quashed and set aside to that extent only to that extent only.

24. The appellate Court to submit the finding on issue No. 3 within six months to this High Court. The Second Appeal will be, thereafter, heard finally. The record as called, be returned back to the appellate Court within two weeks. The parties to appear before the appellate Court on 22nd October, 2007. The status-quo as granted, shall continue till further order. The second appeal is, therefore, adjourned for six months.