

(2014) 08 BOM CK 0133

In the Bombay High Court

Case No : Civil Revision Application No. 22 of 2014

Prabhakar D. Shirwaikar

APPELLANT

Vs

Malini Xete Parker

RESPONDENT

Date of Decision : 04-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2(2)(a), Order 7 Rule 11(a)(d),
Order 7 Rule 11(d), 151

Citation : (2014) 6 ALLMR 271

Hon'ble Judges : A.R. Joshi, J

Bench : Single Bench

Advocate : Prasheen Lotlikar, Advocate for the Appellant; G. Agni, Advocate for the Respondent

Final Decision : Dismissed

Judgement

A.R. Joshi, J.—Rule. Rule made returnable forthwith with the consent of the learned Counsel appearing for the parties. Learned Counsel for the respondent waives service.

2. Heard rival arguments at length on this criminal revision application challenging the orders dated 23/09/2008, 17/01/2012 and 10/01/2014 passed by Civil Judge Junior Division, Ponda Goa passed on respective applications made on different dates and which are exhibits D-11, D-47 & D-63, respectively. Last impugned order was passed on 10/01/2014 on the application preferred by the present petitioners/original defendants no. 1, 2 & 3 filed under the provisions of Section 151, Order 7 Rule 11(d) and Order 14 Rule 2(2)(a) of Code of Civil Procedure. The trial Court framed three points as follows and answered them in negative.

1. Whether the plaint is liable to be dismissed/rejected under Order 7 Rule 11(d) of CPC?

2. Whether the suit is liable to be dismissed by invoking powers u/s 151 of CPC?

3. Whether the suit is liable to be dismissed under Order 14 Rule 2(2)(a) of CPC?

3. Last impugned order and earlier two impugned orders were passed in Regular Civil Suit No. 21/08/C preferred by the original plaintiff, present respondent no. 1.

4. At the threshold, it must be mentioned that the present revision application no. 22/2014 was converted to revision application out of original Writ Petition No. 201/2014 filed by the present petitioners, original defendants no. 1 to 3. As such, now instead of dealing with this matter under the writ jurisdiction, the present matter is to be decided under the revisional authorities available to this Court by which there is a challenge to all the earlier mentioned three orders. In fact, under the revisional jurisdiction, now the only order which could be challenged without there being condonation of delay is the order dated 10/01/2014 i.e. the last order passed by the trial Court, C.J.J.D. Under this factual situation, it must be said that there cannot be any challenge to the earlier two orders which are dated 23/09/2008 and 17/01/2012 and those orders have attained finality. This is more so in view of conversion of the original Writ Petition into a Civil Revision Application and now main challenge is only to the order passed on 10/01/2014.

5. Prior to appreciating the rival arguments, certain factual position without going into much details, is narrated in order to have proper perspective of the case and as to any right available to the present petitioners/original defendants no. 1 to 3 to challenge this last order dated 10/01/2014.

6. Husband of one Smt. Savitribai Parkar, resident of Panditwada, Goa was the original tenant with respect to some tenanted premises. After his death, a suit for eviction was filed against said Smt. Savitribai Parkar. Said suit was filed in 1981. That time, the present respondent no. 1 was unmarried. She was the daughter of said late Parkar and his wife Smt. Savitribai Parkar. On 4/03/1996, the eviction order was passed against said Smt. Savitribai Parkar. Against that order Smt. Savitribai Parkar preferred an appeal before the Administrative Tribunal, Goa being Appeal No. 15/1996. During pendency of the appeal Smt. Savitribai Parkar died in the year 2000. As such, her legal heirs pursued the said appeal and they became the appellants, who were the sons and daughters of the said Smt. Savitribai Parkar. That time, the present respondent no. 1 did not get herself impleaded as one of the appellants and did not pursue the matter as legal heir and representative. Apparently, by that time, she got married. Said appeal was dismissed on 11/09/2006. Against the said dismissal, Writ Petition was preferred before this Court, but it was also dismissed on 17/01/2008. Against the said dismissal of Writ Petition, SLP was preferred before the Hon''ble Apex court. It was also dismissed vide order dated 24/03/2008. Thereafter, an undertaking was given before the Court that then appellants in the Eviction Appeal No. 15/1996 before the Administrative Tribunal, Goa would surrender premises and accordingly they surrendered the suit premises in the year 2010. In the meantime, prior to such surrender on dismissal of the Writ Petition before this Court and dismissal of SLP before the Hon''ble Apex Court, the execution

proceedings were initiated against and then appellants in Eviction Appeal No. 15/1996. It was initiated on 4/02/2009. In the said eviction proceedings present respondent no. 1 filed Misc. Application No. 28/2009 for leave to challenge the said proceeding on the premise that the eviction decree was not against her. Said Misc. application was dismissed on 27/04/2009. Said order was challenged by the present respondent no. 1 in Review Petition No. 4/2009. However, said review was also dismissed by the Administrative Tribunal, Goa vide order dated 23/06/2009. During the pendency of these proceedings before the Administrative tribunal, Goa a suit was filed by present respondent no. 1 being suit no. 21/2008/C. It was so filed on 13/02/2008. The suit is titled as suit for declaration and permanent injunction, but specifically the following prayers were made in the suit which read thus:

a. Make a judgment, order and decree declaring that the Plaintiff shares equal tenancy rights to the suit house along with the other children of her parents late Mrs. Savitribai T. Parkar and her husband late Mr. Tilu Shet Parkar.

b. Make a judgment, order and decree declaring that the eviction order dated 4/03/1996 does not bind the Plaintiff in any manner whosoever.

c. Make a judgment, order and decree of permanent injunction restraining the Defendants, their servants, agents or any other persons acting by, through or under them in any manner interfering with the Plaintiff's possession of the suit house.

c. (i) Make a judgment, order and decree declaring that the eviction of the Plaintiff from the suit house on 10/03/2010 is illegal.

(ii) Make a judgment, order and decree directing the Defendants 1 to 3 to restore the possession of the suit house to the Plaintiff.

(iii) Make a judgment, order and decree of permanent injunction restraining the Defendants in any manner creating third party rights in, to or over the suit house or possession thereof.

7. In view of the above prayers, it can be ascertained that present respondent no. 1 had claimed for equal tenancy rights with respect to the suit house along with other legal heirs of Smt. Savitribai Parkar and also there is a challenge to the order of eviction dated 4/03/1996 and declaration that the said eviction order does not bind the plaintiff.

8. As such, the Civil Suit No. 21/2008/C, in which the impugned order dated 10/01/2014 and earlier two orders were passed, was filed in February, 2008 whereas, the appellants who pursued the Appeal No. 15/1996 before the Administrative Tribunal on the death of Smt. Savitribai Parkar, surrendered the suit house in the year 2010 and in fact the possession was given to the landlords, who are defendants no. 1, 2 & 3 in the suit no. 21/2008/C and who are now present revision petitioners challenging the final order dated 10/01/2014.

9. Again prior to discussing the merits of the rival arguments the issues framed in the pending suit No. 21/2008/C are mentioned as earlier.

ISSUES

1. Whether the Plaintiff proves that the Defendant nos. 1 to 3 in collusion with the Defendant nos. 4 to 7 have dishonestly and fraudulently obtained an order of eviction, which culminated before the Hon'ble Supreme Court, behind the back of the Plaintiff?

2. Whether the Plaintiff proves that she acquired equal tenancy rights to the suit house on 31/03/1973, when her father passed away and that she continues to be a tenant of the suit house, as on the date of filing of the suit?

3. What relief? What order?

10. Now bearing in mind, the above factual position the arguments advanced on behalf of the revision petitioners are discussed here under:

It is submitted by learned Counsel for the petitioners/original defendants no. 1, 2 & 3 that the earlier order of C.J.J.D. dated 23/09/2008 dismissing the application exhibit 11 and another order dated 17/01/2012 dismissing the application Exhibit D-47 were passed on different parameters. Application Exhibit 11 was under the provisions of Order 7 Rule 11(a)(d) whereas the application Exhibit D-47 was on the ground that there was no cause of action inasmuch as due to handing over the possession of the suit premises in favour of the present petitioners the cause of action does not survive. This is more so, when the suit premises has already collapsed and on this count rejection of plaint was prayed by present petitioners. In short, it is the argument on behalf of the present revision petitioners that there cannot be a res judicata applied as against the petitioners/defendants no. 1 to 3 for claiming rejection of plaint and for getting the appropriate orders u/s 151, Order 7 Rule 11(d) and Order 14 Rule 2(2)(a) of the Code of Civil Procedure, thus praying for dismissal of the suit. These arguments are required to be dealt in the light of the scope available to this Court under the revision and not under the writ jurisdiction inasmuch as it is to be ascertained whether the impugned order dated 10/01/2014 dismissing the application Exhibit D-63 is required to be interfered with.

11. In order to determine as above firstly, the provisions of Order 7 Rule 11(d) and Order 14 Rule 2(2)(a) of the CPC are required to be seen, which read thus:

Order 7 Rule 11(d)

11. Rejection of plaint - The plaint shall be rejected in the following cases:

(d) where the suit appears from the statement in the plaint to be barred by any law.

Order 14 Rule 2(2)(a)

2. Court to pronounce judgment on all issues

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court.

Order 7 Rule 11(d) contemplates the rejection of the plaint on the ground that the suit appears from the statement in the plaint to be barred by any law. By pointing out this, learned Counsel for the petitioners stated that the married daughter of a tenant is not entitled for share in the tenanted premises and this can be gathered from the definition of tenant in Section 2(p) of The Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968. Said definition of tenant reads thus:

2(p) "tenant" means any person by whom or on whose account or behalf the rent of any building is, or but for special contract would be payable and includes [in the event of his death the surviving spouse, or any son, or unmarried daughter or father or mother who had been living with him as a member of his family upto the date of his death and] a sub-tenant and also any person continuing in possession after the termination of his tenancy, but shall not include any person against whom any order or decree for eviction has been made.

It is strenuously argued on behalf of the petitioners that present respondent no. 1 is a married daughter of the original tenant Mr. Parkar and his wife Savitribai Parkar and, as such, married daughter of a tenant is not included in the definition of the tenant. Counter to these arguments learned Counsel for the respondent no. 1 pointed out that present respondent no. 1 was unmarried when the eviction suit was filed against the widow Savitribai Parkar in the year 1981. Thus, the subsequent marriage of respondent no. 1 will not divest her from the right which accrued to her being unmarried daughter of Smt. Savitribai Parkar, when the eviction suit was filed. It is further argued that the definition of tenant as mentioned above cannot be considered to accept that there is a law by which after the marriage the daughter loses her right in the tenanted property if she was staying with her parents when she was unmarried and when the suit for eviction was filed. In other words, it is argued that whether or not married daughter has right in a tenanted premises is a question to be dealt by the Court during trial in the civil suit and there is no bar by any law taking away the right of a daughter, who subsequently gets married. As such, further argued that the provisions of Order 7 Rule 11(d) cannot be taken shelter of by the petitioners. In the opinion of this Court this argument advanced on behalf of respondent no. 1 is required to be accepted more so due to the reasoning given by the Court while passing the impugned order dated 10/01/2014.

12. During the arguments, learned Counsel for petitioners placed reliance on the following authorities:

(i) Chhaya Vishnu Sadavarte (Smt.) Vs. Indubai alias Indumati Bhaskar Bhavsar (Smt.) and Others,

The above authority is cited on the aspect that when other legal heirs of a deceased tenant pursue the matter before the Court they are deemed to have protected the rights of another legal heir, who has not been joined as a party in any proceedings. By pointing to the ratio propounded by the above authority, it is further submitted that present respondent no. 1 is bound by the decree passed in the eviction proceedings and also passed in appeal no. 15/1996 presented before the Administrative Tribunal and, as such, now she cannot reagitate the issue.

In the opinion of this Court considering the specific averments in the plaint, in a suit filed by the present respondent no. 1 bearing no. 21/2008/C, she had pleaded practice of fraud played on her by other legal heirs of deceased widow Savitribai Parkar and, as such, according to the respondent no. 1, whatever judgment and decree passed in the eviction suit and also the orders in the appeal no. 15/1996 are not binding on her.

(ii) Ashok Chintaman Juker and Others Vs. Kishore Pandurang Mantri and Another, it is held in para 11 & 16 thus:

11. The question that arises for consideration in such cases is whether the tenancy is joint or separate. In the former case notice on any one of the tenants is valid and a suit impleading one of them as a defendant is maintainable. A decree passed in such a suit is binding on all the tenants. Determination of the question depends on the facts and circumstances of the case. No inflexible rule or straight-jacket formula can be laid down for the purpose. Therefore, the case in hand is to be decided in the facts and circumstances thereof.

16. In the case on hand, as noted earlier, on the death of the original tenant Chintaman the rent bills in respect of the premises in question were issued in the name of his elder son Kesrinath and on his death the rent bills were issued in the name of his widow Smt. Kishori Kesrinath Juker. It is not the case of the appellant no. 1 that there was any division of the premises in question or that rent was being paid to the landlord separately by him. Indeed the appellant no. 1 took the plea that he was paying the rent through Smt. Kishori Kesrinath Juker. Thus the tenancy being one, all the members of the family of the original tenant residing with him at the time of his death, succeeded to the tenancy together. In the circumstances the conclusion is inescapable that Smt. Kishori Kesrinath Juker who was impleaded as a tenant in the suit filed by the landlord represented all the tenants and the decree passed in the suit is binding on all the members of the family covered by the tenancy. In the circumstances the decree passed in terms of the compromise entered between the landlord and Smt. Kishori Kesrinath Juker can neither be said to be invalid nor inexecutable against any person who claims to be a member of the family residing with the original tenant, and therefore, a tenant as defined in section 5(11)(c). The position that follows is that the appellants have no right to resist on the ground that the decree is not binding on them. Further, the trial court and the appellate court concurrently held that the appellant no. 1 has not been residing in the premises

since 1962 i.e. when his elder brother Kesrinath was alive. Therefore, when the suit was filed in the year 1992 there was no necessity for the landlord to implead appellant no. 1 or members of his family in the suit since he (landlord) had no cause of action for seeking a decree of recovery of possession from them. In that view of the matter the decree under execution does not suffer from any illegality or infirmity. Viewed from any angle the appellants have no justification on the facts as well as in law to resist execution of the decree for possession of the premises by the landlord. The Executing Court rightly rejected the objection filed by the appellants against execution of the decree and the appellate court and the High Court rightly confirmed the said order. This appeal being devoid of merit is dismissed with costs which is assessed at Rs. 10,000/-.

By taking shelter of the contents of paras no. 11 & 16 of this authority, it is argued on behalf of the petitioners that only one tenant against whom the suit is filed by the landlord represents all the tenants/his legal heirs and decree passed in the suit is binding on all the members of the family covered by tenancy. Again in the opinion of this Court, for the same reasons mentioned earlier, the ratio of the present authority cannot be made applicable to the present matter inasmuch as pleading of the practice of fraud specifically averred in the plaint in the suit no. 21/2008/C.

(iii) Raj Narain Sarin (Dead) through Lrs. and Others Vs. Laxmi Devi and Others,

This authority is taken shelter of on behalf of the petitioners to canvass the proposition that rejection of plaint is justified where the litigation is utterly vexatious and an abuse of the process of the Court. Again, on facts of the present matter at hand and specifically the challenge to the impugned order dated 10/01/2014, which is on the prayer of the rejection of plaint, in the opinion of this Court on factual matrix at this stage, it cannot be mentioned that the suit filed by the respondent no. 1 is utterly vexatious and abuse of the process of the Court.

(iv) Atma Ram Builders P. Ltd. Vs. A.K. Tuli and Others,

By pointing the contents of para 4 of the said authority, it is submitted on behalf of the present petitioners that the present litigation is dragged for so many years and in fact after failing to retain the tenanted premises and after even following up to the Supreme Court level and after surrender of the said premises to the petitioners, this attempt has been made by the present respondent no. 1/plaintiff to reagitate the matter and which cannot be permissible under the law and it is required to be stopped. The contents of para 4 in the above cited authority are reproduced for the sake of ready reference.

4. It is deeply regrettable that in our country often litigations between the landlord and tenant are fought up to the stage of the Supreme Court and when the tenant loses in this Court then he starts a second innings through someone claiming to be a co-tenant or as a sub-tenant or in some other capacity and in the second round of litigation the matter remains pending for years and the

landlord cannot get possession despite the order of this Court The time has come that this malpractice must now be stopped effectively.

13. Counter to the above authorities, learned Counsel for the respondent no. 1/ plaintiff placed reliance on the following authority:

2004(2) Goa L.R. 488 in the case of Mr. Wilfred John Albuquerque & Ors. V/s. Mr. Custodio D"Costa & Ors. Para 17 reads thus:

17. The second question is whether the learned Addl. District Judge failed to take into consideration that Notice dated 31.7.1978 addressed to Eulogio u/s 22(2)(a) of the G.D.D. (Lent, Rent and Eviction) Control Act, 1968 was binding also on the respondent No. 1 (plaintiff) considering that the incident of tenancy was of joint tenancy and Eulogio was acting for all and for the benefit of all. On behalf of the plaintiff it was contended that this question did not at all arise to be decided by this Court, and, in my opinion, it is rightly so. The defendants had not pleaded at all that the said Eulogio was served with a notice u/s 22(2)(a) of the G.D.D. (Lease, Rent and Eviction) Control Act, 1968. The defendants had also not pleaded that the plaintiff was a joint tenant and that any notice given to the plaintiff's brother Eulogio was binding on the plaintiff. On the contrary, the defendants had pleaded that it is the said Eulogio who was their tenant and not the plaintiff, who according to the defendants, was residing elsewhere. The defendants cannot be allowed for the first time in Second Appeal to make reference to a Notice dated 31.7.78 regarding which the defendants had not taken any plea nor made a whisper about it and had totally remained silent in their written statement. In my opinion, unless there was a foundation laid in the pleadings and proof was produced in support thereof, no question of law can arise for the first time in Second Appeal. This question would have arisen only in case the defendants had pleaded in their written statement that the plaintiff was a joint tenant along with his brother, the said Eulogio and any notice served on the said Eulogio was binding upon the plaintiff.

14. Now coming to the present matter at hand, it is to be ascertained whether per-se the suit filed by the present respondent no. 1 is a vexatious litigation and whether on that basis the plaint is required to be rejected or whether the matter is required to be put to trial as issues are already framed and then to come to the conclusion whether the respondent no. 1/plaintiff has any right over the tenanted premises. The observations of the Hon"ble Apex Court quoted above can be applicable in a suitable case, but a differentiation is required to be made as in the present case inasmuch as the plaintiff, respondent no. 1 herein had alleged practice of fraud on her and further alleged that she was deliberately not made as a party in the eviction suit filed way back in the year 1981. It must be mentioned that at that time, the respondent no. 1/plaintiff was unmarried daughter of Smt. Savitribai Parkar. As such, in the considered opinion of this Court, the present Civil Revision Application is required to be viewed differently considering the rejection of the earlier two applications filed by the petitioners at Exhibit 11 and Exhibit 47 and which were dismissed by the Court and this filing

of the third application and which is also dismissed by the order which is impugned herein.

15. Lastly, it is argued on behalf of the petitioners that the respondent no. 1/plaintiff cannot plead ignorance regarding filing of the eviction petition, order of eviction, filing of appeal by Savitribai Parkar and pursuing of the said appeal by other legal heirs of Savitribai and failure of said other legal heirs in retaining the possession of the suit tenanted premises. It is further argued that even the present respondent no. 1/plaintiff had filed a miscellaneous application no. 28/2009 praying for leave to implead herself in the appeal filed before the administrative tribunal. It is further argued that the said leave petition was dismissed on 27/04/2009 and the review petition filed challenging the said dismissal was also dismissed on 23/06/2009. By pointing out this, it is strongly submitted on behalf of the petitioners that the right of the plaintiffs over the suit premises as one of the legal heirs of the original tenant has been determined by the tribunal and, as such, that issue cannot be reopened by way of filing the suit. Counter to these arguments, learned Counsel for respondent no. 1/plaintiff submitted that the proceedings before the appellate tribunal initiated by respondent no. 1 were not for determining right, but for the impleadment and, as such, any order or decision given by the appellate tribunal cannot be construed and crystallizing the rights of respondent no. 1, so far as tenanted premises is concerned. In other words, it is submitted that the orders passed by the tribunal in rejecting the leave petition and rejecting the review application were the incidental orders and they were in the execution proceedings taken against some of the legal heirs of widow Savitribai Parkar. What is challenged in the suit is the order dated 4/03/1996 on the ground of fraud of practice on respondent no. 1/plaintiff.

16. On carefully going through the rival submissions, in the opinion of this Court, definitely the scope available to this Court in this revision cannot be extended to such an extent so as to determine the rights of the respondent no. 1 for getting the relief in the suit. In other words, what is before this Court is the challenge to the order dated 10/01/2014. As such, considering the relevant provisions under which the said challenge was put forth before the Court seized with the suit no. 21/2008/C, there is nothing to alter in any way the said impugned order and also the earlier orders dated 23/09/2008 and 17/01/2012. Under these circumstances, rule stands discharged, the present Civil Revision Application No. 22/2014 is dismissed and accordingly disposed off with no order as to costs.