

(2016) 11 MP CK 0037

In the Madhya Pradesh High Court

Case No : Second Appeal No. 367 of 2009

Prakash S/o Badridasji Beragi

APPELLANT

Vs

Manager, Smriti Nagarik Sahakari Bank

RESPONDENT

Date of Decision : 17-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11 (d)
Madhya Pradesh Co-operative Societies Act, 1960 — Section 64, Section 82

Citation : (2017) AIRCC 1339

Hon'ble Judges : Shri Prakash Shrivastava, J.

Bench : Single Bench

Advocate : Shri Vinay Gandhi, learned counsel, for the Appellant; Shri V.K. Jain, learned counsel and none for other respondents, for the Respondent No. 1

Final Decision : Dismissed

Judgement

Shri Prakash Shrivastava, J.—The plaintiff being aggrieved with the concurrent judgments of the two courts below has approached this court by way of second appeal under Section 100 of CPC. Trial court while allowing the respondent's application under Order 7, Rule 11 CPC by judgment dated 7/7/2008 had dismissed the suit of appellant and the first appellate court vide judgment dated 28/2/09 by dismissing the appeal has affirmed the judgment of trial court.

2. In brief the appellant had filed the suit for declaration and permanent injunction pleading that plot No. 42 was purchased in the name of his mother Geetabai and plot No. 41 was purchased in the name of his father Badridas. The suit plot was received by appellant in the family partition. Further plea was raised that Geetabai had obtained loan of Rs. 2 lakhs from respondent No. 1 bank in the year 2001 and had mortgaged the plot No. 42 and security of plot No.41 was given by appellant's father Badridas. It was further pleaded that during her lifetime the mother of appellant had repaid the sum of Rs. 5 lakhs but the accounts were not finalized by respondent No. 1 and the recovery proceedings

were initiated on the ground that sum of Rs. 2,10,000/- was unpaid. An application was filed by respondent No.1 before the Joint Registrar and the Joint Registrar by the order dated 22/7/03 had issued the recovery certificate and when appellant came to know about it on 5/3/08 the present suit was filed on the ground that order was passed without giving opportunity of hearing to the appellant and the order was illegal and improper.

3. Respondent No.1 had filed an application under Order 7, Rule 11 CPC raising the plea that plots No. 41 & 42 were mortgaged with respondent No. 1 bank and the amount was not repaid and account had become NPA, therefore, the respondent No. 1 had taken proceedings before the Joint Registrar who had the sole jurisdiction to decide such a dispute under the provisions of MP Cooperative Societies Act and the final order dated 22/7/03 was passed and recovery certificate was issued and in pursuance thereto property of the borrower as well as the guarantor have been auctioned and sale deed has been executed and possession has been delivered by respondent No.2, hence the suit filed by appellant is barred under Section 82 of the Act & Rule 66(6) of MP Cooperative Societies Rules.

4. Trial court by judgment dated 7/7/08 had allowed the said application on reaching to the conclusion that suit filed by appellant is barred under Section 82 of the Act and had accordingly dismissed the suit and the first appellate court has affirmed the said order.

5. This court vide order dated 6/11/09 had admitted the appeal on following substantial questions of law:

1. Whether the suit as filed by appellant was barred under Section 82 of MP Co-operative Societies Act?

2. Whether the suit of the appellant has rightly been dismissed under Order 7, Rule 11 of CPC on the issue of jurisdiction?

6. Considering the nature of controversy I am of the opinion that Question No.2 needs to be decided first and accordingly it is being decided as under:-

7. Learned counsel for appellant submits that the order passed by the Joint Registrar under Section 84 A(i) was in nullity in as much as it was passed without giving any notice to the borrower Geetabai or her LR i.e. the present appellant. He further submits that before the Joint Registrar no opportunity of hearing was given to the original borrower and her LR, therefore, the procedure prescribed was not followed, hence the civil court's jurisdiction has rightly been invoked. He further submits that even at the subsequent stage of auction of the suit property, notice was issued in the name of Geetabai who was dead at that time therefore the bar of Section 82 cannot be attracted because of the procedural lapse. He has further submitted that trial court has allowed respondent's application under Order 7, Rule 11 CPC at a stage when even the written statement was not filed, therefore, without filing of the written statement, the application could not have

been allowed. He has further submitted that under Section 84A(ii) the certificate issued by Joint Registrar is final therefore, the appellant had no remedy under the Act against the said certificate and the bar which is contained in Section 82(iii) does not cover such a certificate and is not attracted when such a certificate is challenged. He has also submitted that there is no explicit bar in this regard. He further submits that when the application under Order 7, Rule 11 CPC was decided at that stage the petitioner's application for amendment of the plaint under Order 6, Rule 17 CPC was pending wherein the appellant had claimed the relief of possession and without deciding the said application Order 7, Rule 11 CPC could not have been decided since the amendment would have changed the very nature of the suit. He has also submitted that in the plaint, the appellant has made a prayer for grant of injunction and also questioning the proceedings which were taken up after issuance of certificate by Joint Registrar which includes the execution of the sale deed for which only the civil court has jurisdiction and the sale deed cannot be set aside by the forum provided under the Cooperative Societies Act. He has further submitted that the order passed by the Joint Registrar is void and it has been passed without following the prescribed procedure therefore, the civil court will have jurisdiction. He has also submitted that un-amended Section 84 A which was prevailing in the year 2003, when the order was passed by the Joint Registrar, respondent No.1 bank was not covered by said provision and Joint Registrar was not competent to entertain the application of respondent no.1.

8. Shri V.K. Jain learned counsel for respondent No. 1 opposing the appeal has submitted that undisputedly the loan was taken by mortgaging the property and the bank had remedy under the Act to approach the Joint Registrar in case of default and inherent jurisdiction of joint Registrar to pass an order and issue the recovery certificate is not in dispute. He has further submitted that recovery certificate was issued in the year 2003 when the mother of the appellant was alive but no action was taken at her instance till filing of the suit. He has further submitted that as per various judgments of the Supreme court the plaint averments are not required to be accepted as true but they are only required to be examined while considering the application under Order 7, Rule 11 CPC. In this regard he has referred to paragraph 8 & 9 of plaint. He has submitted that appellant has several remedies including the remedy to apply for setting aside the ex-parte order of the Joint Registrar and challenging the order in appeal under Section 78 of the Act. He has also submitted that father of appellant had earlier filed writ petition and the note of which has been taken by the trial court in para 11 of the judgment but he had not complied with the conditional order of this court.

9. Section 64 of MP Cooperative Societies Act, 1960 (for short "the Act") provides that any dispute touching the constitution, management or business or liquidation of society shall be referred to Registrar by any of the parties to the disputed between the parties mentioned therein and the nature of dispute covered by subsection 2 thereof. Rule 66(6)(4) of MP Cooperative Societies

Rules, 1962 provides that the order made under the rule about confirmation of sale is final and is not liable to be questioned in any suit or other legal proceeding and Section 82 of the Act bars the jurisdiction of the civil court where any suit is required to be referred to the Registrar or his nominees or Board of nominees.

10. In the present case the appellant had filed the suit for declaration and permanent injunction with the plea that recovery certificate issued by Joint Registrar on 22/7/03 was null and void and property belonging to mother of appellant was attached and sold by respondent no. 1 to respondent No. 2 illegally by showing service of notice to the appellant's mother who was already dead and that no actual proceeding of attachment of sale had taken place nor the appellant or his mother or other LRs were given any notice of these proceedings. In the plaint it is pleaded that mother of appellant had died on 10/5/07 whereas the order was passed by Joint Registrar Cooperative Societies on 22/7/03. It has further been alleged that no actual auction had taken place and respondents no. 1 & 2 in collusion with other respondents had illegally purchased the suit property. On the basis of these pleadings order of Joint Registrar dated 22/7/03 has been challenged and decree has been sought to declare the order as illegal and proceedings on the basis of said order as non-est and also injunction has been sought restraining respondents from interfering in possession of the appellant.

11. The application under Order 7, Rule 11 of the CPC is required to be decided in the light of the pleadings contained in the plaint. Though in the present case the dispute is about the matter touching the business of the cooperative society but it is the settled position in law that the jurisdiction of the civil court is not excluded where the provisions of a particular statute have not been complied with or statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure or if part of the action of the State is violative of the constitutional provision or the mandatory requirement of statute or statutory rules are not followed. It is also the settled position that the jurisdiction of the civil court is not barred when the suit is based on the ground that the order under challenge is a nullity. The statute affecting the jurisdiction of the civil court i.e. ousting their jurisdiction must be very strictly considered and every presumption should be made in favour of the jurisdiction of the civil court and not its exclusion.

12. Supreme court in the matter of Union of India v. Tarachand Gupta and Bros reported in 1971 (1) SCC 486 has held that exclusion of jurisdiction of the civil court is not to be readily inferred and even where a statute gives finality, such a provision does not exclude cases where the provisions of the particular statute have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure. It has been held in Tarachand Gupta's case (supra) as under:

22. The principle thus is that exclusion of the jurisdiction of the Civil Courts is not

to be readily inferred. Such exclusion, however, is inferred where the statute given finality to the order of the tribunal on which it confers jurisdiction and provides for adequate remedy to do what the courts would normally do in such a proceeding before it. Even where a statute given finality, such a provision does not exclude cases where the provisions of the particular statute have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure. The word "jurisdiction" has both a narrow and a wider meaning. In the sense of the former, it means the authority to embark upon an enquiry; in the sense of the latter it is used in several aspects, one of such aspects being that the decision of the tribunal is in non-compliance with the provisions of the Act. Accordingly, a determination by a tribunal of a question other than the one which the statute directs it to decide would be a decision not under the provisions of the Act, and therefore, in excess of its jurisdiction."

13. Supreme court again considering the issue of jurisdiction of the civil court vis-a-vis Labour court in an employer-employee dispute in the matter of Rajasthan State Road Transport Corporation and another v. Bal Mukund Bairwa reported in (2009) 4 SCC 299 has held that civil court jurisdiction is not barred if it is found that the action on the part of State is violative of the constitutional provisions or the mandatory requirements of a statute or statutory rules. It has been held thus:

39. The appellant corporation is bound to comply with the mandatory provisions of the statute or the regulations framed under it. A subordinate legislation when validly framed becomes a part of the Act. It is also bound to follow the principles of natural justice. In the event it is found that the action on the part of the State is violative of the constitutional provisions or the mandatory requirements of a statute or statutory rules, the civil court would have the jurisdiction to direct reinstatement with full back wages.

14. In the matter of Dhulabhai v. State of Madhya Pradesh and another reported in AIR 1969 SC 78, Supreme court has culled out the following principles for exclusion of the jurisdiction of the civil court by holding as under:

32. Neither of the two cases of Firm of Illuri Subayya, 1964-I SCR 752 : (AIR 1964 SC 322) or Kamla Mills, (1966) 1 SCR 64 : (AIR 1965 SC 1942) can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse view expressed in this court may be stated as follows:

(1) Where the statute give a finality to the orders of the special tribunal the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts 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 cases the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

15. In terms of principles note No.1 and 2 noted above, the civil court jurisdiction is not excluded if the provisions of particular Act have not been complied with or special tribunal has not acted in conformity with the fundamental principles of judicial procedure.

16. In the matter of The Provincial Government of Madras (Now Andhra Pradesh) represented by the District Collector, Kurnool v. J.S. Basappa reported in AIR 1964 SC 1873 same principle has been reiterated by holding that even if the provision gives the order of tribunal finality, civil court will still have jurisdiction where fundamental provisions of the Act are not complied with, or where the statutory tribunal do not act in conformity with the fundamental principles of judicial procedure. It has been held as under:

(9) Mr. Sastri contends that in deciding whether the civil court's jurisdiction is barred we must take into account the provisions of Section 11 and Section 12, because these provisions which provide adequate remedies "march with the

construction" of Section 11(4). He submits that the finality which was conferred on the appellate order subject to a revision must necessarily be a finality against determination of the same question by the civil court. It is pointed out by this court in Chetty's case⁽¹⁾ that the exclusion of the jurisdiction of the civil court is not to be readily inferred and that even if a provision giving the orders a finality was enacted, civil courts still have jurisdiction to interfere where fundamental provisions of the Act are not complied with, or where the statutory Tribunals do not act in conformity with the fundamental principles of judicial procedure. Gajendragadkar, J. speaking for the court on that occasion summed up the law as follows:

"In dealing with the question whether Civil Courts' jurisdiction to entertain a suit is barred or not," it is necessary to bear in mind the fact that there is a general presumption that there must be a remedy in the ordinary civil courts to a citizen claiming that an amount has been recovered from him illegally and that such a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of Civil Courts to entertain civil causes will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not by itself necessarily exclude the jurisdiction of the civil courts to deal with a case brought before it in respect of some of the matters covered by the said statute."

Referring to the remarks of Lord Thankerton in *Secy. of State v. Mask and Co.* 67 Ind App 222 at p. 236 : (AIR 1940 PC 105 at p. 110) "it is also well-settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial Procedure" it was observed:

"It is necessary to add that these observations, though made in somewhat wide terms, do not justify the assumption that if a decision has been made by a taxing authority under the provisions of the relevant taxing statute, its validity can be challenged by a suit on the ground that it is incorrect on the merits and as such it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question."

It was thus held that the civil court's jurisdiction may not be taken away by making the decision of a tribunal final, because the civil court's jurisdiction to

examine the order, with reference to fundamental provisions of the statutes, non-compliance with which would make the proceedings illegal and without jurisdiction, still remains, unless the statute goes further and states either expressly or by necessary implication that the civil court's jurisdiction is completely taken away.

17. Same is the view expressed by this court in the matter of V.K. Munshi v. Raipur Co-operative Housing Society Ltd. Reported in 2001 RN 257 by holding that bar of jurisdiction of civil court contained in Section 82(i)(c) of the Cooperative Societies Act does not have the result of excluding the civil Court's jurisdiction in such a case where the suit is based on the ground that the order impugned is a nullity. It will be however, for the civil court to confine itself in the suit only to the ground of nullity because it is only to that extent that the civil court has jurisdiction in the matter.

18. This court in the matter of Sitaram v. Cooperative Bhumi Vikas (Land Mortgage) Bank Ltd Khandwa & others reported in ILR (2009) MP 1707 has reiterated the same preposition that even if jurisdiction of civil court is excluded, the civil court has jurisdiction to examine into cases where the provision of Act have not been complied with or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedure. In said case this court has held as under:

"11. In this case as per the averments made in the plaint, as no notice was required under section 18 of the Act was served and when no such notice was served upon the plaintiff, the auction cannot be said to be a legal auction within the purview of provisions of Adhiniyam and in that circumstances, the provisions of Section 27 may not be applicable. But this question is to be decided by the trial court. If at this juncture this court records any finding then it may effect the interest of the parties, who shall be free to adduce evidence in this regard. But from the perusal of averments made in the plaint it can very well be gathered that plaintiff specifically averred that no such notice was issued and without issuance of notice as required under Section 18, an auction took place. In these circumstances as per averments of the plaintiff the entire auction was invalid. The civil court was having jurisdiction to examine such issue, about the auction took place without following the mandatory provisions of the Act."

19. This court in the matter of State Bank of India Employees Cooperative Housing Society Ltd. Raipur v. Nawal Shanker Dave and others reported in 1971 J LJ 973 has held that the ordinary rule of construction is that statutes affecting the jurisdiction of civil courts i.e. ousting their jurisdiction must be very strictly construed and every presumption should be made in favour of the jurisdiction and its exclusion is not to be readily inferred, but must be either explicitly expressed or clearly implied.

20. In the present case the courts below while dismissing the suit under Order 7, Rule 11 of the CPC on the ground of lack of jurisdiction of the civil court, have

failed to consider the plea of the appellant in the plaint that the order passed by the joint registrar on 22.7.2003 was a nullity and also the reasons given for labelling the aid order to be a nullity, especially the allegation that the order was passed without serving any notice and without giving opportunity of hearing and that the alleged service was affected on the mother of the appellant who was already dead and no proceedings in fact for attachment was undertaken and no service of notice even to the LRs of Geeta Bai was done. Such an allegation relates to the violation of the principles of natural justice and passing an order without following the requirement of statute and not acting in accordance with the fundamental principles of judicial procedure, therefore, when such allegations were made, the plaint could not have been rejected at the threshold on the ground that the civil court had no jurisdiction. At the most the trial Court could have framed an issue in respect of the jurisdiction and decided the same on the basis of the evidence relating to the aforesaid plea raised in the plaint.

21. That apart the appellant has sought the decree of declaration of title by challenging the order dated 22/7/03 passed by Joint Registrar and subsequent proceedings which include sale of property by respondent no. 1 in favour of respondent no.2 therefore, in view of the judgment of this court in the matter of Manju Shyam Sunder Ramteke and another v. Manda W/o Shankar Rao Vaidya and others reported in 2000(1) MPLJ 411 wherein it has been held that suit for declaration of title by earlier purchaser and injunction is maintainable and not barred by Section 82 and such a suit is not covered by Section 64 of the Act, I am of the opinion that the suit filed by appellant cannot be rejected under Order 7, Rule 11 CPC on the ground that the civil court has no jurisdiction.

22. This court in the matter of Kusum S. Verma and another v. Pritam Singh Gulati and another reported in 1998(1) MPLJ 578 has held that dispute relating to transaction of sale can be referred to the Registrar Cooperative Societies only upto the stage anterior to the passing of the title and not thereafter and a void sale is non-est and can be ignored at any stage. The jurisdiction of civil court for such a suit has been held to be not excluded under Section 64 of Act.

23. Supreme court considering the scope of Order 7, Rule 11 (d) CPC in the matter of Popat and Kotecha Property v. State Bank of India Staff Association reported in (2005) 7 SCC 510 has held that said provision applies only where the statement as made in the plaint without any doubt or dispute shows that the suit is barred by law in force, whereas in the present case the pleadings contained in the plaint do not reflect so.

24. That apart this court in the matters of Jaichand v. Smt. Punam Bai and others reported in 1998 RN 67, Moolchand v. Shri N.K. Satsangi and others reported in 1992 JLJ 340, Naresh Saxena v. President Adarsh Nagrik Sahakari Bank reported in 1986 MPLJ Note (6) has taken the view that rejection of plaint under Order 7, Rule 11 CPC at the stage prior of filing of the written statement is not warranted.

25. It is also noticed that the order rejecting plaint under Order 7, Rule 11 of the CPC has been passed by the trial Court without taking note of the fact that an application under Order 6, Rule 17 of the CPC for amending the plaint was pending at that time, which could have a bearing on the objection raised in the application under Order 7, Rule 11 of the CPC.

26. Learned counsel for respondent has placed reliance upon judgment of the Supreme court in the matter of T. Arivandandam v. T.V. Satyapal and another reported in AIR 1977 SC 2421 but in the present case on the basis of pleadings contained in the plaint the claim cannot be held to be false and vexatious therefore the said judgment is not attracted. He has also placed reliance upon judgment of Supreme court in the matter of N.V. Srinivasa Murthy and others v. Mariyamma (dead) by proposed LRs and others reported in (2005) 5 SCC 548 but the present case stands on different factual footing. He has also placed reliance upon judgment of this court in the matter of Karim Bhai v. State of Maharashtra and others reported in ILR (2009) MP 3167 but in that case also it has been held that the court is required to see that vexatious and frivolous litigation should not be allowed to proceed so as to kill the time of the court but the present case cannot be held to be a case of frivolous and vexatious litigation on the basis of pleadings in the plaint. He has also relied upon judgment of this court in the matter of Uma Gupta (Smt.) v. Smt. Susheela reported in 1994 MPWN Page 175 but in the present case on the basis of the pleadings in the plaint the suit cannot be held to be against the provision of the Act. The judgment in the matter of Pashu Chikitsa Vibhagiya Sahkari Nirman Samiti Maryadit Bhopal and another v. State of MP reported in 2000(3) MPLJ 244 relied upon by learned counsel for respondent is distinguishable on facts. So far as the judgment in the matter of Sardar Jodhsingh Gill v. Trilanga Cooperative Society and others reported in 1996 MPLJ Note (43) is concerned that was a case wherein it was found that members could show their infringement of easementary right and it was a dispute falling under Section 64(2)(iv) referable to Cooperative Court but the present case stands on different footing.

27. In view of the above analysis I am of the opinion that trial court has committed an error of law in rejecting the plaint under Order 7, Rule 11 CPC by holding that jurisdiction of civil court is barred and first appellate court has also committed an error in dismissing the appeal. Trial court ought to have framed issue in this regard along with other issues and decided the same on the basis of evidence led by the parties.

28. Hence question No. 2 is answered in favour of appellant.

29. So far as question No.1 is concerned, since the question of bar of jurisdiction of civil court in view of Section 82 of Cooperative Societies Act is to be decided by trial court after framing the issue and permitting the parties to lead evidence. Hence question No. 1 does not arise for consideration before this court at this stage. Hence this court refrains from answering the said question.

30. In view of the aforesaid discussion, the judgments passed by the trial court and appellate court are set aside and the matter is remitted back to the trial court for deciding the suit in accordance with law keeping in view the observations made above.