

(2014) 08 BOM CK 0179
In the Bombay High Court
Case No : Second Appeal No. 27 of 2007

Rama Krishna Arolkar

APPELLANT

Vs

Kumud

RESPONDENT

Date of Decision : 12-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 14

Citation : (2014) 5 ABR 788 : (2015) 2 ALLMR 655 : (2015) 3 MhLj 949

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Amrut Kansar, Advocate for the Appellant; S.G. Desai, Senior Advocate and K. Pednekar, Advocate for the Respondent

Judgement

F.M. Reis, J.—Heard Mr. Amrut Kansar, learned counsel appearing for the appellants and Mr. S.G. Desai, learned Senior Counsel appearing for the respondent Nos. 1 to 4. The above appeal came to be admitted on 19.04.2007 on the following substantial questions of law.

1. Whether the learned Trial Court was not bound to frame the issue of tenancy arising out of the pleadings of the parties?

2. Whether the Trial Court and the first appellate Court were not bound to take into consideration the provisions of the Agricultural Tenancy Act, 1964 as amended from time to time which is a welfare legislation and there could not be any contract waiving the right of tenancy by the tenant?

3. Whether the learned Trial Court and the first appellate Court were not bound to take into consideration the presumption arising out of Section 105 of the Land Revenue Code, 1968 and also the proviso to Section 7 of the Agricultural Tenancy Act, 1964?

2. Mr. A. Kansar, learned counsel appearing for the appellants has pointed out that the appellants are the tenants of the disputed property surveyed under Nos. 82/5 and 7/5 of Village Pilerne which they have been occupying much prior to

the liberation of Goa. The learned counsel further pointed out that the appellants in their written statement have raised the contention that they are the tenants of the disputed property and as such the learned Civil Judge was not justified to proceed with the suit without framing an issue with that regard. The learned counsel further pointed out that though the appellants did not file an application for framing of such issue before the learned Trial Court nevertheless, the application was filed before the learned District Judge to frame an issue on that count. The learned counsel further submitted that the appellants had given all particulars with regard to then-claim of tenancy and as such, the Courts below were not justified to refuse to frame such issue. The learned counsel further submitted that the gift deed dated 19.07.1976 relied upon by the respondents was a fraudulent document executed only to defeat the claim of the appellants as tenants of the disputed property. The learned counsel further submitted that the appellants had planted all fruit bearing trees existing in the suit property which originally admeasures an area of 25325 square metres. The learned counsel further pointed out that this act on the part of the respondents is totally unjustified and the gift deed has been executed only to defeat the claim of the appellants as tenants of the disputed property. The learned counsel has thereafter taken me through the written statement and pointed out that there were enough averments therein to substantiate the claim that they are the tenants of the disputed property. However, the learned counsel points out that they does not dispute the correctness of the declaration of ownership in favour of the respondents but only restricts their claim of tenancy with regard to the said two survey numbers. The learned counsel as such submits that as the impugned judgment is without jurisdiction, the same cannot be sustained and deserves to be quashed and set aside. The learned counsel as such points out that the issue of tenancy would have to be framed and the matter be referred to the learned Mamlatdar to decide such issue in accordance in law.

3. On the other hand, Mr. S.G. Desai, learned Senior Counsel appearing for the respondents has disputed the said contention. The learned Senior Counsel further pointed out that the issues were duly framed by the learned Trial Court and no grievance was raised by the appellants that any issue of tenancy remains to be framed. The learned Senior Counsel further submits that after the suit was decreed in favour of the respondents, the appellants had made an attempt to stay the proceedings on the basis that they had initiated proceedings before the learned Mamlatdar which came to be rejected. The learned Senior Counsel further pointed out that the learned Lower Appellant Court while examining the evidence on record has come to the conclusion that the particulars with regard to the claim of tenancy by the appellants has not been furnished and as such the prayer came to be rejected. The learned Senior Counsel further submits that even after the proceedings before the Appellate Court were disposed of, the appellants had filed an application before the Mamlatdar for declaration of tenancy which according to him has been rejected and the order was affirmed even by the superior authority. The learned Senior Counsel further pointed out

that the substantial questions of law framed by this Court are to be answered in favour of the respondents considering that there are no particulars of the claim of tenancy as alleged by the appellants. In reply to the said submissions, Mr. A. Kansar, learned counsel appearing for the appellants has pointed out that the orders before the Mamlatdar have not attained finality as they are still under consideration before the superior authorities. Mr. Kansar, learned counsel has further pointed out that he does not press for the third substantial question of law which deals with presumption under Section 105 of the Land Revenue Code. In such circumstances, the only aspect to be examined is whether the Civil Court has committed an error in not framing an issue of tenancy and referred the matter to the Mamlatdar.

4. I have considered the submissions of the learned counsel and I have also gone through the records. Both the Courts below upon appreciating evidence on record have come to the conclusion that the respondents are the owners of the disputed property. Mr. Kansar, learned counsel appearing for the appellants does not challenge the said findings of ownership in favour of the respondents herein. As such, the question of interfering with such findings of the Courts below would not arise at all.

5. The question as to whether an issue in fact arises before the Civil Court which would require a reference to the learned Mamlatdar is now well settled by this Court in different judgments. The Division Bench of this Court in the judgment reported in BCI (1981) 25 in the case of Pulmati Shyamlal Mishra and another v. Ramkrishna Gangaprasad Bajpai and others has observed at paras 34, 35 and 36 thus:

"34. It is also not correct to assume that the Court is under any obligation to frame and remit the issue of tenancy mechanically, merely on of its necessity and justification. Cases can be conceived, when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itself attract Sections 85 and 85A of the Tenancy Act. The remittance of any such tenancy issue and the trial mere of by the Mamlatdar and higher authorities in appeal and revision, is known to have become a long winding and time consuming process. This delay enures for the benefit of the person in possession of the land. This, not unnaturally, prompts and tempts him to claim to be the tenant out of sheer anxiety to perpetuate his unmerited possession, even if no basis exists for the claim. Nothing can thus prevent a defendant from claiming to be tenant (1) even if his plea to that effect is overruled specifically or constructively by the Tenancy Court in some earlier proceedings in between himself and the landlord or their predecessor-in-title or (2) even if the plea so set up happens to be irreconcilably inconsistent with his defence of being mortgagee, purchaser or owner of the land by inheritance or adoption, in the earlier stage of the same proceedings or in the earlier round of another litigation. A plea to that effect as an integral part of any other fraudulent defences is yet another specie of the same category. Unwarranted remittance of such issue for trial in literal and

mechanical compliance with the above provisions, enables the litigants to abuse the process of the Court and cause grave miscarriage of justice. This indeed makes mockery of the judicial process causing damage to the confidence of the litigating public in its efficacy and utility.

35. This only highlights the danger of any literal or mechanical construction of these provisions in disregard of their content and context and any casual approach in the matter. Order 14 of the Code of Civil Procedure contemplates framing of issues by the Court on application of mind, not only to the pleading but also to the documents produced, while Rule 4 thereof empowers it to examine any person and enforce production of additional documents for that purpose. These provisions thus enable the Courts to (1) seek clarification of the bald pleadings, (2) insist on production of documents in doubtful cases, and (3) get explanation for the adverse factors even where the litigant is driven to rely on oral evidence, with a view to frame correct issues and restrict the trial of the case only to the same. There is nothing in Section 85 or 85A or in any other provisions of the Tenancy Act, robbing the Courts of these powers so indispensable for the effective adjudication and, relieving it of its duty imposed thereunder. These Sections provide for remittance of issues only if and when the same are framed on being found to arise on such scrutiny and it is after that stage that the Civil Court ceases to have jurisdiction with regard to the same till the finding is certified by the Tenancy authorities. The process contemplated under Order 14 does not contemplate any trial of such issue but it does involve nipping of any such plea in the bud, if the Court, subject to any contrary decision in appeal and revision, judicially concludes against its framing and raising. This is implicit in the separate provision for framing issues and the trial thereof. This process does not thus involve any conflict between Order 14 of the Code of Civil Procedure or Sections 85 and 85A of the Tenancy Act nor any question of any lack or excess of jurisdiction. Such scrupulous compliance with these provisions alone can prevent such possible abuse of its process.

36. The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and mala fide. It is obviously not easy to draw a dividing line between such frivolous and mala fide pleas on the one hand and the ones turning out to be false at the end of the trial on the other. Facts of a given case, however, would rarely fail to furnish the required indication to the judicially trained mind. Facts of the present case, in our opinion, leave no manner of doubt that tenancy plea is a part of the fraudulent defence strategy and does not call for any remittance for trial. The approach could not have been different even if the defendant No. 5 had pleaded the tenancy specifically. The same picture would have emerged in the careful scrutiny at the preliminary stage contemplated under Order 14 of the Code of Civil Procedure."

6. The learned single Judge of this Court in the judgment reported in *Uttam Sambha Deshmukh and others Vs. Yamunabai Bhoyar and others*, in the case of

Uttam Sambha Deshmukh and others v. Yamunabai and others has observed at para 3 thus:

".....However, a bald statement that Sambha was tenant of the suit land previous to sale deed dated 20-4-1959, has been made. However, material facts constituting the plea of tenancy, have not been pleaded, viz. as to when the tenancy commenced; who was the landlord; what were the terms and conditions of the tenancy; what was the rent fixed etc. are absent in the pleading. Apart from this, it will be evident that no documentary evidence viz. revenue record and/or rent receipts have been produced on record to show the relationship of the deceased Sambha as the tenant of the said land....."

7. Taking note of the observations and the ratio laid down in the said judgments and on perusal of the pleadings in the above proceedings, it would incumbent upon the appellants to give requisite particulars of such tenancy as referred to in the aforesaid judgments. Mr. Kansar, learned counsel has taken me through the written statement and pointed out that there are averments therein to suggest that the father of the appellants was a tenant of the disputed property. No doubt, there is no reference to tenancy as claimed by Mr. Kansar nevertheless, there are no particulars of such tenancy which would entitled the appellants to claim that the issue has to be framed and referred to the learned Mamlatdar. When such particulars are found missing in the written statement, the Courts below were justified to refuse to frame such issue. It is not in dispute that the appellants never filed any application to frame any additional issue with that regard. Having failed to do so, it is not open to the appellants to now seek a relief to frame such issue in the present Second Appeal. Apart from that, in terms of Section 58 of the Agricultural tenancy Act, 1964 the jurisdiction to decide or determine the claim of tenancy is expressly barred in the Civil Court. In such circumstances, it is open to the appellants in case they so advised to approach the competent authority to get their alleged claim of tenancy adjudicated in accordance with law. In this context, the contention of Mr. S.G. Desai, learned Senior Counsel that the appellants had availed of such remedy and such proceedings had been rejected and attained finality which is disputed by Mr. Kansar, learned counsel for the appellants is a matter which would also have to be examined by such competent authority. The orders passed in the proceedings before the Agricultural Tenancy Authority are not under challenge before this Court in the present appeal. In such circumstances, the question of going into such aspect in the present Second Appeal is not at all justified.

8. In view of the above, as there are no particulars furnished by the appellants with regard to the alleged claim of tenancy, the Courts below were justified to refuse to frame such issue and refer the matter for adjudication before the learned Mamlatdar. As already pointed out hereinabove, the appellants if so advised would have to take necessary steps in accordance with law to get their alleged claim of tenancy adjudicated if they are so entitled. Subject to the above, the substantial questions of law are answered against the appellants.

Consequently, the appeal stands accordingly dismissed.