

(2015) 08 BOM CK 0195
In the Bombay High Court
Case No : Second Appeal No. 234 of 1993

Shaikh Vazir Ahmad Mulla and Others	APPELLANT
Vs	
Bansi Kalu Sangamnere and Others	RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29, 31, 74, 76, 85
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 22, Order 22 Rule 4
Constitution of India, 1950 — Article 226, 227

Citation : (2015) 5 ABR 650 : (2015) 6 MhLj 410

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : P.S. Dani, Senior Advocate assisted by Vilas B. Tapkir, for the Appellant; R.A. Thorat, Senior Advocate assisted by U.B. Nighot, Advocate and S.A. Agarkar, Advocates for the Respondent

Final Decision : Disposed off

Judgement

R.K. Deshpande, J—In Tenancy Application No. 1158 of 1957, re-registered as Tenancy Proceeding No. 28 of 1968, instituted by the appellant-landlords, the Tahsildar, Niphad, passed an order of eviction and possession on 29th August, 1969 in exercise of his powers conferred by Section 29 read with Section 31 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as "the said Act"), in respect of half share from the eastern side of Survey No. 87 of Chandori, against one Kalu Raoji Sangamnere, the original tenant and the father of the original respondent Nos. 1 to 3 and the uncle of the original respondent Nos. 4 to 9 in this appeal. The aforesaid order was the subject matter of challenge by six tenants including the original respondent No. 1 Bansi Kalu Sangamnere, a son of original tenant Kalu, who died during the pendency of proceedings on 1st January, 1958, by filing Tenancy Appeal No. 240 of 1969, under Section 74 of the said Act, before the Special Deputy Collector, the Appellate Authority at Malegaon. The said appeal was dismissed on 14th September, 1970.

2. Tenancy Application No. 503 of 1972 was preferred by the tenant-respondent No. 1 - Bansi Kalu Sangamnere before the Maharashtra Revenue Tribunal at Bombay (in short "MRT"), under Section 76 of the said Act, which was allowed on 20th June, 1973. The MRT set aside the orders passed by the Authorities below and the Tenancy Application No. 1158 of 1957 was dismissed. Special Civil Application No. 3025 of 1973 was preferred by the appellants/landlords before this Court, which was allowed on 9th March, 1978, setting aside the order dated 20th June, 1973, passed by the MRT and dismissing the Tenancy Application No. 503 of 1973, which was preferred by the respondent No. 1 before the MRT. Consequently, the order of eviction and possession passed on 29th August, 1969, in Tenancy Proceeding No. 28 of 1968, operated.

3. The respondent No. 1 - Bansi Kalu Sangamnere, a son of original tenant Kalu Raoji Sangamnere along with eight other persons who are the respondents in this second appeal, preferred Regular Civil Suit No. 75 of 1980, claiming a decree for grant of declaration that the order dated 29th August, 1969, passed in Tenancy Proceeding No. 28 of 1968 (earlier registered as Tenancy Application No. 1158 of 1957) as nullity and it does not confer any right upon the appellants, who were joined as defendants, to seek enforcement of it. The consequential relief was also claimed to restrain the appellants-defendants or their legal heirs from creating any obstruction in peaceful possession and enjoyment of the suit property by the respondents-plaintiffs. The suit was dismissed on 29th November, 1986.

4. Civil Appeal No. 59 of 1987 preferred by the respondents was allowed by the lower appellate Court on 28th August, 1992, setting aside the judgment and order passed by the trial Court. The appellate Authority passed a decree of permanent injunction restraining the defendants from obstructing the possession of the plaintiffs over the suit property and granted a declaration that the order dated 29th August, 1969, passed in Tenancy Proceeding No. 28 of 1968 is nullity and restrained the appellants-defendants from executing it. The original defendants are before this Court in this second appeal. The parties shall hereinafter be referred according to their original status as "the plaintiffs" and "the defendants".

FINDINGS OF THE COURTS BELOW

5. The trial Court recorded the findings that - (a) the plaintiffs failed to prove that the order dated 29.08.1969 was nullity and therefore, not executable; (b) the plaintiff Nos. 4 to 9 failed to prove that their father Laxman Raoji was co-tenant along with Kalu Raoji in respect of the suit land; (c) the Civil Court has jurisdiction to entertain, try and decide the suit; and (d) the defendants have failed to establish that the tenancy rights of the plaintiffs are extinguished. The appellate Court has reversed these findings of the trial Court and it is held that - (a) the order dated 29.08.1969 is nullity and therefore, unexecutable; (b) the plaintiff Nos. 4 to 9 have established that their father Laxman Raoji was co-tenant along with Kalu Raoji in respect of suit property; and (c) the defendants

have failed to establish that the tenancy rights of the plaintiffs are extinguished.

SUBSTANTIAL QUESTIONS OF LAW

6. In the background of the aforesaid undisputed factual position and the findings of the Courts below, this second appeal was admitted on 28th June, 1993, framing the following two substantial questions of law;

"(i) Whether the Civil Court had jurisdiction to decide the tenancy rights?

(ii) Whether the question of nullity of the order of Tahsildar is rightly decided in law?"

7. The substantial question of law at Sr. No. (ii) will have to be taken first for the decision. It relates to the competency of the Authority to continue with the proceedings of Tenancy Application No. 28 of 1968 and to pass an order on 29th August, 1969, against the deceased respondent Kalu Raoji Sangamnere, in the absence of any order passed on the application at Exh. 42 filed by the defendants to bring his legal representatives on record and its enforceability against the plaintiff Bansi Kalu Sangamnere, as the legal representative of the deceased tenant.

8. The provision of Order XXII, Rule 4 of C.P.C., to the extent it is relevant is reproduced below;

"ORDER XXII-

DEATH, MARRIAGE AND INSOLVENCY OR PARTIES

1.

2.

3.

4. Procedure in case of death of one of several defendants or of sole defendant-
(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

....."

Upon death of the defendant in a suit, if the right to sue survives, then an application is required to be made under sub-rule (1) of Rule 4 above by the

applicant or the plaintiff to bring the legal representatives of the deceased defendant on record. The Court has to pass an order on such application causing the legal representative of the deceased defendant be made a party to the proceeding and thereafter the Court can proceed further in the suit. Article 120 of the Limitation Act prescribes a period of limitation for filing an application to bring the legal representatives of the deceased defendant on record. It is of 90 days from the date of death of the defendant. Sub-rule (3) of Rule 4 under Order XXII states that where within the time limited by law, no application is made under sub-rule (1), the suit shall abate against the deceased defendant.

9. It is, therefore, apparent that if the application to bring the legal representative of the deceased defendant-respondent is made under sub-rule (1) of Rule 4 under Order XXII of C.P.C, then the suit does not abate automatically against the deceased defendant or respondent, unless there is specific order passed by the Court rejecting such application. But, if no such application is made within the time prescribed under Article 120 of the Limitation Act, then the suit or proceeding stands abated automatically against the deceased defendant or respondent, as the case may be, upon expiry of the period of 90 days and no specific order is required to be passed to the effect that the suit has abated.

10. Now, the judicial precedents need to be considered.

In the decision of the Apex Court in case of N. Jayaram Reddy and Another Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool, AIR 1979 SC 1393 : (1979) 3 SCC 578 : (1979) 3 SCR 599 , the two judges of the Apex Court in a Division Bench, concurred with each other but for separate reasons. In paras 5 and 6 of the said decision, the Apex Court rejected the contention that the High Court's decree was nullity merely because it was passed against a dead person. It holds that a decree passed against a dead person is not necessarily a nullity for all purposes. It will be sufficient to say that such a decree has been held to be nullity because it cannot be executed against his legal representatives for simple reason that he did not have an opportunity of being heard in respect of it, and the legal representatives cannot be condemned unheard.

11. In the aforesaid decision, the Apex Court further holds that while the law treats such a decree as nullity qua the legal representatives of the deceased defendant or respondent, there is nothing to prevent him from deciding that he will not treat the decree as nullity, but will abide by it as it stands, or as it may be modified thereafter in an appeal. The Court has further held that if the legal representative adopts that alternative course of action, it cannot possibly be said that his option to be governed by the decree is against the law or in concept of public policy or purpose or the public morality. It is held that, thus a matter entirely at the discretion of the legal representative of the deceased respondent against whom a decree has been passed, to decide whether he will raise the question that the decree has become nullity at the appropriate time, namely, during the course of hearing of any appeal that may be filed by any other party, or to abandon with obvious technical objection and fight the appeal on merits.

12. In the aforesaid decision, the Apex Court in unequivocal terms holds that it is equally futile to argue that an appellate Court is denuded of its jurisdiction to hear an appeal in which one of the respondents has died and the right to sue does not survive against surviving defendant or defendants alone, merely because no application has been made to bring his legal representatives on the record when no objection to that effect is raised by any one.

13. In the decision of the Apex Court in *Puran Singh and others Vs. State of Punjab and others*, (1996) 1 AD 639 : AIR 1996 SC 1092 : (1996) 1 JT 362 : (1996) 113 PLR 700 : (1996) 1 SCALE 380 : (1996) 2 SCC 205 : (1996) 1 SCR 730 : (1996) 1 UJ 241 , the question involved was whether the provisions of Order XXII of the Code of Civil Procedure are applicable to the proceedings under Articles 226 or 227 of the Constitution of India. The Court answered the said question in the negative holding that it is not applicable per se to the writ proceedings. The Court further held that this, however, does not mean that the death of the respondent in a writ petition can be ignored if the right to pursue the remedy even after the death of the respondent survives. The Court further held that there is no question of automatic abatement of the proceedings and in the absence of limitation of 90 days, the High Court has discretion to permit the substitution of legal representatives and proceed with the hearing of writ petition or writ appeal, as the case may be.

14. In para 4 of the decision in *Puransingh's* case, the Apex Court has held that if the right to sue is held to be a personal right, it stands extinguish upon the death of the concerned defendant/respondent and it does not devolve upon his legal representatives or successors. In such situation, the suit cannot be continued. But, if the right to sue survives against the legal representatives/heirs of the deceased respondent, then the procedure under Order XXII, Rule 4 of the Civil Procedure Code needs to be followed by bringing the legal representatives/heirs of the deceased on record.

15. In the decision of the Apex Court in case of *Jaladi Suguna (deceased) through LRs. Vs. Satya Sai Central Trust and Others*, AIR 2008 SC 2866 : (2008) 8 SCALE 709 : (2008) 8 SCC 521 : (2008) AIRSCW 4733 , the Apex Court has held that where the respondent in an appeal dies and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record, before the Court can proceed further in the appeal. It was further held that where the respondent-plaintiff who succeeded in a suit dies during the pendency of the appeal, any judgment rendered on hearing the appeal filed by the defendant without bringing the legal representatives of the deceased respondent-plaintiff on record, will be a nullity. It was further held that when the first respondent in an appeal died, the right to prosecute the appeal survived against her estate and it was, therefore, necessary to bring the legal representatives of the deceased Suguna on record to proceed further with the appeal.

16. In the decision of the Full Bench in case of *Abdul Wahab and Others Vs.*

Ramakrishniah, AIR 1954 Kar 65 : (1953) ILR (Kar) 521 , the question involved was whether the appeal abated because the Court had not passed any order on the legal representative's application. Undisputedly, the application for bringing legal representative was filed within stipulated time, but no order was passed by the Court. It was held that, it cannot be said by any stretch of imagination that the appeal had abated as the application had been filed in time and as no orders had been passed on it. It was also held that the omission on the part of the Court to pass formal order cannot take away the right to proceed with the case and there is no duty on the part of the litigant to remind the Court by observance of the rules. It was held that a possible reason for the omission is that the respondent's counsel took part in the appeal without any objection and the appeal was disposed of after hearing him.

17. The position of law on the basis of the aforesaid decisions can be summarized as under -

"(a) If the right to sue is held to be a personal right, it stands extinguished upon the death of the concerned defendant/respondent and it does not devolve upon his legal representatives or successors. In such situation, the suit cannot be continued. But, if the right to sue survives against the legal representatives/heirs of the deceased respondent, then the procedure under Order XXII, Rule 4 of Civil Procedure Code needs to be followed by bringing the legal representatives/heirs of the deceased on record.

(b) If the application is made under sub-rule (1) of Rule 4 under Order XXII of C.P.C, then the suit or proceedings does not automatically abate against the deceased defendant or respondent even if the period of 90 days prescribed under Article 120 of the Limitation Act expires, unless a specific order rejecting such application is passed in such suit or proceedings. Merely because there is an omission on the part of the Court to pass formal order, cannot take away the right to proceed with the case and there is no duty on the part of the litigant to remind the Court.

(c) If no such application is made under sub-rule (1) of Rule 4 under Order XXII of C.P.C within a period of 90 days as prescribed under Article 120 of the Limitation Act, the suit or proceedings gets abated automatically against the deceased defendant or respondent after expiry of such period of limitation, even in the absence of any specific order passed in such suit or proceedings.

(d) The Court is not denuded of its jurisdiction to hear an appeal in which one of the defendants or respondents has died and that the right to sue does not survive against the surviving defendant/s or respondent/s alone, merely because no application has been made to bring his legal representatives on record, when no objection to that effect is raised by any one.

(e) Any such decree or order against a dead person becomes unexecutable against the legal representatives of a deceased person for the reason that no opportunity of being heard is provided to him if he is not brought on record. In

other words, such decree or order becomes voidable at the instance of the legal representatives of the deceased.

(f) Merely because an order or a decree is passed against a dead person, it does not become nullity for all purposes and the Court will have to consider the facts and circumstances of each case to find out whether such decree or order has in fact becomes nullity.

(g) There is nothing to prevent the legal representatives of the deceased defendant or respondent from deciding to abandon with such technical objection that the appeal has abated and therefore, the Court cannot proceed with the matter or proceeds to fight out the case on merits by his conduct that he will not treat the decree as nullity, but will abide by it, as it stands, or as the case may be, modified thereafter in an appeal.

(h) In the facts and circumstances of each case which is decided against a dead person, the Court will have to find out whether the legal representative or successor of the deceased has abandoned such objection or has proceeded to fight out the case on merits by his conduct that he will not treat the decree as nullity but will abide by it as it stands or as the case may be, modified thereafter in appeal or has availed full opportunity of being succeeded on merits in the original proceedings or in appeal or revision or writ petition etc., as the case may be."

18. There cannot be any dispute over the proposition of law laid down in para 4 of the decision in Puransingh's case. The Apex Court in Puransingh's case was not dealing with the situation where the Court proceeded to decide the case on its own merits in the absence of the legal representatives/heirs of the deceased. Similarly, the proposition laid down in the decision of the Apex Court in Jaladi Suguna's case also cannot be disputed, which was covered by the principle of law laid down in para 4 of the Puransingh's case by the Apex Court. Hence, Jaladi Suguna's case decided by the Apex Court would also not apply to a situation where the Court has proceeded to decide the matter on its own merits in the absence of legal representatives/heirs of the deceased brought on record. In the present case, the Tahsildar proceeded to decide the matter on its own merits against the dead person without there being any order to bring his legal representatives or heirs on record. Hence, the principles of law laid down in Puransingh's case or in Jaladi Suguna's case shall not apply to this case.

19. In the decision of the Apex Court in N. Jayaram Reddy's case, Court proceeded to decide the case on its own merits in the absence of any legal representatives of the deceased brought on record. Hence, the principles of law laid down in this case shall govern the facts of the present case. In the present case, the defendant-tenant Kalu Raoji Sangamnere died on 1st January, 1958 during the pendency of the said proceeding and the application at Exh. 42 was filed on 16th March, 1959 in the Tenancy Case No. 28 of 1968 for bringing his legal representatives i.e. the original plaintiff Bansi Kalu Sangamnere on record.

The application was pending and no order was passed on it. Hence, the principle of law laid down in the decision of the Full Bench of Patna High Court in Abdul Wahab's case, cited supra, shall also govern the controversy involved in the present case.

20. Before this Court, in this case, there is no dispute raised as regards applicability of the provisions of Order XXII of C.P.C, to the proceedings under Section 29 read with Section 31 of the said Act. I, therefore, proceed on the footing that the said provisions are applicable and the respondent in the tenancy proceedings shall be the defendant referred to in Order XXII, Rule 4 of C.P.C. In the present case, Kalu Raoji Sangamnere was the original tenant and the respondent in the Tenancy Proceeding No. 28 of 1968, under Section 29 read with Section 31 of the said Act and he died on 1st January, 1958, during the pendency of the said proceedings. Undisputedly an application for bringing legal representatives of the original tenant at Exh. 42 was filed on 16th March, 1959 i.e. within a period of limitation of 90 days as prescribed under Article 120 of the Limitation Act, in the Tenancy Proceeding No. 28 of 1968. No orders were passed on this application by the Court. Irrespective of this, the plaintiff Bansi Kalu Sangamnere, who was the legal representative of Kalu, participated in the proceedings, without raising an objection either that the appeal has abated or that without any orders on the application at Exh. 42, the proceedings cannot go on and examined himself as a witness. He was also cross-examined by the defendant-landlord. Not only that, but he also preferred the Tenancy Appeal No. 240 of 1969, which was dismissed on 14th September, 1970. The Tenancy Application No. 503 of 1973 filed by the plaintiff Bansi before the MRT was allowed on 20th June, 1973. In Special Civil Application No. 3025 of 1972 filed by the defendant-landlord, he was the respondent before this Court. On 9th March, 1978, this Court set aside the order passed by MRT. Consequently, the order dated 29th August, 1969, passed by the Tahsildar in Tenancy Proceedings No. 28 of 1969 operated.

21. Thus, there was complete participation of the plaintiff in all the proceedings under the said Act and it was not a case where the plaintiff was condemned unheard. On the contrary, it was a case where the plaintiff availed full opportunity and had taken a chance of succeeding in a challenge before the competent Authorities and the Court. The plaintiff has exercised his discretion in this way to abandon the objection or to fight out the case on merits. Merely because the Tahsildar had not passed an order bringing the legal representatives of the original tenant on record, that by itself would not lead to the conclusion that the proceedings had abated in the absence of rejection of application at Exh. 42. The right of the appellants in this appeal was not taken away, to proceed with the case. The order dated 29th August, 1969 passed in Tenancy Proceedings No. 28 of 1969, therefore, does not become nullity, it binds the plaintiff and becomes enforceable against him. The substantial question of law at Sr. No. (ii) is, therefore, answered accordingly.

22. So far as the substantial question No. (i) is concerned, Section 85 of the said Act creating bar of jurisdiction is relevant and hence, it is reproduced below.

"Section 85 : Bar of jurisdiction

(1) No Civil Court shall have jurisdiction to settle, decide or deal with any question [(including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him) which is by or under this Act required to be settled, decide or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the [Maharashtra Revenue Tribunal] in appeal or revision or the [State] Government in exercise of their powers of control.

(2) No order of the Mamlatdar, the Tribunal, the Collector or the [Maharashtra Revenue Tribunal] or the [State] Government made under this Act shall be questioned in any Civil or Criminal Court.

Explanation:--For the purposes of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906.(Bom II of 1906)"

Sub-section (1) of Section 85 clearly bars the jurisdiction of the Civil Court to settle, decide or deal with any question which is by or under the Act required to be settled, decided or dealt with by the Mamlatdar or the Tribunal, a Manager, the Collector or the Maharashtra Revenue Tribunal in an appeal or revision, or the State Government in exercise of their powers of control. Sub-section (2) states that no order of the Mamlatdar, Tribunal, the Collector or the Maharashtra Revenue Tribunal or the State Government made under this Act shall be questioned in any civil or criminal Court.

23. In the present case, the question has been settled, decided and dealt with by the competent Authorities under Section 29 read with Section 31 of the said Act. An appeal and the revision preferred against the said order before the Collector and the MRT under Section 74 and Section 76 respectively, have been dismissed. The order of eviction and possession passed has attained the finality. While answering the substantial question of law at Sr. No. (i), it is held that the order passed by the Tahsildar on 29th August, 1969 in Tenancy Proceedings No. 28 of 1968, was not nullity in the eyes of law. The respondent-original plaintiff took the chance of succeeding in the forum provided under the Act and having lost it, the jurisdiction of the civil Court was clearly ousted, by virtue of Section 85 of the said Act.

24. Shri R.A. Thorat, the learned Senior Advocate, appearing for the respondent has placed heavy reliance upon Paras 4 and 5 of the judgment of this Court delivered on 9th March, 1978 in Special Civil Application No. 3025 of 1973. The said paragraphs are reproduced below.

"4. While I, therefore, propose to set aside the order passed by the President of the Tribunal, I must, however, make it clear that when an authority purports to

pass an order, which is acting without jurisdiction, the purported order is a nullity; and indeed it is not necessary for anybody who objects to that order to apply to get it set aside. Indeed such an order does not give rise to any right whatsoever, not even to a right of appeal. (See *Abdulamiyan Abdulrehman v. The Government of Bombay* 44 Bom.L.R. 577). If that is so, even the appeal preferred by the respondent was not competent and the order passed therein would also have to be held as incompetent. If that is so, the petition itself filed by the respondent before the Tribunal would also have to be held to be incompetent. However, I am not expressing any opinion on this question. If the order passed by the Tahsildar on 29th August, 1969 in the tenancy proceeding No. 28 of 1968 is passed in the application which had abated and is, therefore, thus a nullity, the respondent is always at liberty to resist that order for possession in any proper way he is advised.

5. The result in this petition must succeed. The order dated 28th June 1973 passed by the Maharashtra Revenue Tribunal in Tenancy Application No. 503 of 1972 is set aside, and the application must be deemed to have been dismissed. Rule absolute with no order as to costs."

This Court has held that if the order passed is without jurisdiction and nullity, it is not necessary for any body to apply for getting it set aside. If the appeal preferred by respondent No. 1 was not competent, the order passed in an appeal and consequently in revision would also have to be held as incompetent. The Court did not express any opinion on this aspect and kept the question open as to whether the order passed by the Tahsildar on 29th August, 1969 in Tenancy Proceedings No. 28 of 1968 is nullity or not.

25. The aforesaid order passed by this Court cannot be construed as a license to the respondents to challenge the order dated 29th August, 1969, by filing a civil suit. Neither the order of the Court nor the consent of the parties can confer the jurisdiction upon the civil Court, which is barred by the provisions of Section 85 of the said Act. Once it is held that the order dated 29th August, 1969, was not nullity in the eyes of law, the jurisdiction of the civil Court was completely barred.

26. The necessary result of answering the substantial questions of law is that, the second appeal succeeds. The judgment and order dated 28th August, 1992, passed by the lower appellate Court in Civil Appeal No. 59 of 1987 is quashed and set aside and the judgment and order passed by the trial Court on 29th November, 1986, dismissing the Civil Suit No. 75 of 1980 is restored. No order as to cost.

In view of the disposal of the second appeal, civil application, if any, does not survive. The same stand disposed of.