

(2015) 08 BOM CK 0325
In the Bombay High Court
Case No : Second Appeal No. 576 of 1991

Subhashchandra and Others

APPELLANT

Vs

Kondbarao and Others

RESPONDENT

Date of Decision : 21-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 151, 31, 47, 99

Citation : (2015) 08 BOM CK 0325

Hon'ble Judges : T.V. Nalawade, J.

Bench : Single Bench

Advocate : P.S. Agrawal, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—The appeal is filed to challenge the judgment and order of Regular Civil Appeal No. 94/1981 which was pending in the Court of the Additional District Judge Parbhani and also to challenge the order made by the Civil Judge Junior Division Hingoli dated 2-5-1981 in Regular Darkhast No. 40/1980. Both sides are heard.

2. Argument was heard on mainly following point which was treated as substantial question of law.

"Whether the Courts below have committed error in holding that the appellant needs to approach Tenancy Court to get the relief ?"

3. In execution proceeding, present appellants had filed application under section 47 read with section 151 of the Civil Procedure Code for dismissal of the proceeding filed by Kondbarao, respondent No. 1. The first execution proceeding was filed by a third party in respect of a money decree given in his favour against one Kanhayalal. In the said proceeding agricultural land bearing Survey No. 47 admeasuring 35 acres 30 gunthas situated at Kalgaon was attached. This land was put to auction by Civil Court and in the auction the appellant had purchased the land and sale certificate was also granted to him. Possession was

taken when respondent No. 1 Kondbarao was found in the field and there were standing crops covering the area of more than 7 acres and an area of more than 2 acres was found to be ploughed and it was ready for cultivation.

4. Kondbarao and respondent No. 2 Ramrao had filed proceeding to challenge the sale of the agricultural land by contending that they were having tenancy rights in the land and so the attachment of the land and its sale was illegal and void. Objection proceeding filed in the execution proceeding was rejected but the Appellate Court held that the attachment and sale was illegal and allowed the objection raised by respondent Nos. 1 and 2. This decision was challenged by filing Civil Revision Application No. 155/1970 by the appellant. This Court held that only to the extent of portion of 5 acres 19 gunthas attachment and sale was illegal and not valid but in respect of remaining portion of the land the sale and attachment was valid. This Court, however, observed that for deciding rights of the persons like Kondbarao they need to approach appropriate forum, tenancy Court. The Civil Revision Application was decided on 11-12-1979. Kondbarao then applied to the executing Court for restoration of possession by using section 144 of the Civil Procedure Code. Present appellant opposed the said application. The objection of the appellant was rejected and the Court issued possession warrant for handing over of the possession of entire portion to Kondbarao and accordingly the possession came to be handed over to Kondbarao on 27-2-1981.

5. The aforesaid order was then challenged in Regular Civil Appeal No. 94/1981 and then the appellant has come before this Court. It was mainly submitted by the learned counsel for the appellant that when there is finding of tenancy Court and when this Court has also observed that Kondbarao is entitled to get declaration under section 38G only in respect of 5 acres 19 gunthas, it was not correct and proper on the part of the executing Court to direct to hand over the possession of entire portion to Kondbarao by using provision of section 144 of the Civil Procedure Code.

6. This Court has carefully gone through the observations made by this Court in the judgment delivered in Civil Revision Application No. 155/1970. All the relevant facts are discussed by this Court and the finding given by the Tenancy Court under the provisions of the Hyderabad Tenancy and Agricultural Lands Act is considered. The finding of the trial Court shows that when the order of attachment of the land was made, Rangrao was in possession of the land as tenant. There is finding that somewhere in the year 1965 Kondbarao came in possession of the entire land. The holdings of these two persons were considered by the tenancy Court and it is declared that Kondbarao is entitled to declaration under section 38G but it is only to the extent of 5 acres 19 gunthas. Even the possession receipt under which the possession was taken over in execution proceeding shows that Kondbarao was there, there was standing crop in the area of more than 7 acres and area of more than 2 acres was ready for sowing. Thus, apparently Kondbarao was in possession and he was claiming rights as tenant in the agricultural land. In the revision, this Court has made it clear that even for

ascertaining area of 5 acres 19 gunthas which needs to be given under section 38G to Kondbarao, matter needs to be dealt with by the tenancy Court under the aforesaid Tenancy Act.

7. The Civil Court has taken into consideration the observations made by this Court and after that the civil Court has restored the possession to Kondbarao. The submission made by the learned counsel for the appellant that the Civil Court ought to have restored possession only to the extent of 5 acres 19 gunthas is not at all acceptable. In view of the provisions of the aforesaid Tenancy Act and particularly sections 31 and 99 it can be said that the Civil Court has not committed error in using provision of section 144 of the Civil Procedure Code and restoring the possession to Kondbarao. In view of the decision given by this Court in aforesaid Civil Revision Application it can be said that the appellant stands in the shoes of the original owner Kanhayalal and so he can start appropriate proceeding in the tenancy Court for getting possession of the land to which he is entitled under the sale certificate.

8. Learned counsel for the appellant placed reliance on a case reported as Shantilal Bhujbal-Vaidya, a registered firm by Vahiwardar and Partner Shri Jaykumar Shantinath Vaidya Vs. Vasant Ramchandra Daskul (since deceased by his heir: Smt. Yamunabai Ramchandra Daskul (since deceased by her heir: Smt. Prabhavaati Vasant Daskul)) and Vishnu Kashinath Barge (since deceased by his heirs and LRs: Smt. Parvatibai Vishnu Barge and Dattoba Vishnu Barge), . The facts of the reported case were altogether different. A particular portion of land Survey No. 91-A (southern portion) was under tenancy and there was no proceeding in relation to Survey No. 91-B. So, it was held that the decree could have been executed in respect of Survey No. 91-B. The facts of the present case are altogether different and so this reported case is of no help to the appellant. In view of the aforesaid facts and circumstances, this Court holds that it is not possible to interfere in the order made by the executing Court and also the judgment and order of the District Court.

9. In the result, the appeal stands dismissed. No order as to costs.