
(2019) 02 BOM CK 0062

In the Bombay High Court

Case No : Writ Petition No. 6055, 6056 Of 2014

Tulshiram

APPELLANT

Vs

Venkatrao And Ors

RESPONDENT

Date of Decision : 15-02-2019

Acts Referred:

Bombay Prevention Of Fragmentation And Consolidation Of Holdings Act, 1947 —
Section 36A, 36B

Citation : (2019) 02 BOM CK 0062

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

Bench : Single Bench

Advocate : J.R. Patil, R.R. Suryawanshi

Final Decision : Disposed Off

Judgement

T.V. Nalawade J

1. Heard.

2. Rule. With the consent of the parties, petitions are taken-up for final decision.

3. The first proceeding is filed to challenge the order passed by the learned Civil Judge, Junior Division, Chakur in RCS No.143/2008 below Exhibit 28. This application was moved by the present petitioner herein praying for framing additional issue like, "Whether the partition deed executed between petitioner and his brother was null and void in view of provisions of Bombay Prevention of Fragmentation & Consolidation of Holdings Act, 1947". This application is rejected by the trial Court.

4. In Writ Petition No.6056 of 2014, the relief is claimed to quash and set aside the order made on Exh.83 in RCS No.139/2007 pending before the same Court. This application was filed by the petitioner who was plaintiff in the suit and he is opposing the counter claim filed by the respondent in the said Suit. The said application was filed by the petitioner for framing the aforesaid issue, and

referring the issue to the competent authority created under the aforesaid special legislation.

5. The submissions made by both the sides and the pleading which can be found in the plaint and orders, show that the property involved is a dry agricultural land admeasuring 52-R. Tulshiram and his brothers Vasant and Chandrakant had partitioned this land amongst themselves and they had started cultivating their separate portions. However, no partition was shown by creation of divisions in revenue record. When Tulshiram learnt that Venkatrao, the brother was about to alienate his portion of land, he filed Suit for relief of injunction. During pendency of the suit, Venkat transferred the property to Ram who is not the Member of joint family. As the property was transferred by Venkat, Tulshiram withdrew the suit filed for injunction and he filed another suit for relief of right of pre-emption in which application Exhibit 143 was filed praying for framing issue as to whether plaintiff proves that the partition deed is in contravention of the Bombay Prevention of Fragmentation & Consolidation of Holdings Act". The said application came to be rejected on 9.6.2014, which is the subject matter of challenge in Writ Petition No.6055/2014. Although the suit was withdrawn, there was counter claim of the purchaser for relief of temporary injunction. That counter claim needs to be decided.

6. Learned counsel for the respondents submitted that the mutation made in favour of Ram and also of the partition have become final. He submits that the mutation made in favour of Ram was challenged by both the petitioners under the Maharashtra Revenue Code but they failed in that proceedings.

This Court has gone through the said order and it needs to be observed that the reasoning given by the Trial Court dealing with the circumstances is totally wrong and erroneous. Deciding a matter of right is one thing and deciding the contravention of provisions of aforesaid special enactment is a different thing. When a competent authority is created under special enactment, the said issue needs to be decided by the said authority only and that point cannot be considered in a proceeding filed for challenging the mutation.

7. This Court has carefully gone through the provisions of Section 36-A and 36-B of the aforesaid special legislation. Section 36-A creates bar of jurisdiction. It prescribes that whenever, there is a dispute, it needs to be decided by the authority created under this special legislation. Civil Court is not expected to entertain the dispute. Section 36-B shows that the If any suit instituted in any Civil Court or Mamlatdar's Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act, the Civil Court or Mamlatdar's Court shall stay the suit and refer such issues to such competent authority for determination. On receipt of such reference from the Civil Court or Mamlatdar's Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court or Mamlatdar's Court and such Court shall thereupon dispose of

the suit in accordance with the procedure applicable therefor.

8. In the present matters, the right of the plaintiff Tulshiram of pre-emption is required to be decided by the Civil Court and for that, there are aforesaid circumstances. If the plaintiff is able to show that in addition to right of pre-emption, there is also other provision like the provisions of aforesaid special enactment, preventing creation of fragmentation, then also he has a right of pre-emption. Issue regarding decision of this right is relevant which ought to have been framed. This Court holds that the trial Court has committed error in rejecting the application filed in both the proceedings by the petitioners. Such issue needs to be framed though the normal issue like legality of sale made by Venkat in favour of Ram can also be dealt with. The Trial Court is expected to frame the issue as per provisions of this special enactment and refer both the issues to the competent authority as provided in section 36-B of the aforesaid enactment and it can further proceed as per the provisions of Section 36-A and 36-B of the Act.

9. Rule is made absolute in the aforesaid terms. Petitions are disposed of.