

(1972) 11 BOM CK 0010

In the Bombay High Court

Case No : Letters Patent Appeal No. 1 of 1970

Uttamchand Hukumchand Shet and Others

APPELLANT

Vs

Vishwanath Bindravan Bundelkhandi and Others

RESPONDENT

Date of Decision : 24-11-1972

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 43C
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, 11, 9

Citation : AIR 1974 Bom 28 : (1973) 75 BOMLR 512

Hon'ble Judges : Kantawala, C.J.;Bhasme, J

Bench : Division Bench

Advocate : K.J. Abhyankar, for the Appellant; B.R. Naik, for the Respondent

Judgement

Kantawala, C.J.—This is an appeal filed by the plaintiffs against the decree and judgment passed by all the courts dismissing their suit for possession of agricultural lands and for future mesne profits. By a lease deed dated April 8, 1946, Hukumchand, father of plaintiffs No. 1 to 3 and husband of plaintiff No. 4 leased out the suit lands to the defendants for a period of five years at an annual rent of Rs.1271\-. The period of the lease was to expire in Shake year 1872. Under this lease deed the defendants were to hand over possession of the lands wherein dry crops were grown at the end of Paush of that year while they were to deliver possession of the lands wherein Bagayat crops were raised on the 15th of Falgun of that year. It is the case of the plaintiffs that as the period for which the lease was granted had expired it was not necessary for them to give a notice to the defendants terminating the tenancy. However, by way of abundant caution on March 23. 1954 the plaintiff No. 4 as the guardian appointed by the Court of the minor plaintiffs Nos. 1to 3 gave a notice to the defendants terminating their tenancy. By this notice the defendants were called upon to hand over possession of Jirayat lands at the end of Paush of that year and of the Bagayat lands on the 15th of Falgun of the same year in accordance with the terms of the lease deed. The defendants. however, failed to deliver possession thereof, The plaintiffs under the circumstances filed a suit on July, 5, 1955 for possession of suit lands

and for future mesne profits. No claim in this suit was made in respect of arrears of rent or mesne profits.

2. The defendants in their written statement inter alia contended that the Civil Court had no jurisdiction to entertain this suit in view of the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act No. 67 of 1948) hereinafter referred to as the Tenancy Act of 1948) as amended by the Bombay Act No. 33 of 1952 and the Bombay Act No.13 of 1956. They also contended that the notice terminating the Tenancy was invalid. Their further contention was that even after giving the notice the plaintiffs have accepted rent in respect of the suit lands from the defendants and thereby the notice terminating the Tenancy was waived.

3. It is necessary for the purpose of the present appeal to deal with their other contentions in the written statement. The issue as regards the jurisdiction of the Civil Court to entertain the suit was tried as a preliminary issue by the learned trial Judge. He took the view that the Tenancy Act of 1948 as amended by the Bombay Act 13 of 1956 was applicable to the suit lands and the Civil Court had no jurisdiction to award possession to the plaintiffs in view of the provisions thereof.

4. Against this decision on the preliminary issue the plaintiffs went in appeal before the District Court of East Khandesh. That appeal was appeal No. 29 of 1956. Before this appeal was decided on December 20, 1957, in Civil Revision. Appln. No. 120 of 1957 a Division Bench of the High Court took the view that in respect of lands within the limits of Municipal Boroughs the protection to the tenants by the Tenancy Act of 1948 was taken away by the amending Act of 1952 and the Amending Act of 1955 (i.e. the Bombay Act 13 of 1956) had not the effect of restoring that protection. In view of the said decision it was held that the Civil Court was competent to decide the question whether the plaintiffs who were the landlords were entitled to possession, damages and arrears of rent. As the decision of the Division Bench of the High Court was binding on the District Court, on March 26, 1958 a Joint petition was filed by the advocates of the parties referring to the said decision of the High Court and stating that in view of the said decision the Civil court will have jurisdiction to entertain the suit. As the position in law as concluded by the decision of the Division Bench of the High Court was binding on the District Court, on March 28, 1958 the District Court allowed the appeal and set aside the order of dismissal of the suit on preliminary grounds. The suit was remanded back to the trial court for disposal of the other issues raised therein.

5. Even after the order of remand the suit was dismissed by the trial Court. It took the view that a notice terminating the Tenancy of the defendants was necessary and that the notice of termination given on behalf of the plaintiffs No. 1 to 3 by their guardian, the plaintiffs No. 4 was invalid. As the notice terminating the Tenancy was inter alia held to be invalid, the trial Court dismissed the plaintiff's suit.

6. Against the said decision of the trial court an appeal was preferred by the plaintiffs which was heard by the learned Extra-Assistant judge at Jalgaon. The learned Judge, however, took the view that the notice terminating the Tenancy was valid but it was waived by the plaintiffs by reason of acceptance of rent after giving such notice. In view inter alia of the said finding the appeal of the plaintiffs was dismissed.

7. The plaintiffs came in second appeal to the High Court. That appeal was heard by Bal J. In the second appeal the High Court took the view that the plaintiffs never accepted rent from the defendants after the coming into force of the Amending Act of 1952 and there was no question of the contractual Tenancy being renewed by such acceptance. It also took the view that the notice in the present case was given not only with the consent and concurrence of the Plaintiff No. 4 but it was given with the consent and concurrence of the plaintiff No. 4 on behalf of the minor plaintiffs Nos. 1 to 4. It accordingly took the view that the notice terminating the Tenancy was valid and the Tenancy of the defendants was duly terminated. On the question of jurisdiction the High Court took the view that the matter was concluded and that in view of the decision of the Full Bench of this Court in Patel Maganbhai Jethabhai Vs. Somabhai Sursang, , the rights of tenants of lands within the limits of Municipal Boroughs had been restored by the proviso to Section 43-C introduced in the Tenancy Act of 1948 by the Bombay Act 13 of 1956 with retrospective effect from December 28, 1948 and the provisions of the Tenancy Act so amended were applicable even to proceedings pending at an earlier stage. The view taken by the Full Bench in the above case was also approved by their Lordship of the Supreme Court in Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai, . In view of the said decisions the learned Judge regarded that the position in law was well settled so far as the jurisdiction of the Civil Court was concerned. The settled position in law in view of the said decisions was that the civil Court will have no jurisdiction to entertain the suit which was instituted by the plaintiffs against the defendants in the Civil Court.

8. It was urged, however, before Bal J. that having regard to the provisions of Section 105(2) of the CPC as the defendants had not preferred any appeal against the order of remand made by the learned District Court will have no jurisdiction to entertain the suit. The learned Judge took the view that before the provisions of Section 105(2) of the code can be attracted two conditions are required to be fulfilled; (1) the Party seeking to dispute the correctness of the order must be aggrieved by it, and (2) the order must be one from which an appeal lies. On each of these requirements he held in favour of the defendants and took the view that the provisions of Section 105(2) of the code never operated as a bar against the defendants in raising the contention of want of jurisdiction in a Civil Court. He further took the view that in view of the inherent jurisdiction of this Court u/s 151 of the code it was open to the High Court to exercise jurisdiction and hold that the Civil Court had no jurisdiction to entertain the suit so as to prevent injustice otherwise resulting in the matter.

9. Against this decision of Bal J. the plaintiffs have preferred the present Letters Patent Appeal.

10. Mr. Abhyankar on behalf of the plaintiffs strenuously urged before us that as by the order of remand by the District Court it was held by the court that the Civil Court had jurisdiction and that as against that order no appeal was preferred by the defendants, it was not open to the defendants to raise such a contention in the High Court at the stage of second appeal. His submission was that as upon a joint pursuit by the advocates of the parties the District Court was persuaded to take the view that the provisions of the Tenancy Act of 1948 as amended by the Bombay Act 33 of 1952 and Bombay Act 13 of 1956 were applicable and the civil court has jurisdiction to try the suit, it was not open to the defendants to urge before the High Court in the second appeal that the Civil Court had no jurisdiction to entertain the suit. His further submission was that the provisions of Section 105(2) the code precluded the defendants from urging such a contention in the High Court in the second appeal. He also submitted that having regard to the facts of the case the provisions of Section 151 of the Code were not attracted. As we were not impressed by the arguments advanced on behalf of the plaintiffs we did not call upon the counsel for the respondents. Dr. Naik, however, brought to our notice that it was his preliminary contention that this was a matter wherein a certificate under clause 15 of the Letters Patent ought not to have been granted. He further submitted that the defendants are not only supporting the judgment upon the points decided by the High Court in their favour but also want to challenge the correctness of the findings which are made against the defendants.

11. It is unnecessary in the view that we are persuaded to take, to consider all the contentions urged by Mr. Abhyankar. The first and the foremost question that arises for consideration is, has the Civil Court jurisdiction to entertain the suit? That question is, in our opinion, concluded by the decision of the Full Bench of this High Court in Patel Maganbhai Jethabhai Vs. Somabhai Sursang, . In this case the provisions of the Tenancy Act of 1948 as amended by the Bombay Act 13 of 1956 were construed by a Full Bench of this Court and the view taken by the Division Bench in C.R.A. No. 120 of 1957 has been reversed. The Full Bench has taken the view that the proviso to section 43-C of the Bombay Tenancy and Agricultural Lands Act. 1948 affords protection to the tenant if the tenant had the protection under the Act. notwithstanding the fact that that protection was taken away by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952. That protection must be given to the tenant even though the production is afforded by the proviso which was enacted after the suit was instituted. The Full Bench further held that the proviso to Section 43-C was applicable to the case, as there was no final judgment against the opponent in the sense that the judgment given by the Mamlatdar was subject to revision, and the revisional Court was bound to take notice of the change in law effected by the proviso. Upon construction of the provisions of these statutes the view taken was that the right of the opponent as a tenant under the Tenancy Act of 1948 was by a legal fiction

introduced by the proviso the Section 43-C. continued and was not affected by the Amending Act of 1952. This decision of the Full Bench of the High Court has been approved by the Supreme Court in *Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai*, .

12. In view of the above decisions of the Supreme Court, as well as the Full Bench of this Court, MR. Abhyankar was unable to resist the position the Civil Court will have no jurisdiction to entertain the suit instituted by the plaintiffs against the defendants for possession, further mesne profits and damages. He however, contended any Act of 1948 as amended from time to time applied to the present case, was concluded by the order of remand that was passed by the District Court on March 28, 1958: that as that decision was not appealed from it became final and at a subsequent stage of the same proceedings or in the suit the parties are precluded from re-agitating the correctness of the said decision. Reliance was placed by Mr. Abhyankar upon a decision of the Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, . In the Decision the Supreme Court has considered the effect of res judicata on the question of finality of an issue arising before the Court. The principle of res judicata is based on the need of giving a finality to judiciary decisions. What it says is that once a res is judicata it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter- whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken, to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed again. This principle of res judicate is embodied in relation to suits in Section 11 of the Code of Civil Procedure: but even where Section 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any further held that the principle of res judicata applies also as between two stages in the same litigation of this extent the a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Ordinarily this principle so far as it goes cannot be controverted but the question involved in the this appeal did not relate to the jurisdiction of a Court to entertain and try the suit. If regard be had to the decision of the Full Bench in *Patel Maganbhai Jethabhai Vs. Somabhai Sursang*, and the decision of the Supreme Court in *Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai*, it is settled position in law that the present suit instituted by the plaintiffs cannot be entertained by the Civil Court having regard to the provisions of the Tenancy Act of 1948 as amended from time to time and especially Section 85 thereof.

13. The question to be considered is what is the effect of the parties filing a joint Purshis before the District Court in appeal No. 429 of 1956 on March 26, 1958. In that Purshis a clear reference was made to the decision of the Division Bench of the High Court in C.R.A. No. 120 of 1957 decided on December 1957 20

(Bom) . As that decision was binding upon the District Court the parties at that stage of the proceeding treated it as settled law. Accordingly the joint Purshis was filed after referring to this judgment expressly and it was conceded that the Civil Court will have jurisdiction to entertain and try the suit. This decision of the Division Bench has been reversed by the decision of the Full Bench in Patel Maganbhai Jethabhai Vs. Somabhai Sursang, which is also approved by the Supreme Court in Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai, .

14. It is a fundamental rule that a judgment of a court without jurisdiction is a nullity. Where, by reason of an limitation imposed by statute. Charter or commission, a court is without jurisdiction, neither the acquiescence not the express consent of the parties can confer jurisdiction upon the court, not can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. (See Halsbury's Laws of England, 3rd Edition Vol.. 9, paragraph 824 at page 352). To the same effect is the view taken by the Supreme Court in The United Commercial Bank Ltd. Vs. Their Workmen, , Kantawala, C.J. In the said decision has pointed out that consent cannot given a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. No acquiescence or consent can given a jurisdiction to a court of limited jurisdiction which it does not possess. In the same decision Fazl Ali. J, also took a similar view and has observed "Consent cannot give jurisdiction in respect of a subject-matter though it might curie a mere irregularity". The order of the District Court in Appeal No. 429 of 1956 is based upon a joint Purshis by the advocates of the parties saying that the Civil Court will have jurisdiction to entertain the suit. It is insufficient to confer jurisdiction when having regard to the settled position in law as found by the Full Bench in Patel Maganbhai Jethabhai Vs. Somabhai Sursang, and by the Supreme Court in Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai, the Civil Court will have no jurisdiction.

15. The finding on an issue relating to jurisdiction to what extent operates as res judicata is also considered by the Supreme Court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, . The viw taken by the Supreme Court is that a decision on an issue of law will operate as res judicata in a subsequent proceeding between the same parties. If the cause of action of the subsequent proceeding be the same as in the previous proceeding, but on when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the court to try the earlier proceeding, nor when the earlier decision declared valid a transaction which is prohibited by law. It is further held that a question relating to the jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of the court. If by an erroneous interpretation of the statue the court holds that it has no jurisdiction, the question would not operate as res judicata. Similarly by an erroneous decision if the court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between, the same parties. Whether the

cause of action in the subsequent litigation is the same or otherwise.

16. If an erroneous decision on a question of jurisdiction in an earlier proceeding or litigation does not operate as res judicata in a subsequent proceeding between the same parties, a fortiori it follows that in the same proceedings when the matter has never been considered at the stage of the High Court then any decision of the District Court will never operate as res judicata if having regard to the settled position in law it is quite clear that the Civil Court will have no jurisdiction to entertain the suit or the proceeding.

17. The matter, however does not rest there. If a decree of a court is without jurisdiction then even at the stage of execution proceedings it can be challenged on the ground of nullity. In *Kiran Singh and Others Vs. Chaman Paswan and Others*, it is held that it is a fundamental principle that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.

18. Section 85 of the Tenancy Act of 1948, inter alia provides that no Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act, required to be settled, decided or dealt with by the Mamlatdar or Tribunal or the Maharashtra revenue Tribunal in appeal or revision or the state Government in exercise of their powers of control. Section 29 of this Act prescribes the procedure to be followed by a landlord for taking possession of agricultural lands from a tenant. Thus if the provisions of this Act are applicable it is incumbent upon a landlord to follow the prescribed procedure under the statute for recovery of possession. The jurisdiction of the Civil Court to entertain a suit for such a relief is expressly barred u/s 85. That this is a settled position in law cannot be disputed in view of the earlier decision of the Supreme Court. In our opinion, consent of the defendants or even acquiescence on their part cannot confer jurisdiction upon a court when by a statute a bar is imposed upon exercise of such jurisdiction by a Civil Court. As the court will have no jurisdiction to entertain the suit, the suit is liable to be dismissed on that ground alone.

19. In the view that we have taken on the issue as to jurisdiction of a Civil Court it is unnecessary to consider the preliminary contention raised by Dr. Naik on behalf of the defendants and the other points of controversy arising in this appeal.

20. In the result, the Letters Patent Appeal is dismissed with costs.

21. Appeal dismissed.