(2008) 01 BOM CK 0187

Bombay High Court (Nagpur Bench)

Case No: Second Appeal No. 382 of 1991

Shivaji Bhagat (Since deceased, through L.Rs. Smt. Yamunabai Bhagat and Others)		APPELLANT
	Vs	
Maroti Pawar (Since deceased, through L.R.s Smt. Indirabai Pawar and Others)		RESPONDENT

Date of Decision: Jan. 30, 2008

Acts Referred:

- Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 - Section 100(2), 125
- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2, Order 39 Rule 1, Order 39 Rule 2, 11
- Constitution of India, 1950 - Article 311(1)

Citation: (2008) 2 ALLMR 640 : (2008) 3 MhLj 366

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: L.K. Khamborkar, for the Appellant; S.R. Deshpande, for the Respondent

Final Decision: Dismissed

Judgement

B.P. Dharmadhikari, J.

The original defendant has by this second appeal challenged the judgment and decree dated 03/12/1990 delivered by Joint Civil Judge, Junior Division, Akola asking him to deliver vacant possession of suit field on or before commencement of agricultural year i.e. 1st March, 1991. This judgment and decree in regular civil suit No. 69 of 1986 was then challenged by him by filing regular civil appeal No. 2 of 1991 and Additional District Judge, Washim dismissed this appeal on 10/6/1991. This Court has on 25/7/1991 admitted the second appeal by formulating the following question:

Whether the finding as recorded in a suit filed in 1985 for declaration and permanent injunction would operate as res judicata?

2. In this background I have heard Advocate Shri Khamborkar for the appellant-defendant and Advocate Shri Deshpande for the respondent-plaintiff.

3. Advocate Khamborkar points out that first suit in the chain of suits was filed by respondent vide regular civil suit No. 81 of 1983 for declaration and injunction. In that suit respondent also moved application under Order 39 Rule 1 and 2 of the CPC for protecting his alleged possession and that temporary injunction was rejected. He thereafter filed miscellaneous civil appeal before the District Court but then he withdrew it. After withdrawal, he filed regular civil suit No. 150 of 1985 with a case that on 15/3/1982 he had obtained physical possession of suit field from defendant and in June, 1984 he was forcibly dispossessed by him. Again the suit was for declaration and permanent injunction. The trial Court dismissed the suit and restrained respondent- plaintiff from interfering with physical possession of the present appellant over suit field. Advocate Khamborkar points out that Joint Civil Judge, Jr. Dn. who dismissed said suit on 24/3/1986 also held that after ''Kaul-patta'' between the parties was over, possession of present appellant was as a tenant by sufferance, and therefore, he could not and cannot be removed without following due procedure of law. Said Court observed that plaintiff can take proper steps before appropriate authorities for getting suit land from defendant. Thereafter, the respondent-plaintiff has filed instant suit vide regular civil suit No. 69 of 1986 for possession. In that suit again very same events were pointed out and it was stated in paragraph 4 that plaintiff had secured possession on 15/3/1983 but thereafter defendant (present appellant) forcibly dispossessed him. The prayer was, therefore, to restore possession. The present appellant filed his written statement and opposed the suit but it came to be decreed and the appeal against it also came to be dismissed. Advocate Khamborkar, therefore, states that same cause of action on the basis of which regular civil suit No. 150 of 1985 was filed, was again used by the present respondent to file his latter suit i.e. regular civil suit No. 69 of 1986. He further states that in regular civil suit No. 150 of 1985 on 24/3/1986 the Court of Joint Civil Judge Jr. Dn. gave finding that after ''Kaul-patta'' was over, possession of present appellant was as a tenant by sufferance. Advocate Khamborkar, therefore, points out that because of this, said Court expressed that plaintiff has to approach proper authority for recovery of possession in accordance with law and he contends that these observations are necessarily in the light of the provisions of Bombay Tenancy Agricultural land (Vidarbha Region) Act, 1958 and plaintiff, therefore, ought to have approached Tenancy Tahsildar for recovery of possession. He states that regular civil suit No. 69 of 1986 filed by him was therefore, not maintainable and it was barred by provisions of res judicata. He points out that accordingly the question has been framed or formulated by this Court.

4. He also invites in addition to it another angle of the appellate Court and states that once proceedings in regular civil suit No. 69 of 1986 are held to be barred in view of provisions of Section 11 of the Code of Civil Procedure, the subsequent development in that suit namely; rejection of application of appellant u/s 125 of the Bombay Tenancy Act to make reference to Civil Court or rejection of his civil revision challenging the adverse order of Civil Court on that application are of no consequence. He points out that bar u/s 11 will operate at threshold and when earlier judgment dated 24/3/1986 delivered by competent Court was not challenged and was holding field, inception of regular civil suit No. 69 of 1986 is itself bad and the appellate Court ignored this aspect.

5. He further states that when first civil suit i.e. suit No. 81 of 1983 was withdrawn, the fact that present appellant is in possession was very much on record. The fact again came on record when a finding of such possession was delivered on 24/3/1986 in regular civil suit No. 150 of 1985. He states that in that suit, though present appellant was defendant, the trial Court protected his peaceful possession and advised respondent-plaintiff to file proper proceedings for its recovery. Thus, in view of these two adjudications holding that appellant-defendant is in possession, while filing regular civil suit No. 150 of 1985, prayer for recovery of possession was not made and said suit ought to have been for recovery of possession. He contends that when the facts though found subsequently after recording of evidence established that on the date on which regular civil suit No. 150 of 1985 was filed, respondent-plaintiff ought to have filed suit for recovery of possession and not a suit for injunction, the subsequent suit i.e. regular civil suit No. 69 of 1986 filed by him is also barred on account of provisions of constructive res judicata. He relies upon judgment of the Apex Court reported at State of U.P. Vs. Nawab Hussain, to state that only a relief which was available to respondent-plaintiff on the date of institution of regular civil suit No. 150 of 1985 was to seek possession and said relief was not asked for, and therefore, was given up and hence the same could not have been claimed again in regular civil suit No. 69 of 1986. He states that though a question on these lines has not been expressly framed by this Court as substantial question of law, the aspect of constructive res judicata and the effect of suit filed in 1985 is required to be construed because of question of law as formulated and his arguments are only incidental to the question framed. He, therefore, states that no separate question of law in this respect is required to be framed.

6. Advocate Deshpande for respondent-plaintiff states that first suit i.e. regular civil suit No. 81 of 1983 is of no consequence because it was withdrawn and there was no adjudication on merit. He states that there was no finding recorded in it and hence it cannot be a subject matter for considering application u/s 11 of the Code of Civil Procedure. He further states that in regular civil suit No. 150 of 1985 respondent-plaintiff pointed out that he was placed in possession on 15/3/1983 and was attempted to be dispossessed in June, 1984, and therefore, the suit as filed was for injunction only. He contends that when suit filed was for injunction, prayer for

recovery of possession could not have been made in it and was accordingly not made. He contends that maintainability of regular civil suit No. 150 of 1985 cannot be the issue for consideration at this stage because vide judgment dated 24/3/1986 the Joint Civil Judge, Junior Division, Washim has given liberty to present respondent to file appropriate proceedings for obtaining possession of suit land. He states that in view of said liberty, regular civil suit No. 68 of 1986 has been filed. He further states that finding of Joint Civil Judge, Jr. Dn. in judgment dated 24/3/1986 that present appellant is a tenant by sufferance is without jurisdiction as the civil Court cannot record any such finding and u/s 100(2) of the Bombay tenancy (V.R.) Act, 1958, the jurisdiction is exclusively with Tahsildar. He points out that because of this position only in regular civil suit No. 69 of 1986 appellant-defendant moved application u/s 125 of the Bombay Tenancy Act for framing issue about the tenancy in an effort to obtain adjudication of his status as tenant. That application was rejected and when appellant came before this Court, this Court also dismissed his civil revision on 26/9/1989. He contends that in view of these findings, the earlier alleged finding dated 24/3/1986 declaring the appellant to be tenant by sufferance is rendered insignificant and in any case it is without jurisdiction. He contends that, therefore, Section 11 of the C.P.C. has no application.

7. By placing reliance upon judgment of Hon''ble the Apex Court reported at Sampath Kumar Vs. Ayyakannu and Another, , Advocate Shri Deshpande states that when in such circumstance, the plaintiff is not found to be in possession, he can amend a suit and claim relief of restoration of possession or he can file fresh suit. He argues that in view of liberty granted by judgment dated 24/3/1986, fresh suit has been filed. According to him as relief of possession could not have been asked in 1985 because of facts pleaded by plaintiff therein, provisions of Order-II rule 2 or then the provisions of constructive res judicata flowing from Section 11 of the C.P.C. are not at all relevant. He states that no substantial question of law arises and the appeal needs to be dismissed.

8. Advocate Khamborkar, in reply, points out that when possession is lost during pendency of the suit, the law permits plaintiff to amend his suit from a suit for injunction to a suit for recovery of possession. He emphasizes that here while civil suit No. 81 of 1983 was withdrawn, plaintiff was aware that he was not in possession, there is finding in civil suit No. 150 of 1985 that the appellant-defendant was throughout in possession and hence, civil suit No. 150 of 1985 ought to have been for possession only. When relief for possession was available in that suit and was not asked for, he contends that the suit filed later on i.e. present civil suit No. 69 of 1986 is barred because of principle of constructive res judicata and as per Order-II rule 2 of the CPC only liberty given was to move tenancy authorities after holding that the appellant-defendant is a tenant by sufferance. He further urges that if these findings delivered by Joint Civil Judge on 24/3/1986 is without jurisdiction, then the finding recorded by the Civil Court in latter suit while rejecting application for reference or order recorded by this Court in revision is also without

jurisdiction. He, therefore, states that the question as formulated squarely arises and needs to be answered in favour of the present appellant.

9. After hearing respective Counsel and after considering the facts which have come on record, it is apparent that civil suit No. 81 of 1983 was withdrawn and therefore, no finding recorded in it. As such, there is no question of said suit operating as res judicata for the purpose of present controversy.

10. Insofar as regular civil suit No. 150 of 1985 is concerned, the plaintiff approached with a case that he was placed in possession on 15/3/1983 and was obstructed in June, 1984. With this story, however, he filed a suit for declaration and permanent injunction. Perusal of paragraph 4 of certified copy of the judgment delivered in regular civil suit No. 150 of 1985 reveals that the plaintiff there stated that in June, 1984 he had sown Boru in suit field and thereafter he had grown Kardi crop in September, 1984. Defendant (present appellant) tried to interfere with his possession by filing false report against him and he further stated that in 1985 he had sown crop of Udid and Mung. On 15/6/1985 defendant entered the suit land and obstructed sowing operation. He took possession of his Tiphan and burnt it down. In view of these events, he filed the suit for declaration and permanent injunction. Perusal of judgment dated 24/3/1986 delivered in this suit reveals that though the trial Court found that plaintiff proved his exclusive title to the suit land, he could not prove his possession from 15/3/1983 onwards and it further found that defendant before it i.e. present appellant proved his possession from 1970 onwards. In view of this finding, the trial Court dismissed the suit. However, it recorded that;

...The possession of the defendant is in the beginning legal. After ''Kaul patta'' was over, his possession is as a tenant by sufferance. Therefore, he cannot be removed without following the due procedure of law. Therefore, I feel that plaintiff can take proper steps before proper authorities to obtain possession of the suit land from the defendant....

It is this finding on which the appellant is trying to contend that civil suit No. 69 of 1986 was bad on its inception. It is to be noted that the civil Court in that suit (R.C.S. No. 150/1985) did not frame any issue about the status or position of the present appellant.

11. The provisions of Section 100(2) of the Bombay Tenancy Act are very clear and the question whether appellant is tenant or not is to be decided only by the authorities under that Act. The Civil Court has no jurisdiction to look into that aspect. Because of this position, only when civil suit No. 69 of 86 was filed for possession by the present respondent, the appellant-defendant moved application for framing issue for seeking reference to revenue authorities as per Section 125 of the Bombay Tenancy Act. It is the matter on record that said application was rejected by the Civil Court and that rejection was being challenged by the present appellant by filing civil revision application No. 473 of 1986 before this Court. This Court on 26/6/1989

dismissed that revision and maintained order dated 12/01/1988 passed by the trial Court refusing to frame issue. Thus, order passed by this Court, upholding the order of trial Court refusing to frame issue, has attained finality.

12. It is to be noted that the law on the point is well settled and reference cannot be made by framing issue merely because it is asked for. There has to be prima facie case made out for making such reference and if it is satisfied that there are no such pleadings to constitute any tenancy available on record, Court can refuse to frame issue or to make reference. It is, therefore, apparent that in order dated 26/6/1989 of this Court governs relationship between the parties and the contention of Advocate Khamborkar that said order or the order of trial Court dated 12/01/1988 is without jurisdiction does not hold any water. In any case, order dated 12/01/1988 has been passed by the trial Court on application at Exh. 28 whereby the reference to tenancy authorities was sought by the present appellant only. It is, therefore, also clear that the appellant was also aware that findings or observations in judgment dated 24/3/1986 by trial Court were not conclusive. In view of law on the point, it is apparent that on 24/3/1986 the trial Court has made observations extracted above only to hold that possession of the defendant (present appellant) before it was not prima facie illegal and it need to be protected till he was legally dispossessed. In view of that position only the trial Court observed that plaintiff can take proper steps before proper authorities to obtain possession. I, therefore, find that in civil suit No. 150 of 1985 there is no such finding which would operate as res judicata and bar institution of regular civil suit No. 69 of 1986.

13. The contention of learned Counsel for the appellant upon provisions of Section 11 and Order-II rule 2 C.P.C., in the present facts, appears to be again misconceived. In judgment of Hon''ble the Apex Court in State of U.P. v. Nawab Hussain (supra), the facts demonstrate that an employee was dismissed after holding departmental enquiry and the petition came to be filed alleging breach of principles of natural justice and denial of reasonable opportunity as also alleging mala fides. Said writ petition was dismissed. After dismissal of said writ petition, the employee filed civil suit and one of the grounds raised was that he was appointed by the Inspector General of Police but order of dismissal was passed by authority lower in rank i.e. Deputy Inspector General of Police and as such dismissal was violative of Article 311(1) of the Constitution of India. The suit was held to be barred by principles of constructive res judicata. The facts of case before Hon''ble the Apex Court clearly reveal that, therefore, in petition as filed, the ground of violation of Article 311(1) would have been raised by employee but was not raised and hence it was not allowed to be raised in independent suit. This is not the position in the present matter. The suit filed vide regular civil suit No. 150 of 1985 was only for declaration and injunction and plaintiff stated therein that he was in possession and appellant-defendant was trying to disturb his possession. Looking to the frame of the said suit, it is apparent that relief for recovery of possession could not have been asked for in that suit. Thus, a relief, which was not legally available, and therefore,

could not have been claimed in that suit, can be claimed in the subsequent suit and when it is so claimed in the subsequent suit, the alleged failure to ask for it in earlier suit, cannot be held to constitute constructive res judicata because, in fact, there is no such failure. It is apparent that such relief for possession itself was not available in law when 1985 suit was filed because of cause of action pleaded therein. The contention that evidence on record and facts as settled later on conclusively established that suit as filed in 1985 could not have been a suit for declaration and injunction and it ought to have been a suit for recovery of possession again does not invite application of Section 11 of the CPC or principles of constructive res judicata. The said section or principles will apply only if it is shown that grant or relief with roots in cause of action canvassed was not claimed or was given up. As I have already held the relief for possession was alien and could not have been claimed in the framework of regular civil suit No. 150 of 1985 as filed.

14. The contention by placing reliance on the provisions of Order-II rule 2 C.P.C. is again liable to be rejected in view of same analogy. The relief for possession or claim for possession could not have been included in regular civil suit No. 150 of 1985. It is, therefore, clear that it cannot be said that suit as filed was not including whole claim in respect of cause of action as mentioned therein or respondent-plaintiff then omitted to sue in respect of any portion of his claim. The fact that later on form of suit or facts stated therein were found to be incorrect cannot be relevant to hold that provisions of Order-II rule 2 C.P.C. would, therefore, apply. Dispossession or then title to property to recover possession was never the reason for this suit. Fact that in 1985, suit for possession on the on the facts of title should have been filed instead of suit for injunction cannot attract provisions of Order-II rule 2 and it is law of limitation only which could have barred filing of regular civil suit No. 69 of 1986.

15. Regular civil suit No. 69 of 1986 has been filed on the basis of title for recovery of possession and as there was no such suit filed earlier, I find that neither principles of constructive res judicata nor provisions of Order-II rule 2 of CPC bar the said suit. I, therefore, find that question as framed needs to be answered in negative, i.e. against the present appellant. In the circumstance, there is no merit in this second appeal, the same is accordingly dismissed. However, in the circumstances of the case, there shall be no order as to costs.

16. Rule discharged.