

R. C. S. No. 223/1975

Nivrutti Sakha Waghmare & Ors.

---- **Plaintiffs**

Vs.

Khashaba Dadu Kumbhar & ors.

---- **Defendants**

Order Below Exh. 247

1. Present application has been filed by the plaintiff for recasting of issues vide Order 14 Rule 5 of the Civil procedure Code. (Hereinafter referred as "CPC" for the sake of brevity and convenience.)

2. Defendants have filed say at Exh. 248 and they have taken strong objection with prayer to reject the application.

3. Heard both learned advocates at the length. It is submitted by the plaintiffs advocate that, the plaintiff has filed present suit for redemption of mortgage. The issues were framed at Exh. 73. Out of those issues, issue No. 3 and 6(A) and 6(B) are related to tenancy. To decide these issues the proceeding was referred to tenancy Court. The defendants have pleaded that defendant No. 2 is tenant of defendant No. 1 in the suit property. This pleading is in between defendants themselves and it is not related with the right of the plaintiffs. Therefore, the issues were required to be framed in consonance with the prayer or claim of the plaintiff. But instead of it issues regarding the dispute between the defendants have been framed which is not expected as per law. So issues at sr. no. 3 and 6(A) and 6(B) are required to be deleted. He further submitted that as per Order 14 Rule 5 (4) of Civil Procedure Code the court has power to amend or strike out the issues. In support of this contention learned advocate for the plaintiffs relied upon the decision of Hon'ble Andhra Pradesh high court in the case of

R. B. Bharatha Charyulu, Vs. R. B. Aivelu Manga Thayaru,
reported in AIR 1996 Andhra Pradesh 238.

4. While learned advocate for the defendants submitted that defendant No. 2 is tenant of defendant no. 1. he is cultivating the land as tenant and thereafter Shivaji Dnyanu Kumbhar and his legal heirs have acted as tenant. Therefore, to decide the issue of tenancy the suit was referred to tenancy Court. Once reference is made it cannot be recalled. In support of his contentions learned advocate for the defendants relied upon following decisions of Hon'ble Apex courts and High courts. Which I am enlisting below:

1. In the case of Pandu Dhondi Yerudkar & Ors. Vs. Ananda Krishna Patil reported in AIR 1975 Bombay 52. In which Hon'ble their lordship of Bombay High Court observed that *when issue regarding tenancy is framed it is not permissible to direct defendants to produce evidence as the jurisdiction of Civil Court is taken away.*

2. In Gundaji Satwaji Shinde Vs. Ramchandra Bhikaji Joshi reported in AIR 1979 S. C. 653. In which Hon'ble their lordship of Apex Court observed that *combined effect of Sec. 70, 85 and 85 A of Bombay Tenancy and Agriculture Land Act that the Civil Court is under statutory obligation to refer the issue of tenancy to the competent authority under the tenancy Act.*

3. In Dahya Lala and Ors. Vs. Rasul Mahomed Abdul Rahim & Ors. reported in AIR 1964 S. C. 1320. In which Hon'ble Apex Court has observed that, *the mortgagee in possession of the property has inducted the tenant then the tenant of such mortgagee is protected and cannot be evicted.*

4. In Madhumati Atchut Parab Vs. Rajaram V. Parab and Ors. reported in 2009 (4) Mh. L. J. 668. In which Hon'ble Bombay High

Court has observed that, *where the relationship of tenancy is alleged by one party and denial by other then question falls to be considered and the decision of question is left exclusively to be determined by the Mamalatdar.*

5. In **Bernardo and Ors. Vs. Mrs. Esperanza Miranda and Ors.** reported in **2014 (2) ABR 53**. It is observed that, *the question of tenancy cannot be decided by the Civil Court and in case such issue arises the issue has to be referred to the learned Mamalatdar. The issue framed in respect of tenancy cannot be deleted.*

5. So keeping in mind the observations of Hon'ble their Lordship here we have to see the facts and circumstances of case in hand. From the perusal of the record of the proceeding it can be seen that my learned predecessor in office had framed issues at Exh. 73 in the year 1979. As in the written statement Exh. 53 in para 4 and 5 the defendants pleaded about the tenancy . Thus, defendants have come with the case that defendant no.2 is tenant of defendant no.1. Which is disputed by the plaintiffs. The legal heirs of defendant No. 2 have also come up with their status as tenant in their written statement at Exh. 117. Matter is already referred to tenancy Court and the proceeding was started there.

6. However, as defendant No. 1 during the pendency of the proceeding before Tahsildar i.e. tenancy Court returned this matter back to this court with a letter (Exh. 204) for bringing legal heirs of the defendant on record. In the proceeding before Tahsildar the plaintiffs themselves have admitted the status of defendants as tenant. Moreover, it is pertinent to note here that admittedly the plaintiffs had filed application at Exh. 127 and Exh. 165 for sending this proceeding back to the tenancy Court for decision on issues of

tenancy. But later on all of a sudden they moved pursis Exh. 246 contending that they withdraw these applications.

7. From the record it appears that proceeding before tenancy court i.e. Reference No. 18/1979 had commenced after the reference of these issues. As per Sec. 85 and 85 A of Bombay Tenancy and Agriculture Lands Act the civil Court has no jurisdiction to settle the issues of tenancy and the suits involved the issues of tenancy required to be decided by the tenancy Court. Thus, the issue of tenancy referred to the tenancy Court is now acted upon. So in this backdrop it can not be called back or the issues cannot be deleted till the proceeding before tenancy Court comes to it's logical end. Therefore, the observations of Hon'ble their Lordship in supra cited Bernardo and ors., case will be applicable to the case in hand.

8. In the present proceeding though the plaintiffs have filed pursis at Exh. 246 and have withdrawn the applications Exh. 127 and Exh. 165 the issue of tenancy is already referred to the tenancy Court. The issue of tenancy referred to tenancy Court is acted upon. In view of the observations made in the decision cited by the advocate for the defendants the issue of tenancy referred to tenancy Court cannot be recalled. So considering this factual aspect the issues regarding tenancy can also not be recast at this stage. Therefore, this application deserves to be rejected. In the result, I pass the following order.

ORDER

1. Application (Exh. 247) is hereby rejected.
2. Costs in cause.

Dt. 14/09/2017
Karad.

(V. P. Gaikwad)
Jt.Civil Court Senior. Division Karad.