Inacio Martins Deceased Through Lrs vs Narayan Hari Naik And Ors on 7 April, 1993

Equivalent citations: 1993 AIR 1756, 1993 SCR (2)1015, AIR 1993 SUPREME COURT 1756, 1993 (3) SCC 123, 1993 AIR SCW 2163, 1993 (2) ALL CJ 1161, (1993) 2 SCR 1015 (SC), (1993) 2 JT 723 (SC), (1993) 2 APLJ 13, (1993) 2 MAD LW 1, (1993) 2 SCJ 268, (1993) 2 CIVLJ 750, (1993) 1 RENTLR 741, (1993) 2 ANDH LT 29, (1993) 2 CURCC 119, (1994) 1 RRR 536, (1995) 1 BOM CR 167

Author: A.M. Ahmadi

Bench: A.M. Ahmadi, S. Mohan

PETITIONER:
INACIO MARTINS DECEASED THROUGH LRS.

Vs.

RESPONDENT:
NARAYAN HARI NAIK AND ORS.

DATE OF JUDGMENT07/04/1993

BENCH:
AHMADI, A.M. (J)
BENCH:
AHMADI, A.M. (J)
MOHAN, S. (J)

CITATION:
1993 AIR 1756 1993 SCR (2)1015
1993 SCC (3) 123 JT 1993 (2) 723
1993 SCALE (2)480

ACT:
Code of Civil Procedure, 1908:
S. 11--Res judicata--Subsequent suit raising issue not settled in previous suit--Held, not barred.
Or.2 R.2(3)--Commission to sue for one of several reliefs emanating from same cause of action--Effect of--Held Rule does not preclude a second suit based on distinct cause of action.
S. 11 & Or.2 R.2--Distinction between--Explained.
The Goa, Daman and Diu Agricultural Tenancy Act, 1964:
Ss.2,2(7A), 2(7B),7,8,9,58--Land comprising coconut grove--Plaintiff claiming tenancy of--Suit by plaintiff for restoration of possession from defendant alleging him as

trespasser--Defendant raising a plea of tenancy--During pendency of suit, change in law by Act 17 of 1976 (Fifth Amendment)--Suit property came within expression 'agricultural land'--Held, Civil Court's jurisdiction on issue of tenancy in respect of agricultural land stood excluded--But, Act does not preclude a suit by a tenant for restoration of possession from a trespasser.
Impact of Fifth Amendment on pending litigation--Explained--Guidelines for civil courts laid down.

HEADNOTE:
The plaintiff, predecessor-in-interest of the appellants, flied a suit for a declaration and an injunction to restrain the defendant-respondents from dispossessing him from a certain property comprising of a coconut grove. The trial court dismissed the suit holding that the, plaintiff was no more in possession of the suit property, and, therefore, a suit for a mere declaration simplicitor could not lie. Consequently, the plaintiff flied another suit for restoration of possession. His case was that he was a tenant of the suit property, whereof defendant no. 2 was the owners' and
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that he was forcibly dispossessed by defendant no. 1, in collusion with defendant no. 2, without his tenancy having been lawfully terminated. It was alleged that the defendants were trespassers and liable to be evicted.
The defendants, besides raising the pleas of res judicata and/or constructive res judicata purported to be based on Order 2 Rule 2(3) of the Code of Civil Procedure, contended that defendant no. 1 was in lawful possession of the suit property as the same was let out to him by defendant no. 2 after the lease in favour of the plaintiff stood terminated by efflux of time, and the suit, as such, was not maintainable.
The trial court decreed the suit holding that the suit property was demised to the plaintiff as he was the lawful tenant thereof, and defendant no. 1 in collusion with defendant no. 2 wrongfully dispossessed him.
The appeal riled by the defendants was dismissed by the first appellate court.
The second appeals filed by the defendants were allowed by the High Court holding that the suit was barred by res judicata as well as Order 2 Rule 2(3) C.P.C. The High Court also held that during the pendency of the suit as a result of the amendment of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 by Act 17 of 1976, known as the Fifth Amendment, the definition of 'agriculture' was changed and the suit property came to be covered within the expression 'agricultural land' which rendered the civil court without jurisdiction and the decree passed by it unsustainable.

Aggrieved, the heirs and legal representatives of the plaintiff, filed the appeal by special leave.

Allowing the appeal, this Court,

HELD: 1.1 A subsequent suit would be barred by res judicata only when the subject matter of the suit was directly and substantially in issue in the previous suit. [p. 1022-C]

1.2. The first suit was dismissed on a technical ground that the suit for a mere declaration without seeking consequential relief of possession could not lie. In that suit the issue regarding the status of the plaintiff as a lessee was not settled once for all and hence that issue could not be stated to be barred by res judicata in the subsequent suit brought by the lessee for possession of the demised property. The High Court was not right in holding

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that the second suit was barred by res judicata. [0. 1022 F-H]

2.1. Order 2 Rule 2 CPC is based on,the salutory principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. It does not preclude a second suit based. on a distinct cause of action. [p. 1023 C-E]

2.2. The doctrine of res judicata differs from the rule embodied In Order 2 Rule 2, in that, the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. [p. 1023-E]

2.3. The cause of action for the former suit was based on an apprehension that the defendants were likely to forcibly dispossess the plaintiff. The suit was for an injunction and not for possession of the demised property. It was not on the premise that the plaintiff had in fact been illegally and forcibly dispossessed and needed the court's assistance to be restored to possession. Therefore, the subsequent suit was based on a distinct cause of action not found in the former suit. The High Court was not right in concluding that the suit was barred by Order 2 Role 2(3) of the Code of Civil Procedure, and that the difference in the reliefs claimed in the two suits was immaterial and irrelevant. In the previous suit, the relief for possession was not claimed whereas in the second suit the relief was for restoration of possession. That makes all the difference. [pp. 1023-F, 1024 B-D]

3.1. The impact of the Fifth Amendment on pending litigation is that the question of tenancy in regard to agricultural land cannot be decided by the civil court under the Act and there being no express saying clause permitting the civil court to decide the same, any decision rendered by the civil court would be without jurisdiction. The change in law deprived the civil court of jurisdiction which it undoubtedly possessed on the date of the institution of the suit. Thus, the provisions of the Fifth Amendment would

apply to pending suits also. [pp. 1027 D-E; 1028 D-E; 1029-C]

Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha, AIR 1961 SC 1596= [1962] 2 SCR 159, relied on.

3.2. The Act does not preclude the institution of a suit by a tenant

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for restoration of possession from a trespasser. [p. 1029-C]

3.3. If a suit Is riled to recover possession of agricultural land from a trespasser and no dispute arises, the adjudication whereof is required to be done by the special machinery set up under the Act, the civil court will continue to have jurisdiction. [p. 1027 F-G]

3A. If possession of agricultural land is sought on the plea that the defendant is a trespasser and the defendant contends that he is a tenant, the claim of tenancy by defendant cannot be gone into by the civil court in view of the clear language of S.7 read with s. 58(2) of the Act In such a situation, it would not stand to reason to non-suit the plaintiff who had flied the suit in a competent court having jurisdiction to try the same, merely because of the subsequent change in law. The proper course, therefore, would be that the issue whether the defendant was a tenant should be referred to the Mamlatdar for decision and, after his decision is received by the civil court, if the issue is held against the defendant, the civil court may consider passing of a. decree. for eviction but if, on the other hand, he is held to be a tenant, the civil court may be required to dismiss the suit [pp. 1029 F-H; 1030 A-B; 1031 D-E]

Bhimaji Shankar Kulkam v. Dundappa Vithappa Udapudi & Anr., AIR 1966 SC 166 =. [1966] 1 SCR 145 and Dhondi Tukaram v. Hari Dadu, AIR 1954 Bom. 100 = ILR (1953) Bom. 969, relied on.

3.5. The impact of Fifth Amendment may give rise to a situation where a deemed tenant under s.4 of the Act is evicted from the land on or after 1st July, 1962; his remedy under s.8(2) is to approach the authority under the Act for recovery of possession of the land of which he has been disposed, and jurisdiction of the civil court stands wholly barred by virtue of s.58(2) of the Act as it would not be competent to pass any order for restoration of possession to the deemed tenant. If such a situation arises in a pending suit which was instituted in a competent court having jurisdiction at the date of its institution, it would be unfair to non-suit the plaintiff altogether for no fault of his own and the proper course would be to follow in spirit the procedure outlined in Order 7, Rules 10 and 10A, C.P.C. [pp. 1031 F-H; 1032 A-B]

4. The High Court lacked jurisdiction to decide the question regarding tenancy on merits. Its order is set aside and the matter is remitted to

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the trial court to determine the course of action to be adopted in accordance with the guideline indicated hereinabove. [p. 1032 D-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1695 of 1993. From the Judgment and Order dated 5.4.1991 of the Bombay High Court in S.C.A. Nos. 27 and 31 of 1988.

G.L. Sanghi Dhruv Mehta, Guru Raikar, S.K. Mehta and Arvind Verma for the Appellants.

BA Masodkar, Dr. R.B. Masodkar and KL. Taneja for the Respondents.

The Judgment of Court was delivered by AHMADI, J. Special leave granted.

The appellants are the legal representatives of the deceased plaintiff Inacio Martins who died pendente lite. He had on October 26, 1968 instituted a suit No. 157 of 1968 for a declaration and an injunction to restrain the defendants from dispossessing him from the property known as 'Palmar Oiteral do Predio Aivao' comprising seven lots of coconut grove situated at Caranzalem belonging to defendant No. 2. The said suit was dismissed on Match 28, 1974 on the ground that the plaintiff was no more in possession of the suit property and, therefore, a suit for a mere declaration simpliciter could not lie. On the dismissal of the said suit the original plaintiff filed another suit No. 114/74 on May 6, 1974 for restoration of possession on the ground that he was the lawful tenant of the said property and since he had not been dispossessed,in accordance with law the defen- dants who were mere trespassers were liable to be evicted. The plaintiffs case in the plaint was that he was the lessee in respect of seven lots on an annual rent of Rs. 3600 payable in advance in three instalments; that he had paid the rent upto the end of December, 1967 and the first installment of 1968 but the owner, defendant No. 2, in collusion with defendant No. 1 executed a deed of lease in favour of the latter effective from January 1, 1968 on the strength whereof defendant No. 1 claimed to have assumed possession of the property sometime in the second week of June, 1968 without his tenancy having been lawfully terminated. The plaintiff, therefore, contended that defendant No. 1 was a trespasser in the property and was liable to be evicted therefrom. He, therefore, sought possession of the property in respect of which he claimed to be a lessee.

The defendants, besides contending that the suit was barred on the principle of res judicata and/or constructive res judicata as found in Order 2 Rule 2(3) of the Code of Civil Procedure, averred that on the expiry of the lease at the end of December, 1967 the lease stood terminated by efflux of time and defendant No. 2 was, therefore, entitled to let out the property to defendant No. 1 and hence the latter was in lawful possession of the said property The plaintiffs allegation that he was forcibly dispossessed was denied. The defendants, therefore, contended that the suit was not maintainable and deserved to be dismissed.

The Trial Court upheld the plaintiffs contention that the property was demised to him and he was the lawful tenant thereof till his possession came to be disturbed sometime in June, 1968. The Trial Court also found that the plaintiff had paid a sum of Rs. 1200 to defendant No.2 through his employee Dattu Kenkro by way of advance rent for the year commencing from January 1, 1968. The Trial Court, therefore, held that the plaintiff was wrongly dispossessed by defendant No. 1 in collusion with defendant No.2 and decreed the suit for eviction on September 25, 1985. Against the said decree both the defendants preferred an appeal No. 82/85. The First Appellate Court concurred with the findings recorded by the Trial Court and dismissed the appeal on March 25, 1986. Feeling aggrieved by the order of dismissal of the appeal, the defendants preferred separate Second Appeals Nos. 27/88 and 31/88 which came to be allowed on April 5, 1991. Interfering with the concurrent findings recorded by the two courts below the High Court came to the conclusion that the courts below had applied the wrong test and had based their findings on the question of tenancy and dispossession on mere conjectures. It, therefore, held that the findings were perverse and it was open to the High Court in Second Appeal to interfere with the said findings. It also held that the suit was barred by res judicata as well as Order 2 Rule 2(3) of the Code of Civil Procedure. Lastly it noticed that during the pendency of the suit the Goa, Daman & Diu Agricultural Tenancy Act, 1964 (hereinafter called 'the Act') was amended by Act 17 of 1976 dated October 14,1976 known as the Fifth Amendment which was brought into effect from April 20, 1976 by which the definition of 'agriculture' was changed and the expressions 'garden' and 'garden produce' were defined by the insertion of sub-sections (7A).& (7B) to suction 2 which rendered the Civil Court without jurisdiction. The High Court, therefore, held that the decree passed by the Civil Court was unsustainable. On these findings the High Court allowed the appeals and reversed the decree of the Trial Court with no order as to costs. It is against this order of the High Court that the present appeal by special leave is preferred. Before we deal with the impact of the Act as amended by Act 17 of 1976 we may first deal with the two technical grounds on which the High Court has dismissed the suit. The first ground on which the High Court dismissed the suit is that the suit was barred by the principle of res judicata in view of the dismissal of the former suit No. 157/68. That suit was for a declaration that the plaintiff was a lessee and for an injunction to restrain the defendants from interfering with his possession of the suit property. The foundation for that suit was that the plaintiff who claimed to be a lessee in respect of the demised property apprehended his forcible dispossession therefrom. With a view to preventing any such action on the part of the defendants he instituted the suit for an injunction to restrain them from so doing. That suit, however, came to be dismissed as the Trial Court came to the conclusion that the plaintiff was no more in possession of the property in respect of which he claimed to be a lessee. It was only thereafter that the plaintiff filed the suit for restoration of his possession. In the subsequent suit the plaintiff contended that he had been forcibly dispossessed sometime in the second week of June, 1968 contrary to law even though his tenancy was subsisting and he had paid the first installment of rent for the year 1968. He, therefore, contended that the lease stated to have been created in favour of defendant No. 1 by defendant No. 2 was a sham and bogus document set up with a view to supporting their illegal action in dispossessing him. The High Court, in the backdrop of these facts, came to the conclusion that the subject matter of the second suit was directly and substantially in issue in the previous suit between the same parties and hence regardless of the relief claimed the second suit was clearly barred by res judicata. This finding of the High Court is difficult to sustain. Section 11 of the Code of Civil Procedure provides that 'no court shall try any suit or issue in which the matter directly and

substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court'. It is not the finding of the High Court that in the previous suit the question regarding the tenancy of the plaintiff was determined against the plaintiff. As the record stands the only ground on which the previous suit was dismissed was the technical ground that a suit for a mere declaration cannot lie without claiming possession once it is found that the plaintiff had lost possession. Injunction could not be granted to the plaintiff against dispossession as he had already been dispossessed. The court came to the conclusion that a mere declaration of his status as a tenant could not be granted unless the consequential relief for possession was prayed. It was for this technical reason that the suit was dismissed. It is, therefore, difficult to comprehend how the High Court came to the conclusion that the subject matter of the second suit was directly and substantially in issue in the previous suit. It would have been a different matter if in the previous suit the court had decided the question of status as lessee against the plaintiff, in which case, perhaps, it could be argued that the second suit based on the factum of tenancy was not maintainable. It is only when the subject matter of any suit is directly and substantially in issue in the previous suit that the subsequent suit would be barred by res judicata if the competent court trying it had decided the issue regarding tenancy against the plaintiff. The High Court has concluded against the plaintiff on this point in paragraph 31 which reads as under:

> Thus it is compelling to acknowledge that the subject matter of the second suit was directly and substantially in issue in the previous suit between the same parties. The facts of the case clearly reveal that the res invoked in both the suits is the same. The lite is also the same. Hence the relief by itself is neither material nor relevant for the direct adjudication of the real issue. The relief is only a consequence. Therefore the second suit is to be deemed as barred by res judicata....."

> With respect it is difficult to accept this line of reasoning. As stated earlier, the first suit was dismissed on a technical ground that the suit for a mere declaration without seeking consequential relief of possession could not lie. In that suit the issue regarding the status of the plaintiff as a lessee was not settled once for all and hence that issue could not be stated to be barred by res judicata in the subsequent suit brought by the lessee for possession the demised property. We are, therefore, of the opinion that the High Court was wrong in holding that the second suit was barred by res judicata.

> The next contention which found favour with the High Court was based on the language of Order 2 Rule 2(3) of the Code of Civil Procedure. The submission regarding constructive res judicata was also based on this very provision. Now Order 2 concerns the framing of a suit. Rule 2 thereof requires that the plaintiff shall include the whole of his claim in the framing of the suit. Sub-rule (1) of Rule 2, inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If he relinquishes any claim to bring the suit within the jurisdiction of any court he will not be entitled to claim that relief

> in any subsequent suit. However, sub-rule (3) of Rule 2 provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted. It is well known that Order 2 Rule 2 CPC is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that cause of action he will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the court. But the Rule does not preclude a second suit based on a distinct cause of action.

It may not be out of place to clarify that the doctrine of res judicata differs from the rule embodied in Order 2 Rule 2, in that, the former places emphasis on the plaintiff's duty to exhaust all available grounds in support (if his claim while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. The High Court is, therefore, clearly wrong in its view that the relief claimed is neither relevant nor material. Now, in the fact-situation of the present case, as we have pointed out earlier, the first suit was for an injunction and not for possession of the demised property. The first suit was dismissed on the technical ground that since the plaintiff was not in de facto possession no injunction could be granted and a suit for a mere declaration of status without seeking the consequential relief for possession could not lie. Once it was found that the plaintiff was not in actual physical possession of the demised property, the suit had become infructuous. The cause of action for the former suit was not based on the allegation that the possession of the plaintiff was forcibly taken sometime in the second week of June, 1968. The allegation in the former suit was that the plaintiff was a lessee and his possession was threatened and, therefore, he sought the court's assistance to protect his possession by a prohibitory injunction. When in the course of that suit it was found that the plaintiff had in fact been dispossessed, there was no question of granting an injunction and the only relief which the court could have granted was in regard to the declaration sought which the court held could not be granted in view of the provisions of Specific Relief Act. Therefore, the cause of action for the former suit was based on an apprehension that the defendants were likely to forcibly dispossess the plaintiff. The cause of action for that suit was not on the premise that he had in fact been illegally and forcibly dispossessed and needed the court's assistance to be restored to possession. Therefore, the subsequent suit was based on a distinct cause of action not found in the former suit and hence we do not think that the High Court was right in concluding that the suit was barred by Order 2 Rule 2(3) of the Code of Civil Procedure. It may be that the subject matter of the suit was the very same property but the cause of action was distinct and so also the relief claimed in the subsequent. suit was not identical to the relief claimed in the previous suit. The High Court was, therefore, wrong in thinking that the difference in the reliefs claimed in the two suits was immaterial and irrelevant. In the previous suit the relief for possession was not claimed whereas in the second suit the relief was for restoration of possession. That makes all the difference. We are, therefore, of the opinion that the High Court was completely wrong in the view that it took based on the language of Order 2 Rule 2(3) of the Civil Procedure Code.

The Act was enacted on 16th October, 1964 to provide for the regulation of the terms of tenancy with respect to agricultural lands in the Union Territory of Goa, Daman & Diu and for matters connected therewith. The definition of the various terms employed in the statute have been set out in section 2 thereof The expression 'agriculture' is defined in sub-section (1A) to include horticulture and raising of food crops, grass or garden produce, but not allied pursuits, meaning thereby rearing or maintaining plough bulls, breeding of livestock, dairy farming, poultry farming, grazing on grounds reserved for the purpose and such other pursuits connected with agriculture as may be prescribed. Sub-sections (7A) and (7B) which came to be incorporated by the Fifth Amendment read as under :

> "7A. 'Garden' means land used primarily for growing coconut trees, arecanut trees, cashewnut trees or mango trees;
>
> 7B. 'garden produce' means any produce from a garden."

It will be seen from the aforesaid definitions that land used primarily for growing coconut trees falls within the expression 'garden' and any produce therefrom would be covered by the expression 'garden produce' Since garden produce is included within the definition of agriculture in sub-section (1A) of section 2 it is clear that land used primarily for growing coconut could be described as agricultural land. Sub-section (11) (i) defines land inter alia to mean land which is used for agriculture or which is capable of being so used but is left fallow. Section 2(23) defines a tenant to mean 'a person who on or after the date of commencement of this Act holds land on lease and cultivates it personally and includes a person who is deemed to be a tenant under this Act'. Section 7 posits that if any question arises whether any person is a tenant or should be deemed to be a tenant under the Act, the Mamlatdar shall after holding an enquiry decide such question. Section 8(1) stipulates that no tenancy of any land shall be terminated and no person holding as tenant shall be liable to be evicted therefrom save as provided under the Act. Sub- section (2) of section 8 next provides that where any person as is referred to in section 4 (deemed tenant) has been evicted from the land on or after 1st July, 1962 such person shall be entitled to recover immediate possession of the land in the manner prescribed by or under the Act unless the landlord proves that the termination of tenancy was in the manner authorised by section 9. Even in cases of threatened wrongful possession section 8A says that any tenant in possession of any land or dwelling house who apprehends that he may be dispossessed contrary to the provisions of this Act may apply in the prescribed manner to the Mamlatdar for an order safeguarding his right to possession. Section 9 lays down the modes of termination of tenancy which are (a) by the tenant surrendering his right to the landlord in the manner provided in section 10; or (b) by the landlord terminating the tenancy on the grounds specified in section 11; or (c) under any other specific provision of the Act. Section 18 lays down the procedure for taking possession. It says that a tenant entitled to possession of any land under any of the provisions of the Act may apply in writing for such possession to the Mamlatdar. It will be seen from the aforesaid provisions that the forum created for determination of the question whether a person is a tenant or a deemed tenant under the Act is the Mamlatdar. Ever where a tenant apprehends that his possession is likely to be interfered with contrary to the provisions of the Act he can make an application in the prescribed manner to the Mamlatdar for safeguarding the, same. So also where a tenant is evicted illegally, section 8(2) permits him to approach the Mamlatdar for recovery of possession. Unless the tenancy is terminated in the manner

provided by section 9, the law precludes the landowner from terminating the tenancy and obtaining possession of the land from the tenant. Section 58 bars the jurisdiction of courts. Sub- section (2) thereof provides that save as otherwise provided in the Act no 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 and no order passed by him under the Act shall be questioned in any civil or criminal court. It will thus be seen that the Act sets up an independent machinery and invests the Mamlatdar with jurisdiction to decide questions such as :

(i) Whether any person is a tenant or should be deemed to be a tenant under the Act?

(ii) Whether the possession of any tenant in regard to any land or dwelling house is threatened and if so, whether an order safeguarding the same is required?

(iii) Whether the tenancy of any deemed tenant is legally terminated and if no, whether the tenant evicted from the land held by him as such is entitled to restoration of possession?

The jurisdiction of the civil court is specifically barred by sub-section (2) of Section 58 from settling, deciding or dealing with any question which is by or under the Act required to be settled, decided and dealt with by the Mamlatdar. There can, therefore, be no doubt that after the Fifth Amendment became effective in regard to land used primarily for growing coconut trees and garden produce, the jurisdiction of the civil court was ousted by virtue of section 58(2) of the Act.

The suit in question was instituted on May 6, 1974 i.e. before the Fifth Amendment was brought into force. Thus the amendment came into force during the pendency of the suit. The question, therefore, is what is the effect of the Fifth Amendment on pending litigation? No provision is made in the Act in that behalf. The High Court concluded that since 'there is nothing in the language of sections 7 and 58 of the..... Act which is primarily a welfare legislation to indicate that it should not be applied retrospectively there is no question that its applicability should be necessarily prospective. Proceeding further the High Court takes the view that even after the Fifth Amendment came into force the plaintiff had not applied to the Mamlatdar for possession of the land within the period allowed by Section 18 of the Act and had, therefore, allowed the first defendant to become a deemed purchaser of the suit property on the strength of his tenancy. Since the civil court had lost jurisdiction to decide the suit, the High Court dismissed it. We may now proceed to examine whether this view taken by the High Court is correct.

From the above discussion it emerges that the Civil Court undoubtedly had jurisdiction under section 9 of the Code of Civil Procedure to try and grant eviction till the Fifth Amendment became effective. After that amendment came into force, the provisions of the Act became applicable to the lands in question which were primarily used for growing coconut trees and receiving produce therefrom. By virtue of section 7 any question whether a person is a tenant or a deemed tenant was required to be decided by the Mamlatdar and the jurisdiction of the Civil Court stood ousted by section 58(2) of the Act. The question is whether this subsequent change in the law deprived the Civil Court of jurisdiction which it undoubtedly possessed on the date of the institution of the suit.

Three situations, therefore, develop in the context of the provisions of the Act as amended by the Fifth Amendment, namely, (i) the Civil Court retains jurisdiction or (ii) the Civil Court is precluded from deciding, even incidentally, questions failing within the ambit of section 7 of the Act or (iii) the Civil Court's jurisdiction is wholly ousted. Since the Act is silent as to the fate of pending litigation after the Fifth Amendment the situation arising on the amendment of the Act must be decided on first principles. If a suit is filed to recover possession of agricultural land from a trespasser and no dispute arises, the adjudication whereof is required to be done by the special machinery- set up under the Act, the Civil Court will continue to have jurisdiction. If, however, the defendant raises a dispute which is required to be resolved by the special machinery under the Act, a question will arise what procedure the Civil Court should adopt. There may arise a situation where the entire dispute pending before the Civil Court can be adjudicated by the special machinery only and not the Civil Court, what procedure the Civil Court follow in such a situation? In the case of the first mentioned situation there is no difficulty as the Civil Court will continue to have jurisdiction to settle and decide the dispute and grant appropriate relief The problem arises in the two other situations where the jurisdiction of the Civil Court is partly or wholly ousted. Take the case of suit where possession of agricultural land is sought on the plea that the defendant is a trespasser and the defendant contends that he is a tenant. The question of the defendant's tenancy in respect of agricultural land would be within the exclusive jurisdiction of the Mamlatdar under section 7 read with section 58(2) of the Act. In such a situation what procedure should the Civil Court follow ? Now take a case where the entire dispute falls within the exclusive jurisdiction of the special machinery under the Act and had the litigation commenced after the Fifth Amendment was brought into force it could not have been instituted in a Civil Court. In that case what procedure should the Civil Court follow? These are the questions which arise for determination.

Before we answer those questions we must decide on the impact of the Fifth Amendment on pending litigation. The question whether the Fifth Amendment is prospective or retrospective really recedes in the background if we examine the question from the angle whether the Civil Court can decide any question falling within the jurisdiction of the special forum under the Act in a pending litigation in the absence of an express provision in that behalf. If the question of tenancy in regard to agricultural land cannot be decided by the Civil Court under the Act and there is no express saving clause permitting the Civil Court to decide the same, it is obvious that any decision rendered by the Civil Court would be without jurisdiction. A similar situation did arise in the context of another statute. In Shah Yograj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha, AIR 1961 S.C. 1596 = [1962] 2 SCR 159 the facts were that the landlord had filed a suit for eviction on April 25, 1957 in the regular court, i.e., the Court of the Joint Civil Judge (Junior Division), Erandol, which admittedly had jurisdiction to pass a decree for possession of the demised premises. However, during the pendency of the suit, a notification was issued under section 6 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (hereinafter called 'the Rent Act') applying Part II of the Act to areas where the property in question was situate. The tenants claimed protection of section 12 in Part 11 of the Rent Act which deprived the landlord of the right of possession under certain circumstance-

The question which arose for consideration was whether the tenants were entitled to the protection of section 12 in pending cases and if yes, its effect. Since section 12 of the Rent Act was held to be

prospective, the question which arose for consideration was whether its protection could be extended to tenants in pending litigation. This court pointed out that the point of time when sub-section (1) of Section 12 operates is when the court is called upon to pass a decree for eviction. Thus, said this Court the language of the sub-section applies equally to suits pending when Part 11 comes into force and those to be filed subsequently. The contention of the landlord that the operation of section 12(1) is limited to suits filed after the Rent Act comes into force in a particular area was not accepted. Applying the same principle to the facts of the present case, we have no hesitation in concluding that the provisions of the Fifth Amendment would apply to pending suits also. However, the Act does not preclude the institution of a suit by a tenant for restoration of possession from a trespasser. If the defendant who is sued as a trespasser raises a plea of tenancy, a question arises whether his plea of tenancy can be decided by the Civil Court as incidental to the grant of relief for possession or is the Civil Court precluded from deciding the same in view of section 7 read section 58(2) of the Act. As pointed out earlier, section 7 in terms states that if any question arises whether any person is a tenant or should be deemed to be a tenant under the Act, the Mamlatdar shall decide such question. The jurisdiction is, therefore, vested in the Mamlatdar under section 7 of the Act and section 58(2) specifically bars the jurisdiction of all other courts to settle, decide or deal with any question which is by or under the Act required to be settled, decided or dealt with by the Mamlatdar. Section 8(2) has limited operation where a person referred to in section 4 has been evicted on or after 1st July, 1962. In that case he would be entitled to recover immediate possession of the land in the manner prescribed by or under the Act unless it is shown that his tenancy was terminated in the manner authorised by section 9. In the present case, the plaintiff came to court contending that even though his lease was not terminated as provided by section 9 of the Act, defendant No.1 had dispossessed him by an act of trespass. He, therefore, sought possession of the demised property from the trespasser, defendant No.1. He impleaded the owner of the land as defendant No.2 on the plea that she had colluded with defendant No.1. Defendant No.1 raised a contention in his written statement that he was lawfully inducted as a tenant in the lands in question by the owner, defendant No.2. In other words, he disputed the plaintiff's contention that, he was a trespasser and pleaded tenancy. If his plea was found to be well-founded, he would be entitled to retain possession but not otherwise. Therefore, the question which arose in the suit was whether defendant No.1 proved that he was a tenant in respect of the land in question. This question could not be gone into by the Civil Court in view of the clear language of section 7 read with section 58(2) of the Act. What procedure should the court follow in such situations? It would not stand to reason to non-suit the plaintiff who had filed the suit in a competent court having jurisdiction to try the same merely because of the subsequent change in law. The proper course, therefore, would be one which was followed by the Bombay High Court in Bhimaji Shankar Kulkami v. Dundappa Vithappa Udapudi & Anr., AIR 1966 S.C. 166 = [1966] 1 SCR 145. That was a case arising under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. The lands in question were agricultural lands. Section 29(2) of that law provided that no landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar on an application made in that behalf in the prescribed form. Section 70(b) next provided that for the purposes of the Act, one of the duties and functions to be performed by the Mamlatdar is to decide whether a person is a tenant or a protected tenant or a permanent tenant. Section 85(1) laid down that no Civil Court shall have jurisdiction to settle, decide or deal with any question which is required to be settled, decided or dealt with by the Mamlatdar under the statute. The law was silent as to how a dispute of this

nature raised in a suit filed for eviction on the footing that the defendant is a trespasser should be dealt withby the Civil Court. This question squarely arose for consideration by the Bombay High Court in Dhondi Tukaram v. Hari Dadu AIR 1954 Bom 100 ILR 1953 Bom. 969 wherein that court observed as under:

> "Therefore, we hold that in a suit filed against the defendant on the footing that he is a trespasser if he raises the plea that he is a tenant or a protected tenant, the Civil Court would have no jurisdiction to deal with that plea..... We would, however, like to add that in all such cases where the Civil Court cannot entertain the plea and accepts the objection that it has no jurisdiction to try it, it should not proceed to dismiss the suit straightaway. We think that the proper procedure to adopt in such cases would be to direct the party who raises such a plea to obtain a decision from the Mamlatdar within a reasonable time. If the decision of the Mamlatdar is in favour of the party raising the plea, the suit for possession would have to be dismissed, because it would not be open to the Civil Court to give any relief to the landlord by way of possession of the agricultural land. If, on the other hand, the Mamlatdar rejects the plea raised under the Tenancy Act, the Civil Court would be entitled to deal with the dispute on the footing that the defendant is a trespasser."

Pursuant to the court's recommendation, the Bombay Legislature introduced section 85A which provided that if in any suit instituted in a Civil Court issues which are required to be settled, decided and dealt with by any authority patent to settle, decide and deal with the same arises, the Civil Court shall stay the suit and refer such issues to such competent authority for determination under the statute. Unfortunately even under the Act with which we are concerned the Legislature though aware of section 85A has not chosen to make any provision for dealing with such situations. We are, therefore, of the opinion that it would be just and fair that the issue whether defendant No.1 was a tenant in respect of the lands in question should be referred to the Mamlatdar for decision and after his decision is received by the Civil Court if the issue is held against defendant No.1, the Civil Court may consider passing of a decree in eviction but if on the other hand he is held to be tenant, the Civil Court may be required to dismiss the suit.

One further situation which may arise under the provisions of the Act may be taken note of. The impact of the Fifth Amendment may give rise to a situation where the remedy lies entirely under the Act and may have to be taken in the manner prescribed by or under the Act. For example, where a person who is a deemed tenant under section 4 of the Act if evicted from the land on or after' 1st July, 1962 his remedy under section 8(2) is to approach the authority under the Act for recovery of possession of the land of which he has been dispossessed. In such a situation the remedy may not be the one available in the case of a tenant other than a deemed tenant whose case is not governed by section 8(2) of the Act. But in the case of a deemed tenant who has been evicted from the land on or after 1st July, 1962 since a remedy has been provided under the Act, the Jurisdiction of the Civil Courts stands wholly barred by virtue of Section 58 (2) of the Act. In such a situation the Civil Court would not be competent to pass any order for restoration of possession to the deemed tenant. His remedy would, therefore, to be entirely under the Act. This is just by way of an illustration. If such a situation arises what procedure should the court follow in a pending suit which was instituted in a

competent court having jurisdiction at the date of its institution. It would seem unfair to non-suit the plaintiff altogether for no fault of his own. We think, in such a situation where the entire dispute falls outside the Civil Court's jurisdiction on account of the change in law the proper course would be to follow in spirit the procedure outlined in Order 7 Rules 10 and 10A of the Code of Civil Procedure.

Since the paper book in this appeal does not contain the original plaint and the written statement and counsel were unable to enlighten us on the actual nature of the pleadings we have tried to indicate the procedure to be followed by the Civil Court on illustrative fact-situations. In the circumstances, we are left with no alternative but to remit the matter to the Trial Court with a direction to follow the course that may be found appropriate in the fact-situation arising out of the pleadings in this case and the nature of the questions required to be determined for grant or refusal of relief claimed in the suit. We would like to make it clear that the hypothetical situations may or may not apply to the fact situation that may emanate of the pleadings in this case and it would be for the Trial Court to determine the course of action to be adopted in the light of the guidelines indicated hereinabove.

In view of the foregoing discussion, we allow this appeal, set aside the order of the High Court which in either case lacked jurisdiction to decide the question regarding tenancy on merits and remit the matter to the Trial Court for further orders in the light of the observation hereinabove made. Having regard to the peculiar facts and circumstance, of the case, we make no order as to costs.

R.P. Appeal allowed.