

Bombay High Court

Keshav Dnyanu Gorambekar vs Dnyanu Rama Patil on 23 November, 1962

Equivalent citations: (1963) 65 BOMLR 525

Author: Tambe

Bench: Tambe, Gokhale

JUDGMENT Tambe, Actg. C.J.

1. The question that arises for consideration in this case is whether a second application under Section 70(b) of the Bombay Tenancy and Agricultural Lands Act, 1948, for a declaration that a particular person is a tenant or not, would lie when the first application has been dismissed as abated on account of failure of the petitioner to bring legal representatives of the deceased party on record.

2. The question arose thus : One Keshav, the petitioner before us, filed on June 2, 1956, an application under Section 70(b) of the Act for a declaration, that he is the sole tenant of S. No. 358/2, area 2 acres and 10 gunthas, situate in village Parite, Taluka Karveer, District Kolhapur. To this petition lie had joined one Rama, who also was claiming tenancy rights in the same field along with Keshav, and Krishna, who is the landlord of this field. Rama died on March 5, 1956, On June 29, 1956, the petitioner made an application to bring on record the five sons of Rama, Dnyanu, Satuna, Shiva, Ganpat and Dashrath as legal representatives of the deceased Rama. On January 23, 1958, the Tenancy Aval Karkun dismissed the application under Section 18(3) of the Mamlatdars' Courts Act, on the ground that the application for bringing the legal representatives on record not having been made within the period of 30 days, the application had abated. On June 22, 1958, Keshav filed another application under Section 70(b), praying for a declaration that he is the sole tenant of the aforesaid field. To this petition, he joined the five sons of Rama and the landlord Krishna as parties. Now, one of the contentions raised on behalf of the sons of Rama was that this application was not maintainable. The Tenancy Aval Karkun framed a preliminary issue : "Whether the present application is tenable or not?" He took the view that the first application having been dismissed on account of abatement, it was not open to Keshav to file a second application on the same cause of action, and in this view of the matter, he dismissed the application of Keshav. Keshav filed an appeal before the District Deputy Collector. The District Deputy Collector did not agree with the view taken by the Tenancy Aval Karkun, but accepted the contention of Keshav that the second application was not barred under any of the provisions of the Mamlatdars' Courts Act. He, therefore, allowed the appeal, set aside the order of the Tenancy Aval Karkun and remanded the case to the Tenancy Aval Karkun for disposal on merits. In support of his conclusion he has placed reliance on a decision of this Court in Motiram Raoji v. Sidram Tippanna . The five sons of Rama then preferred, a revision to the Tribunal, The Tribunal, agreeing with the view taken by the Tenancy Aval Karkun, has reversed the order of the District Deputy Collector, and restored that of the Tenancy Aval Karkun, dismissing the application of Keshav on the preliminary issue. The Tribunal has also referred to two decisions of this Court. But counsel for the parties have frankly stated before us that the decisions would have no application to the facts of this case. It is, therefore, not necessary to refer to them.

3. Mr. Hombalkar, learned Counsel appearing for the petitioner, Keshav, contends that the Tribunal was in error in holding that the second application was not maintainable. He admits that by reason of the provisions of Section 72 of the Tenancy Act, the provisions of the Mamlatdars' Courts Act have been made applicable. But according to Mr. Hombalkar, there is no provision in the Mamlatdars' Courts Act to the effect that the dismissal of the first suit on the ground of abatement operates as a bar to institute a second suit on the same cause of action. He has referred us to the two decisions of this Court, (1) Motiram Raoji v. Sidram Tippanna and (2) Dhondi Santu Karande v. Laxman Gangadhar (1961) Special Civil Application No. 146 of 1961. Mr. Samant, on the other hand, appearing for the five sons of Rama, contends that even though there is no specific provision in the Mamlatdars' Courts Act, the Tenancy Aval Karkun is a Court of civil jurisdiction, and therefore, as provided in Section 141 of the Civil Procedure Code, all the provisions of the Code would govern the proceedings before the Tenancy Aval Karkun. Rule 9, Order XXII, in terms prohibits the institution of a second suit on the same cause of action when the first suit has been dismissed as abated. The question is not free from difficulty. Section 71 of the Act provides that Save as expressly provided by or under this Act, all inquiries and other proceedings before the Mamlatdar or Tribunal shall be commenced by an application which shall contain the following particulars :...

The expression 'Mamlatdar' includes a Mahalkari as well as a Tenancy Aval Karkun, under the definition Clause (1) of Section 2 of the Act. Section 72 provides that In all inquiries and proceedings commenced on the presentation of applications under Section 71 the Mamlatdar or the Tribunal shall exercise the same powers as the Mamlatdar's Court under the Mamlatdars' Courts Act, 1906, and shall save as provided in Section 29 follow the provisions of the said Act, as if the Mamlatdar or the Tribunal were a Mamlatdar's Court under the said Act and the application presented was a plaint presented under Section 7 of the said Act. In regard to matters which are not provided for in the said Act, the Mamlatdar or the Tribunal shall follow the procedure as may be prescribed by the State Government....

It is not in dispute that the application under Section 70(b) is a proceeding under Section 71 of the Tenancy Act. Under Section 72, therefore, in disposing of the said application, the Tenancy Aval Karkun will have to exercise the same powers as a Mamlatdar has under the Mamlatdars' Courts Act, and in disposing of matters, the Mamlatdar will have to follow the procedure as prescribed in the Mamlatdars' Courts Act and in regard to matters which are not provided in the Mamlatdars' Courts Act, the procedure that will have to be followed is as prescribed by the State Government. Exercising its powers, the State Government has prescribed rules called the Bombay Tenancy and Agricultural Rules. Rule 44 thereof provides that in all matters which are not provided in the Mamlatdars' Courts Act, 1906, the Mamlatdar or the Tribunal shall follow the procedure prescribed for holding formal inquiries under the Bombay Land Revenue Code, 1879. It thus appears that in disposing of applications under Section 70(b), the procedure which the Tenancy Aval Karkun or the Mamlatdar will have to follow is the procedure prescribed in the Mamlatdars' Courts Act. In the absence of any provision in respect of any matter of procedure in the Mamlatdars' Courts Act, the procedure to be followed would be the procedure prescribed by the Land Revenue Code. By necessary implication, it may, therefore, be inferred that the application of the Civil Procedure Code to such inquiries is excluded. It is not in dispute that there is no provision either in the Mamlatdars' Courts Act or in the Land Revenue Code similar to one under Rule 9 of Order XXII, Civil Procedure

Code, providing that where a suit abates or is dismissed no fresh suit shall be brought on the same cause of action. There being thus no prohibition either in the Mamlatdars' Courts Act or in the Land Revenue Code for institution of a second suit on the same cause of action when the first suit has been dismissed on the ground of abatement, it is difficult to hold that the second application of the petitioner, Keshav, was barred on that ground. The decision of the Division Bench in Dhondi Santu Karande v. Laxman Gangadhar has a bearing on the question which we have to decide here. In that case, during the pendency of an appeal before the District Deputy Collector, one of the parties to the appeal died. The appellant had not taken care to bring legal representatives of the deceased party on record within time. The District Deputy Collector, therefore, dismissed the appeal on the ground that it had abated on account of the failure on the part of the appellant to bring the legal representatives on record. The question arose as to whether the District Deputy Collector exercising his appellate powers could do so. This Court held that in view of the provisions of Section 74 of the Tenancy Act, the procedure prescribed in Chapter 13 of the Land Revenue Code is made applicable to appeals before the District Deputy Collector. In Chapter 13 of the Land Revenue Code, there is no provision with regard to abatement of the cause. An argument was advanced that having regard to the fact that there was no provision in the Land Revenue Code in this respect, the provisions in the Civil Procedure Code relating to this topic are applicable to appeals before the District Deputy Collector. This contention was not accepted by this Court. Mr. Justice Chandrachud, delivering the judgment of a Division Bench of this Court, observed:

...The language used in the several rules of Order 22 clearly indicates that what was contemplated by the Legislature was that the provisions contained in Order 22 should govern the procedure of Civil Courts only.

No good reason has been shown to us to take a view contrary to the one taken by the Division Bench of this Court. It is true that in the Mamlatdars' Courts Act, there is a provision for abatement of the proceedings under the Act if an application for bringing the legal representatives on record is not made within 30 days. But then, there is no provision either in the Mamlatdars' Courts Act or in the procedure prescribed in the Land Revenue Code, similar to that of Order XXII, Rule 9, which provides that "where a suit abates, no fresh suit shall be brought on the same cause of action". In view of this decision of this Court, to which we have just now referred, we find it difficult to apply the provisions of Order XXII, Rule 9 to a proceeding under the Mamlatdars' Courts Act, having regard to the fact that there is no such provision either in the Mamlatdars' Courts Act or in the procedure prescribed in the Land Revenue Code, which has been made applicable to the proceedings under the Mamlatdars' Courts Act.

4. The matter can be looked at from another aspect also. The sheet-anchor of the argument of Mr. Samant in support of his contention, that the provisions of Order XXII, Rule 9 apply to the proceedings under the Mamlatdars' Courts Act, is Section 141 Civil Procedure Code. In our view, on the language of Section 141, it is not possible to extend the provisions of Order XXII, Rule 9 to a proceeding under the Mamlatdars' Courts Act. That section reads:

The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

It is to be noted that what is made applicable to all proceedings in any Court of civil jurisdiction is the procedure provided in the Civil Procedure Code, and nothing else. It is well established that all the provisions in the Civil Procedure Code do not relate to procedure only. Some of them confer substantive rights also on the parties, for instance, the provisions relating to appeals, provisions relating to referring a matter to arbitration etc. It is not necessary to give an exhaustive list of such provisions. The question is can it be said that the provisions of Order XXII, Rule 9 are provisions relating to procedure only. We find it difficult to so hold. Order XXII, Rule 9 enacts a penalty. It provides that where a suit abates or is dismissed under Order XXII, no fresh suit shall be brought on the same cause of action. The only remedy to a party who fails to bring the legal representatives of the deceased on record is to apply for setting aside the abatement and to get the suit, that had abated, restored. These being the provisions of Rule 9 of Order XXII, which, as already stated, enacts a penalty, in our view, they confer a substantive right on the opposite side. The provisions thus being one enacting a substantive right cannot be called provisions relating only to the procedure. These provisions, therefore, even with the aid of Section 141, Civil Procedure Code, cannot be made applicable to the proceedings under the Mamlatdars' Courts Act. We find some support in the decision reported in *Somanna v. Chinnayya* [1945] A.I.R. Mad. 107. There a petition filed under the Madras Village Courts Act was dismissed for default, and an application was made for restoration of the said application. The question arose whether there was power to restore such application under the said Act. It was contended on behalf of the applicant that in the circumstances, the provisions of Order IX, Rule 9 were applicable in view of the provisions in Section 141, Civil Procedure Code. This contention was rejected by the Madras High Court, and Byers J. repelling the contention observed:

Section 141, Civil P.C., only empowers the Judges to regulate judicial proceedings by rules of procedure in the Civil Procedure Code and does not make the Civil Procedure Code, applicable in its entirety to such proceedings including the provisions recognising substantive rights. The remedy under Order 9, Rule 9, Civil P.C., is not a matter of procedure.

Now, by the same analogy of reasoning it can be said that the provisions of Order XXII, Rule 9 cannot be made applicable to an application made under Section 70(b) of the Tenancy Act. For the reasons stated above, we find it difficult to sustain the order made by the Tribunal, and that order is, therefore, liable to be quashed as the error is apparent on the record.

5. The rule is, therefore, made absolute. The order of the Tribunal is set aside and that of the District Deputy Collector is restored. The ease will now go back to the Tenancy Aval Karkun for disposal in accordance with law. Costs shall abide the result.