

(1969) 10 BOM CK 0015

In the Bombay High Court

Case No : Spl. C. Application No. 129 of 1968

Akhatarunnisa Begum and others

APPELLANT

Vs

Ahmadkhan Qadarkhan

RESPONDENT

Date of Decision : 09-10-1969

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 107
Civil Procedure Code, 1908 (CPC) — Section 141

Citation : (1970) MhLj 699

Hon'ble Judges : M. N. Chandurkar, J

Bench : Single Bench

Advocate : V. R. Manohar, for the Appellant; B. R. Mandlekar, for the Respondent

Final Decision : Allowed

Judgement

M. N. Chandurkar, J.—The question involved in this petition by the landholder's legal representatives is what is the limitation for making an application for substitution of the legal representatives of a party to an appeal filed u/s 107 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereafter referred to as the Tenancy Act, if one of the parties dies during the pendency of the appeal. The question arises in the following way;

2. One Mir Razuk had started a proceeding u/s 38 of the Tenancy Act against respondent Ahmadkhan in the Court of the Tenancy Naib-Tahsildar, Malkapur. That application came to be rejected and the landholder then filed an appeal against the order of the Naib-Tahsildar before the Sub-Divisional Officer, Malkapur. During the pendency of this appeal the landholder died on 30-11-1965 and the petitioners who were legal representatives of the deceased landholder filed an application on 22-2-1966 for their names being brought on record in place of the name of deceased Mir Razak. The Sub-Divisional Officer took the view that the appeal had abated in view of the provisions of section 18 (3) (ii) of the Mamlatdars' Courts Act, 1906. The petitioners then filed a revision application against this order before the Maharashtra Revenue Tribunal and the

Tribunal took the view that in the absence of an application filed within the period of limitation by a party the Court cannot be in a position to enquire as to who are the legal representatives and since the application for bringing on record the legal representatives was not made within the period of limitation the appeal was correctly held to have abated u/s 18 (3) (ii) of the Mamlatdars' Courts Act, 1906. These orders are now challenged by the petitioners in this petition.

3. The learned counsel appearing on behalf of the petitioners contends that the provisions of section 18 (3) of the Mamlatdars' Courts Act do not apply to an appeal riled before the Collector and the applicability of these provisions is restricted only to the proceedings before the Tahsildar. He has placed reliance on a decision of this Court in Hafasji Ibrahim Vs. Mangalgirji Mathuragirji, in which Chagla J. (as he then was) held that: section 18 (3) of the Mamlatdars' Courts Act which prescribed limitation for bringing on record the legal representatives of a party did not apply to a revision application filed u/s 23 of the Mamlatdars' Courts Act. In order to appreciate this contention it is necessary to make a reference first to section 102 of the Tenancy Act. Section 102 is as follows:

"102. In ail inquiries and proceedings commenced on the presentation of applications made u/s 101, the Tahsildar 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 36 follow the provisions of the said Act, as if the Tahsildar or the Tribunal were a Mamlatdar's Court under the said Act and the application presented was a plaint presented u/s 7 of the said Act. In regard to matters which are not provided for in the said Act, the Tahsildar or the Tribunal shall follow such procedure as may be prescribed by the State Government. Every decision of the Tahsildar or the Tribunal shall be recorded in the form of an order which shall slate the reasons for such decision."

It is clear on the words of section 102 that in dealing with an inquiry or a proceeding commenced on an application filed before him the Tahsildar or the Agricultural Lands Tribunal has to follow the provisions of the Mamlatdars' Courts Act, 1906, as if the Tahsildar or the Tribunal were a Mamlatdar's Court under the said Act. This section also provides that in regard to the matters which are not provided for in the Mamlatdars' Courts Act the Tahsildar or the Tribunal U required to follow such procedure as may be prescribed by the State Government. A reference to section 18 of the Mamlatdars' Courts Act may then be made. The relevant provision of this section is contained in sub-section (3), which is as follows."

"18. (3) In case of the death of any party while the suit is pending,

(i) if application is made within one month of such death, the Mamlatdar shall determine summarily who is the legal representative of the deceased party and shall enter on the record the name of such representative;

(ii) if no such application is made, the suit shall abate."

The provisions of section 18 (3) of the Mamlatdars Courts Act specifically refer to a case where a party dies pending a suit and by virtue of the provisions of section 102 of the Tenancy Act the proceeding u/s 36 before the Tahsildar is deemed to be a suit and there is no doubt that the proceeding before the Tahsildar or the Agricultural Lands Tribunal is governed in the matter of abatement and substitution of the legal representatives of a deceased party by the provisions of section 18 (3) of the Mamlatdars' Courts Act, Provision is made u/s 107 of the Tenancy Act for an appeal to the Collector from a decision given by the Mamlatdar in accordance with section 102 of the Tenancy Act. On the terms of section 102 of the Tenancy-Act the provisions of section 18 (3) of the Mamlatdars' Courts Act have only a restricted application and this applicability is restricted only to the proceeding before the Tahsildar. The provisions of section 18 (3) cannot be made applicable so far as the procedure is prescribed thereby is concerned to an appeal, the disposal of which is governed by section 107 of the Tenancy Act. It is not possible, therefore, to import in section 107 of the Tenancy Act the provisions of section 18 of the Mamlatdars' Courts Act, because there is no provision in the Tenancy Act which provides that the procedure in appeal before the Collector will also be governed by the provisions of section 18 of the Mamlatdars' Courts Act. It may also be noticed that there is no provision for any appeal against the decision of the Mamlatdar even under the Mamlatdars' Courts Act, and the scheme of the Mamlatdars' Courts Act shows that section 18 (3) is restricted in its operation only to a proceeding before the Mamlatdar. If the enquiry u/s 102 of the Tenancy Act is to be treated as if it is an enquiry under the Mamlatdars' Courts Act, then the provisions of section 18 (3) cannot by themselves become applicable to any other proceeding. There is, therefore, no warrant for the proposition that the period for bringing on record legal representatives of a deceased party to an appeal pending before the Collector is governed by the provisions of section 18 (3) of the Mamlatdars' Courts Act. On the terms of section 102 and section 107 of the Tenancy Act and section 18 (3) of the Mamlatdars' Courts Act no other view is possible. I might also make a reference to a decision of this Court in Mafasji's case on which the learned counsel for the petitioners had placed some reliance. The facts in that case were that in a proceeding under the Mamlatdars' Courts Act a decree was passed u/s 19 ordering the petitioners before the High Court to hand over possession of the suit lands to the opponent. The petitioners had applied to the Court in revision u/s 23 of the Mamlatdars' Courts Act and during the pendency of this revision application the original defendant died on 7-10-1942 and on 5-1-1943 the petitioners applied to bring themselves on record as the heirs of the original defendant. The Assistant Collector, who was dealing with the revision application, took the view that the revision application had abated inasmuch as the petitioners had not applied to bring themselves on record within one month of the death of the original defendant and on that ground the revision application was rejected. Against this order the petitioners filed a revision application before the High Court. While deciding the question whether there was any period of limitation prescribed for bringing the heirs on record in default of which the

revision application would abate, the learned Judge made a reference to the order passed by the Assistant Collector and he observed as follows:

"The learned Assistant Collector took the view-and rightly-that there was no specific provision under the Mamlatdars' Courts Act with regard to the abatement of pending revisional applications before the Collector. But he proceeded on a rather curious reasoning that because the period of one month was given in the case of a party to the suit dying, for the heirs to be brought on record, therefore, a similar time-limit must be imposed in the case of a revisional application. You cannot surely bar litigants applications or suits by analogy. The learned Assistant Collector then went on to say that as the application in this case was made nearly three months after the death of the original defendant, the application was time-barred and he would not hear the application on its merits and rejected the application. Now, in my opinion, the learned Assistant Collector was definitely wrong in coming to the conclusion that the limitation for the revisional application before him was one month, and he acted with material irregularity in refusing to exercise his jurisdiction to hear the revisional application pending before him on the ground that the application was barred by limitation."

The learned Judge, therefore, held that the limitation of 30 days provided by section 18 (3) of the Mamlatdars' Courts Act cannot be used for the purposes of deciding whether the limitation for bringing on record the legal representative of a deceased party, who dies during the pendency of appeal before the Collector, u/s 23 of the Mamlatdars' Courts Act was barred by limitation. It is, therefore, clear that the provisions of section 18 (3) of the Mamlatdars' Courts Act are inapplicable to any proceeding under the Tenancy Act other than the one which is governed by section 102 of the Tenancy Act for the purposes of the Tenancy Act. Thus the orders passed by the Revenue Tribunal and the Sub-Divisional Officer holding that the application should have been made within 30 days from the death of the deceased landholder are not justified.

4. The question which then arises is what is the period of limitation for bringing on record the legal representatives of a party who dies during the pendency of appeal before the Collector. Even with the assistance of the counsel on both sides it has not been possible to find out any particular provision of law which would govern such an application. The proceeding before the Tahsildar is governed by the provisions of section 18 (3) of the Mamlatdars' Courts Act. A revision application filed before the Maharashtra Revenue Tribunal u/s 111 of the Tenancy Act against an order passed by the Collector either in appeal u/s 107 or in revision application u/s 110 of the Tenancy Act is governed by the procedure prescribed in the Bombay Revenue Tribunal Regulations, 1958. Regulations 24 and 25 prescribe the procedure and the limitation for bringing on record the legal representatives of the deceased applicant or opponent respectively. The prescribed period of limitation there is 90 days from the date on which a party dies. But neither in the Tenancy Act nor in the Bombay Tenancy and Agricultural

Lands (Vidarbha Region) Rules, 1959, is there any provision which provides for limitation for making such an application. It was argued at the Bar that by virtue of the provisions of section 141 of the CPC the provisions of Order 22, Civil Procedure Code, should be imported into the provisions governing appeals under the Tenancy Act and then the period of limitation would be governed by Article 120 of the Limitation Act, 1963. This provision of the Limitation Act provides for a period of 90 days for an application to bring on record a legal representative of an appellant or a respondent and a period is to be computed from the death of the appellant or the respondent as the case may be. Section 141 of the Civil Procedure Code, in my view, however, cannot help the petitioners. It is now well established that the provisions of section 141 can be invoked only if the proceedings in respect of which it is sought to be invoked are original in nature. This is clear from the decision of the Supreme Court in *Dokku Bhushayya Vs. Katragadda Ramakrishnayya*, Their Lordships of the Supreme Court have quoted with approval the decision of the Privy Council in *Thakur Prasad v. Sheikh Fakir Ullah* I L R 17 All. 106 in which the Privy Council dealing with section 647 of the Civil Procedure Code, 1882, which was parallel to section 141 of the CPC of 1892, had observed:

"Their Lordships think that the proceedings spoken of in section 647 include, original matters in the nature of suits such as proceedings in probates, guardianship and so forth, and do not include executions."

A proceeding in an appeal cannot be said to be a original proceeding as contemplated by section 141 of the Civil Procedure Code. The argument based on section 141 and consequent application of the provisions of Order 22 of the CPC cannot, therefore, be accepted.

5. The position, therefore, is that there is no express provision prescribing a period of limitation for an application for bringing on record the legal representative of a party who dies during the pendency of an appeal pending before the Collector.

6. The next question is what course should be followed in such a case. If there is no limitation prescribed for an application, the application cannot be thrown out on the ground that it is barred, and in such a case discretion will have to be left to the Collector to decide whether the application has been made within a reasonable period of time. Of course, while considering whether the application is made within a reasonable period of time, the normal period which is prescribed by the provisions of Article 120 of the Limitation Act and the one which is prescribed by Regulations 24 and 25 of the Bombay Revenue Tribunal Regulation for purposes of a subsequent revisional proceeding under the Tenancy Act can always be considered. That this is the best course to follow is also indicated by the decision in *Mofasji Ibrahim's* case reference to which has been made earlier. The learned Judge was faced with a similar question in that case, because the revision application was pending before the Assistant Collector when one of the parties died and no limitation was prescribed for bringing on record the legal

representatives. The learned Judge passed the following order in that case:

"I would, therefore, send back this matter to the Assistant Collector to decide whether under the circumstances of the case he should in his discretion allow the petitioners to bring themselves on record as the legal representatives of the original applicant; and if he so decides, to hear the revisional application on merits."

It need not be stated that the discretion must be judicially exercised.

7. The learned counsel appearing on behalf of the respondent then contended that there is no statutory right in the petitioners to be brought on record as legal representatives of the deceased landholder, and therefore, the application itself was not maintainable. It is difficult to accept this contention. The deceased landholder had an order against him passed by the Tahsildar rejecting his application u/s 36 read with section 38 of the Tenancy Act. That order was challenged by him and the appeal was pending. This appeal had to be disposed of on merits and would have been so disposed of if the deceased landholder had not died. The order which is passed by the Sub-Divisional Officer dismissing the appeal as having been abated adversely affects the present petitioners and the petitioners would, therefore, have a right to challenge that order. In other words, if the petitioners have a right to challenge an adverse order passed against the deceased landholder through whom they claim, and which order if not challenged adversely affects their right to the property, they cannot be prevented from challenging the order which operates against them. They no doubt step into the shoes of the land holder, they represent the estate of the deceased landholder and are, therefore, entitled to prosecute the appeal. It is this right to prosecute the appeal which was initially filed by the deceased landholder that they are exercising, when they say that they want to be substituted as legal representatives. If they are entitled to continue the appeal after the death of the deceased landholder and are vitally interested in seeing that the order of the Tahsildar is set aside then they have a right to ask for a substitution of their names in the place of the deceased landholder.

8. A contention was faintly raised on behalf of the respondent that the proper course to be adopted by the legal representatives was to give a fresh notice u/s 38 of the Tenancy Act. It is apparent that they could not have exercised their right u/s 38 (1), because the date prescribed thereby had already lapsed. There is, therefore, no substance in the contention that the petitioners had no right to take part in the proceeding and that they could have taken recourse to an alternative remedy, namely take steps afresh u/s 38 of the Tenancy Act. In the view which I have taken the orders passed by the Revenue Tribunal and the Sub-Divisional Officer are quashed and the matter is sent back to the Sub-Divisional Officer with a direction to decide the application made by the petitioners in accordance with law.

9. The petition, therefore, succeeds and is allowed with costs.