

(1998) 09 BOM CK 0059

In the Bombay High Court

Case No : Writ Petition No. 4104 of 1985

Ananda Vithu Shinde Since Deceased By His Heirs and others

APPELLANT

Vs

Kashinath Galbu Borate and others

RESPONDENT

Date of Decision : 30-09-1998

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29(1), 31, 32
Constitution of India, 1950 — Article 227

Citation : (1999) 1 BomCR 776

Hon'ble Judges : P.S. Patankar, J

Bench : Single Bench

Advocate : H.D. Gole, for the Appellant; D.K. Ghaisas, for the Respondent

Judgement

P.S. Patankar, J.—This petition arises out of the proceedings which were initiated by the petitioners under sections 37, 39 read with section 29 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereafter referred to as the Tenancy Act). Land bearing Survey No. 325 admeasuring about 17 acres 20 gunthas situated at village Dahiwadi, Taluka Man, District Satara was owned by respondent No. 5 Shivaram Gopal Kashid. The father of the petitioner by name Vithu Manyaba Shinde was the tenant thereof from 1948. About 4 acres and 10 gunthas of land was sold by respondent No. 5 to the sons of Vithu Manyaba (some of the petitioners herein) by sale deed dated 18th January, 1951. The said land is given Survey No. 325/1 and the remaining land is given Survey No 325/2. The respondent No. 5 has filed an application u/s 29 read with section 31 of the Tenancy Act. In those proceedings, a direction was given that half of the total land i.e. 17 acres and 20 gunthas be restored to respondent No. 5. This order was passed on 19th May, 1958. After the said order was passed, respondent No. 5 sold the entire land of 13 acres and 10 gunthas by a registered sale deed dated 22nd April, 1960 to the respondents Nos. 1 to 4. In the meanwhile, Vithu Manyaba died. On the basis of the sale deed, the respondents Nos. 1 to 4 obtained the possession on the date of the sale deed of the entire land of 13 acres and 10 gunthas. This required Vithu Manyaba to file Regular Civil Suit for

possession. Points under Tenancy Act were raised and reference u/s 85A of the Tenancy Act was made by the Civil Court to the Authority. This reference came to this Court in Special Civil Application No. 299 of 1973. It was decided on 15th February, 1978. The petitioners herein were also the petitioners in the said Special Civil Application. This Court observed:-

"It is impossible to place any reliance upon this statement because it is not permissible at this stage to go behind the order dated 19th May, 1958, passed by the Tenancy Authority u/s 31 of the Tenancy Act. That order already shows that certain area which was left after giving 8 acres. 30 gunthas to respondent No. 5 remained with Vithu Manyaba as a tenant. If, at all possession had been given, that might be after the order u/s 31 was passed. It is not necessary for me to go into the details of the effect of certain surrender if it is true. As far as the present proceedings are concerned it is enough to say, as I have said earlier, that an order was passed giving to respondent No. 5 the possession of 8 acres, 30 gunthas out of Survey No. 325 and Vithu Manyaba who was holding the entire Survey No. 325 as a tenant became the deemed purchaser of the balance of the land. There is thus no difficulty in accepting the grievances of the petitioners. The effect would be naturally to substantially allow this petition, but not the restoration of the findings of the Tahsildar in the words in which they have been expressed. I proceed to reformulate the finding in the following terms which may be sent to the Civil Court.

ISSUE No. 5- The plaintiff proves that he became the deemed purchaser of the land that remained in his possession after 8 acres, 30 gunthas were ordered to be delivered to respondent No. 5 u/s 31 of the Tenancy Act. This came about on the Tiller's Day which in the present case is 19th May, 1958. Thereafter the plaintiff continued to be in possession till he lost the same which has given the cause of action to the present suit.

ISSUE No. 7- The sale deed of 22nd April, 1960 executed by respondent No. 5 in favour of respondents Nos. 1 to 4 is illegal in view of the provisions contained in section 37 of the Tenancy Act."

Thus, it was held that the father of the petitioners, Vithu Manyaba, had become the deemed purchaser of the land, which was ordered to be delivered to respondent No. 5 u/s 31 of the Tenancy Act on 19-5-58. Vithu Manyaba continued to remain in possession thereafter. It was also held that the sale deed dated 22nd April, 1960 executed by respondent No. 5 in favour of respondents Nos. 1 to 4 was illegal in view of the provisions contained in section 37 of the Tenancy Act.

3. It is to be noted at this juncture that the civil suit came to be decreed by the learned Civil Judge, Junior Division, Dahiwadi, by order dated 27th April, 1979, holding that the present petitioners are entitled to claim possession of 4 acres and 30 gunthas from the Civil Court. It was observed that the balance of the land can be taken possession by the petitioners from the Tenancy Court and not from

the Civil Court. The said finding was based on the fact that the said land of 8 acres and 30 gunthas was ordered to be given in possession of respondent No. 5 u/s 31 of the Tenancy Act and hence the petitioners shall be required to approach the Tenancy Court to get possession of the same u/s 37 of the Tenancy Act. As far as the balance land of 4 acres and 30 gunthas was concerned, respondents Nos. 1 to 4 were unauthorisedly in possession and hence the Civil Court was competent to grant the decree of possession. This was not challenged by any party. During the pendency of the suit. Vithu Manyaba died and petitioners were brought on record as his heirs.

4. The petitioner initiated the proceedings under sections 37, 39 and 29 of the Tenancy Act during the pendency of the suit for getting possession of 8A and 30G of the land. The said application came to be rejected by the learned Tahsildar by order dated 31st July, 1980 holding that the petitioners were not tenants and respondent No. 5 did not get possession of 8 acres and 30 gunthas from the tenant. Respondents Nos. 1 to 4 got it directly from the tenant. The application filed by the petitioners under sections 37, 39 and 29 was not maintainable and that it was time barred. This was challenged by the petitioners by filing Tenancy Appeal No. 31 of 1980. The learned Assistant Collector, Phaltan Division. Phaltan, in detail considered the import of the decision of this Court in Special Civil Application No. 299 of 1973 dated 15-2-1978 which was under Article 227 of the Constitution of India. It was held that as the respondent No. 5 has obtained the order of possession of 8 acres and 30 gunthas from the tenant Vithu in 1958 for personal cultivation u/s 31 of the Tenancy Act and as he has sold it to respondents Nos. 1 to 4 on 22nd April, 1960, there was clear contravention of section 37. It was, therefore, held that the tenant was entitled for restoration of 8 acres and 30 gunthas of land. However, as in the operative part of the order no direction was given by the Assistant Collector. Phaltan Division, to restore the said 8 acres and 30 gunthas of land to the petitioners. Both sides filed revision applications. The learned Member of the Maharashtra Revenue Tribunal came to the conclusion that the Assistant Collector, Phaltan Division has not rightly interpreted the provisions of section 37 and section 39 of the Tenancy Act. It was held that the purchasers had obtained possession on 22nd April, 1960 from the tenant directly. Hence, the provisions of sections 37 and 39 are not attracted. It was held that landlord respondent No. 5 has not obtained possession from the tenant and in turn given to respondents Nos. 1 to 4 at the time of the execution of the sale deed. But it was taken by respondents Nos. 1 to 4 directly from the tenant when the sale deed was executed in their favour on 22nd April 1960. In the result, the revision filed by respondents Nos. 1 to 4 came to be allowed while the revision filed by the petitioners came to be rejected. Hence, this petition under Article 227 of the Constitution of India.

5. Therefore, this involves interpretation of sections 29(1), 37 and 39 of the Tenancy Act. They read as under:-

"29(1) A tenant or an agricultural labourer or artisan entitled to possession of

any land or dwelling house under any of the provisions of this Act may apply in writing for such possession to the Mamlatdar. The application shall be made in such form as may be prescribed (and within a period of two years from the date on which the right to obtain possession of the land or dwelling house is deemed to have accrued to the tenant, agricultural labourer or artisan, as the case may be.)."

"37.(1) If after the landlord takes possession of the land after the termination of the tenancy (under section 31), (33B or section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956) he fails to use it for any of the purpose specified in the notice given under sections 31, 33 B or section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956 within one year from the date on which he took possession or ceases to use it at anytime for any of the aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him, unless he had obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof."

"39. If at anytime the tenant makes an application to the Mamlatdar and satisfies him that the landlord has failed to comply within a reasonable time with the provisions of section 37, the tenant shall be entitled on a direction by the Mamlatdar to obtain immediate possession of the land and to such compensation as may be awarded by the Mamlatdar for any loss caused to the tenant by eviction and by failure on the part of the landlord to restore or give possession of the land to him as required by section 37."

In the present case, in my opinion, respondents Nos. 1 to 4 have taken possession on the date of the sale deed i.e. 22nd April, 1960 as agent of the vendor. They cannot be called as total trespassers. They were claiming title from the landlord respondent No. 5 under the sale deed executed by him. They were not third parties. They have not entered the land as trespassers. The order of taking possession was passed u/s 31 in favour of respondent No. 5 landlord on 19-5-58. Therefore, in the eye of law he has taken the possession and in turn it was passed on to respondents Nos. 1 to 4 under the sale deed executed by him on the same day. Section 37(1) does not require that landlord should take actual possession first and thereafter he should give it to somebody else. If section 37(1) is interpreted in that manner, then it would be easy for any landlord to defeat the rights which are created in favour of the tenant because of the wrong doing of the landlord. The landlord can very well transfer the land directly and transferee would take the possession. It would suffice u/s 37(1) that the landlord obtains the order and on that basis gives possession to a third party. It was not the case of respondents Nos. 1 to 4 that there was no term in the sale deed

regarding giving of possession of this land to them. They have taken the possession on behalf of the landlord respondent No. 5. It is necessary to see that the object of legislation is not defeated which is meant essentially for the benefit of the agricultural tenants. Therefore, what section 37(1) means is that whenever the landlord obtained an order for possession under sections 31, 33-B or 34 of the Tenancy Act and fails to use it for any purpose specified in the notice given under those sections within a period of one year from taking possession or ceases to use it at any time for that purpose within 12 years from that date, then he is liable to restore possession of the land to the tenant. In the present case, therefore, it should be deemed that on the date of the sale deed dated 22nd April, 1960 respondent No. 5 first obtained possession pursuant to the order dated 19th May, 1958 obtained by him u/s 31 and thereafter the respondents Nos. 1 to 4 got the possession. Obviously, this was contrary to section 37(1).

6. The learned Counsel for the respondents Nos. 1 to 4 relied upon the judgment of this Court in Himatrao Ukha Mali and others Vs. Popat Devram Patil and another, . In the said case, one Ukha Hiralal was the tenant and original owner was one Shri Zaverchand Laxmichand. Ukha Hiralal entered into an agreement of sale with respondent. Popat Devraj Patil. It was a registered deed and possession was also handed over to him. Ukha filed regular civil suit claiming possession of the said land from the respondent No. 1. It came to be dismissed holding that possession of respondent No. 1 was protected u/s 53-A of the T.P. Act. Ukha received certificate of purchase. Ukha died. Thereafter the petitioners who were the heirs of Ukha, filed another suit. That was also dismissed holding that the possession of respondent No. 1 was protected u/s 53-A and the decision given in the earlier suit operates as res judicata. During the pendency of the said suit, the petitioners approached the Sub-Divisional Officer, Amalner by filing an application u/s 84 for restoration of the land alleging that the transfer in favour of respondent No. 1 was invalid in view of section 43 of the Tenancy Act.

Mainly two points arose in those proceedings (1) Whether the agreement of sale executed in favour of respondent along with possession by petitioner's father was valid in view of section 43(1) of the Tenancy Act and (2) whether the application filed for possession was hit by the principles of res judicata. While discussing this, the learned Judge observed that the provisions of section 29(1) are attracted for claiming repossession of the land from the original landlord and the said provisions are not applicable when the repossession of the land is being sought from a third person. But it was held that section 43(1) of the Tenancy Act mandates that no land purchased by a tenant u/s 32-G shall be transferred by sale gift, exchange, mortgage. etc. without the previous sanction of the Collector and in view of section 43(2), such transfer is invalid. It was held that the principle of res judicata are not attracted here and the petitioners (heirs of the original tenant Ukha) were entitled for possession.

7. In my opinion, this has no application in the present case since the possession of respondents 1 to 4 was from respondent No. 5 and therefore squarely covered

u/s 37(1). In addition, it is clear from section 29(1) that a tenant or an agricultural labourer or artisan entitled to possession of any land etc. can make an application in writing for getting possession to the Mamlatdar from any party. There is no bar. Therefore, M.R.T. has committed an error in holding that the present application filed by the petitioners was not maintainable.

8. In view of this, I pass the following order -

Rule is made absolute. The petitioners are entitled to get the possession of 8 acres and 30 gunthas of land from respondents Nos. 1 to 4 of Survey No. 325/2 as detailed in the application.

No order as to costs.

9. Petition allowed.