
(1993) 04 BOM CK 0044
In the Bombay High Court
Case No : Writ Petition No. 96 of 1984

Bapurao Ragho Dethe

APPELLANT

Vs

Ganpati Vithu Rohankar and Others

RESPONDENT

Date of Decision : 02-04-1993

Acts Referred:

Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 —
Section 5(1)

Citation : (1994) 2 BomCR 409 : (1994) MhLj 1504

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : P.C. Madkholkar, for the Appellant; S.D. Patil, for respondent No. 1,
B.R. Gawai, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

D.R. Dhanuka, J.—By this petition filed under Article 226 of Constitution of India, the petitioner has impugned order dated 19th November, 1981 passed by Sub Divisional Officer, Wani in Revenue Case No. 2/40/1980-81 of Village Mangrud and order dated 30th November, 1983 passed by the Additional Commissioner, Amravati Division, Amravati in revisional proceedings arising therefrom numbered as Case No. 7/F.C.R/81-82 of Mangrud.

2. This petition raises interesting questions of law concerning interpretation and applicability of some of the provisions contained in Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

3. The admitted facts required to be noticed for disposal of this petition are briefly summarised as under :--

(a) The respondent No. 1, Ganpati Vithu Rohankar was owner of field bearing Survey No. 42/1 of village Mangrud, admeasuring about 2 acres of land (0-81 R) more particularly described in the impugned order dated 19th November, 1981 copy whereof is annexure D to this petition, since 1960, the writ petitioner

Bapurao Ragho Dethe is in possession of the said land. Some time in the year 1969, the respondent No. 1, filed Regular Civil Suit No. 163 of 1969 against the petitioner herein for possession of the said land. The said suit was dismissed, by the learned Civil Judge, Wani by his order dated 27th March, 1972. Being aggrieved by the said decree, the respondent No. 1, preferred Civil Appeal No. 51 of 1972. By an appellate decree dated 3rd July, 1975, the said appeal was dismissed by Shri A.S. Medhekar, Assistant Judge, Yavatmal. The said appellate decree became final. From the copy of the judgment delivered in Civil Appeal No. 51 of 1972, it clearly emerges that an agreement of sale was arrived at between the respondent No. 1 and the petitioner in respect of the said land some time in the year 1960 for consideration of Rs. 733/- and that the petitioner had paid the entire consideration amount payable in respect of the said land to respondent No. 1, by the harvest season of the year 1960 in the year 1960. It appears from the copy of the said judgment that since the year 1960, the respondent No. 1, is in possession of the said land. The respondent No. 1, has been cultivating the said land. By the said judgment dated 3rd July, 1975, the learned Assistant Judge held that the respondent No. 1, herein was in possession of the said land in part performance of the said agreement of sale and his possession was protected u/s 53-A of the Transfer of Property Act. It is of considerable significance that according to the findings recorded in the said judgment, the respondent No. 1, had paid the entire stipulated price for purchase of the said land by 1960.

(b) Thereafter, second round of litigation started. The respondent No. 1. made an application for eviction of the petitioner from the said land to the Sub Divisional Officer, Wani, invoking section 9(3) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. In the said application filed by the respondent No. 1 some time in the year 1980, the respondent No. 1 contended that the said land constituted a fragment and the possession of the said land was transferred to Bapurao Ragho Dethe the petitioner herein-without the permission of the Competent Authority. In the said application, the respondent No. 1, averred that the petitioner herein had failed to apply for regularization of the transfer and the petitioner was, therefore, liable to be evicted from the said land. The petitioner resisted the said application by contending that the petitioner's possession of the said land was lawful and the same was not prohibited by law.

(c) By an order dated 19th November, 1981, the Sub Divisional Officer at Wani allowed the said application and directed that the petitioner shall be evicted from the said land. The Sub Divisional Officer came to the conclusion that the impugned transaction was prohibited by the provisions contained in the above-referred Act and the said transaction was, therefore, liable to be treated as void u/s 9(1) of the Act. The said Ganpati Vithu Rohankar was a party to the said transaction. By the said impugned order dated 19th November, 1981 the said Ganpati Vithu Rohankar was directed to pay a fine of Rs. 100/- for having entered into transaction of transfer of the said land without the permission of the Competent Authority even though the said land constituted a fragment within the

meaning of the said Act according to the findings recorded in the said order. By the appellate order dated 30th September, 1993, the order passed by the Sub Divisional Officer was confirmed.

4. The learned Counsel for the petitioner had submitted that the impugned transaction was lawful and the said transaction was not at all affected by the provisions contained in the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The learned Counsel for the petitioner has invited attention of the Court to the definition of "Fragment" as contained in section 2(4) of the said Act. The said definition reads thus:

"Fragment" means a plot of land of less extent than the appropriate standard areas determined under this Act:

Provided that no plot of land shall be deemed to be a fragment by reason of any diminution in its area by diluvion."

The learned Counsel for the petitioner has invited the attention of the Court to notification No. CON. 3360/33065-M published in the Official Gazette on 17th May, 1962 issued by the Government of Maharashtra in exercise of powers conferred on it by sub-section (3) of section 5 of the said Act. By the same notification the Government of Maharashtra gave public notice of the standard area specified in column 4 of the Schedule annexed thereto, which the Government of Maharashtra has determined under sub-section (1) of the said section 5 for the class of land specified in column 3 thereof in the local area or areas specified in column 1 of the said Schedule. Schedule 4 of the said notification is directly relevant for our purpose. Schedule 4 of the said notification is extracted hereinafter:

-- Serial Local Area or Areas Class Minimum No. District Tahsil of Area. land. 1			
2	3	4	-----
-----	A. G. 4.	Yeotmal (1) Yeotmal Tahsil Jirayat 3 0 excluding the (Dry Crop) area comprised Tari: 1 20 in Yeotmal Garden: 0 20 Municipality.	
	(2)	Darwha Tahsil excluding the area comprised in Darwha Municipality.	
	(3)	pusad Tahsil excluding- (i) the area comprised in Pusad Municipality. (ii) the area comprised in Unmarked Municipality	
	(4)	Kelapur Tahsil excluding (i) the area comprised in Pandharkawada Municipality (ii) the area comprised in Ghatanji Municipality	
	(5)	Wani Tahsil excluding the area comprised in Wani Municipality. -----	

5. The learned Counsel for the petitioner submitted with considerable force that the said land could not be construed as a fragment at the material time as the impugned transaction was of the year 1960 and the possession of the said land was also handed over by the respondent No. 1, to the petitioner in the year

1960. The learned Counsel for the petitioner pointed out that even the entire payment of price was already made by the petitioner to respondent No. 1, in the harvest in the year 1960 as recorded in the judgment of the learned Assistant Judge, in Civil Appeal No. 51 of 1972. The learned Counsel for the petitioner submitted that in the year 1960, standard area was not determined by the appropriate authority and thus it could not be said that the area of plot of land in question was of less extent than the standard area. The question to be asked is as to what was the situation as on the date of the transaction. The learned Counsel for the respondent No. 1, submits that the said notification dated 17th May, 1966, must have retrospective effect and once the standard area was determined, it would affect the transaction in respect of plot of land of less extent than the standard area even if the impugned transaction was entered into prior to determination of standard area. It is not possible to accept this submission. The said notification dated 17th May, 1962 is prospective in character and not retrospective. Normally, no subordinate legislation or notification can be retrospective. Only where the enabling Act expressly or by necessary implication authorises the authority to issue notification with retrospective effect and the authority exercises such power making the notification retrospective, the notification issued by the appropriate authority may be treated as retrospective. There is nothing in the impugned notification to show that the notification was intended to be made operative from retrospective. There is nothing in the provisions of the Act that the appropriate authority could determine the standard area with retrospective effect.

6. The learned Counsel for the respondent No. 1, invited the attention of the Court to section 31-AA of the Act. Section 31-AA of the Act provides for validation of transfers made before 15th day of November, 1965 subject to the conditions specified therein. Section 31-AA of the Act is applicable only to such transfers which are in contravention of the provisions of the Act. It does not follow that all transactions of transfers prior to 15th November, 1965 may be deemed to be transactions in contravention of the provisions of the Act. Section 31-AA is general in its nature. In my judgment, section 31-AA has no applicability in this case. In my judgment, the impugned transaction did not contravene any of the provisions of the Act at the time of transaction entered into and completed. Merely because the respondent No. 1 has not executed the sale deed, it makes no difference. The transaction was substantially completed in the year 1960 and the respondent No. 1 cannot be allowed to take advantage of his own wrong. The findings recorded in the judgment delivered by the learned Assistant Judge in Civil Appeal No. 51 of 1972 are binding on the parties.

7. Both the authorities below have erroneously assumed that the impugned transaction was invalid and the petitioner was liable to be evicted from the said filed in view of the fact that the petitioner had not applied for validation of the transaction as permissible u/s 31-AA of the Act. It is not quite clear as to whether attention of the two authorities below was specifically invited to the notification dated 17th May, 1962 referred to hereinabove. Even if the attention

of the authorities below was not invited to the said notification, the High Court is bound to take into consideration the effect of the said notification. The impugned orders thus suffer from error of law apparent on the fact of record. The said errors are jurisdictional errors.

8. At an earlier stage, this petition was on the Board of Brother Justice Mane. By an order dated 15th February, 1993, Brother Justice Mane directed that the petition shall not be treated as part heard. The learned Judge passed a brief order highlighting the question which was required to be gone into before this petition was decided. In the said order, the learned Judge observed that the courts shall have to address itself to the question as to whether the consolidation scheme was made under the Act and whether such scheme was made applicable to the village where the land in dispute is situated. With respect, the question of consolidation scheme appears to be irrelevant in this case in view of the fact that the relevant Notification was not in force on date of the transaction. Since the transaction is of the year 1960 and the relevant notification was issued only on 17th May, 1962, the transaction is not at all affected by the provisions of the Act and the plot of land in question cannot be considered as fragment under the Act.

9. The learned Counsel for the respondent No. 1, has pointed out that the Bombay Prevention of Fragmentation and Consolidation of Holding Act, 1947 was applied to Vidarbha Region with effect from 1st April, 1959. The learned Counsel submits that accordingly the impugned transaction shall have to be treated as contrary to the provisions of the said Act as the transaction was for a plot of land admeasuring about 2 acres when the standard area determined by the appropriate authority was 3 acres. It is common ground that the standard area was determined for the first time by notification published in the Official Gazette on 17th May, 1962. It is not possible to accept the submission of the learned Counsel for the respondent that the transaction is hit by the provisions of the said Act even though no such notification was in force on the date of transaction. Merely because the provisions of the Act was extended to Vidarbha Region from 1st April, 1959, the plot of land in question did not become a fragment in the absence of determination of the standard area by appropriate authority. I think I have dealt with all the contentions addressed at the Bar.

10. In the result, the petition succeeds. The petition is allowed. Rule is made absolute. Both the impugned orders dated 19th November, 1981 (Annexure D to the petition) and 30th September, 1983 (Annexure E to the petition) are quashed and set aside. Having regard to the facts and circumstances of the case, there shall be no order as to costs.