
(2012) 01 BOM CK 0112
In the Bombay High Court
Case No : Writ Petition No. 3652 of 2011

Bhimrao Kale

APPELLANT

Vs

Sambha Mudhal and Others

RESPONDENT

Date of Decision : 23-01-2012

Acts Referred:

Citation : (2012) 2 ALLMR 682 : (2012) 3 BomCR 311 : (2012) 3 MhLj 756

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : V.D. Salunke, for the Appellant; V.N. Yelnoorkar, Advocate for Respondent No. 1 Mr. N.H. Borade, A.G.P. for Respondent Nos. 2 to 4, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith. With the consent of the parties heard finally.

2. This writ petition takes exception to the order dated 10-11-2008 passed by the Tahsildar, Kalamnuri and the judgment and order dated 23-10-2009 passed by the Deputy Collector, Hingoli in Appeal No.TNC/1/2009 and the judgment and order dated 26-04-2011 passed by the Maharashtra Revenue Tribunal, Aurangabad in Case No.43B2009 H.

3. When this petition was heard for admission on 18-05-2011, the parties are directed to maintain status in respect of the suit property, same order is continued time to time till date.

4. The back ground facts as disclosed in the writ petition are as under :

? The land in dispute is Survey No.131 converted into Gat No. 660 admeasuring 9 Acres 39 Gunthas situated at village Yehalegaon (Tu), Tq. Kallamnuri, District Hingoli. One Madanlal Dahiwal was the original owner of the said land. Narayan Sitaram Mudhal was declared as protected tenant over the said land u/s 38 of

Hyderabad Tenancy and Agricultural Lands Act,1950. (For short, "said Act").

5. It is the case of the petitioner that, respondent No. 1 agreed to sell suit land to the present petitioner and accordingly, executed agreement to sell on 06-12-1976 for consideration of Rs.10,000/-. It is further case of the petitioner that, respondent No.1 also executed "Karnama" on 25-11-1979 stating therein that, if he could not sell the disputed land to the petitioner, then he will execute sale deed of his own land situated at Belmandal Taluka Kalamnuri District Hingoli.

6. It is further case of the petitioner that, on 28-10-1987 the Additional Tahsildar, Kalamnuri initiated suo moto proceedings u/s 98C of the said Act for declaration whether the said alienation by agreement to sell dated 06-12-1976 is valid or not. The Tahsildar issued notice to the parties and after hearing both the parties, Additional Tahsildar, Kalamnuri by order dated 26-10-1987 declared that, the agreement to sell dated 06-12-1976 is in contravention of sub section 1 of Section 50B of the said Act. It further appears that, the Tahsildar declared the said agreement as invalid u/s 50B of the said Act. It is the case of the petitioner that, in the said order, it was observed that, if the tenant wants to take possession, he can seek remedy u/s 98 of the said Act.

7. Being aggrieved by the judgment and order dated 26-12-1987 passed by the Tahsildar, the petitioner herein filed the appeal before the Deputy Collector, Parbhani. The said appeal came to be allowed by the judgment and order dated 06-07-1991.

? Being aggrieved by judgment and order dated 06-07-1991 by the Deputy Collector, the respondent No.1 filed Revision before the Additional Collector, Hingoli, which came to be allowed.

? It is the case of the petitioner that, the provisions of the Maharashtra Land Revenue Code are not applicable to the proceedings which were initiated under the provisions of the Tenancy Act. However, the Additional Collector entertained the revision and same came to be allowed. The Additional Collector in the said order, while allowing the said revision filed by the respondent No.1 herein, asked respondent No. 1 herein to file separate application for possession.

? The petitioner herein being aggrieved by the order of the Additional Collector in Revision, preferred revision petition u/s 90 of the said Act before the Divisional Commissioner, Aurangabad, however, same came to be rejected on 08-02-2006. Being aggrieved by the said order, the petitioner herein preferred Writ Petition No. 2993 of 2006 which came to be rejected on 13-03-2008. The petitioner further carried the matter to the Supreme Court, however, the SLP filed by the petitioner came to be rejected on 22-09-2008.

8. It is the case of the petitioner that, meanwhile respondent No.1 herein filed application before the Deputy Collector, Hingoli u/s 98C for possession of the disputed land, whereas the petitioner and other concerned persons were made respondents. It is the case of the petitioner that, no notice was served upon the

petitioner in the said proceedings and without giving opportunity of hearing, the Deputy Collector allowed the said application by order dated 29-04-2006, whereas he directed the Tahsildar, Kalamnuri to take land in possession u/s 98C sub section-2 and take further action. The said order came to be passed on 29-04-2006. The copy of the said order is placed on record for perusal. It is the case of the petitioner that, the said order was not within the knowledge of the petitioner and therefore said order could not be challenged. Subsequently, respondent No.1 herein submitted the application to the Tahsildar, Kalamnuri for possession of the said land on 06-07-2008. It is the case of the petitioner that, when notice in such proceedings was served upon the petitioner, the petitioner came to know about the order passed by the Deputy Collector, on 29-04-2006. The petitioner challenged the said order by way of filing the appeal before the Maharashtra Revenue Tribunal, Aurangabad bearing Appeal No.41/A/H/2008 which is still pending.

? It is further case of the petitioner that, the Tahsildar, Kalamnuri has no jurisdiction and power to accept and decide the application for possession u/s 98A of the said Act. However, the application submitted by respondent No.1 for possession was entertained by the Tahsildar, Kalamnuri and by order dated 06-11-2008 the Tahsildar, Kalamnuri allowed the application, but told respondent No.1 to file application before Deputy Collector u/s 98A of the said Act for the possession of the suit land. On 10-11-2008 Tahsildar, Kalamnuri issued letter to the Circle Inspector and directed him to take land Gat No. 660 in Government possession.

9. It is the case of the petitioner that, actual possession of the said land is not taken, but back dated panchnama was prepared stating that, possession is taken on 21-01-2009. It is further contention of the petitioner that, possession of the said land cannot be taken since on 20-01-2009 there was stay granted by the Deputy Collector to the order passed by the Tahsildar.

? It is further case of the petitioner that, the petitioner's appeal was pending before the Deputy Collector against the order of the Tahsildar dated 10-11-2008 directing the Circle Inspector to take the land in Government possession. The Deputy Collector was pleased to reject the application and directed the authorities working under him to hand over possession of the land to respondent No.1. Being aggrieved by the said order, the petitioner herein filed revision before the Maharashtra Revenue Tribunal, Aurangabad which came to be rejected on 26-04-2011, hence, this writ petition.

10. The Counsel appearing for the petitioner invited my attention to the pleadings and grounds taken in the petition, annexures thereto and also to the orders of the Tahsildar and also by the Deputy Collector time to time in the proceedings either filed by the petitioner or by the respondent No.1. The main contention of the Counsel for the petitioner is that, in the earlier order passed by the Deputy Collector as back as in 2001, the Deputy Collector though allowed the revision, however, respondent No.1 was told to file separate application to get

possession of the land in dispute. Therefore, according to the learned Counsel for the petitioner, pursuant to the said order, respondent No.1 herein did file application before the Deputy Collector for possession of the land in dispute. The learned Counsel further submits that, the order passed by the Deputy Collector on 29-04-2006 was without hearing the petitioner. The petitioner came to know about the said order, when he received the notice from Tahsildar in other proceedings i.e. in Case No.2008/Land/KV. It is admitted position that, the appeal filed by the petitioner bearing No.41A2008H against the said order, is pending before the Maharashtra Revenue Tribunal, Aurangabad. The learned Counsel further submits that, filing application u/s 98C and filing application u/s 98 for possession of the land requires separate adjudication and it has different consequences. According to the Counsel for the petitioner, the application filed by respondent No. 1 before Tahsildar itself was not maintainable since respondent No. 1 was granted liberty to file application for possession of the said land before the appropriate authority. The learned Counsel further submits that, the Tahsildar had no power to entertain the application entertaining the prayer of respondent No.1 for possession of the land in dispute since such powers are with the Deputy Collector u/s 98A of the said Act.

? The learned Counsel for the petitioner further submits that, the order passed by the Tahsildar is contradictory. The operative part of the order mentions that the application is allowed, however, further order reads that, respondent No. 1 should file application under the provisions of Section 98 of the said Act before the Deputy Collector for possession of the land in dispute. Therefore, according to the Counsel for the petitioner, in the first instance, Tahsildar was not competent to entertain such application and secondly, when Tahsildar himself has expressed in his order that if respondent No.1 wish to take possession of the land in question, in that case he should file application u/s 98 of the said Act and therefore, subsequent order passed by the Tahsildar on 10-11-2008 directing the Circle Inspector to take possession of the land and to keep it in possession of Government was itself without jurisdiction and when the application of respondent No.1 is pending u/s 98 before the Deputy Collector and also the appeal of the petitioner is also pending before the Maharashtra Revenue Tribunal. Therefore, according to the Counsel for the petitioner, the said order of the Tahsildar was without jurisdiction, the said order was assailed before the Deputy Collector, the Deputy Collector by order dated 20-01-2009 granted stay to the said order. However, the Tahsildar by preparing panchnama in his office on 21-01-2009 prepared the record showing possession is taken on 21-01-2009 by the Tahsildar. The Counsel for the petitioner further submits that, when there was stay in operation which was granted by the Deputy Collector on 20-01-2009, there was no question of preparing any record dated 21-01-2009 about taking the land in Government possession.

11. The learned Counsel for the petitioner further invited my attention to Exhibit O at Page65 i.e. judgment and order passed by the Deputy Collector, Hingoli challenging the order dated 10-11-2008 passed by the Tahsildar, Kalamnuri

thereby directing the Circle Inspector to take possession of the disputed land and retain the possession of the said land with the Government. It is the contention of the Counsel for the petitioner that, in Appeal No. TNC1/ 2009 which was filed by the petitioner herein, the Deputy Collector, travelled beyond the pleadings and prayers of the appellant and while dismissing the said appeal, directed to give possession of the land in question to respondent No.1. It is the contention of the Counsel for the petitioner that, the appeal was filed by the petitioner aggrieved by the order of the Tahsildar directing the Circle Inspector to take possession of the land in question and retain it with the Government. Therefore, according to the Counsel for the petitioner, there was no occasion for the Deputy Collector to travel beyond the pleadings and prayers in appeal and to give further direction to hand over possession of the land in question to respondent No.1. According to the Counsel for the petitioner, this order of the Deputy Collector is in excess of jurisdiction. The Deputy Collector should have confined himself to the pleadings and prayers of the appeal. He further submits that, application for possession u/s 98 of the said Act which was filed by respondent No. 1, is pending before the Deputy Collector and the appeal before the Maharashtra Revenue Tribunal, by the petitioner is also pending and therefore, the order should not have been passed by the Deputy Collector.

? The learned Counsel for the petitioner submits that, while passing such order of taking possession and handing over it to other person, procedure is prescribed u/s 98 of the said Act. The firstly, person who is in possession of the property is required to be evicted after following proper procedure and thereafter only another person can be put in possession. Therefore, according to the Counsel for the petitioner, the order passed by the Deputy Collector on 23-10-2009 in Appeal No. TNC1/ 2009 was in excess of jurisdiction or passed beyond the prayers and pleadings in the appeal, therefore, said order was challenged before the Maharashtra Revenue Tribunal, Aurangabad. However, Maharashtra Revenue Tribunal without appreciating the contentions of the petitioner that the Tahsildar and also the Deputy Collector exceeded their jurisdiction, merely endorsed findings recorded by the Tahsildar and also the Deputy Collector. Therefore, this petition deserves to be allowed.

12. The learned Counsel for the petitioner, in support of his contention that, while taking and handing over possession, procedure u/s 98 of the said Act is required to be followed, placed reliance upon the reported judgment in the case of Dnyanoba Deorao Ugle and others Vs. Shaikh Hussain deceased through his L.Rs., . Relying upon the said judgment, the Counsel for the petitioner would submit that, in the first instance, while entertaining the prayer for possession, the procedure u/s 98 of the said Act is required to be followed and secondly, if the tenant has entered into agreement to sell, whether such tenant is entitled to be placed in possession of the said land, is also required to be considered by the authority.

? The learned Counsel for the petitioner invited my attention to the judgment of

the Division Bench of this Court in the case of Husein Miya Dosumiya vs. Chandubhai Jethabhai and another reported in 1954 BCI 103 and in particular para5 of the said judgment. The Counsel for the petitioner submits that, since the order passed by the Tahsildar is without jurisdiction, same order is a nullity and therefore, the said order cannot be acted upon. The order passed by the Deputy Collector rejecting the appeal of the petitioner and further giving direction to put respondent No.1 in possession of the suit land is also beyond the scope of appeal, which was filed by the petitioner before the said authority. Therefore, the Counsel for the petitioner relying upon the pleadings in the petition, grounds taken therein, annexures thereto and the judgments cited supra, would submit that, the petition may be allowed.

13. The learned Counsel for the petitioner also submits that, the alleged panchnama dated 03-05-2011 is prepared without notice to the petitioner. It is further submitted that, the petitioner is in physical possession of the land in question. It is further submitted that, in view of the stay order dated 20-01-2009 by the Deputy Collector any further action in respect of taking over possession is illegal and without following any procedure. Therefore, the learned Counsel for the petitioner would submit that, the petition may be allowed.

14. On the other hand, the learned Counsel for the respondent No. 1 invited my attention to the affidavit in reply filed by him, which is a part of compilation of the writ petition from pages 82 to 87. The learned Counsel submits that, there was no agreement to sell at all between respondent no.1 and the petitioner, such agreement to sell is denied by respondent No.1. Possession of the suit land was never handed over to the petitioner. The petitioner forcibly dispossessed respondent No.1 from the said property in the year 1973. The learned Counsel further submits that, respondent No.1 is a protected tenant. The learned Counsel invited my attention to the findings recorded by the Maharashtra Revenue Tribunal in para6 and submitted that, it is not in dispute that the applicant i.e. respondent No.1 is son of Narayan Mudhal, who was declared as the statutory tenant of the suit land u/s 38E of the Tenancy Act. Therefore, according to the Counsel for respondent No.1, when it is admitted position that, he is declared as the statutory owner of the suit land, there is no question of any interference in the possession of the land in question by the petitioner, such possession was never given, nor agreement was entered between the parties.

? The learned Counsel further submits that, pursuant to the order of the Deputy Collector in 2001, respondent No. 1 did file application before the Deputy Collector which came to be decided on 29-04-2006. According to him, said order was passed by the Deputy Collector on an application filed by respondent No.1. The Counsel further submits that, another application was filed before the Tahsildar. The Tahsildar taking recourse to the relevant provisions has passed appropriate order and thereby directed the Circle Inspector to take possession of the land in question and retain the said possession with the Government. It is further submitted that, the Deputy Collector has power and accordingly, by order

dated 23-10-2009 the Deputy Collector has rightly ordered that respondent No.1 be placed in possession of the suit land. According to him, the application which was filed by him u/s 98 of the said Act for retaining possession of the land in dispute is also decided by way of said proceedings i.e. Appeal No. TNC1/ 2009. He further submits that, pursuant to the said order and pursuant to the order of the Tahsildar, respondent No.1 is given possession of the land in question on 03-05-2011. The learned Counsel further submits that, after this writ petition was filed, this Court granted status quo on 18-05-2011, however, by that time possession of the said land was taken by respondent No.1 and therefore, this writ petition has become infructuous due to possession and panchnama dated 03-05-2011. He submits that, respondent No.1 is in possession of the suit land.

15. The learned Counsel for respondent No.1 further submits that, alleged agreement to sell which was pleaded by the petitioner was the subject matter of the proceedings before the Tahsildar, Deputy Collector, Maharashtra Revenue Tribunal and this Court and before the Supreme Court and since those proceedings are concluded in favour of respondent No.1 and against the petitioner and respondent No.1 is held to be protected tenant. Therefore, this Court may not interfere in the extraordinary writ jurisdiction in the impugned judgments and orders which are assailed in this writ petition.

16. I have given due consideration to the rival submissions. Upon perusal of the order passed by the Deputy Collector, Hingoli in Appeal No. TNC1/ 2009, it is abundantly clear that, the said order is passed in appeal filed by the petitioner herein. Therefore, though the Counsel for respondent No.1 was at pains to argue that, the application u/s 98 of the said Act filed by respondent No.1 is also decided by the said proceedings, does not appear to be correct. The said proceedings are restricted only to the Appeal No. TNC1/ 2009. The said judgment and order is placed at Exhibit O at page 65 and 66 of the compilation of the writ petition. Upon careful perusal of the judgment and order passed by the Deputy Collector, it is abundantly clear that, the said judgment and order is confined to the Appeal No. TNC1/ 2009 which was filed by the petitioner, assailing the order of the Tahsildar dated 10-11-2008.

? The appeal is a valuable right of the parties. When any party approaches by way of filing appeal, necessarily authority has to restrict the judgment and order to the pleadings and prayers in the appeal. From careful perusal of the judgment and order placed at Exhibit O of the compilation of writ petition, it clearly emerges that, there was no occasion for the Deputy Collector to give direction No.2 i.e. direction to hand over the possession of the suit property to respondent No.1. I find considerable force in the arguments of the Counsel for the petitioner that, if the application is filed u/s 98 of the said Act and if such application is entertained, certain procedure is required to be followed. The person who is in possession of the property is also required to be evicted by taking appropriate steps as contemplated under the provisions of section 98 of the said Act. For ready reference Section 98 of the said Act reads thus :

98. Any person unauthorisedly occupying or wrongfully in possession of any land
- (a) the transfer of which either by the act of parties or by the operation of law is invalid under the provisions of this Act, or
 - (b) the management of which has been assumed under the said provisions, or
 - (c) to the use and occupation of which he is not entitled under the said provisions, may, if the said provisions do not provide for the eviction of such person, be summarily evicted by the Collector.

17. Therefore, from perusal of the provisions of section 98 of the said Act, in the first instance, the person who is in possession of the property may be in a wrongful possession or unauthorizedly occupying the property, is required to be evicted by following summary eviction. Said steps are required to be taken by the Collector. However, in the instant case, the order passed by the Deputy Collector is passed in appeal filed by the appellant where the petitioner who is appellant therein, has questioned the correctness of the order of the Tahsildar directing the Circle Inspector to take possession of the suit land and retain the same with the Government. Therefore, the said order of the Tahsildar was confined to the provisions of Section 98C of the said Act. However, the Deputy Collector in appeal filed by the petitioner travelled beyond the pleadings and prayers in the appeal and granted something which was not even asked by the respondent No.1 in the said proceedings. Therefore, though the Counsel for respondent No.1 strenuously contended that, even his application u/s 98A of the said Act has been allowed and decided by the Deputy Collector on 23-10-2009, said contention is required to be rejected since the Deputy Collector has only adjudicated and decided the Appeal No. TNC1/ 2009 filed by the petitioner herein.

18. Though the Counsel for respondent No.1 submits that, his application u/s 98A of the said Act is not pending before the Deputy Collector, in that regard it has to be observed that, if the application is not pending and decided u/s 98 of the said Act, it was open for respondent No. 1 to bring on record under which proceedings the said application is adjudicated and decided by the Deputy Collector separately, by giving opportunity to the petitioner to put forth his case. Nothing has been placed on record by respondent No.1 alongwith affidavit in reply to show that, his application u/s 98A of the said Act has been adjudicated and decided by the Deputy Collector, who is competent to hear and decide the said application and the decision is rendered thereupon by directing the authorities to give possession to respondent No.1 herein. Therefore, what is challenged in this writ petition is the order of the Deputy Collector dated 23-10-2009 in Appeal No. TNC01/ 2009 which is confirmed by the Maharashtra Revenue Tribunal.

19. On careful perusal of the judgment and order of the Maharashtra Revenue Tribunal, in para10 the Maharashtra Revenue Tribunal has mechanically confirmed the order passed by the Tahsildar and also the order passed by the Deputy Collector, without appreciating the contention of the petitioner that the

order of the Deputy Collector was in excess of his jurisdiction.

20. Therefore, for the reasons aforesaid, I am inclined to allow this writ petition. In the result, the judgment and order passed by the Tahsildar, Kalamnuri dated 10-11-2008 in Case No. 2008/Land/KV, confirmed by the Deputy Collector in Appeal No. TNC1/ 2009 and further confirmed by the Maharashtra Revenue Tribunal in Case No.43B2009H is quashed and set aside.

? Since the impugned judgments and orders passed by the Tahsildar, Deputy Collector and Maharashtra Revenue Tribunal are quashed and set aside, further question of continuing status quo order would not arise.

? The appeal filed by the petitioner herein and also the application, if any, filed by respondent No.1 is pending before the Deputy Collector, should be decided by the authorities and Maharashtra Revenue Tribunal within four months from today, in accordance with law.

? It is made clear that, this Writ Petition is allowed since order passed by the Tahsildar dated 21-02-2009 taking possession of suit land was in violation of stay order dated 20-02-2009 passed by the Deputy Collector and further the order passed by the Deputy Collector was beyond the prayers and pleadings of the Appeal. Therefore, it will be open for the Competent Authorities to take steps in accordance with law in the matter, if parties approaches by way of filing appropriate proceedings or in already pending proceedings.

21. Writ Petition is allowed to the above extent, same stands disposed of. Rule made absolute as indicated above.