

(1983) 10 BOM CK 0047

In the Bombay High Court

Case No : Writ Petition No. 4531 of 1976

Dattatraya Shankar Dixit and another

APPELLANT

Vs

Bhimrao Laxmanrao Bobde and others

RESPONDENT

Date of Decision : 07-10-1983

Acts Referred:

Transfer of Property Act, 1882 — Section 45

Citation : (1985) MhLj 105

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : P.D. Dharaskar, for the Appellant; L. Mohta, For respondents Nos. 1 and 2, B.N. Mohta and C.W. Moharir, For respondents 5(a) to (g), for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—This writ petition arises out of the proceedings under Sections 46 and 48 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (for short "Tenancy Act") before the Agricultural Lands Tribunal. Akola filed in 1963-64. The petitioners and the respondents nos. 4 and 5 are the joint owners of field survey no. 14 of village Nandapur, tahsil and district Akola admeasuring 17 acres and 23 gunthas. The respondent no. 1 and one Ramjiwan son of Rampratap Tiwari were the joint tenants of the aforesaid field survey no. 14. The said Ramjiwan died after the impugned order of the Maharashtra Revenue Tribunal. The respondents nos. 2 and 3 are his legal heirs. The Agricultural Lands Tribunal by the order dated 28-2-1974 held that the respondent no.1 and the deceased Ramjiwan were the co-tenants of the aforesaid field survey no.14 on 1-4-1961, and, therefore, the rights of ownership in respect of the said field vested in them on the said date u/s 46 of the Tenancy Act. In the appeal, the sub-Divisional officer remanded the proceedings back to the Agricultural Lands Tribunal for determining the question whether the land held by the tenants exceeded three family holdings as contemplated by section

42b of the Tenancy Act. The Agricultural Lands Tribunal, after remand, held that the land held by each of the two co-tenants including the suit land, does not exceed three family holdings and hence the said co-tenants are entitled to the rights of ownership u/s 46 of the Tenancy Act. The decision of the Agricultural Lands Tribunal is confirmed in appeal by the Sub-Divisional Officer and in revision by the Maharashtra Revenue Tribunal. Hence this petition.

2. The Learned Counsel for the petitioners has first urged that the holding of the landlords is less than one family holding and, therefore, in view of the then provisions of section 42(c) (deleted in 1962) of the Tenancy Act, the ownership cannot be conferred upon the tenant in respect of the suit field. Thus so far as this question is concerned, no such question is raised in the grounds taken in the instant writ petition before the authorities below and there is no material on record to show what the total holding of the landlords is. Apart from the fact that the said question cannot be allowed to be urged in writ jurisdiction orally for the first time during the hearing in the absence of any material on record, it cannot be held that the landlords had less than one family holding. This contention raised on behalf of the petitioners, therefore, fails and is rejected.

3. The Learned Counsel for the petitioners has then urged that there was a joint tenancy of the respondent no 1 and the deceased Ramjiwan in respect of the suit field and as such in calculating their three family holdings, the holding of both of them should have been taken together. It is not in dispute that the respondent no 1 as a tenure holder possessed 69 acres and 1.5 gunthas as agricultural land. The deceased Ramjiwan as a tenure-holder has 38 acres of land. The total agricultural land possessed by the respondent no. 1 and the deceased Ramjiwan comes to 107 acres and 1.5 gunthas. According to the petitioners, one family holding in the district of Akola is 28 acres. The three family holdings would, therefore, be 84 acres and since the total holding of the respondent no. 1 and deceased Ramjiwan exceeds 84 acres, the submission is that they are not entitled to purchase the suit field as per the provisions of sections 41 of the Tenancy act and since they are not entitled to purchase the suit field as per the provisions of section 41 of the Tenancy Act, the rights of ownership cannot vest in them on 1.4.1961 as per the provisions of section 46 of the Tenancy Act. All the tenancy authorities below have considered this aspect by considering the holding of each of the co-tenants separately and adding to the same, the half share from the suit field in regard to which the rights of ownership are claimed by them by virtue of provisions of section 46 of the Tenancy Act. The crucial question that is necessary to be decided, therefore is as to whether the character of possession of the respondent no.1 and the deceased Ramjiwan is that of joint tenants or as tenants in common ?

4. The contention on behalf of the petitioners is that there is no finding by the Tenancy Authorities that there is a separate 1/2 share of each of the co-tenants. Reliance is also placed upon the provisions of section 33(1) of the Tenancy Act to show that there cannot be any sub-division or sub-letting of the land held by the

tenant or assigning of any interest therein. The argument, therefore, is that since there cannot be any sub-division and since there is no evidence to show that each of the co-tenants is having half share in the suit field, the total holding of both the co-tenants must be taken into consideration in determining three family holdings for the purposes of section 42 b of the Tenancy Act. So far as the question whether their is joint tenancy or tenancy in common is concerned, it is well settled that in India there is a presumption that the tenancy would be the tenancy in common, unless it is shown that it is a joint tenancy. This is the view which this Court has taken in Mahomed Jusab Abdulla Vs. Fatmabai Jusab Abdulla, and the Full Bench of the then Lahore High Court has taken in AIR 1946 399 (Lahore) So Par as the Hindu Law is concerned, the same view is taken by the Supreme Court in the decision reported in Boddu Venkatakrishna Rao and Others Vs. Shrimati Boddu Satyavathi and Others, .

5. It is, therefore, necessary to see in the facts and circumstances of this case whether there is any evidence on record to show that the tenancy of the suit field is a joint tenancy. In this regard no material has been placed on record on behalf of the landlords to show that the character of the tenancy is joint tenancy. Although there is no firm finding that each of the co-tenants has half share in the suit field, the Additional Tahsildar, Akola, to whom a reference was made for determining the issue of tenancy, has found that both the co-tenants were bearing the" expenses over the cultivation and the lease-money equally. In this regard paragraph 2 of section 45 of the Transfer of Property Act is of assistance. According to paragraph 2 of section 45 of the Transfer of Property Act in the absence of any evidence as to the share, the co-tenants will be presumed to have equal interest in the property. In the absence of any evidence in this case, it will have to be presumed that each of the two co-tenants has half share in the suit field. The ground that there is no evidence in this case or any finding in this case about the share of each of the co-tenants does not help the petitioners. It is, therefore, to be held that the respondent no. 1 and the deceased Ramjiwan were the tenants in common in respect of the suit field no.14 admeasuring 17 acres and 23 gunthas and were having 1/2 share in the said suit field. If they are held as tenants in common, then while examining the question whether the holding of the tenants exceeded three family holdings, the holding of each of the co-tenants will have to be considered separately. I am supported in this view by a decision of this Court reported in Ganesh Govindrao vs. Narayan 1977 Mh. L.J. 906.

6. The Learned Counsel for the petitioners has urged that there is one indivisible tenancy unit and, therefore, while granting of ownership, separate shares cannot be taken into consideration. The emphasis is particularly upon the provisions of section 33(1) of the Tenancy Act. This point has also been considered in para 5 of the report of the decision of this Court cited supra (1977 Mh.LJ.906) wherein it has been held by this Court that it is one thing to treat the said tenancy as one and indivisible while it is another thing to say that the property held by the co-lessees is of the character of joint tenants. It has been further held in the said

case that the tenancy in favour of the respondents in the said case is to be treated as indivisible. However, at the same time, the right, title and interest of the four respondents in the said case in the lease-hold property bear the character of the tenants-in-common. Applying the ratio of this decision in the instant case, although in view of the provisions of section 33(1) of the Tenancy Act, and even otherwise the tenancy unit is one and is indivisible, so far as the right, title or interest of the respondent no.1 and the deceased Ramjiwan in the said tenancy is concerned, the same is that of tenants-in-common with the result that after the death of each of the co-tenants, the concerned shares would go to the heirs of the respective co-tenants. There is, therefore, no merit in the contention raised on behalf of the petitioners that the tenancy unit is one and indivisible, because what we are concerned with is the character of such tenancy.

7. Since the co-tenants held the tenancy as tenants-in-common, for the purposes of determining the question whether their holdings would exceed three family holdings, the holding of each of the co-tenants would have to be considered separately to which half share of each in the suit field would have to be added. It is not in dispute that if the total holdings of each of the co-tenants is calculated separately, the holding of each of the co-tenants including the share in the suit field does not exceed three family holdings with the result that the condition of section 42b of the Tenancy Act would not be attracted and each of the co-tenants would be entitled to purchase the land u/s 41 of the Tenancy Act. As such the co-tenants would become the owners of the suit field holding the same again as tenants-in-common. It is worthwhile to note that section 57(1) of the Tenancy Act, after its amendment which is deemed to have always been made, does not put any restriction on partition and, therefore, the co-tenants can partition the suit field in question after they become owners of the same by virtue of the provisions of section 46 of the Tenancy Act. The finding rendered by the Tenancy Court in this regard is correct and has, therefore, to be upheld.

8. In the result, the writ petition is dismissed. However, there would be no order as to costs in this writ petition.