

(1957) 08 BOM CK 0020

In the Bombay High Court

Case No : Special Civil Application No's. 46 and 54 of 1956

Doshi Prabhudas Girdharlal

APPELLANT

Vs

State of Bombay

RESPONDENT

Date of Decision : 26-08-1957

Acts Referred:

Barkhali Abolition Act, 1951 — Section 2(i), 5, 7, 7(3), 8(1), 8(1)(a), 8(2)(a), 8(1)(b), 8(2), 10(2)(e), 12, 12(1), 15, 35, 39(2)
Constitution Of India, 1950 — Article 227

Citation : (1958) 60 BOMLR 815

Hon'ble Judges : M.C. Shah, J;K.T. Desai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

K.T. Desai, J.—These are two petitions filed before us under Article 227 of the Constitution of India. As the principal question for determination is common to both the petitions and as it arises out of one application made to the Mam-latdar under the Saurashtra Barkhali Abolition Act, 1951, it is agreed between the parties that the petitions should be hoard together and that there should be one judgment delivered in respect of both the petitions.

2. Doshi Prabhudas Girdharlal and Mohanlal Mathuradas, acting as Vahivat-dars of two separate joint families, made an application before the Mamlatdar for the allotment of 5 acres and gunthas of land situate at Mahuva of which they were the Barkhalidars for the purpose of personal cultivation. They had given that land to one Ghanchi Alibhai Gandabhai as a tenant. After the death of Ghanchi Alibhai, his eldest son Balubhai, who is opponent No. 3 in both the petitions, carried on the vahivat of Alibhai Gandabhai Opponent No. 3 as such Vahivatdar was, at the date of the application before the Mamlatdar, a tenant in respect of 80 bighas i.e. 32 acres of land belonging to Gopnathji. The Mamlatdar, who heard the application, took the view that these 80 bighas of land were liable to be taken into account under the provisions of Section 8(1)(a) of the Barkhali Abolition Act,

1951, as opponent No. 3 was in possession thereof as a tenant of Gopnathji and was cultivating the same. He held that the applicant Barkhalidars were entitled to be allotted for personal cultivation the whole of 5 acres and 7 gunthas of land situate at Mahuva in respect whereof the application had been made by them. He accordingly held that they were entitled to an occupancy certificate in respect of the whole of that land. This decision of the Mamlatdar was given on September 11, 1953. The applicants' case is that these 5 acres and 7 gunthas of land had been partitioned between the persons represented by the Vahivatdar Doshi Prabhu-das Girdharlal and the persons represented by the Vahivatdar Mohanlal Mathuradas and that on such partition the northern portion of that land consisting of 6 bighas and 7? gunthas (1 acre being equivalent to 2? bighas) had come to the share of the persons represented by Vahivatdar Doshi Prabhudas Girdharlal and the remaining 6 bighas and 7? gunthas had come to the share of the persons represented by the Vahivatdar Mohanlal Mathurdas. After this partition each Vahivatdar was in separate possession and enjoyment of the land coming to the share of the persons represented by him. On January 1, 1953, an agreement was entered into between opponent No. 3 and the persons doing the vahivat of Gopnathji for the surrender of 80 bighas of land held by opponent No. 3 as the tenant of Gopnathji. On October 8, 1953, these 80 bighas of land were surrendered by opponent No. 3 to Gopnathji. On November 18, 1953, opponent No. 3 as such Vahivatdar being dissatisfied with the order passed by the Mamlatdar on September 11, 1953, filed an appeal before the Deputy Collector. Thereafter on August 31, 1954, opponent No. 3 and his brothers entered into an agreement with Doshi Prabhudas Girdharlal and those represented by him for the purchase of the northern portion of the aforesaid land admeasuring 6 bighas and 7? gunthas at or for the price of Rs. 5,701. That agreement for sale is exh. 3 to the petition. Under the terms of that agreement a sum of Rs. 2,000 was paid as and by way of earnest on the date of the execution of the said agreement. A further sum of Rs. 701 was paid by way of further earnest money on September 4, 1954. Under the terms of the said agreement for sale, it was provided that the appeal that was pending between the parties to that agreement before the Deputy Collector should be withdrawn. On September 10, 1954, an application was made to the Deputy Collector, before whom the appeal was pending, by opponent No. 3 as such Vahivatdar and Doshi Prabhudas Girdharlal for himself and as the Vahivatdar of the joint family represented by him. In that application it was stated that the appellant before the Deputy Collector had entered into an agreement for purchase of the separate share and interest of the family represented by Doshi Prabhudas Girdharlal for a sum of Rs. 5,700 and that a sum of Rs. 2,700 had been paid by way of earnest. It was further stated that the balance of Rs. 3,000 was to be paid by Posh Sud 2nd, Samvat Year 2011 and a conveyance in respect of the said property was to be executed. A copy of the said agreement for sale was produced along with that application. By that application, it was prayed that the Deputy Collector should hold that it was not necessary to proceed with the appeal in relation to the portion of land agreed to be sold as aforesaid, and that proper orders should be passed. It appears that no

separate orders were passed on that. application. The appeal was heard and finally decided on November. 10, 1954. The order made by the Deputy Collector in appeal is exh. 5 in the case. In the course of his judgment the learned Deputy Collector observes that he was required by both the parties to accept the agreement that had been entered into for the sale of northern half of the said land for the sum of Rs. 5,700 and that he should hear and decide the appeal in respect of the other half of that land. The learned Deputy Collector in the course of his judgment further observes that the appellant was the tenant of Gopnathji, that it was no fault of the respondents to that appeal that the appellant had voluntarily surrendered that land, that the appellant could have obtained an occupancy certificate in respect of that land which would have exceeded half an economic holding (one economic holding being of 32 acres of land) and that there was no reason why the respondents to that appeal should suffer. He held that the whole of the 5 acres and 7 gunthas of land should be allotted to the respondents to the appeal. He further held that as there was an agreement entered into in respect of half of that land the right of opponent No. 3 to pre-empt was recognised and that the occupancy certificate should be issued in respect of the remaining half of that land to those represented by Mohanlal Mathuradas. On December 27, 1954, a conveyance was executed in favour of opponent No. 3 and his brothers in respect of 6 bighas and 7? gunthas of land that had been agreed to be sold as aforesaid. That conveyance is exh. 6 in the case.

3. On January 5, 1955, opponent No. 3 as such Vahivatdar filed an application in revision before the Saurashtra Revenue Tribunal. He urged that the 80 bighas of land which had been held by him as a tenant of Gopnathji were not liable to be taken into account under the provisions of Section 8(1)(a) of the Barkhali Abolition Act, 1951. He contended that those lands were not "khalsa" lands in his possession and that he was entitled to the whole of 5 acres and 7 gunthas of land of the Barkhalidars. All the Barkhalidars including the Barkhalidars whose land had been purchased as aforesaid were made parties to the revision application. The Saurashtra Revenue Tribunal upheld the contention that the 80 bighas of land could not be regarded as khalsa land and that it was not liable to be taken into account under the provisions of Section 8(1) of the said Act. The Revenue Tribunal held that opponent No. 3 as such Vahivatdar was entitled to the occupancy certificate in respect of the whole of 5 acres and 7 gunthas of land of the Barkhalidars. It made an order setting aside the decisions of the Deputy Collector and of the Mamlatdar. The Revenue Tribunal held that the Barkhalidars were not entitled to be allotted any land for the purpose of personal cultivation. The Revenue Tribunal remanded the matter back to the Mamlatdar for the purpose of determining the question of compensation payable by the tenant, From this order of the Saurashtra Revenue Tribunal, two petitions have been filed before us under the provisions of Article 227 of the Constitution and we are asked "to revise the said decision of the Revenue Tribunal and to order that the decision of the Deputy Collector given on 10.11.1954 be held to be final and

binding on the parties." One of the petitions has been filed by Doshi Prabhudas Girdharlal and the other has been filed by Mohanlal Mathuradas. These two petitions have not been filed by the respective petitioners in their representative capacity. There are other formal defects in the petitions. As no preliminary objections have been urged before us and the matter has been argued at some length and as important questions have arisen for consideration we will proceed to deal with the same.

Section 8(1)(a) of the Saurashtra Barkhali Abolition Act, 1951, runs as under:

(1) A Barkhalidar in whose estate the agricultural land is equal to two economic holdings or less and who is not a Chakariat, Dharmada Institution, or Jivaidar for life, shall be allotted land for personal cultivation in the following manner:

(a) each of his tenants shall first be given half an economic holding, including any Khalsa Land in possession of such tenant.

A controversy has arisen as regards the meaning to be given to the expression "Khalsa Land". Section 5 of the Act provides as follows:

On the commencement of this Act, or on the date of the notification issued under Clause (i) of Section 2, as the case may be, all rights, title and interest of all the Barkhalidars in agricultural lands comprised in Barkhali Estate shall cease and be vested in the State free from all encumbrances, subject to the provisions of this Act.

It is urged that by reason of Section 5 of the Act all Barkhali lands have been turned into Khalsa lands and the expression "Khalsa Land" appearing in Section 8(1)(a) must cover such erstwhile Barkhali lands. The term "Khalsa land" has not been defined in the Act. That expression is a well-known expression with a definite meaning. Prior to the Barkhali Abolition Act, 1951, and the Land Reforms Act, 1951, there were two different classes of land in Saurashtra, viz., Khalsa land and non-Khalsa land. Khalsa lands comprised lands belonging to the State and held by occupants directly from the State. Khalsa lands were those lands in respect whereof land revenue was not alienated. Barkhali land and Girasdari land were non-khalsa lands. The expression "Khalsa land" is used at various places in the Act. By Section 8(1)(b) of the Act it is provided that if there remains any Barkhali land after giving land to the tenant u/s 8(1)(a), the Barkhalidar shall be given land to make up half an economic holding, including Gharkhed and Khalsa land in his possession, if any. In this sub-section both the expressions "Barkhali land" and "Khalsa land" are used. If the expression "Khalsa land" included all the Barkhali lands which vested in the State by reason of the provisions of Section 5, then it would not have been proper for the Legislature to use the expression "Barkhali land" at all in Section 8(1)(b). If the contention of the petitioners is right, all Barkhali lands would cease to be Barkhali lands on the commencement of the Act and would have to be termed "Khalsa lands". It would not then have been proper for the Legislature to refer to such Khalsa lands as Barkhali lands. As both the expressions "Khalsa land" and "Barkhali land" have been used at

various places in the Act, they must be given a separate and a distinct meaning. If the expression "Khalsa land" was not given such a separate and distinct meaning in Section 8(1)(a), then the words "including any Khalsa land in possession of such tenant" would not be apt. This is made clear when one refers to the provisions of Section 8(1)(a) and Section 10(2)(e) of the Act. When an application is made by a Barkhalidar for allotment of land for personal cultivation, he has in the application to specify the area of Khalsa land, if any, in his possession. This obviously could not refer to the Barkhali land of his which under the provisions, of Section 5 has vested in the State. Similarly, when one refers to the provisions of Section 10(2)(e), the tenant, when he applies for acquisition of occupancy rights, has to specify whether he held any Khalsa lands and, if so, its area and location. The reference to Khalsa lands in that section is a reference to lands other than the Barkhali land of which he is the tenant. In our opinion, the expression "Khalsa land" used in Section 8(1)(a) clearly refers to land other than the Barkhali land which has vested in the State by virtue of Section 5 of the Act. It refers to such land as was regarded as Khalsa land immediately prior to the commencement of the Act. On this interpretation of the provisions of Section 8(1)(a) of the Act, the 80 bighas of land in the possession of opponent No. 3 as such Vahivatdar was not Khalsa land and was under no circumstances liable to be taken into account and opponent No. 3 as such Vahivatdar was entitled to retain the whole of the said 5 acres and 7 gunthas of land. In the result the petition filed by Mohanlal Mathuradas must fail.

4. On behalf of Doshi Prabhudas Girdharlal it is urged before us that the Revenue Tribunal acted without jurisdiction in making an order in respect of the land which had been sold to opponent No. 3 and his brothers. It is urged that an order had actually been passed by the Mamlatdar in respect of that land allotting the same to the Barkhalidars and that once an order of allotment had been made, the Barkhalidars were entitled to deal with and dispose of that land in any manner they liked. It is further urged that in any event it had been agreed that the appeal that had been filed by opponent No, 3 as such Vahivatdar before the Deputy Collector in connection with that land should be withdrawn, that thereafter nothing remained to be done with regard to that land by the Deputy Collector and that the revenue Tribunal had no jurisdiction to pass any orders or give any directions respecting that land. In reply it is urged that a mere order of allotment u/s 8(1)(a) does not vest in the person, in whose favour the order is made, any occupancy rights in the property; that until such occupancy rights are acquired, they cannot be dealt with or disposed of; and that it is only where the order of allotment is followed up by an occupancy certificate that occupancy rights are acquired. It is further urged by way of reply that so far as the Deputy Collector was concerned, the appeal in connection with that land was not, in fact, withdrawn; that the agreement in connection therewith was placed before the Deputy Collector and he was asked to give recognition to the same; that as the appeal was not withdrawn so as to deprive the Deputy Collector of any right to deal with the matter and as he was asked to recognise the sale, he having

considered the agreement to be valid, recognised the same and passed the order which be thought proper; and that it was then open to the Revenue Tribunal in revision to interfere with the order so made if the Revenue Tribunal found that the order Avas improperly made.

5. As regards the first contention it will be necessary to refer to some of the provisions of the Act. Section 7 provides that after the receipt of an application from the Barkhalidar for allotment of land for personal cultivation the Mamlatdar after making an inquiry into the matter may pass an order ""making an allotment to the Barkhalidar of such land as may be specified in the order." Sub-section (3) of Section 7 provides that after making an order under Sub-section (2), "the Mamlatdar shall issue an occupancy certificate, in such form as may be prescribed, to a Barkhalidar" in respect of his Gharkhed and the land if any allotted to him under that section. Section 8(2)(a) provides that the Barkhalidar in respect of land allotted to him for personal cultivation under Sub-section (1), and the tenant in respect of land allowed to remain in his possession under the said ub-section, shall have a mutual right of pre-emption for ten years for lease or sale at a price to be determined by the Mamlatdar under the rules made under the Act. Section 15 provides that a Barkhalidar shall become an occupant in respect of his Gharkhed and in respect of land allotted to him u/s 7, subject to any conditions that may be imposed in the occupancy certificate in accordance with the provisions of Clause (a) of Sub-section (2) of Section 8 where applicable. There are provisions in the Act for the issue of a certificate to" the tenant. Section 12(1) of the Act provides that after making inquiry the Mamlatdar may pass an order,

specifying therein (a) the holding or the part thereof in respect of which the tenant may be declared to be an occupant,

and that after making an order under Sub-section (1), the Mamlatdar

shall issue an occupancy certificate in such form as may be prescribed in respect of the occupancy-holding, and the tenant shall become an occupant accordingly, subject to any conditions that may be imposed in the occupancy certificate in accordance with the provisions of Clause (a) of Sub-section (2) of Section 8 where applicable.

In the case of the tenant as well as of the Barkhalidar it is provided that they would become occupants subject to any conditions that may be imposed in the occupancy certificate in accordance with the provisions of Clause (a) of Sub-section (2) of Section 8 where applicable. That necessarily implies that they must obtain an occupancy certificate before they can be regarded as occupants. Their character as allottees is altered to that of occupants only on the issue of the occupancy certificate. The Mamlatdar no doubt is under an obligation to issue such certificate, but that does not imply that before such certificate is issued, the tenants or the Barkhalidars, who are merely allottees, become occupants and acquire all rights as occupants. An occupant acquires an interest in the property

which is both heritable and alienable. He takes the property subject to the conditions mentioned in the certificate. The language used in Section 12 makes it clear that the order of the Mamlatdar is merely to specify the holding or the part thereof in respect of which "the tenant may be declared to be an occupant". It further in terms provides that the Mamlatdar shall issue an occupancy certificate and that "the tenant shall become an occupant accordingly." So far as the tenant is concerned it is clear that he becomes an occupant only on the issue of the certificate. As regards the Barkhalidar, though the language is not as explicit, nothing different is intended. He becomes an occupant only on the issue of a certificate. It appears to us from the scheme of the Act that the issue of a certificate is necessary before a person can be called an occupant and is clothed with all the rights of an occupant. u/s 35 of the Act the Government has been empowered to make Rules for carrying out the purposes of the Act. It is further provided that such rules may prescribe the form of occupancy certificate under Sections 7 and 12. Form No. IX prescribed by the rules framed by the Government is headed "Form of Application by a Barkhalidar to acquire occupancy rights." Form No. X is the form of occupancy certificate u/s 15 of the Act. Its operative part is as follows:

It is hereby certified that the said Barkhalidar Mr. ?shall be deemed to be the occupant of the land described below subject to the conditions mentioned hereinbelow.

Form No. 12 is the form of occupancy certificate to be issued u/s 12 of the Act. Its operative part is as follows:

It is hereby certified that the said tenant Mr. ?shall be deemed to be the occupant of the land described below subject to the conditions mentioned hereinbelow.

It appears that the rules framed by the Government proceed on a construction similar to the one we have placed upon the provisions of the Act referred to above.

6. Our attention has been drawn to the provisions of the Saurashtra Land Reforms Act, 1951, which was passed at about the same time as the Barkhali Abolition Act, 1951, in furtherance of the land reforms scheme in the State of Saurashtra. Section 39(2) of that Act provides that a Girasdar

shall become an occupant in respect of his Gharkhed and the land allotted to him in accordance with the provisions of Chapter IV, as from the date of the issue of occupancy certificate.

7. The language used in that section is explicit and leaves no room for doubt. It is urged before us that similar language has not been used in Section 15 of the Barkhali Abolition Act, 1951, as the intention of the Legislature was to confer upon a Barkhalidar rights of an occupant even before the issue of an occupancy certificate. We do not think there is much substance in. this argument. In Section

15 of the Barkhali Abolition Act, 1951, it has been stated that a Barkhalidar shall become an occupant subject to any conditions that may be occupancy . If he is to become an occupant subject to conditions that may be imposed in the occupancy certificate, the occupancy certificate must be in existence before he can become an occupant. As Section 15 postulates the existence of an occupancy certificate, before occupancy rights are acquired it was not necessary to state that he shall become an occupant from the date of the issue of the occupancy certificate. Under the Saurashtra Land Reforms Act no conditions are imposed subject to which the Girasdar is to acquire occupancy rights. It was, therefore, necessary to state that a Girasdar would become an occupant as from the date of the issue of the occupancy certificate. In the present case no certificate had, in fact, been issued to Doshi Prabhudas Girdharlal or any other person in connection with the portion of the land purported to be dealt with by them under the agreement for sale dated August 31, 1954. Before the Mamlatdar could issue a certificate, an appeal was filed by opponent No. 3 as Vahivatdar before, the Deputy Collector. That appeal was one single appeal in respect of one order dealing with the whole area of land admeasuring 5 acres and 7 gunthas. Even when opponent No. 3 entered into the agreement for purchase in respect of one half of that land, he continued to challenge the order of the Mamlatdar, His agreement for purchase did not proceed on an acceptance of the order of the Mamlatdar relating to the allotment of the land to the Barkhalidars for personal cultivation. He did not want the appeal to be withdrawn completely. He wanted to proceed with the appeal so far as Mohanlal Mathuradas and those represented by him were concerned, and he wanted to challenge the order of the Mamlatdar, which was a single order relating to the whole of the area admeasuring 5 acres and 7 gunthas. He no doubt had provided under the agreement that the appeal so far as the vendors were concerned was to be withdrawn. The agreement to withdraw the appeal was however not acted upon. Instead of applying to the Court for withdrawal of the appeal against Prabhudas Girdharlal and those represented by him, an application was made to the Court to hold that it was not necessary to proceed with the appeal to the extent of one half of that land because of the agreement for purchase. The Court was asked to recognise the agreement. As the Deputy Collector was of the view that the Barkhalidars were entitled to the whole of 5 acres and 7 gunthas of land for personal cultivation, he passed an order to that effect. He then proceeded to direct the issue of an occupancy certificate in respect of only one half of that land in favour of Mohanlal Mathuradas and those represented by him because of the agreement for sale dated August 31, 1954. Under the provisions of Section 5 of the Barkhali Abolition Act, 1951, all rights of the Barkhalidars had ceased in the whole of the property admeasuring 5 acres and 7 gunthas. Before any occupancy rights were, in fact, acquired, the agreement for sale was entered into. If the Deputy Collector had come to the correct conclusion that the said 80 bighas of land was not to be taken into account for the purpose of Section 8, then he should have held that the Barkhalidars were not entitled to be allotted any land for personal cultivation and that under the intended sale no interest would pass, as the

vendors were not entitled in law to any interest in the property. What the Revenue Tribunal has purported to do in revision is merely that which the Deputy Collector ought to have himself done if he had taken the correct view of the law. The Revenue Tribunal was justified in setting aside the order of the Deputy Collector, as that order proceeded upon an erroneous view of the provisions of Section 8(1)(a) of the Act. The Revenue Tribunal was acting within its jurisdiction in passing the order which it has done and was justified in doing so.

8. It is lastly urged that the Revenue Tribunal could only pass an order in revision, if an application had been made before it u/s 28 of the Act. It is urged that opponent No. 3 had, in fact, no right to make an application in revision to the Revenue Tribunal so far as one half of the land was concerned having agreed to withdraw the appeal in respect thereof before the Deputy Collector. There is not much substance in this contention. The appeal as regards the portion of land agreed to be sold was not in fact withdrawn. The Deputy Collector passed an order erroneously holding that the Barkhalidars were entitled to the whole of 5 acres and 7 gunthas of land for personal cultivation. An application in revision was made therefrom and the Revenue Tribunal had jurisdiction to pass the orders which it did under the provisions of Section 29 of the Act. In our view, the decision of the Revenue Tribunal is right and no interference with the order of the Revenue Tribunal is called for.

9. In the result, both the petitions fail and are dismissed with costs. Costs to be paid in separate sets.