

(1976) 02 BOM CK 0012

In the Bombay High Court

Case No : Special Civil Application No. 2110 of 1974

Ebrahim Yusuf Lambe

APPELLANT

Vs

Abdul Razak Abdul Rahiman Mulla and Another

RESPONDENT

Date of Decision : 27-02-1976

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 2(18), 4, 70, 74(1), 85

Citation : AIR 1977 Bom 22 : (1977) MhLj 160

Hon'ble Judges : Mridul, J;Deshpande, J

Bench : Division Bench

Advocate : V.M. Limaye, for the Appellant; D.M. Parulekar, for the Respondent

Judgement

Deshpande, J.—The Petitioner applied to the Tahsildar for a declaration of his being the tenant of certain land. The application was made u/s 70 (b) of the Bombay Tenancy and Agricultural Lands Act, (hereinafter referred to as "the Act"). Tenancy is claimed on the basis of contract with opponents" father and rent also is claimed to have been paid to him during his lifetime and thereafter to the opponents. Opponents denied all this. On evidence, the Aval Karkun accepted his claim. In an appeal by the opponents, the petitioner raised a preliminary point that Section 74 (1) did not provide for any appeal against such declaration u/s 70 (b) of the Act. The Collector overruled this, saying that the Petitioner is found to be a-deemed tenant u/s 4 of the Act and hence appeal u/s 74 (1) (a) was competent. The Revenue Tribunal declined to interfere in revision.

2. In the case of Shantabai Ramchandra Ghatge and Others Vs. Pandurang Ramchandra Mandlik and Others, , Malvankar, J., held that no appeal against the order of Tahsildar passed u/s 70 (b) would lie unless it is in regard to the claim of deemed tenancy.

3. Mr. Limaye, the learned Advocate appearing for the Petitioner, relied on this case and contends that the petitioner having claimed contractual tenancy and succeeded therein, appeal to the Collector was not competent. But in Spl. Civil

Appln. No. 1908 of 1970. decided on 3-4-1972 (Bom), Vaidya, J., on the other hand held that every order u/s 70 (b), is appealable to the immediate Superior Revenue Officer, u/s 247 of the Land Revenue Code which according to him is made applicable to tenancy appeals by virtue of Section 74 (2) of the Act. Mr. Parulekar, learned Advocate for Respondents relied on this. He also contended that a claim of even being a contractual tenant cannot be excluded from Section 4 of the Act, order under which is made expressly appealable u/s 74 (1) (a) of the Act, even though Section 4 deals with "who can claim to be a deemed tenant".

4. Sawant, J., referred the case to the Division Bench in view of this conflict of opinion proceeding presumably but rightly on the basis that petitioner claimed contractual tenancy, and impugned declaration is based thereon.

5. It is now well settled that right of appeal is entirely a creature of the Statute. Assumption of such right by reference to Section 247 of the Land Revenue Code appears to us to be open to doubt. Section 74 (1) enumerates the various sections, orders passed under which, are made expressly appealable. Section 74 (2) makes Chapter XIII of the Land Revenue Code applicable to appeals under "this Act". The words "to the appeals to the Collector under this Act" signify that provision for the appeal has to be traced in the Tenancy Act itself and provisions of Chapter XIII are to be applicable not for tracing the right of appeal but for some procedural purpose. The words obviously seem to have reference to the appeals indicated in Section 74 (1) of the Act which are all contemplated to be to the Collector.

6. Secondly such application of the Code is subject to "save as otherwise provided" in this Act. An appeal u/s 247 of the Code against orders under other enactments also is made subject to any contrary provision. Section 74 (1) itself is such a contrary provision. By specifying appealable orders, Section 74 (1) impliedly prohibits other order being appealable. Thirdly Deputy Collector would be the immediate superior Revenue Officer to the Tahsildar and appeal against the order of the latter would lie to the former u/s 247 of the Code, But Section 74 (2) refers to the "appeal to the Collector", which again is indication of contrary intention. That, Collector's such powers are exercisable by Deputy Collector is wholly irrelevant for this construction. With respect, it is difficult to draw an inference of the right of appeal by reference to Section 247 of the Land Revenue Code .

7. The fact however, remains that Section 74 (1) (a) makes only order u/s 4 appealable and not the order u/s 70 (b). Curiously enough both the Sections 4 and 70 (b) do not contemplate any application or passing of any. order as such. Section 70 enumerates duties and functions of the Tahsildar for the purposes of the Tenancy Act, clause (b) therein indicating deciding claims to tenancy as one of his such duties and functions. Section 2 (18) defines the word "tenant" so as to include (1) contractual (2) deemed (3) permanent and (4) protected tenant. Curiously enough again clause (b) in Section 70 does not specifically refer to the

duties with regard to the claim to deemed tenancy, covered by Section 4 of the Act. These peculiar features create doubts whether Section 4 and Section 70 (b) contemplate creation of rights and of any applications or any orders at all, for enforcement thereof, and if so, any negative declaration against the rights claimed is conceivable thereunder or not. In *Mela Kabhai v. Motibhai Kahandas Patel*, reported in 60 Bom LR 1071, a Division Bench of this Court exhaustively considered these points and held that: application for declarations of tenancy rights conceived under definition of Section 2 (18) of the Act were maintainable u/s 70 (b) of the Act to the Tahsildar and duties and functions of the Tahsildar thereunder included, even power to make negative declarations and declarations as to the deemed tenancy rights claimable u/s 4 of the Act though not specifically included u/s 70 (b) of the Act. This Court noted the defects in the phraseology of the concerned provisions but gathered the Legislative intent by reading other provisions of the Act.

8. The discussion in the above case is illustrative of how the provisions of the Act are not that explicit and how it would not be safe to rule out the right of appeal in the instant case merely because order u/s 70 (b) is not made specifically appealable u/s 74 (1) of the Act. It is pertinent to note that u/s 74 (1) (v) orders u/s 85-A are made appealable. Tahsildar is required to decide under that section all questions referred to him by the Civil Court, for want of jurisdiction and because the same are triable exclusively by him under the provisions of the Tenancy Act. Such orders include orders on claims to tenancy of every kind defined u/s 2 (18) including contractual tenancies. His such order, as discussed earlier, is expressly made appealable u/s 74 (1) (v) of the Act. It is difficult to conceive of any good reason why Legislature could have thought of excluding identical orders passed by reference to Section 70 (b), from the purview of Section 74 (1). when the same are expressly brought under it when passed by the Tahsildar on reference u/s 85-A.

9. All this lends considerable support to the contention of Mr. Parulekar. Clause (a) in Section 74 (1) calls for broader construction. Every order u/s 4 is made appealable under this clause. Section 4 indicates, who can claim to be a deemed tenant of the land. It is an error to assume that section contains mere definition. It confers right on every one to claim deemed tenancy if he satisfies the requirement of Section 4. But , the wide wording of this section does not admit of excluding other kinds of tenants from its purview. Thus contractual tenant, protected tenant or permanent tenant also cultivates land personally, and also lawfully which belongs to others, and does not happen to be a person covered by clauses (a) to (c). The fact that, section contemplates to cover also persons who cannot lay claim to the said three kinds of tenancies, is not enough to exclude them from the purview of this section for the limited purpose of ascertaining its true content in the context of the scheme of Section 74 (1) (a) of the Act. The Legislature presumably did not think it necessary to provide for appeals specifically against order u/s 70 (b) separately for this reason, and "advisedly remained content by providing appeal against order u/s 4 only. We are thus of

the opinion that Section 4 in the context of Section 74 (1) (a) is wide enough to cover every order in regard to claim to tenancy passed u/s 70 (b) of the Act and the order under consideration of the Awal Karkun, was appealable to the Collector u/s 74 (1) (a) of the Act.

10. With respect, the view enumerated in Shantabai Ramchandra Ghatge and Others Vs. Pandurang Ramchandra Mandlik and Others, , is not acceptable to us for the above reasons. We do not think that any rights can be deemed to have been created by mere definition.

11. Rule is accordingly discharged.

12. NO order as to costs.

13. Order accordingly.