
(1974) 08 BOM CK 0002

In the Bombay High Court

Case No : Special C. Application No. 70 of 1971

Eknath Namdeo Matey and another

APPELLANT

Vs

Kondba Laxman Gadhawe and others

RESPONDENT

Date of Decision : 26-08-1974

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (1975) MhLj 114

Hon'ble Judges : C.S. Dharmadhikari, J

Bench : Single Bench

Advocate : S.N. Kherdekar and M.P. Deshmukh, for the Appellant; J.M. Dharaskar, for the Respondent

Final Decision : Dismissed

Judgement

C.S. Dharmadhikari, J.—Field survey number 28/1, admeasuring 12 acres 29 gunthas, situated at mouza Palaskhed in taluq Chandur Railway district Amrawati, originally belonged to respondents Nos. 2 and 3, Vasant and Dhundiraj respectively and it was the case of respondent No. 1 Kondba that he was a tenant of the said field. According to Kondba, he was cultivating the field for the years 1957-58 and 1958-59 as a tenant. He further contended that he was dispossessed by the landlords illegally, and therefore, he filed an application for restoration of possession u/s 36 (1) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, referred to hereinafter as the Tenancy Act. The said case was registered as Revenue Case No. 6/59 (10-A) /61-62 on the file of the Additional Tahsildar (Tenancy), Chandur Railway. It seems that at about the same time respondent No. 3 Dhundiraj also has filed application for resumption of 4 acres 10 gunthas of land out of survey number 28/1 under the provisions of section 36 (2) read with section 39 of the Tenancy Act contending that he required the land for personal cultivation. The said case was registered as Revenue Case No. 2/59 (10-F) 61-62 in the same Court. Similarly respondent No. 2 Vasant also filed an application against Kondba for resumption of the land

u/s 36 (2) read with section 39 of the Tenancy Act and the said case was registered as Revenue Case No. 3/59(10-F) /61-62. All these cases were consolidated and by a common order passed 23-1-1964 the Additional Tahsildar held that respondent No. 1 Kondba was a tenant of the suit field and was illegally dispossessed by the landholders in the year 1959-60, and as such he was entitled to restoration of possession thereof. However, the Additional Tahsildar further found that the landlords were also entitled to resumption of the suit field u/s 39 of the Tenancy Act and in this view of the matter he passed an order that the plaintiffs-landlords shall retain the suit land for their personal cultivation. As much of the controversy involved in this writ petition is based on this order passed by the Additional Tahsildar, Chandur Railway, on 23-1-1964, it will be useful to reproduce relevant paragraphs 14 and 15 of the said order. Paragraphs 14 and 15 of the Said order are as under :

"14. In view of my finding I have arrived at in the above paras it will be seen that the landlords have satisfied all conditions u/s 39 of the Bombay Tenancy and Agricultural Lands Act. Therefore, they are entitled for possession of whole of the suit land in both the cases.

15. It is the admitted fact that the possession of the suit land is with the landlords (i. e. plaintiffs Vasant and Dhundiraj of Palaskhed). In Case No 6/59 (10-A) /61-62 of Palaskhed started u/s 36 (1) ibid, the tenant Kondba is entitled for possession of the suit land from the landlords. Landlords have also started resumption proceedings u/s 39 ibid for possession of the suit land. As discussed above, they are entitled for possession of whole of the suit land. I, therefore, order that the plaintiffs landlords shall retain the suit land for their personal cultivation."

It is further clear from the record that this order passed by the Additional Tahsildar was not challenged by any of the parties.

2. There is no dispute between the parties that the landlords thereafter sold the field by different sale-deeds. 4 acres 10 gunthas of land out of the laid field on the Southern side along with 1 /4 the share in 15 mango trees was sold to petitioner Eknath vide sale-deed dated 14-12-1964. Vasant also transferred 5 acres 10 gunthas of land by sale-deed dated 19-2-1965 along with 1 /4th share in 15 mango trees to petitioner No. 2 Namdeo. He also transferred Northern 3 acres of land out of the said survey number to respondent No. 4 Bhimrao on 29-2-1965. In this view of the matter respondent No. 1 Kondba filed an application for restoration of possession u/s 52 (1) read with section 36 (2) of the Tenancy Act.

3. Petitioner Nos. 1 and 2 and respondent No. 4 Bhimrao filed their written-statement and denied all the allegations made by Kondba. They denied the fact that the land was required by the respondents Nos. 2 and 3 for their bona fide personal cultivation. They denied that respondent No. 1 was a tenant. It was also contended that the proceedings for resumption were collusive and the said right

was lost as the respondent No. 1 Kondba had not taken any objection to the sale-deeds though he was aware of the sales effected.

4. The application filed by Kondba u/s 52 of the Act was allowed by the order dated 6-4-1988 passed by the Tenancy Naib-Tahsildar, Chandur Railway. The learned Tenancy Naib-Tahsildar held that respondent Kondba was the tenant of the suit field and that the landholders had taken possession of the suit field u/s 39 of the Tenancy Act and have failed to use the land for the purpose Specified in the notice given by them u/s 39 of the Tenancy Act. In substance the learned Naib-Tahsildar held that inspite of the order of resumption passed in their favour u/s 39 of the Tenancy Act they have failed to cultivate the suit field personally and have sold the land as per the sale-deeds to the petitioners as well as respondent No. 4 Bhimrao. In this view of the matter the learned Naib-Tahsildar further held that respondent No. 1 Kondba is entitled to restoration of possession of the suit field.

5. Being aggrieved by this order the landlords purchasers filed appeals before the Sub Divisional Officer, Chandur Railway. The Sub Divisional Officer during the course of hearing of appeals allowed the appellants landholders to file a certified copy of Thekepatrak, holding that the said Thekepatrak was a public document. The Sub-Divisional Officer has gone to the extent of reviewing the order of the Tenancy Naib-Tahsildar u/s 110 of the Act suo motu and held that respondent No. 1 Kondba was not the tenant of the field but was a contractor who was given a contract to complete the summer operation. In this view of the matter he allowed the appeals filed by the purchasers landholders and set aside the order passed by the Tenancy Naib-Tahsildar.

6. Being aggrieved by this order respondent Kondba filed revision application before the Maharashtra Revenue Tribunal. The learned Member of the Maharashtra Revenue Tribunal vide his order dated 13th October 1970 allowed the revision applications filed by respondent Kondba and held that respondent Kondba was a tenant of the suit field. The learned Member further found that in view of the facts and circumstances of the case respondent Kondba was entitled to the restoration of possession of the field u/s 52 (1) of the Tenancy Act, Being aggrieved by this order passed in the revision applications by the learned Member of the Maharashtra Revenue Tribunal the purchasers, namely, Eknath and Naradeo, had filed the present writ petition. It is pertinent to note that the third purchaser, namely, Bhim-rao Dnyanoba has not filed any writ petition challenging the order passed by the Revenue Tribunal. After the admission of this writ petition, it seems one order was passed on admission of the petitioners that they had purchased only 9 acres 20 gunthas of land in dispute (Southern portion), and therefore, this Court vide order dated 29-6-1971 directed that the stay will operate only in. respect of that portion only and the stay in respect of the rest of the field, that is, 3 acres 9 gunthas, was vacated,

7. Shri Kherdekar, the learned counsel for the petitioners, contended before me that the learned Member of the Maharashtra Revenue Tribunal committed an

error in holding that respondent No. 1 Kondba was a tenant of the suit field- He further contended that assuming that Kondba was a tenant of the suit field, the original landholders were not placed in possession of the suit property in pursuance of any order passed by the Revenue authorities in the proceedings instituted by the landlords either u/s 38 or section 39 of the Tenancy Act. According to Mr. Kherdekar, the original landlords had taken wrongful possession of the suit field and the tenant was dispossessed in the year 1959 itself. Therefore, according to him, the provisions of section 52 of the Act will not apply to such a case. He further contended that the order passed by the Additional Tahsildar dated 23-1-1964 was an order without jurisdiction. According to Shri Kherdekar, the provisions of section 36 (2) of the Act read with section 38 or section could apply to a case when the landlords are not in possession of the field property on the date of the application and wants to obtain possession of the land. In the present case the landlords were already in possession of the suit property when they gave notice u/s 38 or section 39 or filed application u/s 36 (2) of the Act. Therefore, according to Shri Kherdekar, the application filed by the landlords for obtaining possession of the suit field was itself not maintainable and the order passed by the Additional Tahsildar dated 23-1-1964 was without jurisdiction. He further contended that it was not open for the learned Additional Tahsildar to have passed an order confirming possession of the landlords u/s 36(2) of the Tenancy Act. Thus in substance it is contended by Shri Kherdekar that the landlords had not obtained possession of the suit field either u/s 38 or section 39 of the Act and hence the provisions of section 52 (1) of the Act are not applicable to the facts and circumstances of the present case and the application filed by the respondent No. 1 tenant was not maintainable. For this proposition Shri Kherdekar has relied upon a decision of this Court in Vasantrao v. Laxmanrao Spl C. Appl No. 120 of 1967, decided on 14-3-1969.

8. On the other hand it is contended by Shri Dharaskar, the learned counsel for the respondent No. 1, that the law laid down in the said decision by Chandurkar J. is not applicable to the facts and the circumstances of the present case. According to Shri Dharaskar, the applications filed by the landlords for termination of tenancy and possession of the land, though registered separately, were consolidated with the proceedings filed by the tenant u/s 36(1) of the Act for restoration of the possession of the suit field. He further contended that in view of the provisions of the Tenancy Act, it was not open for the landlords to have taken forcible possession of the suit field without an order by the Tahsildar as contemplated by section 36 (2) of the Act. The possession of the suit property taken by the landlords contrary to the provisions of the Act was, therefore, illegal and respondent No. 1 Kondba was entitled to restoration of possession of the suit property. Accordingly he had filed an application for restoration of possession u/s 36 (1), and the Additional Tahsildar vide his order dated 23-1-1964 has found that respondent No. 1 Kondba was a tenant of the suit field and that he was also entitled to restoration of possession. However, since the proceedings instituted by the landlords were also consolidated and were tried together with the said

proceedings instituted by the tenant u/s 36 (1) and as all these proceedings were disposed off by the common order, instead of parsing an order of possession in favour of the tenant first and then directing restoration of possession to the landlords as their applications u/s 33 were also allowed by the Additional Tahsildar, he passed a common permitting retention of possession of the suit property by the landlords. Therefore, in substance, the order passed by the Additional Tahsildar amounts to an order in the proceedings under sections 38 and 39 read with section 36 of the Act instituted by the landlords and after the said order passed by the Additional Tahsildar on 23-1-1964 the possession of the landlords over the suit field will be under the order passed by the Additional Tahsildar in the proceedings instituted by the landlords u/s 38 and section 39 read with section 36 (2) of the Act. In this view of the matter he further contended that it was obligatory on the part of the landlords to have cultivated the land personally At least for 12 years. They have failed to do so, and therefore, the tenant is entitled to restoration of possession of the suit field. Shri Dharaskar further contended that in the prior proceedings instituted between the original landlords and the tenant it was held by the competent authority that respondent No. 1 Kondba was a tenant of the suit field. This order was not challenged by the original landlords, and therefore, became final and binding upon the parties. The present purchasers are claiming through the original landlords, and therefore, the said order is also binding upon them. He further contended that the common order passed by the Additional Tahsildar dated 23-1-1964 in the proceedings which were directed to be consolidated was neither illegal nor without jurisdiction. Even if it is an order assumed that it was illegal order it cannot be said that it was without jurisdiction because it was passed by the competent authority in exercise of the power vested in him by law.

9. Shri Dharaskar has further contended that the order passed by the Maharashtra Revenue Tribunal is, therefore, perfectly correct. He further argued that the order passed by the Sub-Divisional Officer in appeal was obviously illegal and without jurisdiction. According to Shri Dharaskar in substance the order passed by the Sub-Divisional Officer amounts to setting aside an order passed by the Additional Tahsildar on 23-1-1964 and it was not open for the Sub-Divisional Officer to have revised the said order by taking recourse to the provisions of section 10 (2) of the Tenancy Act. As the order passed by the Sub-Divisional Officer was without jurisdiction and illegal it was perfectly open for the learned Member of the Maharashtra Revenue Tribunal on reappraisal of the whole matter to set aside the said order and then pass an order restoring the order passed by the Tenancy Naib Tahsildar.

10. In my opinion there is no substance in the contention raised by Shri Kherdekar that respondent No, 1 Kondba was not the tenant of the suit field. The said controversy was already decided by the Additional Tahsildar by his order dated 23-1-1964 wherein after appreciating the oral and documentary evidence on record, including the crop-statements, it was held by the Additional Tahsildar that respondent No. I Kondba had cultivated the suit land in the years 1957-58

and 1958-59 as a tenant. The evidence adduced on behalf of the tenant in this behalf was further supported by the conduct of the landlords themselves because it is an admitted position that respondent No. 1 Kondba was served with a notice u/s 39 of the Act and in fact resumption proceedings were also started against him admitting the fact that respondent No. 1 Kondba was a tenant on the suit field. The order passed by the Additional Tahsildar in this behalf was not challenged by the original landlords, and therefore, had become final and conclusive between the parties. The petitioners who are the purchasers of the portion of the suit field are claiming right to the property through the original landlords. Therefore, in my opinion, the said order passed by the Additional Tahsildar dated 23-1-1964 is also binding upon them.

Therefore, the only question which is required to be considered in this writ petition is as to whether the present application filed by respondent No. 1 Kondba u/s 52 (1) of the Act is maintainable or not. For deciding this controversy it will be necessary to refer to the provisions of section 52 (1) of the Act. Section 52 (1) of the Act reads as under:

"52 (1) Where after terminating the tenancy of any land u/s 9 of the Berar Regulation of Agricultural Leases Act, 1951, or under sections 38, 39 or 39A of this Act, the landlord has taken possession of such land and he fails to use the land for the purpose specified in the notice given under the said section 9 or as the case may be, sections 38,39 or 39-A within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him, unless he has obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof:

Provided that no refusal of the tenant shall be valid unless it has been verified before the Tahsildar in the prescribed manner."

11. According to Shri Kherdekar, the possession of the field was not obtained by the original landholders under an order passed by the Additional Tahsildar, Chandur Railway, in the proceedings instituted u/s 38 or section 39 read with section 36 (2) of the Act. He contended that even according to the tenant he was dispossessed from the suit field after expiry of the agricultural year 1958-59. Therefore possession was taken by the original landlords in the year 1959 itself and they had not obtained possession of the suit property under the order passed by the Additional Tahsildar dated 23-1-1964. As the landlords have not taken possession of the said land after termination of the tenancy of the tenant u/s 38 or section 39 of the Act, According to Shri Kherdekar, the provisions of section 52 (1) of the Act will not apply. He further contended that the order granting possession passed by the Additional Tahsildar in the previous

proceedings was without jurisdiction and was therefore a nullity. He contended that the application filed by the landlords for Obtaining possession of the land itself was not maintainable because they were already in possession of the suit field and therefore any order passed in the said proceedings was ab initio void and without jurisdiction. For this proposition he has relied upon the decision of this Court in *Vasantrao v. Laxmtanrao* referred to hereinbefore. In that case on the facts found it was held by this Court that the provisions of section 52 of the Act cannot be invoked. In the said case the tenant had filed an application on 29-9-1959 u/s 36 (1) of the Act for restoration of possession of the field and the said application came to be rejected on 29-1-1972 and this fact was admitted by the parties. In this context it was observed by this Court as under:

"If such an application claiming restoration of possession on the basis of forcible dispossession was already negatived, it is difficult to see how it is now open to the tenant to say that this forcible dispossession must be related to the termination of the tenancy. Now, the argument of the tenant is that this forcible dispossession has been legalised by the order dated 27-8-1962 passed on what purported to be an application u/s 36 (2) read with section 39 (1) of the Act. I am unable to spell out this concept of regularisation of illegal possession from any of the provisions of the Tenancy Act. As between a landlord and a tenant for recovery of possession from a tenant, whose tenancy has been terminated or whose tenancy has not been terminated, the only provision so far as the landlord is concerned is section 36 (2) of the Act. The words of section 36 (2) cannot be so stretched as to take within its compass an application by a landlord who is already in possession and who seeks to have a declaration that he is lawfully in possession. On a plain reading of section 36 (2), the landlord, who is contemplated as applying for possession and I fail to see what jurisdiction the Tahsildar had got to make an order which is not contemplated by the provisions of section 36 (2) or any of the provisions of the Act. Such an order must be treated to be entirely without jurisdiction. In my view, therefore, the order dated 27-8-1962 which merely stated that a landlord is already in possession and he must be deemed to be restored to possession was an order without jurisdiction and will have to be ignored."

In this context It was further held that thus not only the applicability of section 52 was ruled out by allegation made by the respondent No. 1 in application dated 9-7-1963, but the finding of the revenue authorities that the petitioners were estopped from challenging the status of the opponent No. 1 and therefore the possession must be deemed to have been taken u/s 39 of the Act has also been vitiated because that finding is based on the construction of an order which is held to be without jurisdiction. In the said case after the dispossession the tenant had filed an application u/s 36 (1) of the Act for restoration of the possession of the suit property and the said application was rejected. The obvious result and dismissal of such an application is that the tenant was not entitled to the possession of the land itself. If this is the position, then the possession obtained by the landlord without the order of the tenancy authorities u/s 36 (2) of the Act

could not have been termed to be illegal. In this context this Court took the view that if such an application claiming restoration of possession on the basis of forcible dispossession was already rejected, it is difficult to see how it is now open to the tenant to say that this forcible dispossession must be related to the termination of the tenancy and in this context further observation was made by this Court that it is not possible to spell out the concept of regularisation of illegal possession from any of the provisions of the Tenancy Act. In the present case the application filed by the tenant u/s 36 (1) of the Act for restoration of possession was practically allowed by the Additional Tahsildar. The Additional Tahsildar has held that respondent No. 1 Kondba was the tenant of the suit field and he was illegally dispossessed from the suit property and was, therefore, entitled to the restoration of possession of the suit land from the landlords. Therefore, the application filed by the tenant u/s 36 (1) of the Act was allowed by the Additional Tahsildar. However, since the matter relating to resumption of the land for personal cultivation was consolidated with the said application filed by the tenant u/s 36 (1) of the Act for restoration of possession, instead of passing separate orders, a common order was passed by the Additional Tahsildar holding that the landlords are entitled for possession of the whole suit land, and therefore, the landlords shall retain the possession of the suit land and that too for their personal cultivation. In my opinion, therefore, the facts and circumstances of the present case cannot be compared with the facts found in the aforesaid decision by this Court. When the matters are consolidated and a common order is passed, the order passed by the Tahsildar disposing of both the applications before him, one filed by the tenant for restoration of the possession and another filed by the landlords for resumption of the land for their personal cultivation, cannot be said to be either illegal or without jurisdiction. The whole object behind consolidation of the proceedings is to avoid multiplicity of proceedings and to prevent delay and conflict in decisions. In both the cases it was the Additional Tahsildar who was the competent authority to decide the controversy involved in the proceedings. By consolidation it cannot be inferred that he has ceased to have jurisdiction to dispose of matters either separately or by common order. Therefore, in my opinion, it cannot be said that the order passed by the Additional Tahsildar dated 23-1-1964 was either illegal or without jurisdiction. On the contrary, having regard to the facts and circumstances of the present case and in view of the consolidation of the proceedings as well as the common order passed in the said proceedings, it will have to be held that the original landlords had obtained possession of the suit field under the provisions of section 38 and 39 read with section 36 of the Act. If this is the position in law, and, if it is further found that instead of cultivating the said field personally if the landlords sell the said field to the present petitioners as well as the respondent No. 4, then it will have to be held that they have failed to use the suit field for the purpose specified in the notice given by the landlords u/s 38 or section 39 of the Act and they have ceased to use the said field for the aforesaid purpose, for the period prescribed by section 52 (1) of the Act. In this view of the matter, in my opinion, the learned Member of the Maharashtra Revenue Tribunal was right in allowing

the revision application filed by the respondent-tenant and in holding that the respondent No. 1 Kondba was entitled to be placed in possession of the land, namely, survey number 28/1 of village Palas-khed. The further direction issued by the learned Member of the Maharashtra Revenue Tribunal directing the petitioners, who are the subsequent purchasers, to place respondent No. 1 Kondba in possession of the land is also, therefore, confirmed.

12. Even otherwise, in my opinion, considering conduct of the previous landlords as well as the purchasers, this is not a fit case wherein this Court should exercise its extraordinary jurisdiction under Article 227 of the Constitution of India. The powers of this Court under Article 227 of the Constitution of India are intended to be used only in appropriate cases for the purpose of keeping the subordinate Courts and Tribunal within their authority and not merely correcting the errors. In the present case the landlords want to take advantage of their own wrong. The original landlords had taken forcible and illegal possession of the suit property from the respondent tenant. They themselves had instituted proceedings u/s 36 (2) read with section 38 or section 39 of the Act for resumption of the suit field. Thereafter instead of cultivating the suit field personally they sold away the suit property and now a contention is being raised before this Court that the proceedings instituted by the landlords and the order obtained therein by them itself were illegal and without jurisdiction. In substance this practically means that the purchasers who entered into the shoes of landlords want to take the advantage of their own wrong. In my opinion, such a course is not permissible and the subsequent purchasers should be held to be bound by the Acts or omissions of the original landlords. In this view of the matter, in my opinion, this is not a fit case wherein this Court should exercised its extraordinary jurisdiction under Article 227 of the Constitution of India in favour of such petitioners.

13. In the result, the petition fails and is dismissed with costs.