
(1982) 01 BOM CK 0018

In the Bombay High Court

Case No : Spl. Civil Application No. 5086 of 1976

Gajanan Vasant Vijjayankar and Another

APPELLANT

Vs

Valubai Bapu Govindhi and Others

RESPONDENT

Date of Decision : 30-01-1982

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 27, 29(2), 43A(3), 84

Citation : AIR 1982 Bom 325 : (1982) MhLj 933

Hon'ble Judges : Sharad Manohar, J;Mandon, J

Bench : Division Bench

Advocate : K.J. Abhyankar and Y.S. Jahagirdar, for the Appellant; Bhirmrao N. Nailk, for the Respondent

Judgement

Mandon, J.—This petition under Article 227 of the constitution of India challenges an order made by the maharashtra Revenue Tribunal by which the tribunal held that the application filed by the petitioners and Respondents numbers 2 and 3 u/s (84?) (Bombay Act No. LXVII of 1948) (hereinafter for the sake of brevity referred to as "the said Act"), was not maintainable.

2. The petitioners and Respondents Nos.2 and 3 are owners of half portion of a plot of land bearing Revision survey Nos. 91 and 92 situate in Kagal Taluka in the District of Kolhapur. It will be convenient to refer hereinafter to the petitioners and Respondents numbers 2 and 3 as "the landlords" In 1953 the landlord leased the said plot of land to one shankar Krishna Bondre whose heirs and legal representatives are Respondents Nos.5 (a), 5 (c) and 5 (d) . It is not disputed that the said lease was for the purpose of cultivation of sugar cane. By a writing dated october 24, 1969, the said Bondre created a sub-lease in respect of the said plot of land in favour of the first Respondent Valubai for a period of ten years for a consideration of Rs. 4,000/- It is the case of the landlords that on coming to learn about the sub-lease they gave a notice of three months terminating the said lease in favour of the said Bondre. In the said notice the ground for termination was mentioned as the creation of the said sublease In

favour of the First Respondent without the consent of the landlords. This notice was addressed both to the said Bondre as also to the first Respondent. Thereafter the landlords filed an application under Sec.84 of the said Act against the first Respondent. The said application was numbered as Tenancy case No.9 of 1971 and was heard by the Assistant collector, Karvir Division, Kolhapur. The said Assistant collector sent the papers to the Tenancy Aval Karkun, Kagal, for recording evidence, both oral and documentary, which the said Aval Karkun did and forwarded his report to the said Assistant Collector. Before the said Assistant collector it was contended by the first Respondent that she was in possession of the plot of land on the basis of the said writing dated october 24, 1969 and, therefore, it could not be said that her possession was illegal or invalid. It was further urged that the legality of the First Respondent's tenancy was yet to be decided and, therefore, the landlords should seek redress under sections 14 and 29 of the said Act. The said Assistant collector held that the said writing dated October 24, 1969 was executed without the consent of the landlord, and, therefore, the possession of the First Respondent was a wrongful possession and that of a trespasser, and he allowed the said application and passed an order of summary eviction from the said land against the first Respondent. The first Respondent thereupon approached the Maharashtra Revenue Tribunal in revision. Before the Tribunal four contentions were taken on behalf of the First Respondent, namely (1) the application u/s 84 was not maintainable and the only remedy available to the landlords was to proceed under sub-section (2) of sec. 29 (2) the said Bondre was a necessary party to the proceedings. (3) as the said plot of land was leased to the said Bondre for the purpose of cultivation of sugar-cane, section 27 of the said Act was not attracted, and, therefore, the landlords could not file an application u/s 84 on the ground that the said plot of land had been sublet by the said Bondre to the first Respondent, and (4) the said Bondre had become a deemed purchaser on April 1, 1957, and the question of unlawful subletting by the said Bondre, therefore, did not arise. The Tribunal held that by reason of the provisions of section 43A of the said Act sec. 27 did not apply to the plot of land in question inasmuch as the said plot was leased for the purpose of cultivation of sugar-cane and therefore, the application filed by the landlords u/s 84 was not maintainable and that the proper remedy for the landlords was to proceed u/s 29 (2) of the said Act. It is against this order of the Tribunal that the present petition under Article 227 of the constitution has been filed by the petitioners.

3. The other co-owners not having joined the petitioner in filing this petition, they have been made Respondents Nos.2 and 3 to the petition. The original fourth Respondent was a member of the Maharashtra Revenue Tribunal whose name on an application by Mr. Abhyankar, learned advocate for the petitioners has been deleted from the record. This petition reached hearing before Pendse, J., on October 23, 1980. At the hearing of this petition the attention of the learned judge was drawn to two unreported decisions of this High Court, both being by learned single judges, the first being the judgment of judges, the first

being the judgment of Vaidya, J., delivered on December 11, 1975 in spl. Civil Appln. No. 1782 of 1972 with spl. Civil Appln No.345 pf 1972 * -Hiralal vithals Gurathi v. Kondaji Keru Girme, in which vaidya J., held that section 27 of the said Act did not apply to lands which had been leased for cultivation of sugar-cane. The second decision is that of Apte, J., in spl. Civil Appln. No.5076 of 1976 with spl. Civil No. 5079 of 1976, Hari Rau pawar V. Jijabai, decided on july 20, 1977, in which the learned Judge held that section 27 applied to lands leased for cultivation of sugar-cane. In view of this conflict, pendse, J., by his order dated october, 23, 1980 referred the matter to a Division Bench. While this matter was pending, the petitioners applied to the court to bring on record the heirs and legal representatives of the said Bondre who had in the meantime died Bondre,s heirs and legal representatives were thereafter added as Respondents Nos.5 (5), (c) and 5 (d) to the petition.

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5. The question of applicability of section 27 of the said Act to the plot of land in question arises by reason of the provisions of section 43A of the said Act. The relevant provisions of the said section 43A are as follows :

"43A some of the provisions not to apply to leases of land. Obtained by industrial or commercial undertakings, certain co-operative societies or for cultivation of sugarcane or fruits or flowers

(1) The provisions of sections 4B 8, 9, 9A, .9B, 9C, 10A, 14, 16, 17, 17A, 17B, 18 27 31 to 31D (both inclusive), 32 to 32R (both inclusive) 33A, 33B, 33C, 43, 63, 63A, 64 and 65, shall not apply to :-

(a) xx xx xx xx

(b) leases of land granted to any bodies or persons other than those, mentioned in clause (a) for the cultivation of sugar-cane or the growing of fruits or flowers or for the breeding of livestock ;

(c) xx xx xx xx

(3) Notwithstanding anything contained in sub-sections (1) and (2), it shall be lawful for the state Government to direct, by notification in the official Gazette, that the leases of lands, as the case may be, to which the provisions of sub-sections (1) and (2) apply, shall be subject to such conditions as may be specified in the notification, in respect of -

(a) the duration of the lease :

(b) the improvements to be made on the land and the formation of co-operative farming societies for the purpose and financial assistance to such societies;

(c) the payment of land revenue, irrigation cess, local fund cess and any other charges payable to the state Government or any local authority. Or

(d) any other matter referred to in sections mentioned in sub-sec.,(1)". It is not disputed that the plot of land in question falls under C. (B) of section 43A (1).

6. It will be noticed that amongst the list of sections which by sub-section (1) of section 43A of the said Act do not apply to leases of lands granted for the cultivation of sugar-cane are S.s 14 and 27. It should further be noted that under sub-section (3) of the said S.43A it is open to the state Government to direct by a notification in the official Gazette that the leases of lands, as the case may be, to which the provisions inter alia of sub-section (1) apply are to be subject to such conditions as may be specified in the said notification in respect of the four classes of matters set out in clauses (a) to (d) if sub-section (3). Clause (d) speaks of "any other matter referred to in sections mentioned in sub-section (1)" which would include any of the matters referred to in any of the sections specified in sub-section (1) including sections 14 and 27 , as not being applicable to the leases of lands of the classes mentioned in clauses (a) to (c) of sub-section (1) so far as the leases of lands for the cultivation of sugar-cane are concerned, the Government of Maharashtra has issued a notification dated February 14, 1958, under sub-section (3) of sec. 43A . The said notification was amended by another notification dated October 8, 1969. The relevant provisions of the said notification as so amended are as follows :

"In exercise of the powers conferred by sub-section (3) of section 43A of the Bombay Tenancy and Agricultural Lands Act, 1948, (Bom. LXVII of 1948), the Government of Bombay hereby directs that the leases of land referred to in Cl. (B) of sub-section (1) of the said sec. 43A apply shall be subject to the following conditions, namely:-

conditions as to the duration and termination of lease :

XX XX XX XX

3. If a lessee commits any of the defaults mentioned in clause (a) of sub-section (1) of sec. 14 in relation to such lease of land, the lease may be terminated by the lessor by giving the lessee three months' notice in writing stating therein the reasons for such termination.

Xx xx xx xx

Thus under the said notification a lease for cultivation of Sugar-cane can be terminated by the lessor by giving the lessee three months' notice in writing stating therein the reason for such termination if the lessee commits any of the defaults mentioned in clause (a) of sub-section (1) of section 14. Section (1) provides as follows :

14. Termination of tenancy for default of tenant

(1) Notwithstanding any law, agreement or usage, or the decree or order of court, the tenancy of any land shall not be terminated - (a) unless the tenant :-

(I) has failed to pay the rent for any revenue year before the 31st day of may thereof;

(Ii) has done any act which is destructive or permanently injurious to the land;

(iii) has sub-divided, sub-let or assigned the land in contravention of section 27;

(iv) has failed to cultivate it personally; or

(v) has used such land for a purpose other than agricultural or allied pursuits ; and

(b) unless the landlord has given three months' notice in writing informing the tenant of his decision to terminate the tenancy and the ground for such termination, and within that period the tenant has failed to remedy the breach for which the tenancy is liable to be terminated."

7. As it is the case of the landlords that the said Bondre has sublet the said plot of land in contravention of the provisions of Section 27 of the said Act, it now becomes necessary to refer to the said Section 27, Under the said Sec, 27, "save as otherwise provided in S. 32-F, no sub-division or subletting of the land held by a tenant or assignment of any interest therein shall be valid". The section then sets out the cases in which it is permissible for the lessee either to sub-divide or sublet the land leased or to assign any interest therein. It is not disputed that were Section 27 to apply, the sub-lease in favour of the First Respondent by Bondre would be invalid, Since the Tribunal has held, by its order which is challenged before use, that the proper remedy for the landlords was to Procedure u/s 29 (2) and not u/s 84, it will be convenient also to set out the said statutory provisions. Section 29 is headed "Procedure of taking possession". And sub-section provides as follows :

"(2) Save as otherwise provided in sub-section (3A) no landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land or dwelling house, as the case may be is deemed to have accrued to him".

Section 84 is in the following terms:

"84. Summary eviction.

Any person unauthorisedly occupying or wrongfully in possession of any land:

(a) the transfer or acquisition of which either by the act of parties or by the operation of law is invalid under the provisions of this Act.

(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 and the said provisions do not provide for the eviction of such persons, may be summarily evicted by the Collector."

8. Mr. Abhyankar, learned advocate for the Petitioners, has submitted before us that the subletting of the said plot of land by Bondre to the First Respondent was in contravention of Section 27 of the said Act and that, therefore, under the said Government notification a right accrued to the landlord to terminate the tenancy of the said Bondre and that such tenancy has been validly terminated by him. He further submitted that by reason of the provisions of Section 27 the sub-tenancy created by the said Bondre in favour of the first Respondent was invalid and created no right, title or interest in favour of the First Respondent and the First Respondent was, therefore, a trespasser upon the said plot of land and could, therefore, be summarily evicted by the Collector u/s 84, Mr. Naol. Learned advocate for Respondent No. 1, on the other hand, raised four contentions before us, namely. (1) that the tenancy of the said Bondre had not been determined, (2) that the said Bondre was a necessary party, (3) Section 27 has no application to a lease of land granted for cultivation of sugar-cane, and (4) that the application made by the landlords under Sec. 84 was not maintainable and that the proper remedy of the landlords was to proceed under S. 29 (2) Turning now to the first point raised by Mr. Naim, it does not appear from the record that the First Respondent has at any time contended either before the Assistant Collector or before the Tribunal that the tenancy of Bondre had not been terminated. In fact, it is the admitted position that the First Respondent has received the said notice of termination dated June 30. 1970, The fact that such a notice had been sent to both the said Bondre and the First Respondent is mentioned in the report made by the Tenancy Aval Karkun. The Tribunal also, while setting out the undisputed facts, has stated that the said Bondre was a tenant of the said plot of land from 1952 to 1969, which could only be on the basis that after 1969 the tenancy of the said Bondre had been terminated. There

is, therefore, no substance in the contention that Bondre's tenancy had not been terminated by the landlords.

9. The questions whether Section 27 of the said Act applies to the plot of land in question and the section under which the remedy of the landlords lay are interlinked and required to be considered together. By the express terms of Section 43A, Sections 14 and 27 are not to apply to leases of lands granted for the cultivation of sugar-cane. However, in the notification which the State Government is empowered to issue under sub-section (3) the State Government can direct that these leases should be subject to such conditions as may be specified in the notification in respect of inter alia matters referred to in the sections mentioned in sub-section (1). Therefore, while issuing a notification u/s 43A (3) the State Government can direct that leases of lands for cultivation of sugar-cane were to be subject to the conditions specified by it in respect of matters referred to in S. 14 and 27 which are two of the sections which by the opening words of sub-section (1) of Section 43A do not apply to the lands and leases specified in the said sub-section (1). It is necessary to bear in mind that under the said subsection (3) what the State Government is empowered to do is not to direct that certain sections which, though made inapplicable to these lands and lease by Section 43A (1), will none the less apply to these lands and leases or any of them. What it is empowered to do is to direct that these lands and leases shall be subject to certain conditions specified in the said notification in respect of the matters specified in clauses (a) to (d) of sub-section (3). So far as the Government notification in question is concerned, what the Government had done is to inter alia specify the conditions subject to which a lessor can terminate a lease, namely, when the lessee commits any of the defaults mentioned in cl. (A) of sub-section (1) of Section 14. The termination is to be by three months notice in writing stating therein the reason for such termination. The subject-matter of Section 14 is termination of tenancy for default by tenant, one of sub defaults being subdivision or subletting or assignment of lands in contravention of Section 27, What the Government has done is instead of reproducing the matters set out in S. 14 (1) (a) it has stated shortly in the said notification that. "If a lesses commits any of the defaults mentioned incluse (a) of Sub-section (1) of Section 14 the lease may be terminated by the lessor", but the effect of these words is to incorporate in the said notification the conditions upon which a lease can be terminated u/s 14 (1) (a) The Government has thus in substance reproduced in para 3 of the said notification the provisions of Section 14 (1) (a). It is pertinent to notice that the said notification refers only to clause (a) of Section 14 (1) and not to clause (b) of Section 14 (1) which gives to the tenant an opportunity to remedy the breach complained of within the three months, period of notice. As we have seen, one of the defaults specified in Section 14 (1) (a) is subdivision, subletting or assignment of lands in contravention of S. 27, and if the effect of reference to S. 14 (1) (a) has the effect of incorporating, by a reference in the said notification, the provisions of Section 14 (1) (a), then necessarily the provisions of Section 27 must also be

deemed to have been incorporated in the said notification, because had the provisions of S. 14 (1) (a) been reproduced in the said notification, then while setting out the provisions of sub-clause (iii) of Cl. (A) the Government would have been required to set out also the circumstances in which a subdivision, subletting or assignment would be in contravention of Section 27, which would be when a subdivision, subletting or assignment would be invalid u/s 27. Vaidya, J., in his judgment in Special Civil Application No. 1782 of 1992 with Special Civil Application No. 345 of 1972. Referred to earlier held that if the Government wanted Section 27 to apply to lands leased for cultivation of sugar-cane, it would have specifically said so and that in the absence of any such specific reference it would not be proper for the Court to apply Section 27 just because the Government had referred to Section 14 (1) (a), Apte. J., on the other hand, in the said Special Civil Application No. 5076 of 1976 with Special Appln earlier, came to the conclusion that Section 14 (1) (a) having been referred to and since sub-clause (iii) of clause (a) mentioned Section 27. It was unnecessary to make any reference to S. 27 in the Government notification in question with respect, we find ourselves unable to accept the view which found favour with Vaidya. J. We have already pointed out that the effect of the reference to Section 14 (1) (a) in Cl. 3 of the incorporation of the provisions of Section 14 (1) (a) (iii) in the said notification has the effect of incorporating in the said notification the provisions of S. 27. Were the view which found favour with Vaidya J., correct, the result would be that even though the lessee of a land leased for cultivation of sugar-cane had subdivided, sublet or assigned the land in contravention of Section 27, the landlord would have no right to terminate lease even though such subdivision, subletting or assignment were invalid and would have no right to terminate lease even though such subdivision, subletting or assignment were invalid and would have thus no remedy in respect of these defaults. It can never have been the intention of the State Government to make these defaults the grounds for termination of tenancy without even providing for a locus poenitentiae for the tenant, which clause (b) of Section 14 does, and none the less leave the landlord without a remedy; and we are unable to ascribe such intention to the Government.

10. This, therefore, takes us to the question as to the proper remedy of a landlord in a case where there is an illegal subletting. The sub-tenancy in favour of the first Respondent being invalid under Sec 27 of the said Act, by reason of its being in contravention of the provisions of that sec, the First Respondent did not and could not acquire any right, title or interest to the plot of land in question. Her possession of the said plot was, therefore, wholly unauthorized and that of a trespasser. The question is whether the landlords should have proceeded under Sec. 29 (2) save as otherwise provided in sub-sec (3A) of S. 29, a landlord cannot obtain possession of any land or dwelling house held by a tenant, except under an order of the Mamlatdar. Admittedly, sub-sec (3A) has no application to the present case. The question to consider, therefore, is whether in the present case the landlords could have obtained possession of their plot of

land by making an application to the Mamlatdar under S. 29 (2) Such an application, however, is to be made where the land is held by a tenant. Clause (6C) of Sec 2 defines the expression "to hold land" as an owner or tenant as follows.

"(6C) "to hold land" as an owner or tenant shall, for the purposes of Clause (2D) of this Section and Secs. 32 (1B), 32A, 32B and 63, mean to be lawfully in actual possession of land as an owner or tenant, as the case may be"

That definition, however, applies only when the expression defined is used in the sections mentioned in the said clause (6C) and not in other sections. Section 29 is not amongst the sections mentioned in clause (C) Clause (6C) therefore, cannot be of any use in interpreting the expression "held by a tenant" in Section 20 (2). We must, therefore, turn to the definition of the expression "to hold land" in Cl. (12) of Section 2 of the Maharashtra Land Revenue Code, 1966 (Maharashtra No. XLI of 1966), which is as follows.

"(12) "to hold land" or to be a landholder or holder of land" means to be lawfully in possession of land, whether such possession is actual or not".

Now the plot of land was not in the actual possession of tenant Bondre but it was in the possession of the First Respondent. Unlike in the case of clause (6C) of Section 2, where the possession of the tenant has to be actual possession, under Cl. (12) of Sec 2 of the Maharashtra Land Revenue Code the possession may be either actual or constructive. If it was contended by Mr. Naik that the said Bondre was constructively in possession of the said plot of land through the first respondent, his subtenant. The sub-tenancy being, however, invalid and creating no right, title or interest in favour of the First Respondent, the First Respondent cannot be said to be in possession of the said plot of land on behalf of the tenant, the said Bondre, because by the express words of the said S. 27 the sub-tenancy and consequently the agreement upon which the transaction of sub-tenancy was founded must both be held to be invalid, and there cannot therefore, be said to be either any privity of contract or privity of estate between the said Bondre and the First Respondent.

11. What the landlords were seeking to do is to obtain possession of their land on which a trespasser was squatting without any right or title in law. Bondre was neither in actual nor in constructive possession of the said plot of land. He had left the said land, if appears, for good and had no interest left in the said plot of land. In this connection, it is significant that though the heirs and legal representatives of the said Bondre have been joined as Respondents Nos. 5 (a), 5 (c), and 5 (d) to this petition, they have not appeared before the Court at any stage of the proceedings. It should further be borne in mind that the tenancy of Bondre had already been validly terminated before the landlords' said application was filed. The question therefore, of obtaining possession of land from a tenant who has continued in possession after the termination of his tenancy did not arise in the present case. What the landlords had to do in the present case was

to obtain possession of their plot of land from the trespasser who was squatting on it. To such a case Section 29 (2) of the said Act cannot be applied. The only section which can apply is Section 24. In Spl. Civil Appln. No, 278 of 1956 - Shiddappa Bhimanna Ullaodi v. Mallappa Mennappa Badachi decided by Gajendragadkar. J. (As he then was), and Gokhale J., on April 10, 1956 (Bom) (Unrep) it was decided that an application under Sec 29 of the said Act could not be against a trespasser and that the only provision that could be invoked was the contained in Sec. 84. The position was reiterated by another Division Bench of this Court consisting of Mudholkar and Patel JJ., in Spl., Civil Appln No. 3297 of 1958 - Sml. Anjalibai v. Shankar Bala Patil, decided on Feb., 10, 1959 (Unrep). The ratio of these two cases was again reemphasized by another Division Bench consisting of Patel and Wagle, JJ., in Mallasha Sayabanna Mangonda Vs. Khadir Ajam Aherwadi, , in which Sec 84 again came up for interpretation. In that case the Court further held that the expression "the said provisions" in Cl. (C) of Sec 84 did not mean merely the provisions relating to transfers but they could only mean the provisions of the said Act and that it is shown that the occupant is not entitled under any of the provisions of the said Act to occupy or use the land and if there is no provision for eviction of such persons, S. 84 would apply. The only provision of the said Act upon which Mr. Naik has relied as providing the proper remedy for eviction is S. 29 (2) which, as we have already held earlier, is wholly inapplicable. The use and occupation of this plot of land by the First Respondent is obviously contrary to the provisions of the said Act, and there being no remedy provided under any of the provisions of the said Act, the only section under which the landlords could have proceeded was S. 84.

12. This brings us to the last question whether the tenant the tenancy Bondre was a necessary party to the proceedings before the Assistance Collector. This contention raised on behalf of the First Respondent overlooks the real nature of the proceedings. It overlooks the facts that the said Bondre has left the land, handing over possession thereof to the First Respondent that his tenancy had been determined; that even though the sub-lease period of ten years has expired, he has not claimed to come back into possession of the plot of land purported to be sub-leased by him; and that the person in actual possession today is a rank trespasser with the least colour of authority of law, namely, the First Respondent. Such a trespasser cannot contend as against the true owner of the property that the person entitled to possession of the said plot of land is not the owner but his tenant in the words of S. 84 of the said Act, the First Respondent was a person unauthorizedly occupying and wrongfully in possession of the said plot of land to the use and occupation of which she was not entitled under the provisions of the Act, and she can, therefore, be summarily evicted by the Assistant Collector, irrespective of the fact whether the said Bondre was a party to the proceedings or not.

13. In the result, this Special Civil Application succeeds and is allowed and the rule issued therein is made absolute by setting aside the impugned order of the Maharashtra Revenue Tribunal. Kolhapur, and restoring the order of Summary

eviction passed by the Assistant Collector, Karvir Division, Kolhapur. Respondent No. 1 will pay to the Petitioners that costs of this Special Civil Application. The other Respondents will bear and pay their own costs.

14. Application allowed.