

(1986) 06 BOM CK 0001

In the Bombay High Court

Case No : Writ Petition No. 2045 of 1981

Gangaram

APPELLANT

Vs

Kamalkishore Panpalia and Another

RESPONDENT

Date of Decision : 30-06-1986

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 38(7)
Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (1987) 1 BomCR 310

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

Bench : Single Bench

Advocate : S.R. Deshpande, for the Appellant; B.N. Mohta, for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—This is a writ petition arising of the proceedings under the Bombay Tenancy and Agricultural Land (Vidarbha Region) Act, 1958 (for short, the Tenancy Act).

2. The dispute relates to the field Survey No. 10, admeasuring 18 acres and 29 gunthas of village Tulanga Khurd, Tahsil Balapur, District Akola. The petitioner is a tenant and the respondent No. 1 is the landlord of the suit filed. The respondent No. 1 landlord initiated proceedings u/s 38 read with section 36 of the Tenancy Act for resumption of the suit filed. Originally the Tenancy Courts held that the claim of the landlord was hit by section 38(7) of the Tenancy Act. However in the writ petition preferred by the landlord in this Court, the said decisions were set aside and the proceedings were remanded to the learned trial Court for a decision on merits.

3. The learned Additional Tahsildar after remand held that the respondent was entitled for resumption of half of the suit field. His order was affirmed in the appeal before the Sub-Divisional Officer as well as in revision before the Maharashtra Revenue Tribunal. It may be stated that the revision before the

Maharashtra Revenue Tribunal was dismissed on the ground of limitation. The writ petition filed in this Court against the aforesaid orders of the Tenancy Courts was dismissed in limine. The L.P.A. preferred was time barred and was also dismissed. The respondent No. 1 then filed an application u/s 106 of the Tenancy Act for restoration of half of the suit field on his part as per the aforesaid order of Tenancy Court. The learned Additional Tahsildar by his order dated 25-2-1980 directed issue of warrant of possession for restoration of half of the suit land. The appeal preferred by the petitioner against the said order was dismissed by the learned Sub-Divisional Officer. Hence, the instant writ petition is filed in this Court by him challenging the orders u/s 106 of the Tenancy Act.

4. It is strenuously urged on behalf of the petitioner that there was inherent lack of jurisdiction in the Tenancy Court to entertain the application of the respondent No. 1 u/s 38(1) of the Tenancy Act because although this Court in the original writ petition before remand i.e. Special Civil Application No. 868 of 1965 decided on 19th August, 1966, held on the basis of *Salubai's*, case 1966 Mh.L.J. 289 that section 38(7) of the Tenancy Act was not a bar to entertain the application u/s 38(1) of the said Act, because, under that sub-section the requirement was that the tenure holder must acquire the land by partition. *Salubai's* case was overruled by the Full Bench of this Court in *Smt. Radhabai's* case, 1969 Mh.L.J. 933 in which it was held that section 38(7) was a bar for entertaining the application u/s 38(1) even if it was proved that the land was merely allotted to the tenure holder in partition. It is further his submission that in view of the judgment of the learned Single Judge of this Court in the case of *Shenphad Sadashiv Kalwaghara v. Maharashtra Revenue Tribunal*, 1970 Mh.L.J. 541, he could not raise the said question after remand before the Tenancy Authorities in the original proceeding, because, this Court held in that case that the principle of *res judicata* was applicable to the subsequent stage of the same proceeding and therefore, the order of this Court in the Writ Petition No. 868/1965 referred to above would have operated as *res judicata*. According to him, if at all, he could raise this question only when the above view of this Court on the question of *res judicata* was overruled by the Division Bench of this Court in the case of *Ratanlal v. Bajirao*, 1975 Mh.L.J. 65. It may be seen that the above decision in *Ratanlal's* case is rendered by the Division Bench on 23-10-1974. It is the submission on behalf of the petitioner that if there is an inherent lack of jurisdiction the question can be raised even in the execution proceedings because the original judgment sought to be executed is then a nullity and is inexecutable. Reliance in support of the above submission is placed upon the decision of the learned Single Judge of this Court in the case of *Shamrao v. Ratilal*, 1977 Mh.L.J. 31.

5. On the other hand, it is urged on behalf of the respondent No. 1 that if the question of jurisdiction raised in the execution proceedings depends upon and needs investigation of facts or if the question of jurisdiction could be raised in the original proceedings, it is not open to the party to raise the same in the execution proceedings. In support of the above contention reliance is placed upon the decision of the Supreme Court in the case of *Vasudeo Dhanjibhai Modi*

v. Rajabhai Abdul Rehman and others, AIR 1970 SC 1745. Reliance is also placed upon the decisions of this Court in the case of Poona Contractors Co-operative Bank Ltd. v. Dattatraya Shankarrao Dhumal and another, 1978 Mh.L.J. 804, and in the case of Fattechand Murlidhar Shop by Proprietor v. Shrikrishna son of Tejmalji, 1984 Mh.L.J. 796. The learned Counsel for the respondent has further urged before me that the question about the bar of section 38(7) was kept open on facts by this Court in Special Civil Application No. 868/65 while remanding the case and was in fact considered after remand by the learned Addl. Tahsildar, who after reaching conclusions on facts held that the instant case was covered by Smt. Salubai's case, 1966 Mh.L.J. 298, and therefore, the instant application was not hit by section 38(7) Tenancy Act. However, according to him the said finding of the learned Additional Tahsildar was not challenged by the petitioner in the appeal filled by him before the Sub-Divisional Officer or before the Maharashtra Revenue Tribunal. It is, therefore, urged that it was not open to the petitioner to raise this question before the Executive Court.

6. It is true that the view taken by this Court (Justice D.B. Padhye, J., as he then was) in the previous petition (Special Civil Application No. 868/65 decided on 19-8-1966) is based upon the judgment of the Court in Smt. Salubai's case (cited supra) which subsequently stands overruled by the Full Bench of this Court in Smt. Radhabhai's case (cited supra). It is, however, material to see from the previous judgement of this Court in the instant case that it was urged before this Court that the suit field was the self acquired property of the father of respondent No. 1 and, therefore, there could not be in law a partition between the father and the son of the said self acquired property of the father. It was, therefore, the submission that it should be held that the respondent No. 1 i.e. the son acquired the suit field from the father after 1-8-1953 within the meaning of section 38(7) of the Tenancy Act. This Court observed in the above writ petition that this contention whether the said field was the joint family property and whether there could be a partition of the same between the members had not been gone into by the Court observed below, and therefore, the Court did not express its view upon the said question at that stage. However, relying upon the view taken by this Court in Smt. Salubai's case that it is only when the property can be said to be acquired within the meaning of the said section that a bar u/s 38(7) of the Tenancy Act would apply, this Court set aside the orders of the Tenancy Authorities and remanded the case to the trial Court for enquiry on merits and decision according to law.

7. It is in the light of this judgment that it is necessary to construe the finding rendered by the Additional Tahsildar after remand in para 8 of his order. It is clear from the judgment of Justice Padhye in the aforesaid writ petition that the question whether the suit field was the joint family property or the self acquired property of the father of the respondent was not decided by the Tenancy Courts, and therefore, he did not express any opinion in regard to the same. The said question which was necessary to be decided before holding whether section 38(7) would apply or not was, therefore, open before the Tenancy Authorities.

After remand this question was considered by the learned Additional Tahsildar in rendering a finding on the issued No. 1 In rendering his finding on the said issue, the Additional Tahsildar came to the conclusion that the suit field was a joint family property and, therefore, relying upon the upon the judgement of this Court in Smt. Salubai's case he held that it was not hit by section 38(7) of the Act as the suit field then could not be said to be acquired by partition.

8. It is thus clear from the above facts that the issue whether the bar u/s 38(7) would apply or not was not finally decided by Justice Padhye in his remand order in the aforesaid writ petition and therefore, his judgment would not operated as res judicata in the aforesaid writ petition and therefore, his judgment would not operated as res judicata in the proceedings after remand even as per the ratio of the decision in this Court in Shenphad's case (cited supra) The petitioner could have and should have, therefore, urged before the Additional Tahsildar that the decisions in Smt. Salubai's case is not more a good law in view of the decision of the Full Bench of this Court in Smt. Radhabai's case which was available to him during the said proceedings. At any rate, even assuming that in view of the decision in Shenphad's case which was available to him during the said proceedings. At any rate, even assuming that in view of the decision in shenphad's case the petitioner could not raise this question before the Additional Tahsildar, he could certainly raise the same in appeal because on 23-10-1974. i.e. before the decision in appeal by the learned S.D.O. the Division Bench of this Court had overruled the decision in Shenphad's case on the question of judicate. It was, therefore, open to the petitioner to raise the question before the learned Sub-Division Officer in appeal that in view of the judgment in Smt. Radhabai's case (cited supra) overruling Smt. Salubar's case, the view taken by Padhta, J., in the previous Writ Petition No. 88/65 in the instant case was erroneous and should not be followed. No such question was raised in the appeal nor in the revision although it is true that revision was dismissed on the ground that it was barred by limitation.

9. I may observe that the above technical submission based upon the Shenphad's case is the brainwave of the learned Counsel for the petitioner in the writ petition and was not surely in the mind of the person who conducted the case in the courts below which is clear from the fact that no such submission was ever made in the courts below. However, the facts remain that a finding is rendered by the learned Additional Tahsildar on the question u/s 38(7) of the Tenancy Act which stands affirmed in the appeal since no question in the regard was raised in that appeal and also in the revision. It may be that by relying upon the wrong judgment, the learned Additional Tahsildar has committed an error of law, but nonetheless the finding is rendered in this regard by him which is final and binding between the parties. It is the light of there facts and circumstances and the finding rendered by the learned Additional Tahsildar that it is necessary to consider the question whether in the execution proceedings, it is open to the petitioner to raise a plea that the original order passed in the instant case is without jurisdiction and that the said order, therefore should not be executed

because Salubai's case on which it is based is over ruled in Smt. Radhabai's case.

10. The Supreme Court in the case of Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, (cited supra) has considered the question in which case the decree passed by the Court can be challenged in the execution proceedings on the ground that it had no inherent jurisdiction to make it. In para 7, it observed as follows :

"When the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding, if the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the Executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction".

It is thus clear from the above judgment of the Supreme Court that where the question of jurisdiction raised the execution proceedings requires examination of the question raised and decided at the trial or which could have been, but has not been raised in the original proceeding, the Executing Court would not have jurisdiction to entertain such an objection as to the validity of the decree on the ground of absence of jurisdiction.

11. In pleading the bar of section 38(7), the petitioner tenant must satisfy the Tenancy Court that the transfer or partition was after 1-8-1953 and that he was a protected lessee whose right as a protected lessee had come into existence before such transfer. The question involved in section 38(7) requires investigation of facts in regard to the above question by the Court in the original proceedings. A bar of section 38(7) cannot, therefore, at all be said to be a matter relating to inherent lack of jurisdiction of the Court, much-less it can be said that the said objection is apparent on the face of the record. In investing the facts and applying the law the trial Court may take erroneous view of the law also, As already stated the question about the bar of section 38(7) has been considered, may be wrongly, be the Additional Tahsildar in his judgment. As already pointed out it was open to the petitioner in the original proceedings to show that Smt. Salubai's case was overruled in Smt. Radhabai's case. In the circumstance it is not open to the petitioner to urge on the basis of the above grounds that section 38(7) was a bar in view of Smt. Radhabai's case and the original order in the instant case was, therefore, executable.

12. Moreover, apart from the question of partition another question which needs consideration for application of the bar of section 38(7) is whether the tenant was a protected lessee before such transfer. As regards the said question it has to be seen that the said question would also require investigation. It cannot be said that there is any direct finding on this question in any of the order in the original proceedings. The only finding of the learned Additional Tahsildar after

remand which is used in this regard is in regard to Issue No. 6 relating to duration of tenancies of various tenants for the purpose of section 38(3)(e) of the Tenancy Act, which would show that the petitioner was the tenant prior to the coming into force of the Berar Regulation of Agricultural Leases Act, 1951. But then it must be seen that the said finding might not have been challenged by the respondent, because, he was satisfied by getting the relief of resumption of the suit field in regard to half of the suit field. However, had the ground about an absolute bar for resumption of land u/s 38(7) been urged by showing that the petitioner was a protected lessee before the alleged partition, the respondent No. 1 might have challenged the said finding about the petitioner being a protected lessee. The indirect observation made by the learned Additional Tahsildar in the context of his finding upon the Issue No. 6. cannot, therefore, be pressed into service to show that the petitioner was indisputedly a protected lessee and therefore, since the requirements of section 38(7) were thus satisfied which would create a bar for resumption of land by the respondent. The inherent lack of jurisdiction of the learned Additional Tahsildar to entertain the application u/s 38(7) of the Tenancy Act was apparent on the face of the record.

13. In support of the contention that there is inherent lack of jurisdiction, reliance is placed upon the decision of Justice Masodkar (as he then was) in the case of *Shamrao v. Ratilal*, 1977 Mh.L.J. Note No. 31. I have perused the whole text of the judgment. What was held in the case was that the application for possession u/s 36 filed by the landlord on the ground of forfeiture of tenancy or on the ground of non-payment of rent after 1-4-1963 was not maintainable since on that date as per the provisions of section 49-A of the Tenancy Act, the petitioner tenant therein had become the statutory owner due to which the relationship of landlord and tenant had ceased thereafter between the parties. Since the error in this regard about the lack of jurisdiction was an error apparent on the face of the record, it was held in the said case that it could be raised in the execution proceedings for restoration of possession. The said case is in my view of no assistance to the petitioner in the facts and circumstances of the instant case, which needed as shown above investigation of facts for application of the bar u/s 38(7).

14. The learned Counsel for the petitioner has also urged that the question of jurisdiction should be liberally or widely construed. In support of his aforesaid contention, he has relied upon the decision of the Supreme Court in the case of *Kaushalya Devi and Others Vs. Shri K.L. Bansal*, and also upon another decision of the Supreme Court in the case of *Ramchandra Kashav Adke v. Govind Joti and others*, 1975 Mh.L.J. 515 . In the former case the compromise decree for possession of the rented premises did not satisfy the requirements of the grounds of Delhi Rent Control Act for eviction of the tenant given in Delhi Rent Control Act. It was thus a clear case of the decree of possession being without jurisdiction which question could be raised in the execution proceedings. The said case is thus of no assistance to the petitioner in the instant case. The other case cited by the petitioner has no bearing at all upon the question which was arisen

for consideration in the instant case. There is, therefore, no merits in any of the contentions raise on behalf of the petitioner.

15. In the result, the instant writ petition fails and is hereby dismissed. However, in the circumstances of the case, there would be no order as to costs.