

(1999) 11 BOM CK 0048
In the Bombay High Court
Case No : Writ Petition No. 54 of 1984

Ganpat Deshmukh

APPELLANT

Vs

Yeshwant Deshmukh

RESPONDENT

Date of Decision : 29-11-1999

Acts Referred:

Citation : (2000) 2 ALLMR 338 : (2000) 2 BomCR 40 : (2000) 1 MhLj 126

Hon'ble Judges : B.H. Maralapalle, J;A.S. Bagga, J

Bench : Division Bench

Advocate : A.B. Naik, for the Appellant; A.H. Vaishnav, for the Respondent

Judgement

B.H. MARLAPALLE, J.—The petitioner was the owner of agricultural land admeasuring 3 acres and 4 gunthas in Survey No. 28 and 3 acres and 7 gunthas in Survey No. 29 of village Khadaki Ghat in tq. and dist. Beed and the respondent was a protected tenant over the land. The respondent was declared as owner of the land u/s 38-E of the Hyderabad Tenancy & Agricultural Lands Act, 1950 (the Act for short) and by an order dt. 18-12-1959, the Agricultural Lands Tribunal had fixed the price of the subject land in both the survey numbers at Rs. 4,823.50 ps. and directed the price be paid in six equal installments, commencing from 21st April, 1960. The period of payment expired in 1965 and therefore, the tribunal issued four notices of demand against the tenant and despite these notices, the tenant did not deposit the purchase price of the land. The landlord, therefore, filed an application before the tribunal on 20-10-1974 for the reliefs:

- (1) that the declaration u/s 38-E was ineffective and
- (2) recovery of possession of the subject land.

2. The tribunal by its order dt. 21st January, 1982 held that the declaration of the transfer of ownership was ineffective as per the provisions of section 38(6) (d) of the Act and turned down the claim for possession of the land in favour of the landlord. In appeal, the Deputy Collector, was pleased to cancel the said

certificate and directed the tribunal to fix the purchase price afresh. The Deputy Collector, further held that the original declaration could not be cancelled and could not be held to be ineffective and the price of the land would be fixed afresh. Being dissatisfied with this order passed by the Deputy Collector, the landlord approached the Maharashtra Revenue Tribunal (M.R.T) by way of revision and by the impugned judgment and order it remanded the matter to the Tahsildar and directed to limit the scope of his enquiry only to the extent of recovery of the price money fixed along with interest and if such amount could not be recovered as arrears of land revenue, then only it be declared that the transfer of land as ineffective under proviso to sub-section (3) of section 38-E of the Act.

3. The learned Single Judge of this Court (B.N. Deshmukh, J.) did not agree with an earlier view taken by another learned Single Judge (Kanade, J.) in Writ Petition No. 564/1980, in his order dt. 17-11-1987, and therefore, observed that the matter required to be considered by a larger Bench. The case was, therefore, referred to the learned Chief Justice pursuant to our order dt. 15-11-1999 and as per the order passed by the learned Chief Justice, the matter has been placed before us to decide the following issue viz.:

(I) Whether the transfer of ownership in favour of the tenant u/s 38-E of the Act becomes ineffective merely on the default of payment of the entire purchase price or

(II) such a transfer would not be ineffective unless the two conditions are satisfied viz

(i) the erstwhile tenant fails to pay the entire purchase price and

(ii) inspite of proceedings for recovery by the tribunal, the purchase price could not be recovered from the said tenant.

4. Section 38 of the Act provides for the rights of the protected/ordinary tenant and sub-section (1) states that a protected tenant or as the case may be ordinary tenant (not being a tenant holding land from a landholder who is a serving member of the armed forces) shall at any time after the commencement of the Act be entitled to purchase the landlord's interest in the land held by the former as a protected tenant or, as the case may be, ordinary tenant. As per sub-section (2), a protected tenant who desires to exercise the right conferred by sub-section (1), shall make an offer to the landholder stating the price which he is prepared to pay for the landholder's interest in the land upto 15 times for dry land or 8 times for wet land, (irrigated by wells) and 6 times of wet lands, irrigated by other sources of the rent payable by him and where he is not entitled to purchase whole of the land, the portion thereof which he is entitled to purchase. Same right is also available to an ordinary tenant under sub-section (2-A)(a) and as per sub-section (3), if the landholder refuses, or fails to accept the offer and to execute a sale deed within three months from the date of the offer, the protected tenant or, as the case may be, ordinary tenant may apply to the

tribunal for the determination of the reasonable price of the land. The tribunal shall after following the procedure as prescribed under sub-section (4) determine the reasonable price of the land and the said price is required to be deposited with the tribunal by the tenant under sub-section (5). Sub-section (6) states that on deposit or recovery of the entire amount of the reasonable price being made, the tribunal shall issue a certificate in the prescribed form to the protected tenant or, as the case may be, ordinary tenant, declaring him to be the purchaser of the land and such certificate shall be conclusive evidence of the sale as against the landholders and all persons interested therein. Clause A to C of subsection (6) provide the procedure for recovery of the reasonable price with interest, etc. and the amount being paid to the landholder. Clause (d) of subsection (6), which is relevant to our decision in the present petition reads :

"(d) If the protected tenant (or, as the case may be, ordinary tenant) fails to pay the entire amount of the reasonable price within the period fixed under sub-section (5) or the same is not recovered from him, the purchase by the protected tenant (or, as the case may be, ordinary tenant) shall not be effective and he shall forfeit the right of purchase of the land, and the amount paid by him towards the reasonable price shall be refunded to him with interest at three percent per annum together with land revenue paid by him if any, after deducting therefrom the rent due from him for the period :

Provided that if the amount of reasonable price in respect of which the protected tenant (or, as the case may be ordinary tenant) has committed default, does not exceed one-fourth of the price fixed by the tribunal under sub-section (5) the right of purchase of the protected tenant (or, as the case may be, ordinary tenant) shall not be forfeited and tribunal shall cause the balance of reasonable price to be recovered as arrears of land revenue and paid to the landholder."

5. Section 38-E added in the Act by Act No. (1) 1954 and section 1 of the said Act states that notwithstanding anything in Chapter IV-A or in law for the time being in force or in customs, usages, decree, contract or grant to the contrary, the Government may, by notification in the official gazette, declare in respect of any area and from such date as may be specified therein that ownership of all lands held by protected tenants which they are entitled to purchase from their landlords in such area under any provision of the said Chapter shall stand transferred to and vested in the protected tenants holding them and from such date the protected tenants shall be deemed to be the full owners of such lands. For Beed District, the relevant date of transfer of ownership under sub-section (1) of section 38-E is 31-1-1957. Sub-section (2) provides for a certificate being issued in the prescribed form declaring the protected tenant to be the owner and notice of such issuance to be simultaneously issued to the landlord and such certificate shall be conclusive evidence of the protected tenant having become owner of the land w.e.f. the date of the certificate, as against the landholder and all other persons having any interest therein. Sub-section (3) states that within 90 days from the date specified in the Notification u/s 1 every landholder of

lands situated in the area specified in such notification shall file an application before the tribunal for the determination of the reasonable price of his interest in the land which has been transferred to the ownership of a protected tenant under sub-section (1) and if an application is not filed within such period by the landlord, the tribunal may suo motu proceed to determine such price and thereupon all the provisions of sub-section (4) to (9) of section 38 shall mutatis mutandis apply to such application. For our decision on the point of reference, it is necessary to reproduce the following two proviso to sub-section (3) of section 38-E of the Act.

".....Provided that if the protected tenant commits default in respect of any installments, it shall be recovered by the Government as arrears of land revenue and paid to the landholder;

Provided further that if the whole or any part of the price due to the landholder cannot be recovered as arrears of land revenue, the transfer shall not be effective and the amount, if any, already paid by the protected tenant towards the price shall be refunded to him together with interest @ 3% p.a. and the land revenue paid by him, if any, after deducting therefrom the rent for the period."

6. It is required to be noted that the provisions of section 38 of the Act are applicable for both the protected tenant as well as ordinary tenant and they provide for a voluntary act for transfer of ownership from the landlord to the tenant and if such voluntary exercise does not result in transfer, the tenant has a remedy of approaching the tribunal which shall in turn determine the reasonable price and transfer the ownership of the land in favour of the tenant. If the tenant fails to pay entire amount of reasonable price within a fixed period under sub-section (5) or if the same is not recovered from him, the purchase of the tenant shall not be effective and he shall forfeit the right of purchase of land, as per the provisions in Clause (d) of sub-section (6) of section 38. The word used in Clause (d) is "or", which means either on failure to pay the entire amount of reasonable price within the period fixed under sub-section (5) or if the same is not recovered from him, the purchase becomes ineffective. These two conditions are in alternate and if any one of them is satisfied, the transfer by purchase in favour of the tenant becomes ineffective.

7. Section 38-E is applicable only to a protected tenant and not an ordinary tenant and it is not by way of any voluntary act. As soon as the notified date is declared in respect of any area, a protected tenant becomes owner of the land he was cultivating as a tenant and the only relief available to the landlord is to apply within 90 days from such date before the tribunal for the determination of the reasonable price of his interest in the land which has been transferred to the ownership of a protected tenant. This provision has been incorporated with an intention to transfer ownership in favour of the tiller namely the protected tenant, by operation of a statute automatically and confirmation of such a transfer is made by issuing a certificate in the prescribed format. It is pertinent to note that issuance of such certificate of transfer of ownership u/s 38 is only

after the entire amount of reasonable price is paid by the transferee tenant and whereas, under provisions of section 38-E(2) there is no such condition precedent for issuing the certificate of ownership. Failure to deposit or pay the entire amount of the reasonable price may result in non issuance of certificate of ownership under subsection (6) of section 38 and till such a payment is made within the period and installments fixed by the tribunal, the certificate cannot be issued. It further provides that even failure to pay the entire amount of the reasonable price within the period fixed under sub-section (5) shall make the purchase ineffective under Clause (d) of sub-section (6) of section 38. Same is not the case under the provisions of section 38-E and the purchase in favour of the protected tenant can be ineffective only under the eventualities stipulated under the proviso of sub-section (3) of the said section, as reproduced hereinabove. For making the purchase transfer u/s 38-E to be ineffective, there are two conditions to be fulfilled simultaneously viz.

(i) protected tenant commits default in payment of the entire amount of purchase price and (ii) if the whole or any part of the purchase price due to the landlord could not be recovered as arrears of land revenue.

The proviso states that if the protected tenant commits default in respect of any installment, it shall be recovered by the Government as areas of land revenue and paid to the landholder. The language used in this proviso is clear and different from the language used in Clause (d) of sub-section (6) of section 38 of the Act. On the failure of the protected tenant to pay any installment, it is clear that the installment amount has to be recovered by the Government as arrears of land revenue as per the first proviso under sub-section 3 of section 38-E and if the whole or any part of the price due to the landholder cannot be recovered as arrears of land revenue, the transfer shall be ineffective. These steps have to be read one after another and in continuity. The legislature has, therefore, provided a separate methodology for declaring the transfer of ownership u/s 38-E ineffective and the procedure provided for making the transfer ineffective u/s 38 of the Act cannot be transposed or implied to be included under the provisions of section 38-E. Though sub-section (3) states that the provisions of sub-section (4) to (9) of section 38 shall "mutatis mutandis" apply, that does not mean that the provisions of sub-section (6) of section 38 are made applicable suo motu for declaration of the transfer as ineffective and the term "mutatis mutandis" means "with necessary changes", as has been held by the Supreme Court in the case of Ashok Service center and Others Vs. State of Orissa, .

8. Both sections i.e. 38 and 38-E are required to be read independent of each other, specially when section 38 applies for both protected as well as ordinary tenant and deals with a voluntary act on the part of the tenant and the landlord and section 38-E deals with the statutory right of ownership automatically from the date notified by the Government in favour of protected tenant alone and there is no role assigned to the landholder except to apply for fixation of a reasonable price. To make transfer u/s 38-E effective, the provisions of sub-

section (3) of the said section alone will apply and the provisions of Clause (d) of sub-section (6) of section 38 do not come into play at all. Both the provisions apply in the case of respective purchase transfers independently and it cannot be read that for declaring the purchase transfer u/s 38-E as ineffective the provisions of Clause (d) of sub-section 6 of section 38 would apply.

9. We, therefore, agree with the view taken by Shri B.N. Deshmukh, J., and we are of the opinion that the view of Shri Kanade, J., is not a good law. The reference is answered accordingly and we hold that for declaring the purchase transfer u/s 38-E of the Act as ineffective, two conditions are essential viz. :

- (i) tenant commits a default in the payment of entire purchase price ; and
- (ii) inspite of the proceedings for recovery, the entire price amount could not be recovered;

The reference is answered accordingly.

10. We direct the registry to place the matter before the appropriate Bench for further disposal on merits.

11. Order accordingly.