
(2011) 10 BOM CK 0044

In the Bombay High Court

Case No : Writ Petition No. 1783 of 1990

Ganpati Dadu Mali Since deceased through heirs (Rakhmabai
Ganpati Mali and Others) and Damodar Dadu Mali, All

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 04-10-2011

Acts Referred:

Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 —
Section 15A, 22, 31A, 32
Constitution of India, 1950 — Article 227

Citation : (2012) 3 BomCR 703 : (2012) 1 MhLj 341

Hon'ble Judges : Ranjit More, J

Bench : Single Bench

Advocate : G.R. Rege with Mr. S. M. Railkar, for the Appellant; A.I. Patel, AGP
for respondent Nos. 1 to 3 and Shri S.B. Deshmukh, Advocate for respondent
Nos. 4A to 4D, for the Respondent

Judgement

1. The petitioners by this petition under Article 227 of the Constitution of India challenges the orders contained in Letter dated 2nd February, 1990 as well as Notice dated 3rd March, 1990 issued by respondent no.3 and respondent no.2 respectively under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter for the sake of brevity referred to as "the Act").

2. The brief facts giving rise to the present petition are as follows:

The dispute is about the land, Survey No.349, Hissa No.7 admeasuring 18 gunthas of Village -Lengare, Taluka Khanapur, District : Sangli, now forms part of Gat No.1316 (hereinafter for the sake of brevity referred to as "the suit land"). In the Village Lengare, the Consolidation Scheme under the Act was made applicable in the year 1970. Notices to the parties u/s 15A of the Act were issued on 8th June, 1970. The Consolidation Officer recorded statements as agreed by concerned Khatedars on 10th November, 1970. The revised statements of six

khatedars were also recorded on 2nd January, 1971. These statements are signed by the petitioners' father as well as respondent no.4. Under these statements, respondent no.4 who was the holder of the suit land agreed to transfer the same to the holdings of the petitioners' father. The suit land was accordingly merged in new Gat No.1316. In pursuance of these agreements, a draft Scheme was published on 24th January, 1971. Objections were invited within a period of 30 days. Since no objections were received, the Deputy Director of Land Records, Pune published Final Scheme on 24th February, 1971. The scheme was executed on 31st March, 1971. Possession receipts to that effect were obtained from the concerned khatedars.

The revenue records were changed in accordance with the Final Scheme and lands were placed in the records of the respective holders. The suit land was recorded in the Khata of the petitioners' father. However, at the same time it remained to be deleted from the Khata of respondent no.4. Respondent No.4 taking advantage of this fact, preferred an application in the year 1973/74. After inquiry, it was directed that the suit land be removed from Khata of respondent no.4 and be retained in Khata of the petitioners' father. Respondent No.4 again applied to the Chief Minister with request to delete the suit land from the holdings of the petitioners' father and to continue the same in the name of respondent no.4. This application was inquired into by the Consolidation Officer and by Order dated 3rd May, 1982, respondent no.4's application was rejected. Respondent No.4 started disturbing the possession, and therefore, the petitioners' father was compelled to file a civil suit for injunction simpliciter. Interim injunction was granted in favour of the petitioners' father. However, subsequently the suit was dismissed. The petitioners preferred an appeal and the same is pending in the District Court. In this appeal, the interim injunction is granted in favour of the petitioners and against respondent no.4. The said injunction is in operation.

Despite the above position, respondent no.4 made an application on 28th March, 1983 to the Deputy Director of Land Records making grievance that injustice was done to him in the said allotment. He also mentioned that his uncles-Krishna & Laxman, Khatedars of Khata No.276 did not sign the agreed statements, and hence, the same was not binding on him. The Settlement Commissioner without giving any notice to the petitioners in exercise of his powers u/s 32 of the Act concluded that deceased Khatedars viz. Krishna & Laxman had not given consent to the agreed statements, and therefore, directed that the suit land be allotted to respondent no.4 by removing it from the holdings of the petitioners. The Settlement Commissioner accordingly, directed the Consolidation Officer, Sangli to publish Variation Scheme in Village Lengare and Taluka Notice Board as per Rules. The petitioners were intimated about this. The petitioners thereafter gave their objection dated 17th January, 1989. It appears that the Settlement Commissioner finally confirmed the Variation Scheme on 12th December, 1989.

3. Mr. Rege, learned counsel for the petitioners submitted that respondent no.4

had signed the statements dated 10th November, 1970 and 2nd January, 1971. The authorities acted upon these statements, and therefore, the scheme was finalized and now it cannot be varied. He also submitted that respondent no. 4's uncles viz. Krishna Keru Mali and Laxman Keru Mali had already died 20 years and 16 years prior to recording of the above statements, and therefore, respondent no.4 could not have capitalized non-signing of these statements by his said uncles. Mr. Rege also submitted that respondent no.4's application making grievance about the scheme was rejected twice, and therefore, the Settlement Commissioner could not have entertained the same for the 3rd time. Mr. Rege lastly pointed out that the order of the Settlement Commissioner varying the scheme is not only in violation of the principles of natural justice but also barred by the Law of Limitation. In this regard, he has relied upon the decisions of a Division Bench in Gulabrao Bhaurao Kakade (Smt.) since deceased by his heirs and legal representatives Vs. Nivrutti Krishna Bhilare & Ors. reported in 2001 (Supp.) Bom. C.R.688 and Shri Dattu Appa Patil (since deceased, by legal heirs and representatives Shri Ananda Dattu Patil, Shri Sadashiv Dattu Patil and Shri Maruti Dattu Patil) Vs. State of Maharashtra and Shri Rama Yesaba Patil, .

4. Mr. Deshmukh, learned counsel appearing for respondent no.4A to 4D contested the writ petition by supporting the order impugned in the petition. He submitted that the original scheme was defective for the following reasons :

- i) The exchange of lands was made without the consent of the joint owners of Khata No.276.
- ii) The original Consolidation Scheme was not executed in accordance with Rules under the Act, inasmuch as, the petitioners "father have not signed the Kabja receipts.
- iii) The suit land was retained in the Khatas of the petitioners" father as well as respondent no.4, and lastly
- iv) The petitioners" father did not raise any objection to the Variation Scheme published in the Village-Lengare and Taluka Notice Board.

On the basis of the above submissions, he asserted that this Court should not exercise its jurisdiction under Article 227 of the Constitution of India, and the petition deserves to be dismissed.

5. Mr. Patel, learned AGP appearing for respondent nos. 1 to 3 supported the impugned order by relying upon the affidavit filed by R. A. Kutkar, Assistant Settlement Commissioner (Consolidation), Pune. Mr. Patel raised objections somewhat similar to the one raised by Mr. Deshmukh.

6. Having gone through the compilation of the writ petition including the impugned orders and having considered the submissions of the respective counsel, I find merit in the writ petition. There is no dispute that in the Year 1970 consolidation proceedings were started in Village Lengare by Assistant

Consolidation Officer No.I, Vita, District-Sangli by giving notices u/s 15A of the Act. There is also no dispute that the statements of the concerned Khatedars were recorded by the Consolidated Officer on 10th November, 1970 and 2nd January, 1971. Initial statement dated 10th November, 1970 is annexed at Exhibit -1 to the written submission tendered on behalf of the petitioners. Statement dated 2nd January, 1971 is annexed at Exhibit "A" to the petition. Both the statements are signed by the petitioners' father as well as respondent no.4. Khata No.278 belongs to the petitioners' father and so far as respondent no.4 is concerned, he holds two khatas viz. Katha No.61 which he holds independently and Khata No.276 which he holds along with his two uncles viz. Krishna & Laxman. The suit land prior to the introduction of the scheme was shown in Khata No.276 belonging to joint family of respondent no.4 and his two uncles. Perusal of the statements makes it abundantly clear that respondent no.4 agreed to transfer the suit land as well as lands shown in Khata No.276 to the petitioners' father and others and in lieu thereof agreed take land admeasuring about 27 gunthas from Survey Nos. 346/1, 4, 5, 6 & 7 as the same was irrigated land. There is no question of the consent of respondent no.4's uncles as both of them expired much prior to the recording of these statements. Laxman Keru Mali expired 16 years prior to 1974 and Krishna Keru Mali expired 20 years prior to 1974. Mutation Entry Nos. 120 and 121 are effected in that regard. The statement as signed by respondent no.4 makes it unequivocally clear that exchange was made and lands were consolidated in gat nos. by mutual consent of the concerned Khatedars.

The draft scheme thereafter was published on 24th January, 1971 and since no objections were received, the same was finalized on 24th February, 1972. The revenue records were also changed. However, one mistake remained i.e. the suit land was shown in Khata of the petitioners' father as well as respondent no.4. The suit land ought to have been deleted from the Khata of respondent no.4. However, inadvertently, the same remained in respondent no.4's Khata. Respondent no.4 took advantage of this fact and preferred an application in the year 1973/74 which was inquired by the Assistant Consolidated Officer. The Assistant Consolidated Officer, Vita, District Sangli after verifying the statements came to the conclusion that the suit land should not have been retained in Joint Khata No.276 belonging to respondent no.4 and his two uncles. In order to rectify the scheme, he proposed variation u/s 31A of the Act. The Deputy Director of the Land Records sanctioned the variation. Accordingly, the suit land was deleted from the Joint Khata No.276 of respondent no.4. Respondent no.4 again made an application to the Chief Minister on 12th June, 1977. This application was sent to the Consolidation Officer through Collector. The Consolidation Officer submitted report to the Deputy Director of Land Records that variation approved under 31A of the Act will have to be cancelled and the suit land will have to be retained in Joint Khata No.276 belonging to respondent no.4 and his uncles. This report, however, was not accepted by the Deputy Director of Land Records and respondent no.4's application was rejected on 3rd

May, 1982.

Respondent no.4 again made an attempt to change the record by giving an application on 28th March, 1983 to the Deputy Director of Land Records. The grievance was the same. The Deputy Director of Land Records sent this application to the Consolidated Officer. The Consolidated Officer opined that the suit land should be retained in Khata of respondent no.4. The Settlement Commissioner relied upon this opinion. The Settlement Commissioner on the basis of this opinion passed an Order u/s 32 of the Act for variation. It is worth to note that this order u/s 32 of the Act was passed by the Settlement Commissioner without giving any notice to the petitioners and behind their back. The Settlement Commissioner failed to consider that earlier on two occasions, respondent no.4 made similar attempts, however, he could not succeed. The Settlement Commissioner varied the scheme. The Settlement Commissioner exercised the jurisdiction u/s 32 of the Act in the year 1989 i.e. 18 years after finalization of the earlier scheme. The scheme was varied on the following grounds :

- i) The initial exchange of the land under the original scheme was without the consent of the joint owners of Khata No.276.
- ii) Signature of the petitioners' father is not there on the kabja receipt. Both the grounds on which the scheme is varied are not sustainable.

7. As stated above, though Khata No.276 is Joint Khata of respondent no.4 along with his uncles viz. Krishna & Laxman, both of his uncles expired much prior to the introduction of the Consolidation Scheme to the village land. Therefore, there is no question of consent of these Khatedars for exchange of the suit land. Respondent no.4 was aware of these facts as the intimation of his uncles death was given by respondent no.4 himself to the Village Officers, and thereafter, mutation entries were effected on record. Respondent no.4 with malafide motive made repeated attempts to grab the suit land. His first two attempts failed. However, he succeeded in his 3rd attempt. The Deputy Director of Land Records / Settlement Commissioner failed to verify whether respondent no.4's uncles were alive when the original statements were recorded and exchange of the land was made. They blindly relied upon the statement of respondent no.4 and passed the order u/s 32 of the Act.

Another ground of which support is taken by the Deputy Director of the Land Records and Settlement Commissioner is that the petitioners' father has not signed the kabja receipt. This ground, according to me, is frivolous. The statements where under the concerned Khatedars agreed to exchange lands are signed by petitioners' father and respondent no.4. The draft scheme thereafter was published and the same was finalized in year 1971 only. Thereafter, possession of the land was handed over by executing the kabza receipt. The said receipt is signed by respondent no.4. In these circumstances, non-signing of the said receipt by the petitioners' father does not make any difference as the suit

land shown in Khata No.276 originally belongs to respondent no.4.

8. Mr. Deshmukh, learned counsel appearing on behalf of respondent no.4A to 4B contested the petition on the ground that the petitioners have not raised any objection to the proposed variation u/s 32 of the Act published in the Village-Lengare and Taluka Notice Board on 8th August, 1989. This submission is without any merits. This variation was in pursuance of 3rd application made by respondent no.4 in the year 1983. There is nothing on record and respondent no.4 also could not point out that the petitioners or their father were heard while disposing of this application of respondent no.4. The order came to be passed behind their back. The only basis as stated above is that respondent no.4's uncles did not consent to the exchange of the lands. When petitioners came to know about the proposed variation, they preferred an application before the Settlement Officer on 17th January, 1989. However, they were informed that the variation scheme is finalized. The Consolidation Officer thereafter gave notice to the petitioner on 3rd March, 1993 for implementation of the variation scheme. The petitioners immediately thereafter came to this Court. In these facts and circumstances, I find that the submission of Mr. Deshmukh, learned counsel for respondent no.4A to 4D is without any merit.

9. This takes me to consider the issue of jurisdiction of respondent no.3 to pass order u/s 32 of the Act for variation of the said scheme. The Consolidation Scheme was introduced in Village Lengre in the year 1970. The draft scheme was published on 24th January, 1971 and since no objections were received the final scheme was published on 24th February, 1971. Respondent No.4 filed an application on 28th March, 1983 invoking provisions of Section 32 of the Act. Respondent No.3 by invoking powers conferred to him, varied the scheme and thereby the suit land was directed to be deleted from Khata of the petitioners and was retained in Joint Khata No.276 belonging to respondent no.4. Thus, respondent no.3 accepted the variation of the scheme after a period of 18 years. The Act does not prescribe any limitation for variation of the scheme. The question whether there is limitation for variation of scheme fell for consideration before the Division Bench in Gulabrao Bhaurao Kakade's case (supra). Paragraph No.6 of the said judgment makes it clear that no limitation for variation of the scheme is prescribed under the Act and the same is to be done within reasonable time. What is the reasonable time, would depend upon the facts and circumstances of each case. The Division Bench held that ordinarily exercise of such powers after three years of finalization of scheme u/s 22 may not be justified. In this case, the scheme was varied after a period of 15 years. Therefore, the variation was set-aside. Another Division Bench has taken a similar view in Dattu Appa Patil's case (supra). In this case, the consolidation scheme was varied after 27 years. The Division Bench held that the exercise of powers by Consolidation Officer after 27 years is totally unjustified and on that ground alone the impugned order therein came to be set-aside. In the light of the ratio of the above judgments of the Division Bench, the respondent no.3 was grossly unjustified in exercising powers u/s 32 of the Act after a period of 18

years. The variation of the scheme, therefore, is required to be quashed and set-aside.

10. Before parting with the judgment, it must be mentioned that the petitioners had filed a suit in the Lower Court for permanent injunction restraining respondent no.4 from disturbing their possession in the suit land. In this suit, interim injunction was prayed and the same was granted by the Trial Court. The suit ultimately was dismissed on 31st January, 1987, and thereafter, petitioners filed an appeal and interim injunctions was granted by the District Court in the year 1987, which is in operation. Thus, petitioners' father's possession is also protected by the Civil Court. Respondent No.3, in view of the order of the Civil Court could not have directed the petitioners to handover possession.

11. In the facts and circumstances of the case, the petition succeeds, and the same is allowed in terms of prayer clause (b) and (d). However, there shall be no order as to costs.

12. Mr. Deshmukh, learned counsel for respondent nos. 4 A to 4D at this stage seeks stay of the present order for a period of six weeks in order to enable his clients to approach the Higher Court. Mr. Railkar, learned counsel for the petitioners, opposes the grant of such stay. However, in the interest of justice and in order