

(2011) 06 BOM CK 0024
In the Bombay High Court
Case No : Writ Petition No. 513 of 1992

Habibabi and Others

APPELLANT

Vs

Reubai Jadhav and Others

RESPONDENT

Date of Decision : 19-06-2011

Acts Referred:

Citation : (2011) 06 BOM CK 0024

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : Gulam Mustafa, for the Appellant; P.F. Patni, for Resp. Nos. 1B, 1C, 1D, 1R, 1F and 2, 4 and 6 and Mr. Dr. Korde, AGP for Resp. Nos. 7 to 9, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—Heard. This writ petition takes exception to the judgment and order dated 15th July, 1991 passed by Maharashtra Revenue Tribunal, Aurangabad, (for short, the Tribunal) in case No. 83/B/91A.

2. The background facts of the case as disclosed in the writ petition, are as under :

(a) It is the case of the petitioner that the petitioner is owner of the agricultural land bearing Survey No.101/5, admeasuring 1 acre and 30 gunthas as "KolMala" situated at village Modhe Kh. Tq. Sillod, District Aurangabad.

(b) The petitioner filed an application for recovery of possession u/s 32(2) r/w 5 WP513/1992 Section 44 of The Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter to be referred to as "the Act"), before the Additional Tahsildar, Sillod. The Additional Tahsildar decided the said application by judgment and order dated 25th April, 1989 in favour of the petitioner, directing to put the petitioner in actual possession of the land.

(c) Being aggrieved, the respondents filed an appeal before the Deputy Collector,

Land Reforms, Aurangabad. By his judgment and order dated 27th September, 1989, the Deputy Collector, LR, Aurangabad, dismissed the appeal filed by the respondents herein, thereby confirming the decision of the Additional Tahsildar.

(d) Being aggrieved, the respondents herein filed proceedings before the Maharashtra Revenue Tribunal, Aurangabad. The Tribunal by its judgment and order dated 15th July, 1991 allowed the revision filed by the respondents. Hence, this petition by the original applicant.

3. Learned Counsel appearing for the petitioner invited my attention to the findings recorded by the Additional Tahsildar and also the Deputy Collector and submitted that, the Additional Tahsildar has recorded a finding that 6 WP513/1992 there was default in depositing the rent by one Mr. Shenphad; and as such, on this ground alone, the application filed by the petitioner deserves to be allowed.

4. The learned Counsel for the petitioner invited my attention to the provisions of Section 19(2)(d) of the said Act and, relying upon the said provision, he would submit that, the suit land was given for cultivation and in possession to appellant no.6 by appellant Nos.1 to 5 and, therefore, as rightly held by the Additional Tahsildar and also by the Deputy Collector, there was subletting and the application filed by the petitioner for restoration of possession, is required to be allowed.

5. According to the learned Counsel for the petitioner, in the written statement filed by the respondents herein before the Appellate Authority, they have categorically admitted that Appellant No.6 is in possession of the suit land. It is submitted that Appellant No.6 before the Appellate forum, was not family member of appellant Nos.1 to 5, there was subletting of land by the Respondent Nos. 1 to 5 in favour of respondent No.6 and he was found in possession of the suit land. When the appellants themselves have admitted the fact that appellant No.6 is in possession of the suit property, the fact which is admitted, need not be proved. Therefore, relying upon the findings recorded by the Additional Tahsildar and the Deputy Collector, counsel appearing for the petitioner submits that this writ petition deserves to be allowed.

6. Learned Counsel also invited my attention to the grounds taken in the petition and also certain copies of 7/12 extracts and submitted that the entries in the name of Kishan in 7/12 extracts are in dispute and, therefore, the findings recorded by the Tribunal, that after death of Shenphad, name of Kishan is entered in the revenue record, are based upon no evidence. Therefore, according to counsel for the petitioner, the judgment and order passed by the Tribunal deserves to be interfered.

7. On the other hand, counsel appearing for the respondent Nos.1 to 5 submits that, before taking any action on the ground of default in payment of rent, Tahsildar is bound to follow the provisions of section 28 of the said Act.

It is further submitted that if there is eventuality of default for three years then only the landholder is entitled for recovery of possession on the ground of default in payment of rent. Therefore, according to the counsel appearing for Respondent Nos.1 to 6, the Tahsildar, before taking any action on the basis of default in payment of rent, is bound to follow the mandate of Section 28 of the said Act; and, therefore, the Appellate authority has rightly not commented or observed anything about the said aspect and ignored the said aspect.

8. Learned Counsel further submitted that it was never the case of Respondent Nos.1 to 5 that Respondent No.6 is in possession of the suit property. Learned Counsel submitted that Respondent No.6 is a family member and, therefore, the findings recorded by the Appellate Authority that, it is an admitted position that Respondent No.6 is in possession of the suit property, are contrary to the record. There is no any document on record which would suggest that Respondent No.6 is in possession of the suit property. On the contrary, the Tribunal, upon perusal of the record made available, has observed that, after death of Shenphad, the revenue entires are recorded in the name of his legal heirs and representatives. Therefore, according to learned Counsel appearing for Respondent Nos. 1 to 6, the petition is devoid of any merit and same deserves to be dismissed.

9. With the able assistance of the counsel appearing for the parties, I have perused the impugned judgment and order passed by the Additional Tahsildar; Deputy Collector; Maharashtra Revenue Tribunal; and the relevant provisions of the said Act.

10. At the outset, it would be appropriate to reproduce herein below the provision of Section 28 of the said Act, which reads as under:

28(1) Whereas a tenancy of any land held by a tenant is terminated for nonpayment of rent and the landholder files any proceeding to eject the tenant, the Tahsildar shall call upon the tenant to tender to the landholder the rent in arrears together with the cost of proceeding within ninety days from the date of the order, and if the tenant complies with such order, the Tahsildar shall, in lieu of making an order of ejectment pass an order directing that the tenancy has not been terminated, and thereupon the tenant shall hold the land as if the tenancy had not been terminated;

Provided that nothing in this section shall apply to any tenant whose tenancy is terminated for nonpayment of rent if he has failed for any three years to pay rent within the period specified in sub clause (1) of clause (a) of subsection (2) of section 19 and the landholder has given intimation to the tenant of the default within a period of six months of each default.

(2) The landholder may apply to the Tahsildar in the prescribed form for recovery of arrears of rent for any period not exceeding three years. The Tahsildar may, after such enquiry as he considers necessary pass such order as he deems fit. The Tahsildar in passing an order shall allow the tenant to setoff the sum if any, paid by him to the landholder within the period of three years immediately

preceding the date of application made under subsection (1) in excess of the rent due from him:

Provided that if the Tahsildar is satisfied that in consequence of a total or partial failure of crops or similar calamity the tenant has been unable to pay the rent due, the Tahsildar may, for reasons to be recorded in writing, direct that the arrears of rent together with costs of the proceedings, if awarded, shall be paid within one year from the date of the order and that if before the expiry of the said period the tenant fails to pay the said arrears of rent and costs, the tenancy shall be deemed to be terminated and the tenant shall be liable to be evicted.

11. Bare perusal of the provisions, referred above, would make it abundantly clear that before any proceedings are initiated by the Tahsildar or Additional Tahsildar, as the case may be to eject or evict the tenant, on the ground of default in depositing the rent, a notice is required to be issued, calling upon the tenant to tender to the land holder the rent in arrears together with the costs of proceedings within ninety days from the date of the order and if the tenant complies with such order, the Tahsildar shall, in lieu of making an order of ejectment pass an order directing that the tenancy has not been terminated, and thereupon the tenant shall hold the land as if the tenancy had not been terminated.

? Under subsection (2) of Section 28 of the Act, landholder is entitled to apply to Tahsildar for recovery of rent not exceeding three years.

? From careful perusal of the judgment of the Additional Tahsildar, there is no discussion about all these aspects. There is no discussion or adherence to the provisions of Section 28 of the Act. There is a reference to only one notice issued by the landlady, that too, as to when such notice was served or received by the respondents, i.e. Tenants, is also not clear. Merely by general observations, without following the relevant provisions u/s 28 of the said Act, or without adhering to the said provision, the Additional Tahsildar has recorded the finding that there is default in depositing the rent by Respondents Nos.1 to 5 and, on this ground, the application filed by the petitioner came to be allowed. Therefore, in my opinion, the findings recorded by the Additional Tahsildar on the aspect of default in depositing the rent, cannot be sustained since those findings are without adhering to the provisions of Section 28 of the said Act.

12. Though, learned Counsel appearing for the petitioner was at pains to argue that there is admission in written statement by the Respondent Nos.1 to 5 that Respondent No.6 is in possession of the suit land, there is no any document on record to show or suggest that Respondent No.6 is in possession of the suit land.

13. The Tribunal upon perusal of 7/12 extracts at pages 65 to 75 of the original record, has observed that, after death of Shenphad, his son Kishan inherited the tenancy rights over the disputed land and after his death, his sons, his mother Reobai and wife of Kishan and sons of Kishan and daughter of Shenphad Salubai, wife of Shenphad inherited the tenancy rights. Therefore, the findings recorded

by the Appellate Authority that Respondent No.6 is in possession of the suit property and, therefore, the petitioner is entitled for possession of the suit land, are without there being any documentary evidence on record to show that Respondent No.6 is in actual possession of the property or there is any creation of any right in favour of Respondent No.6 by Respondent Nos.1 to 5, showing his possession. Therefore, viewed from any angle, the view taken by the Tribunal appears to be reasonable.

14. A feeble attempt was made by the counsel appearing for the petitioner to suggest that even original tenant Shenphad was not protected tenant. The issue neither was raised before Additional Tahsildar nor before the Appellate Authority or before the M.R.T. Therefore, this Court refrain from making any observations on the said issue. For the aforesaid reasons, the writ petition is devoid of any merit and the same stands dismissed. Rule discharged.