
(1998) 02 BOM CK 0068

In the Bombay High Court

Case No : Writ Petition No. 3343 of 1989

Himatrao Ukha Mali and others

APPELLANT

Vs

Popat Devram Patil and another

RESPONDENT

Date of Decision : 20-02-1998

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29(1), 32
Civil Procedure Code, 1908 (CPC) — Section 11
Contract Act, 1872 — Section 23
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1999 Bom 10 : (1998) 3 ALLMR 415 : (1998) 3 BomCR 680 :
(1998) 2 MhLj 383

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : R.G. Karmarkar, for the Appellant; V.T. Choudhary, for the Respondent

Judgement

B.H. Marlapalle, J.—One Ukha Hiralal Mali was a tenant in respect of land admeasuring 5 Hectares 13 Ares located in Gat No. 33/1, S. No, 21/2 of village Lon, Tq. Amalner. District Jalgaon and the original owner of the said land was Shri Zaverchand Laxmichand. It appears that Ukha Hiralal Mali entered into an agreement of sale with the present respondent in respect of the said land for a consideration of Rs. 6,000/-. The tenant received the consideration and receipt to that effect as well as possession of the land by the vendee was issued. It is pertinent to note that the agreement of sale was registered and the possession of the subject land was handed over to respondent No. 1. Ukha Hiralal Mali filed R.C.S. No. 96/71 before the Civil Judge (J.D.) Amalner and claimed possession of the said land from respondent No. 1. The said suit came to be dismissed by order dated 20-12-1973. In the meanwhile, when the suit was pending certificate of ownership u/s 32-G of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Tenancy Act for short) came to be issued in favour of Ukha Hiralal on 11-6-1971. R.C.S. No. 96/71 was dismissed solely on the

ground that the possession of respondent No. 1 was - protected u/s 53-A of the Transfer of Property Act. The plaintiff therefore, filed Civil Appeal No. 13/74 which was dismissed on 23-2-1977 and the order passed by the trial Court was confirmed.

2. Ukha Hiralal Mali died on 5-8-1980 and the present petitioners who are the heirs of late Ukha Hiralal Mali filed Special Civil Suit No. 67/82 before the Civil Judge (S.D.) Dhule claiming the reliefs of possession of the suit land and the said suit was again dismissed by order dated 14-3-84 on the same ground namely the possession of -respondent No. 1 was protected u/s 53-A of the Transfer of Property Act and that the same relief prayed in earlier R.C.S. No. 96/71 was already rejected and the order was confirmed in appeal. While Special Civil Suit No. 67/82 was pending, the petitioners approached the Sub-Divisional Officer, Amalner and filed Tenancy Application No. 16/83 u/s 84 of the Tenancy Act for summary eviction of the -respondent No. 1 and restoration of the subject land to them. The S.D.O. directed Tahsildar and Agricultural Land Tribunal, Amalner for recording the evidence and the Tahsildar after making necessary enquiry submitted his report. It was contended by the present petitioners before the Sub-Divisional Officer that the transfer of land to respondent No. 1 was invalid u/s 43 of the Tenancy Act and hence, they were entitled for the restoration of land from the respondent No. 1. The Sub-Divisional Officer by his order dated 28-2-84 dismissed the tenancy application on the ground that the transaction between late Ukha Hiralal and the respondent No. 1 was merely an agreement of sale which was not a complete sale based on the sale-deed and hence, the possession of the respondent No. 1 was protected u/s 53-A of the T.R Act. The S.D.O., for arriving at this conclusion, also relied upon the judgment in R.C.S. No. 96/71 as well as Civil Appeal No. 13/74 and held that the findings recorded by the Civil Court were binding on the Tenancy Court and that the transaction between Ukha Hiralal and the present respondent No. 1 was not invalid. The S.D.O. concluded that provisions of section 43 of the Tenancy Act did not come in the way of the respondent No. 1 as it was a case of incomplete sale-deed which was merely a contract of sale.

3. The petitioners filed Tenancy Revision Application No. 103/84, u/s 76 of the Tenancy Act against the order passed by the Sub-Divisional Officer in Tenancy Application No. 16/83. By order dated 28-2-1985 the Revision was rejected and the findings recorded by the Sub-Divisional Officer were confirmed. The Maharashtra Revenue Tribunal further held that decision in regular civil suit as well as appeal, as rendered by the Civil Courts regarding the claim of the petitioners for possession of the land had become final and the said operated as res-judicata and hence, the application u/s 84 of the Tenancy Act was not tenable. The petitioners have challenged the order dated 28-2-1984 passed by the Sub-Divisional Officer, Amalner and the order dated 28-2-85 passed by the Maharashtra Revenue Tribunal at Bombay.

4. Sections 29(1), 32-G, 32-R, 43, 84 & 85 of the Tenancy Act read as under :

"29(1) A tenant or an agricultural labourer or artisan entitled to possession of any land or dwelling house under any of the provisions of this Act may apply in writing for such possession to the Mamlatdar. The application shall be made in such form as may be prescribed (and within a period of two years from the date on which the right to obtain possession of the land or dwelling house is deemed to have accrued to the tenant, agricultural labourer or artisan, as the case may be.

32-G. (1) As soon as may be after the tillers" day the Tribunal shall publish or cause to be published a public notice in the prescribed form in each village within its jurisdiction calling upon, -

(a) all tenants who u/s 32 are deemed to have purchased the lands

(b) all landlords of such lands, and

(c) all other persons interested therein,

to appear before it on the date specified in the notice. The Tribunal shall issue a notice individually to each such tenant, landlord and also, as far as practicable, other persons calling upon each of them to appear before it on the date specified in the public notice.

(2) The Tribunal shall record in the prescribed manner the statement of the tenant whether he is or is not willing to purchase the land held by him as a tenant.

(3) Where any tenant fails to appear to makes a statement that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective:

Provided that if such order is passed in default of the appearance of any party, the Tribunal shall communicate such order to the parties and any party on whose default the order was passed may within 60 days from the date on which the order was communicated to him apply for the review of the same.

(4) If a tenant is willing to purchase, the Tribunal shall, after giving an - opportunity to the tenant and landlord and all other persons interested in such land to be heard and after holding an inquiry, determine the purchase price of such land in accordance with the provisions of section 32-H and of sub-section (3) of section 63-A:

(Provided that where the purchase price in accordance with the provisions of section 32-H is mutually agreed upon by the landlord and the tenant, the Tribunal after satisfying itself in such manner as may be prescribed that the tenant's consent to the agreement is voluntary may make an order determining the purchase price and providing for its payment in accordance with such agreement.)

(5) In the case of a tenant who is deemed to have purchased the land on the

postponed date the Tribunal shall, as soon as may be after such date determine the price of the land.

(6) If any land which, by or under the provisions of any of the Land Tenures Abolition Acts referred to in Schedule III to this Act, is regranted to the holder thereof on condition that it was not transferable, such condition shall not be deemed to affect the right of any person holding such land on lease created before the regrant and such person shall as a tenant be deemed to have purchased the land under this section, as if the condition that it was not transferable was not the condition of regrant.

32-R. If any time after the purchase of the land under any of the foregoing provisions, the purchaser fails to cultivate the land personally, he shall, unless the Collector condones such failure for sufficient reasons, be evicted and the land shall be disposed of in accordance with the provisions of section 84-C.

43(1) No land purchased by a tenant u/s 32, 32-F, (321, 320, (33C or 43-ID) or sold to any person u/s 32-P or 64 shall be transferred by sale, gift, exchange, mortgage, lease or assignment without the previous sanction of the Collector, such sanction shall be given by the Collector in such circumstances, and subject to such conditions as may be prescribed by the State - Government :

Provided that, no such sanction shall be necessary where the land is to be mortgaged in favour of Government or a society registered or deemed to be registered under the Bombay Co-operative Societies Act, 1925, for raising a loan for effecting any - improvement of such land. (2) Any transfer of land in contravention of sub-section (1) shall be invalid. 84. 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.

85. (1) No Civil Court shall have jurisdiction to settle, decide or deal with any question (including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him) which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the (Maharashtra Revenue Tribunal) in appeal or revision or the (State) Government in exercise of their powers of control.

(2) No order of the Mamlatdar, the Tribunal, the Collector or the (Maharashtra Revenue Tribunal) or the (State) Government made under this Act shall be questioned in any Civil or Criminal Court.

Explanation.--- For the purposes of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906."

5. The only points for consideration in the instant petition are (1) whether the sale of the suit land by way of an agreement of sale in favour of respondent No. 1 executed on 16-3-61 was valid, (2) whether the transfer of the subject land by way of an agreement of sale between the petitioners' father and the respondent No. 1 was invalid as per section 43(2) of the Tenancy Act and (3) whether the application filed by the petitioners before the Sub-Divisional Officer u/s 84 of the Tenancy Act was hit by res-judicata.

6. In the instant case the petitioners who are the heirs of the original tenant were not seeking re-possession of the subject land from the original landlord and instead they are seeking repossession of the suit land from a third person namely the respondent No. 1 who came in possession of the suit land by way of an agreement of sale signed some time in the year 1961 and registered. It is well established in law that the provisions of section 29(1) are attracted for claiming repossession of the suit land from the original landlord and the said provisions are not applicable when the repossession of the suit land is being sought from a third person. Section 43(1) of the Tenancy Act mandates that no land purchased by a tenant u/s 32-F shall be transferred by sale, gift, exchange, mortgage, lease or assignment without the previous sanction of the Collector and section 43(2) provides that any transfer of land in contravention of sub-section (1) of section 43 shall be invalid. It has been the case of the petitioners consistently that though, Ukha was a Karta of the Hindu family, the agreement of sale dated 16-3-61 was illegal inasmuch as though Ukha Hiralal was a tenant of the suit land on the tillers day, he was not a owner of the suit land on 16-3-61 and he became owner of the suit land only on 11-6-71 when the certificate of ownership u/s 32-G of the Tenancy Act was issued in his favour. The petitioners therefore, contended that the agreement of sale dated 16-3-61 was illegal and subsequent to the certificate of ownership being issued u/s 32-G of the Tenancy Act on 11-6-71, transfer of land by way of sale, gift, exchange, mortgage, lease or assignment was prohibited and such transfer by sale could not have taken place unless it was with the previous sanction of the Collector. Admittedly no such sanction has ever been obtained by the respondent No. 1 or by Ukha Hiralal during his life time. The petitioners therefore, contended that the transfer by way of sale of the suit land in favour of respondent No. 1 was invalid u/s 43(2) of the Tenancy Act and hence, the application for summary eviction u/s 84 of the Tenancy Act was tenable and that the decisions rendered by two civil courts in the civil suits filed by Ukha as well as the present petitioners did not come in their way.

7. In the case of Dadu Rau Yelavade (dead) by his Heirs and LRs. Vs. Himmat Rasul Patel, , land admeasuring 3 acres 25 gunthas belonging to one Anant Gopal Prabhu was under the cultivation of one Rau, who was a tenant and the landlord instituted proceedings u/s 31 read with section 29 of the Tenancy Act

against the tenant Rau. During the pendency of these proceedings Rau died and his tenancy rights were inherited by his four sons namely Dadu, Mahadu, Ganpati and Shripati. These proceedings came to an end by an order dated 24-5-61 and subsequently proceedings were initiated by the Tahsildar u/s 32-G of the Tenancy Act some times in 1969. However, in the meantime on 27-4-61 the landlord Prabhu had decided to sell the suit land to the fourth son of Rau, who effected a partition of the property and Mahadu, one of the other sons of Rau, sold his share in the suit land in favour of one Patel by a registered document dated 11-5-1966. The Tahsildar passed an order on 21-12-69 declaring the fourth son of Rau as purchaser u/s 32-G and a certificate u/s 32-M read with section 43 was directed to be issued to the tenants Dadarao and his brothers. In the said order the Tahsildar also discussed the alleged sale to one Patel and he came to the conclusion that the sale effected by Mahadu in favour of Patel, being contrary to law was illegal and the Tahsildar therefore, directed to remove the name of Patel from the revenue records. The Supreme Court inter alia held thus :

"The tenants could not, therefore, have acquired any right or title under the sale deed executed by the landlord. It is no doubt true that ultimately the proceedings u/s 32-G went in their favour and the sale certificate issued in their favour was regularised. Though the order u/s 32-G purports to ratify the earlier transaction of sale by the landlord to the tenants, the transaction acquires its validity not by virtue of the sale deed of 27-4-1961 but only by virtue of the order u/s 32-M dated 21-12-1969. On 11-5-66 - the date of the sale to Patel presently impugned - the tenants (including Mahadu) had no title to the property which they could validly convey in favour of Patel. That title vested in them only on 21-12-1969, when the order u/s 32-G was passed. This being so, the logic of the Tribunal and High Court that transfer in favour of Patel was not a property acquired u/s 32 but of a property acquired by a voluntary process is not correct. As we have already pointed out, on the date of the sale deed in favour of Patel, the vendor had no title to the land in view of the provisions of section 64(8). Even if the subsequent conferment of title on them by the order u/s 32-G be treated to date back to 24-5-61, still Mahadu, being a tenant who acquired title under the Act, his sale to Patel will fail in view of the provisions of section 43(2) of the Act."

In the instant case the subject land originally belonged to one Zaverchand and late Ukha Hiralal was a tenant on the tillers day. A certificate of ownership u/s 32-G of the Tenancy Act was issued to him only on 11-6-71 and it is therefore, clear that late Ukha became the owner of the subject land only on 11-6-71, whereas the agreement of sale in favour of respondent No. 1 was signed on 16-3-61 and also the possession of the suit land was handed over to respondent No. 1 in March/April 1961 itself. In view of the above law laid down by the Supreme Court in the case of Dadu Rau Yelavade (*supra*) this sale in favour of respondent No. 1 of the subject land was therefore, invalid. In addition, if regard be had to the provisions of section 32-R of the Tenancy Act, if the purchaser fails to cultivate the land personally, any time after the purchase of the land under the provisions

of the Tenancy Act, he shall be evicted and the land shall be disposed of in accordance with the provisions of section 84(C) unless of-course the Collector condones such failure for sufficient reasons. The statutory mandate indicates that even after the ownership certificate is issued u/s 32-G in favour of the tenant, the tenant is required to cultivate the land personally and his failure to do so results in his eviction from the said land. The ownership vested in favour of the purchaser tenant is thus not absolute but is conditioned and late Ukha Hiralal did not have an absolute right to enter into an agreement even after the certificate of ownership u/s 32-G was issued to him.

8. The Tenancy Act is a special piece of legislation granting protection to a tiller and it also provides for the welfare of tenants whether protected tenant or an ordinary tenant. While the Tenancy Act has provided for rights in favour of the tenant, it has also made provisions for the protection of the tenant and ensure that the tenant cultivates the land himself as far as possible. Section 43 has been incorporated in the Act for very good reasons and the Legislature has prescribed a total and complete bar on alienation of the agricultural lands in question without the previous sanction of the Collector. The intention behind promulgation of this provision of law was aimed at protecting the tenant agriculturists who were not only poor but invariably illiterate and therefore, extremely vulnerable to all sorts of methods whereby they would be divested of the lands that had been conferred on them by operation of law. It cannot be denied that the reform in question would have been totally frustrated if what the Legislature was to give with one hand was permitted to be taken away by the other hand. Section 43 therefore, imposes a total prohibition or legal bar on alienation of the lands vested in favour of the tenants under the provisions of the Tenancy Act. If an agreement of sale or any instrument in respect of the subject land is executed without taking permission of the Collector u/s 43(1) of the Tenancy Act, the said agreement will be invalid as per section 43(2) of the said Act. This proposition finds support in the judgments of this Court in the case of Dnyanoba Sukhdeo Lande and Another Vs. Shrirang Mahataraji Dhurwade, , Shri Parshuram Kathod Gaikar Vs. Pandu Mahadu Hard and Another, and in the case of Lotan Ramchandra Shimpi and Others Vs. Shankar Ganpat Kayasth and Others, .

9. A Certificate of ownership issued u/s 32-G shall be a conclusive evidence of a protected tenant having become owner of the land with effect from the date of the certificate as against the land holder and all other persons having any interest therein. The Legislature by enacting the said provision intended that the protected tenant should become owner of the land and he should enjoy the benefit for which he had been declared owner. A restriction has been imposed on him not to transfer or deliver possession of the land to anyone else except with the previous sanction of the Collector u/s 43. In addition, section 32-R requires that the tenant-owner himself continues to cultivate the land and failure to do so entails his eviction from the land. Section 43(1) of the Tenancy Act clearly lays down that the land purchased by a tenant u/s 32-F shall not be transferred by sale etc. without the previous sanction of the Collector, whereas sub-section (2)

of the said section invalidates any such transfer which has been effected without the previous sanction of the Collector. The contract for sale of such land of which the tenant has become the owner will be invalid in view of the provisions of section 23 of the Indian Contract Act, because it contravenes the provisions of section 43(1) of the Tenancy Act. It is therefore, clear that the agreement of sale on which the respondent No. 1 relies is illegal by virtue of section 43(2) of the Tenancy Act. The respondent No. 1 is therefore, not entitled to protection of section 53-A of the Transfer of Property Act. The view of the courts below namely the Civil Court and the Appellate Court that in view of the provisions of section 53-A of the Transfer of Property Act, the provisions of section 43 do not come in the way of respondent No. 1 is unsustainable in the eyes of law. Such a view as taken by the courts below would amount to defeating the provisions of the Tenancy Act and hence, the agreement of sale ought to be declared as invalid and unenforceable in law.

10. The Maharashtra Revenue Tribunal in the impugned order, inter alia, referred to the judgment of the Allahabad High Court in the case of Mst. Sudehaiya Kumar and Another Vs. Ram Dass Pandey and Others, and another judgment of the Supreme Court in the case of Lal Chand (Dead) by Lrs. and Others Vs. Radha Krishan, and held that the application filed by the petitioners before the Sub-Divisional Officer u/s 84 of the Tenancy Act was hit by res-judicata in view of the findings recorded by the Civil Court in R.C.S. No. 96/71 and Special Civil Suit No. 67/82 as well as the decision of the lower Appellate Court in Civil Appeal No. 13/74. All these Judgments relied upon by the Revenue Tribunal confirmed the view that the sale of the subject land in favour of respondent No. 1 was incomplete and his possession was protected u/s 53-A of the Transfer of Property Act and hence, the transfer of the land in favour of respondent No. 1 was not invalid. The Revenue Tribunal went one step further and held that there was no contravention of the provisions of section 43 of the Tenancy Act when late Ukha Hiralal transferred the subject land in favour of respondent No. 1 by an agreement of sale dated 16-3-1961 and when there was mutation entry performed and the possession of the respondent No. 1 was protected.

11. It is well settled position in law that if a decision has been rendered between the same parties by a Court, which had no jurisdiction to entertain and decide the suit, does not operate as res-judicata between the same parties in subsequent proceedings. In the instant case the father of the present petitioners had become owner of the subject land under the provisions of the Tenancy Act and the petitioners were seeking repossession of the said land from respondent No. 1 solely on the ground that the subject land could not have been transferred by way of sale to respondent No. 1 without the previous sanction of the Collector and failure to do so made the agreement of sale invalid u/s 43(2) of the Tenancy Act. Thus the petitioners claim for repossession of the subject land from respondent No. 1 was solely based on the scheme of the Tenancy Act. Section 85 of the Tenancy Act creates a bar of jurisdiction of Civil Court to settle, decide or deal with any question which is by or under the Tenancy Act required to be

settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Maharashtra Revenue Tribunal in appeal or revision. R.C.S. No. 96/71 filed by late Ukha Hiralal before the Civil Judge (J.D.) Amalner as well as the Special Civil Suit No. 67/82 filed by the petitioners before the Civil Judge (S.D.), Dhule was therefore, not tenable in view of the bar created by section 85(1) of the Tenancy Act. The decisions in both these suits rendered by the Civil Courts, which had no jurisdiction to entertain and decide these civil suits, would not operate as res-judicata for deciding the tenancy application filed by the petitioners before the Sub-Divisional Officer, Amalner u/s 84 of the Tenancy Act for relief of summary eviction of respondent No. 1 from the subject land. Reliance of the Maharashtra Revenue Tribunal on the judgments of the Allahabad High Court and of the Supreme Court in the cases cited hereinabove, in this regard, is totally mis-placed.

12. In the result, the petition succeeds and the impugned orders passed by the Sub-Divisional Officer, Amalner on 28-2-84 and Maharashtra Revenue Tribunal at Bombay on 28-2-85 are quashed and set aside. It is declared that the transfer of subject land admeasuring 5 Hectares 13 Ares in Gat No. 33/1 S. No. 21/2 of village Lon, Taluka Amalner, District Jalgaon in favour of respondent No. 1 by the agreement of sale dated 16-3-1961 is invalid u/s 43(2) of the Tenancy Act and therefore, the application filed by the petitioners u/s 84(1) of the said Act hereby stands allowed. The respondent No. 1 is directed to hand over peaceful possession of the subject land free from encumbrances to the petitioners within a period of two months from to-day.

Rule made absolute accordingly with no order as to costs.

13. Petition allowed.