

(1989) 10 BOM CK 0034
In the Bombay High Court
Case No : L. P. A. No. 28 of 1987

Hiralal Bhagirath Marwadi and another	APPELLANT
Vs	
Vishwanath Parashram Katekar and others	RESPONDENT

Date of Decision : 06-10-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1989) 10 BOM CK 0034

Hon'ble Judges : V.A. Mohta, J;D.J. Moharir, J

Bench : Division Bench

Advocate : J.N. Chandurkar, for the Appellant; B.N. Deshpande and R.L. Khapre, for the Respondent

Final Decision : Dismissed

Judgement

D.J. Moharir, J.—This appeal under Clause 115 of the Letters Patent is directed against the judgment of the learned Single Judge of this Court in a Writ Petition under Articles 226 and 227 of the Constitution of India.

2. The Writ Petition was filed to challenge the order of the Maharashtra Revenue Tribunal passed in its revisional jurisdiction. The Maharashtra Revenue Tribunal set aside the order of the Deputy Collector as the appropriate authority and Special Tahsildar, Washim. The Maharashtra Revenue Tribunal restored the order of the Special Tahsildar.

3. The proceedings were initiated thus :- Acting suo motu, the Tahsildar started an inquiry for restoration of possession of field survey No. 103 of Malegaon, Taluka Washim, District Akola to one Parashram Krishnaji. At the end of it, he passed an order u/s 49-B of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, holding that on 20-8-1958, on the appointed day, Parashram was entitled to hold land which belonged to two persons - Hiralal Marwadi and Jagdish Gaurishankar and was also in their possession, possession having been surrendered to them by Parashram. Parashram claimed to be a

Bataidar, cultivating the land since 1952-53 whereas Hiralal and Jagdish claimed that he was a mere partner in cultivation. The latter contention was accepted by the Tahsildar. Parashram was held not to be a tenant.

4. Parashram appealed to the Deputy Collector who took the view that he was a tenant. Though Parashram had executed the deed of surrender dated 18-2-1959, the same was still ineffective as possession had not been taken from him by Hiralal and Jagdish under the orders of the Tahsildar. The Deputy Collector directed that subject to an enquiry about the extent of land held by Parashram (for purposes of keeping up compliance under the provisions of Ceiling Act) possession of the land survey No. 103 of Malegaon be restored to Parashram. Hiralal and Jagdish challenged this order by way of a revision application to the Maharashtra Revenue Tribunal. As stated, this was allowed by the Maharashtra Revenue Tribunal.

5. Aggrieved, the legal representatives of Parashram - since he had by then died - filed the Writ Petition 307 of 1975 in this Court and the same was allowed restoring the order of the Deputy Collector, as the appellate authority. Now, the landholders have appealed under clause 15 of the Letters Patent.

6. The respondents who succeeded before the Single Judge in the Writ, Petition, have raised a preliminary objection that the Letters Patent Appeal is not maintainable under the law in force and should, therefore, be promptly dismissed. That objection must, in our opinion, succeed for the following reasons.

7. To determine whether the Writ Petition was decided by the learned Single Judge by exercising jurisdiction under Article 226 or only the superintending jurisdiction is not categorically mentioned as exercised under Article 227. A careful perusal of the judgment rendered by the learned Single Judge would show the pleadings of the parties came to be closely considered and appreciated by him. The present appellants claim that Parashram was a partner in cultivation and not a bataidar and not a tenant, the contention of Parashram that he was a bataidar and had not surrendered as such possession, that the surrender had not been verified as was required to be done by the Tahsildar. Such verification was not done was dispersed with by the Tahsildar, because Hiralal and Jagdish were in (illegal) possession and that he (Parashram) was, therefore, entitled to be restored to possession. Evidence of the landholder's own witness that Parashram was admittedly a bataidar is supported by documentary evidence of crop statement of the relevant years. The learned Single Judge also noted that though this surrender was said to have been verified, the Tahsildar had not passed an order directing delivery of possession to Hiralal and Jagdish. It was noted that in law, the landholders could not claim entitlement to possession or retention of it as obtained somehow. They were not entitled to retain possession. The order of the Deputy Collector was found to be a well considered one and that of the Maharashtra Revenue Tribunal as one passed without referring to such important material on record. The Maharashtra Revenue Tribunal having failed to refer to the material fact which influenced it in taking a view contrary to the considered

one of the appellate authority, it was not open to it to disturb the findings of fact recorded by the Deputy Collector as the appellate authority. The learned Single Judge also noted that under law, as settled by the decisions of this Court as also the Supreme Court, the order of the Tahsildar which the Maharashtra Revenue Tribunal restored was in clear breach of section 38 of Bombay Tenancy Act. The learned Single Judge has also noted that the order verifying surrender could be questioned u/s 49B as held by the Supreme Court. The law as settled by the Supreme Court was that where the surrender was not verified, as required and was not therefore, valid, there could be no termination of tenancy; the landlord could not retain possession of the land even if it were to have been handed over to him. The surrender had not been verified, so much so that the surrender deed has not been even produced before the Tahsildar. That was fatal. The surrender as the learned Single Judge has remarked was. therefore, non est.

8. All this would, as the respondents' learned counsel contends, therefore, provide a clear indication that the judgment of the learned Single Judge is one which is unmistakably one recorded in exercise of the Court's supervisory powers under Article 227

9. After considering the two decisions of the Supreme Court in the case of (i) Umaji Keshao Meshram and Others Vs. Radhikabai and Another, and (ii) The Ratnagiri District Central Co-operative Bank Ltd. vs. Dinkar Kashinath Waive and others. Civil Appeal No. 520 of 1989 decided on 27th January 1989 a Full Bench of this Court in the case of Sushilabai Laxminarayan Mudliar and others vs. Nihalchand Waghajibhai Shaha and others. 1989 Mh.L.J. (F.B.) 695 has laid down certain tests to be applied in deciding the question of maintainability of appeals under clause 15 of the Letters Patent against the judgment of a Single Judge upon a petition filed under Article 226 read with Article 227 of the Constitution of India by which is impugned the order of the Subordinate Court or Tribunal.

10. A reference to Full Bench was necessitated since there was a conflict of views between different Division Benches of this Court upon the correct ratio of Umaji Keshao. The conflict was between the case of Surekhabai Amrut Asare vs. Motilal Prabhudayal Sharma. 1987 Mh.L.J. 610 on one hand and the cases of (i) Pushpabai Anandji Gala vs. Sukumar Jinnappa Bhore. 1980 Mh.L.J. 765 and (ii) Jaitunbi vs. Smt. Halimabai. (L.P.A. No. 14 of 1088 and 111 of 1988. decided on 21st December 1988) on the other.

11. In Surekhabai Letters Patent Appeal arose out of an order on merits passed by the Collector under the Rent Control Order which was challenged by filing a petition under Article 226 read with Article 227 before the learned Single Judge without joining the Collector as a party. Objection was raised before the Division Bench that under all these circumstances order passed by the learned Single Judge was in reality under Article 227 and hence appeal did not lie. But it was overruled holding that - (i) title of the petition showed that it was under Article 226 read with Article 227; (ii) non-joinder of the Collector was immaterial since such point was not raised before the Single Judge, (iii) relief could be claimed

also under Article 226, since Rent Control Authorities are quasi judicial in nature amenable to that jurisdiction; and (iv) contents of the petition should be liberally construed so as to allow the parties to have a right of appeal.

12. In Pushpabai Letters Patent Appeal arose out of order of dismissal of suit for possession on merits under the Rent Act which was challenged before the Single Judge by filing a petition under Article 226, Objection to the maintainability of L.P.A. was upheld holding that - (i) title of the petition was not decisive and (ii) in substance, relief claimed in the petition and granted by the Single Judge was under Article 227.

13. In Jaitunbi and others the three L.P.As. arose out of orders passed on merit by the Rent Control Authorities and Co-operative Courts which were challenged by filing a petition under Article 226 read with Article 227 of the Constitution before the Single Judge. Preliminary objection to the maintainability of L.P.A. was upheld holding that (i) title of the petition was not decisive, (ii) there was no justification for invoking jurisdiction under Article 226 in such matters and (iii) in substance, the relief claimed in the petition and granted by the Single Judge was under Article 227.

14. The Full Bench in para 5 of its judgment referred to the following tests laid down by the Supreme Court:

(i) Whether facts of the case justify an application either under Article 226 or Article 227 of the Constitution?

(ii) Whether the substantial part of the order of the learned Single Judge was passed under Article 226 of the Constitution?

(iii) Ancillary reliefs granted were not relevant for the purpose of deciding the question of maintainability of an appeal under clause 15 of the Letters Patent?

and proceeded to explain what the term "facts justify" used by the Supreme Court connotes and gave the illustrative list of relevant legal principles which can be summarised thus :

(i) L. P. A. against the judgment of a Single fudge upon petition under Article 226 read with Article 227 does not lie as a matter of course.

(ii) The substance of the petition and/or judgment and not the form should be the decisive factor,

(iii) Upon the facts alleged whether a petition either under Article 226 or under Article 227 could be legitimately entertained?

(iv) When a combined petition under Article 226 read with Article 227 is filed complaining of a jurisdictional error by a Court or a Tribunal, ordinarily it would be more appropriate to deal with the matter by exercising supervisory powers under Article 227 and not by invoking its extraordinary and discretionary original jurisdiction under Article 226, since, in such cases alternate adequate remedy is

available.

(v) In case of the Court or Tribunal (i) acts without jurisdiction or in excess of jurisdiction, (ii) fails to exercise a jurisdiction vested in it, (iii) violates principles of natural justice or (iv) commits any error apparent on the face of record, a Single Judge has a discretion to exercise powers either under Article 226 or under Article 227 or under both.

(vi) In order to decide whether the order passed by the Single Judge is under Article 226 or Article 227 of the Constitution, the Division Bench should look into the substance of the order and ascertain what particular jurisdiction the Single Judge has in fact exercised.

(vii) If vires of the statute under which the subordinate Court or Tribunal is constituted is challenged or any fundamental right under Part III of the Constitution is sought to be enforced, the Single Judge may deal with the matter under his jurisdiction under Article 226 of the Constitution.

(viii) If the Single Judge has, in fact, invoked only his supervisory jurisdiction under Article 227, the Letters Patent Appeal would not lie.

(ix) If the order passed by the Single Judge specifically mentions the Article under which the relief is granted, it may not be necessary for the Division Bench to elaborately examine the question of maintainability of appeal.

(x) When the Single Judge does not mention the Article under which order is passed, the Division Bench may examine the relief granted.

(xi) When more than one reliefs are granted by the Single Judge, the deciding factor would be the main relief and not the ancillary relief?

(xii) When a combined petition filed under both the Articles is summarily dismissed without reasons, the facts alleged warranted filing of the petition under Article 226 or 227.

(xiii) In case of doubt about the maintainability of the appeal, the benefit ought to go in favour of the appellant.

15. It is thus clear that basic approach made in Pushpabai and Jaitunbi about the substance and not the form being the appropriate determining factor has been approved by the Full Bench.

16. The writ petition from which this Letters Patent Appeal is preferred was filed under Articles 226 and 227, challenging the order on appreciation of merits passed by the Deputy Collector as the appellate authority. The learned Single Judge held that well considered and balanced order of the appellate authority was based on a proper appreciation of facts of the case and due application of the provisions of law. That conclusion of the learned Single Judge is itself, as we have found above by looking closely into the substance and substantial details, based on his own equally searching appraisal of the record, exercising

superintending jurisdiction only under Article 227.

17. This Letters Patent Appeal is not, therefore, maintainable and is accordingly dismissed. No order as to costs.