

(1969) 12 BOM CK 0008

In the Bombay High Court

Case No : Special Civil Application No. 821 of 1968

Jaikisan Biharilal

APPELLANT

Vs

Budhaji Nagoji

RESPONDENT

Date of Decision : 15-12-1969

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 40

Citation : (1971) 73 BOMLR 167 : (1970) MhLj 532

Hon'ble Judges : Chandurkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Chandurkar, J.—The petitioner is the son of one Biharilal and claims to have become the owner of field survey number 24/2, area 21 acres, 26 gunthas of mouza Balkhed, Taluq Pusad, district Yeotmal, as a result of a partition which had taken place; on February 4, 1961. Long before this partition, the respondent who was a tenant of this field had served a notice on the original owner Biharilal exercising his right of purchase and making an offer to him for purchasing the land. Biharilal did not take any action under the proviso to Section 40 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereafter referred to as the Tenancy Act. Under this proviso a landlord could within 8 months from the date of the receipt of the offer made to him by the tenant u/s 43 of the Act select the land for cultivating personally and he had to give an intimation in writing to the tenant of his intention to terminate the tenancy. On August 22, 1960 the respondent applied to the Agricultural Lands Tribunal for determination of the purchase price because the landlord had not accepted the offer. This application was fixed for final order on February 25, 1961. Till that date Biharilal did not disclose the fact of the alleged partition. The petitioner's counsel now informs that on the date on which the case was fixed for orders, that is February 25, 1961, the petitioner had applied to the Tribunal for being permitted to be joined as a party to the proceedings, but this application was

rejected. It is not disputed that the petitioner did not proceed ahead to challenge the order passed on February 25, 1961 by which the price payable by the respondent was determined nor did he challenge the order refusing him to be allowed to be joined as a party. Instead, the petitioner's father Biharilal alone filed an appeal before the Special Deputy Collector.

2. This appeal was firstly held to be delayed but the delay was condoned and the Deputy Collector had observed that the application, of Jaikisan was rejected by the Tahsildar as it was filed after the order was passed. The Deputy Collector held that since the appellant Biharilal before him did not take any action as provided within the time prescribed by Section 40 of the Act, he had lost the opportunity to resume the land. The Deputy Collector further held that since the right to purchase the land had become operative against Biharilal it could not be negated by bringing about a partition. Thus since the offer was made to the landlord who was recorded as the owner, the Deputy Collector declined to interfere with the order of the Agricultural Lands Tribunal.

3. Against this order the petitioner and his father had filed a revision application, which came to be rejected by the Maharashtra Revenue Tribunal. But the Revenue Tribunal on being informed that proceedings u/s 38(1) were pending observed that the order of the Deputy Collector will be effective only after the final decision of the resumption proceedings started by the applicant-landlord for bona fide personal cultivation. Except for making these observations, on merits the order passed by the Deputy Collector was confirmed. It may be stated at this stage that the petitioner had in the meantime made an application on March 24, 1961 purporting to be one u/s 38 of the Tenancy Act for resumption. This application was rejected by the Tahsildar as barred by the provisions of Section 38(1) of the Tenancy Act. The order of the Tahsildar was upheld in appeal and the Revenue Tribunal declined to interfere with the appellate order.

4. The matter was, however, remanded back to the Tribunal by this Court for disposal according to law. When the revision application was re-heard, the Tribunal found that the respondent had been declared to be a statutory owner on July 18, 1965, but observed that when the Tribunal had disposed of the earlier revision application arising out of the proceedings for determination of the purchase price, the necessary facts regarding resumption proceedings were not before the Tribunal. The learned Member of the Tribunal observed:

It was never brought to ray notice that the application for fixation of statutory price of the suit field had been filed before the Agricultural Lands Tribunal on 22-8-1960, i. e. much before 1-4-1961. It is, therefore, evident that no notice u/s 38(1) was either given on or before 22-8-1960 when proceeding u/s 43 were started by Tenant Budhaji against the land holder. (Rev. Case No. 15/59/60-61). It was during the pendency of this case that the notice as required by Section 38(1) and the application u/s 86(2) were started. The notice was given on 10-2-1961 and the application was filed on 29-3-1961. It maybe noted that Rev. case No. 15 was disposed of by the Agricultural Lands Tribunal vide order dated

25-2-1961. In view of this position, the applicant landlord had no right to terminate Tenancy u/s 38(1) and he was not competent to start resumption proceedings u/s 36(2) of the New Tenancy Act as all these rights had come to an end and did not exist as the proceedings for transfer of ownership were started on 22-8-1960 and the same were decided on 25-2-1961.

5. The Tribunal thus took the view that on the day on which the application u/s 36(2) read with Section 38(1) was filed no right subsisted which could be enforced u/s 86(2) of the Tenancy Act. The revision application was, therefore, rejected. This order is now challenged by the petitioner in this petition.

6. The learned counsel for the petitioner contends that having regard to the observations made by the Tribunal in Revision Application No. 2132/ Tenancy/ of 1968 which arose out of the proceedings for determination of purchase price that the appellate order of the Deputy Collector passed on July 31, 1963 would become operative after the final determination of the proceedings u/s 38 of the Tenancy Act, the Tribunal was bound to decide the application u/s 88 on merits and that the application could not have been disposed of as not maintainable. It was further contended on behalf of the petitioner that even though an order determining the purchase price was fixed in view of the provisions of Section 43(8) of the Tenancy Act the tenant had not become an owner because no certificate as required by the provisions of that section was issued, and therefore, under the second proviso to Section 46 the transfer of ownership must stand postponed to the date of final determination of the proceedings u/s 38 of the Tenancy Act.

7. No doubt the Tribunal by its order passed in Revision Application No. 2132/ Tenancy/63 had made observations that the order of the appellate authority passed on July 31, 1963 will be effective only after decision of the resumption proceedings started by the applicants-landlords for bona fide personal cultivation, but while making these observations the Tribunal was only making a statement of the law as contained in the second proviso to Section 46 of the Tenancy Act. That, however, did not necessarily mean that the maintainability of the application u/s 88 was being adjudicated upon. Indeed, in the proceedings for determination of the purchase price the question whether the application u/s 88, which no doubt was made by the petitioner and was pending, was in law maintainable or not could have been decided and the material date of such decision would still be the actual date of the final decision of the application u/s 38 as contemplated by the second proviso to Section 46 of the Tenancy Act. It is not necessary to go into the correctness of the observations made by the Tribunal in the impugned order that when the Tribunal disposed of revision application No. 2132/Tenancy/1963 necessary facts of Revenue Case No. 178/59 (6) 60-61 which was the number of the case dealing with the fixation of the purchase price were not before the Tribunal, because even otherwise it is not possible to find any error in the impugned order. When the tenant had made his offer in the exercise of his right of purchase on November 26, 1959, the

petitioner was not the landholder. The landholder was the joint family consisting of the petitioner and his father and such other members as there may be at that time. When the offer was made on that date it was a perfectly legal offer which the tenant was entitled to make having regard to the provisions of Section 40. Section 40 of the Act specifically provides that nothing in Section 38 shall be deemed to affect the right of a tenant to purchase u/s 41 land held by him as a tenant. It is clear from this provision that a right to purchase u/s 41 could have been exercised even before the period prescribed for exercising the right u/s 38 expired. In a case where the tenant seeks to exercise his right of purchase before the period provided by Section 88 for issuing a notice of termination of tenancy to the tenant expires, what is the course to be followed and how the right of a landholder to resume the land for personal cultivation is safe-guarded is indicated by the first proviso to that section. The first proviso reads as follows :

Provided that where the tenant makes an offer to the landlord u/s 43 in respect of such land, the landlord may, within three months from the date of receipt of such offer, select the land for cultivating personally and give an intimation in writing to the tenant of his intention to terminate the tenancy of such land:

Under this proviso to Section 40 (1) of the Tenancy Act, therefore, the landholder has to take his decision to terminate the tenancy of the tenant who is keen to purchase the land even before the landlord exercises his right of resumption and has within 3 months from the date of the receipt of the offer intimate the tenant of his intention to terminate the tenancy. If the landlord fails to do so then the provision of Section 40 referred to above begins to operate and the right to purchase the land could be enforced notwithstanding the provisions of Section 38 of the Tenancy Act. It is this that has happened in the instant case. The petitioner's father who represented the joint family which was the landlord had failed to exercise his right under the proviso to Section 40 (1). Therefore, under the provision of Section 40 (1) the tenant's right to purchase could be proceeded with. Indeed, that was proceeded with and even before the alleged partition an application was already made u/s 43 of the Tenancy Act by the tenant. An order on that application was also passed and the fact of the alleged partition was not disclosed either by the father or by the son and as observed by the Deputy Collector in those proceedings the application for being joined as a party was filed by the son only after the order was passed. The question is whether the subsequent partition which is brought about after the tenant has exercised his right of purchase and after the landlord had failed to exercise his right under the proviso to Section 40 (1) can defeat the right which is exercised by the tenant. In my view, the answer to this must be in the negative .Since the offer was lawfully made by the tenant to a person who was legally the landlord, namely, the joint family in this case, the failure of the manager of the joint family to exercise his right under the proviso to Section 40 (1) read with Section 38 of the Tenancy Act has the effect of permitting the tenant to exercise his right of purchase even before the period provided by Section 38 had expired. When subsequently the property is partitioned it is not possible to allow that partition

to defeat this right. Permitting it to do so will render the provisions of the proviso to Section 40 (1) nugatory. Thus when the application was made the joint family as the landlord had failed to intimate to the tenant that his tenancy was being terminated and there was no difficulty in proceeding with the application made by the tenant. Indeed, so far as the present petition is concerned that order had really become final for two reasons firstly, on account of failure of the father to take the necessary steps, and secondly, on account of failure of the petitioner himself to challenge the order passed in the proceedings for determination of the purchase price. The Tribunal in my view, was therefore, right in holding that the application u/s 38(1) was not maintainable.

8. The contention of the petitioner that the tenant had not become a full owner till a certificate was issued to him u/s 43(8) of the Tenancy Act, and, therefore, the petitioner must be permitted to exercise his right u/s 38 of the Tenancy Act must also be rejected. The right which the petitioner was seeking to exercise was a right u/s 38(1) which right initially was that of a joint family. If the joint family had forfeited that right on account of the failure of the petitioner's father to act in accordance with the proviso to Section 40 (1), as already held that right could not be re-vested in the petitioner by bringing about a partition subsequently. On account of failure of the father to act in accordance with the proviso to Section 40 (1) of the Tenancy Act, landlord of the tenanted land whosoever he was had incurred an obligation under the Tenancy Act to sell the land to the tenant if in law a proper offer was found to have been made and if the tenant was found legally to be entitled to the purchase of that land. The absence of a certificate u/s 43(8) did not affect merits of the orders in the earlier proceedings in which the tenant was held entitled to purchase land.

9. In the view which I have taken, therefore, there is no error in the order passed by the Revenue Tribunal and the Tribunal was justified in taking the view that the application for resumption filed by the landlord was not maintainable.

10. The petition, therefore, fails and is rejected with costs.