

(2003) 08 BOM CK 0111

In the Bombay High Court

Case No : Writ Petition No. 5326 of 1989

Janardhan Krishnaji Kulkarni

APPELLANT

Vs

Vishnu Ganapati Ghorapade and others

RESPONDENT

Date of Decision : 20-08-2003

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 33B, 70(b), 88C
Constitution of India, 1950 — Article 227

Citation : (2003) 08 BOM CK 0111

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : A.V. Anturkar, for the Appellant; H.D. Gole for Respondent Nos. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This Writ Petition under Article 227 of the Constitution of India takes exception to the judgment and order passed by the Maharashtra Revenue Tribunal, Pune, dated 13-4-1989.

2. The land in question is an agricultural land bearing survey No. 66, gat No. 352.4.28A admeasuring 4 acres and 28 gunthas at village Matyapur, taluka and dist. Satara. The petitioner is the owner of the suit land whereas the respondents herein claim to be tenants in respect of the suit land. It is common ground that the petitioner had taken out proceedings u/s 88C of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the "Act") in which the petitioner was held to be entitled for issuance of a certificate. In other words, the petitioner was a certified landlord. On the basis of that certificate, the petitioner filed an application for possession of the suit land against the respondent No. 1 who was his tenant. That application was decided in favour of the petitioner on 2-8-1963 by the Tahsildar who in turn directed the respondent No. 1 to hand over possession of the suit land to the petitioner. It is not in dispute that the order issuing certificate in favour of the petitioner u/s 88C as well as the order of

possession u/s 33B of the Act have never been challenged by the respondent No. 1 in appeal. The record also indicates that pursuant to the aforesaid order u/s 33B, possession of the suit land was taken over from the respondent No. 1 and handed over to the petitioner on 6-5-1964. Mutation entry to that effect has been recorded in the revenue record bearing No. 1245. Even this mutation entry has not been challenged at any point of time. Be that as it may, the respondents herein, without disclosing the above position, instituted an application before the tenancy authority u/s 70(b) of the Act for a declaration that they were in possession of the suit land on the tiller's day i.e. 1-4-1957 as tenants and have continued to remain in possession as such till the institution of the application, that application was filed on 23-4-1985. The Tahsildar allowed the said application on 31-8-1985. The Tahsildar was persuaded to take a view that notwithstanding the certificate issued u/s 88C of the Act and the possession order passed u/s 33B of the Act as well as the mutation entry No. 1245 as recorded on 6-5-1964 in the revenue record, the respondents have remained in possession as the taking over possession was only a paper entry made in the record. On that basis, the Tahsildar allowed the application preferred by the respondents u/s 70(b) of the Act. Against that decision, the petitioner carried the matter in appeal before the Sub-Divisional Officer. The Sub-Divisional Officer also affirmed the view taken by the Tahsildar by judgment and order dated 16-8-1986. Before the Sub-Divisional officer, the petitioner had pressed into service the judgment and decree passed by the Civil Court in the suit instituted by the petitioner against the respondents, being Regular Civil Suit No. 263 of 1985, for a perpetual injunction in which it has been positively found by the Civil Court on the basis of evidence on record adduced before it that the petitioner was found to be in possession of the suit land. However, the appellate authority discarded that judgment and decree of the Civil Court on the specious argument that the same has not become final and conclusive because it was an appealable decree. In the circumstances, the petitioner carried the matter in revision before the Maharashtra Revenue Tribunal, Pune. The Tribunal by the impugned judgment and order has dismissed the revision application preferred by the petitioner, in substance affirming the view expressed by the two authorities below. These concurrent decisions are the subject-matter of the present Writ Petition under Article 227 of the Constitution of India.

3. Mr. Anturkar for the petitioner contends that once the order issuing certificate u/s 88C in favour of the petitioner has become final and, in fact, on that basis the petitioner has succeeded in proceeding u/s 33B of the Act, it presupposes that the tenancy of the respondents has been determined on 2-8-1963 and that position has remained unchallenged. Mr. Anturkar submits that, in fact, pursuant to the said order, the petitioner has already taken possession of the suit land which fact is reinforced by the mutation entry No. 1245 effected in the village records which also has remained unchallenged. Indubitably, there is presumption about the correctness of that entry unless contrary was to be proved; and the evidence as adduced by the respondents cannot be said to be sufficient to

counter that position. Moreover, he submits that, the competent Civil Court has examined the issue of possession on the basis of evidence adduced before it and has positively found that the petitioner was put in possession as per the said mutation entry in 1964. In the circumstances, the learned counsel submits that once the order u/s 33B has been allowed to become final, it was not open to the respondents to institute proceedings for a declaration u/s 70(b) of the Act as has been resorted to in the present case. He submits that the respondents did not disclose the order of the tenancy authorities u/s 33B in the application, but it is the petitioner who had to bring that on record before the tenancy authority. The learned counsel, therefore, submitted that even though all the three Courts have decided the matter against the petitioner, they have overlooked the important legal position that the proceedings u/s 70(b) of the Act was unavailable on the principles analogous to *res judicata* and more so when the tenancy stands determined by order dated 2-8-1963. Subsequently, the tenancy Court could not have declared that the respondents were tenants on 1-4-1957 and that have continued to remain in possession of the suit land in that capacity even now.

4. On the other hand, Mr. Gole for the respondents contended that no interference is warranted in exercise of writ jurisdiction as three Courts have found in favour of the respondents and it is not open for this Court to overturn the concurrent finding of facts and the decisions rendered by the Courts below. He submits that all the three Courts below have found as a fact that even though the mutation entry has been recorded to show that the possession of the suit land has been made over to the petitioner, however, that was only a paper transaction and the evidence that has come on record clearly supports the position that the respondents continue to remain in possession of the suit land, notwithstanding the said mutation entry. Therefore, he submits that since the order passed u/s 33B of the Act has not been executed against the respondents and that they continued to remain in possession of the suit land in spite of that order, they would continue to occupy the suit land as tenants from 1-4-1957 as if no order has been passed against them or that their tenancy has not been determined as contended by the other side. He, therefore, states that there is no substance in this petition and the same be dismissed on the above reasons.

5. Having heard the rival submissions, to my mind, the basis on which all the three Courts below proceeded to decide the application preferred by the respondents is unsustainable both on facts and in law. As it is not in dispute that the certificate u/s 88C was issued in favour of the petitioner; and on that basis the petitioner filed an application for possession of the suit land by invoking the provisions of section 33B of the Act and that application having been decided in favour of the petitioner, it would necessarily follow that the tenancy rights which existed in favour of the respondents in respect of the suit land stood determined at least with the passing of the order on 2-8-1963. It is also not in dispute that the said order has become final. If that is so. the fact whether possession has actually been taken over by the petitioner or not would recede in the background. In fact, once it is held that the tenancy rights of the respondents

have been determined by order dated 2-8-1963, the subsequent possession of the respondents cannot be ascribed to the tenancy rights which existed on 1-4-1957. Understood thus, the application as filed u/s 70(b) of the Act for a declaration that the respondents were tenants in possession since 1-4-1957 itself was misdirected and that relief was unavailable to the respondents. Be that as it may, as the order passed u/s 33B of the Act has become final, it was not open to the respondents to institute an application u/s 70(b) of the Act for a declaration, as has been filed in the present case, on the principle analogous to *res judicata*. Even on that basis, the application could not be proceeded further. To my mind, in an application u/s 70(b), the principal question to be decided is whether the applicant who has filed the application can be declared as a tenant as claimed. In such a proceeding, the issue of possession is really incidental to that question. In the present case, however, on the reasoning of the three Courts below, it appears that they were more obsessed by the fact that the respondents were in possession of the suit land all throughout since prior to 1-4-1957 and even at the filing of the application. That cannot be the basis for deciding the rights of the respondents in respect of the suit land. Having regard to the fact situation of the present case, the only course open for the tenancy authorities was to negate the relief claimed by the respondents for a declaration that they were tenants in respect of the suit lands since 1-4-1957 and have continued to occupy the suit land in that capacity even now as claimed. For the relationship of landlord and tenant between the parties was snapped at least on passing of the order by the Tahsildar u/s 33B of the Act on 2-8-1963.

6. That takes me to the argument canvassed on behalf of the respondents by Mr. Gole that the three Courts below have found as a fact that the respondents were in possession of the suit land prior to 1-4-1957 and have continued to remain in possession in the capacity of protected tenants even till the institution of the application u/s 70(b) of the Act. On the above reasoning, this argument is unsustainable. For the tenancy rights which existed in favour of the respondents have been determined on 2-8-1963, the subsequent possession of the respondents, cannot be the basis to hold that their possession is ascribable to the rights which existed in their favour as on 1-4-1957. Moreover, in the present case, the petitioner has instituted the suit for perpetual injunction against the respondents in which after examining the relevant material on record, the civil Court has recorded a positive finding of fact that the petitioner was found to be in possession of the suit land. That decision has been discarded by the authorities below on the specious argument that the said decision is yet to become final and conclusive. Be that as it may, the finding recorded by the tenancy authorities would be of no avail to the respondents, assuming that the respondents continued to remain in possession after the order was passed in section 33B proceedings on 2-8-1963. That possession cannot be the basis to decide the issue in favour of the respondents that they have continued to remain in possession as tenants prior to 1-4-1957, because the tenancy rights have been determined by order dated 2-8-1963.

7. In the circumstances, this Writ Petition succeeds. The impugned judgments and orders passed by the three Courts below are set aside. As a consequence, the application preferred by the respondents u/s 70(b) of the Act is dismissed. The rule is made absolute in the above terms with costs.