

(1996) 02 BOM CK 0009
In the Bombay High Court
Case No : Writ Petition No. 2 of 1990

Julikhabhi Suphy and Another

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 23-02-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3
Constitution of India, 1950 — Article 226, 227
Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 — Section 10(1), 15, 16(1), 18, 19

Citation : (1996) 5 BomCR 217 : (1996) 2 MhLj 345

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : M.N. Ingley, for the Appellant; P.D. Kothari, A.G.P. for respondent
No. 1, B.N. Mohta, for the Respondent

Final Decision : Allowed

Judgement

R.M. Lodha, J.—By this writ petition filed under Articles 226 and 227 of the Constitution of India, the petitioners are seeking to impugn the order dated 6.12.1989 passed by the Respondent No. 1 and the order passed by the Additional Commissioner, Amravati on 24-11-1987.

2. The learned Counsel for the petitioner, at the outset, urged that the order passed by the respondent No. 1 on 4-12-1989 is innocuous and as a matter of fact, no proceedings could have been initiated by the petitioners before the State Government against the order passed by the Additional Commissioner on 24.11.1987 and, therefore, he does not challenge the order passed by the State Government on 4.12.1989 whereby the interim stay order passed by it on 30-2-1982 was vacated. During the course of arguments, accordingly, challenge is confined to the legality and correctness of the order passed by the Addl. Commissioner, Amravati Dvn., Amravati on 24.11.1987 whereby the Additional Commissioner, in exercise of his powers u/s 45 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (for short, the Ceiling Act") upon revision

filed by the Sarda Education Trust (respondent No. 4 herein) allowed the said revision and set aside the order passed by the Sub-Divisional Officer, Daryapur on 8-10-1995.

3. The important question involved in the writ petition is construction and interpretation of the expression, "subject to an encumbrance" in Clause (a) of section 16(1) of the Ceiling Act and the said construction of expression, "subject to an encumbrance" is to be made on the facts whether right of landowner to resume the land u/s 19 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (for short, the "Tenancy Act") can be said to be an encumbrance on the land held by tenant under the Ceiling Act and where the said tenant holds land in excess of the ceiling area permissible under the Ceiling Act.

4. Basic facts are short. Sanaullah Khan (since deceased and now represented by present petitioner) was holding the land situated at various places, viz. Survey Nos. 12 and 33/2 admeasuring 1934 acres and 0.29 acres respectively at Deogaon, Survey Nos. 18 and 15 admeasuring 4.00 acres and 33 gunthas and 0.25 acres respectively at Shahpur, Survey No. 13/2 admeasuring 10 acres 24 gunthas at Hasanpur Pardi on owner and Survey No. 23 admeasuring 30 acres and 21 gunthas situated at Wadali as tenant of respondent No. 4 Sarda Education Trust. Ceiling case of the land hold by Sanaullah Khan was registered and ultimately, by the order dated 8.10.1985 the Sub-Divisional Officer, Daryapur held that Sanaullah Khan was holding 86 acres 26 gunthas of land and he and his family unit was entitled to 78 acres of land and, thus, Sanaullah Khan was holding 8 acres and 26 gunthas of land in excess of the permissible ceiling area. Sanaullah Khan gave his option before the Sub-Divisional Officer u/s 16 and submitted that the land admeasuring 8 acres 26 gunthas which had been declared surplus in his holding, may be delimited from Survey No. 23 situated at village Wadali which he was occupying as tenant. The Sub-Divisional Officer accordingly by the order dated 8.10.1985 delimited 8 acres 26 gunthas from Survey No. 23 situated at village Wadali and declared that the surplus land would sent in the Government. Sarda Education Trust filed revision petition against the order passed by the Sub-Divisional Officer on 8.10.1985 and the Additional Commissioner held that the land delimited by the Sub-Divisional Officer was subject to an encumbrance u/s 16(1) of the Tenancy Act and, therefore, it was required to be retained by Sanaullah Khan and the Sub-Divisional Officer ought not to have delimited the said land and the other land from the holding of Sanaullah Khan should have been delimited which was not encumbered. Accordingly, the Additional Commissioner set aside the order passed by the Sub-Divisional Officer and directed the Sub-Divisional Officer to issue fresh notices for the purpose of delimitation to the legal heirs of Sanaullah Khan and then after the fresh option is exercised by the legal heirs, delimit and appropriate the land as surplus. This order passed by the Additional Commissioner on 24.11.1987 is impugned in the present writ petition.

5. The contention of the learned Counsel for petitioners is that the comprising of Survey No. 23 situated at Wadali which was held by Sanaullah Khan as tenant of the respondent No. 4 herein viz. Sarda Education Trust was not subject to an encumbrance, and it was not covered u/s 16(1) and therefore, Sanaullah Khan was not obliged to retain the land of Survey No. 23 situated at Wadali to the extent it was declared surplus and, therefore, the Additional Commissioner seriously erred in interfering with the order passed by the Sub-Divisional Officer.

6. Responding to the contention raised by the learned Counsel for petitioners, on the other hand, Mr. G.N. Mohta, the learned counsel for respondent No. 4 strenuously urged that the land comprising of Survey No. 23 which is owned by respondent No. 4 and was in tenancy of Sanaullah Khan was subject to an encumbrance inasmuch on fulfilment of any of the conditions u/s 19 of the Tenancy Act, it was open to the Trust to get back possession from Sanaullah Khan. According to the learned Counsel the right of owner of the land to resume possession would be construed as an encumbrance on the land which is occupied by tenant. Mr. Mohta, taking me through facts of the case, submitted that the Trust in the year 1978 had transferred Survey No. 23 including the delimited land to various persons and the possession of the said land was also given to the purchasers since Sanaullah Khan had surrendered his tenancy and these persons have not been impleaded in the writ petition though they were parties before the Additional Commissioner. The learned Counsel for the respondent Trust, thus, contended that in the absence of impleadment of purchasers in the writ petition, no relief should be granted to the petitioners and writ petition deserve to be dismissed.

7. I will consider the effect of non-impleadment of the purchaser, who were parties before the Additional Commissioner, but not impleaded in the present writ petition at a later stage and deal with the principal question as to whether delimited land admeasuring 8 acres 26 gunthas from Survey No. 23 situated at village Wadali was subject to an encumbrance or not first, because that is foremost and principal question to be decided in the writ petition.

8. Couple of facts are not disputed which are only material for deciding the scope of expression "subject to an encumbrance" occurring in section 16(1)(a) of the Ceiling Act and whether the right of respondent No. 4 owner-Trust to have resumption of land from the tenant Sanaullah Khan could be said to be an encumbrance on the land comprising of Survey No. 23 situated at Wadali which was in tenancy of Sanaullah Khan. These couple of facts are that Survey No. 23 situated at Wadali admeasuring 30 acre as 21 gunthas is owned by respondent No. 4 Trust and that the said land was in tenancy of Sanaullah Khan and that the Sub-Divisional Officer, Daryapur had exempted the lands of the Trust including the land comprising of Survey No. 23 situated at Wadali u/s 129(b) of the Tenancy Act. The question, therefore, is whether the right of respondent No. 4 Trust/owner to get possession of Survey No. 23 situated at Wadali back, from the tenant upon fulfilment of conditions u/s 19 of the Tenancy Act could be said to be

an encumbrance. In other words, whether the right of owner to resume possession of the land from the tenant, can it be said that such land which a owner is entitled to resume is subject to encumbrance u/s 16(1)(b) of the Ceiling Act.

9. Section 16 of the Ceiling Act - reads as under :-

16. (1) Where a person or a family unit holds land in excess of the ceiling area and the whole or part of such land -

(a) is subject to an encumbrance, or

(b) answers to the description of clause (b) of section 18, then subject to the provisions of sub-section (1) of section 10 and section 15, such person or the family unit shall retain such land (whether that land is held as owner or as tenant upto the extent of the ceiling area.

(2) Subject to the provisions of sub-section (1), a person or family unit shall be entitled to select the lands he or it wishes to retain with himself or itself up to the ceiling area.

(3) In the case of a family unit, where land is held by each spouse separately, then each spouse shall, subject to the provisions of sub-section (2), be entitled to select the land the spouse wishes to retain with himself or herself, so however that the lands to be retained bear the same proportion in which the lands are held by each spouse before the declaration."

10. According to sub-section (1) of section 16 of the Ceiling Act, a land-holder or his family unit who holds the land in excess of the ceiling area is required to retain such land subject, of course, to the provisions of sections 10(1) and 15 if such land is encumbered or is covered by the land described in Clause (bb) of section 18 to the extent of permissible ceiling area. Meaning thereby, the land-holder giving his option of retention of land when he holds the land in excess of the ceiling area, cannot give an option of delimitation of land which is subject to encumbrance or is covered in clause (bb) of section 18. Sub-section (2) of section 16 gives option to the land-holder to select the land which he wishes to retain upto the ceiling area if the excess land or part of such land is not subject to an encumbrance or is not covered by the land described in Clause (bb) of section 18. The entire scheme of section 16, therefore, is that a land-holder holding the land in excess of the ceiling area can select the land for his retention upto the ceiling area of his choice, but that choice is not open if such land-holder holds the land in excess of the ceiling area is subject to encumbrance or is covered by the land described in Clause (bb) of section 18 i.e. the land in which the holder has any share held by the family or held by any co-operative society or held jointly with others or held as partner in a firm and the extent of such share. Admittedly, in the present case, the land in question is not covered under the land described in clause (bb) of section 18 and therefore, clause (b) of section 16(1) has no application. The controversy centres around clause (a) of

section 16(1) of the Ceiling Act which deals with the land subject of encumbrance.

11. "Encumbrance" has not been defined in the Ceiling Act. New Webster's Dictionary defines term "encumbrance", that which encumbers, a burden, a hindrance, something useless or superfluous; an annoyance or trouble, a dependent person. According to the Oxford English Dictionary, "Encumbrance", is a burden on property; "A claim, lien, liability attached to property, as a mortgage, a registered judgment, etc". Longman Synonym Dictionary, Second Impression explain "encumbrance" as an impediment, hindrance, handicap, disadvantage, encumbrance, strain, burden, weight, onus, cross, millstone, albatross, duty, obligation, responsibility, tax.

12. Referring to Wharton's Law Lexicon, in Mitra's Legal & Commercial Dictionary, 5th Edn. "encumbrance" is explained as a claim, lien or liability attached to property, as a mortgage, a registered judgment etc. burden imposed upon land or interest in land by the owner of the land or the interest.

13. The term, "encumbrance", in legal - sense, is explained in Corpus Juris Secundum, Vol. 42 at pages 549-551 as under :-

"While it has been said that the word has no technical meaning, is not one of the terms of law, and no definition of it will be found in the older books, yet it has also been said that it has now a fixed and definite meaning; and within the present century it has been defined to be very right to, or interest in, the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance; anything that impairs the use or transfer of property or real estate, a burden of land, depreciative of its value, such as lien, easement, or servitude, which, although adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee; a burden or charge on property, an estate, or right in lands, diminishing their value to the general owner, a paramount right in, or weight on, land which may lessen its value; a legal claim or lien or an estate, which may diminish its value. The definitions substantially as given above, have received judicial approval.

Encumbrance may be created by contract, or acquired in pursuance of some statute and generally they are of two kinds; (1) Those which effect the title. (2) Those which affect only physical condition of the property. The mortgage or other lien is a fair illustration of the former, a public record or a right of way of the latter. As applied to land or an estate in land, the term implies or requires the existence of a legal claim, and it may fairly include whatever charges, burdens, obstructs, or impairs its use, or presents or impedes its transfer, regardless of the extent of amount of the diminution of value occasioned thereby. The following notes contain some specific examples of what the term has been held to include and not to include ""

14. The Apex Court while considering the provisions of the Land Acquisition Act, 1894 explained the meaning of the word "encumbrance" occurring in the said Act

in *The Collector of Bombay Vs. Nusserwanji Rattanji Mistri and Others*, , inter alia as under :-

"... The word "encumbrance" in this section can only mean interest in respect of which a compensation was made u/s 11, or could have been claimed. It cannot include the right of the Government to levy assessment on the land. The Government is not a "person interested" within the definition in section 3(b) and, as already stated, the Act does not contemplate its interest being valued for compensation being awarded therefor."

15. While construing the provisions of the Sick Textile Undertakings (Nationalisation) Act, 1974, the expression "encumbrance" occurring in sub-section (2) of section 4 was explained by the Supreme Court in *National Textile Corporation & anr. v. State of Mah. & ors.* 2 AIR 1977 S.C. 1565, inter alia as under :-

"..... The term "encumbrance" had not been defined in the Act. In Wharten's Law Laxicon encumbrance is described as being a claim, lien or liability, attached to property. This is the sense in which the term is ordinarily used. An encumbrance, in this sense, has to be a liability "attached to property", it must be a burden or liability that runs with the land as the High Court has held. But a Notification issued by the Government under the Land Acquisition Act is not a burden or liability that is attached to the property. The sovereign right of the State to take proceedings for the acquisition of any land for public purpose is similar to its right to impose a tax on the land which is "paramount to the ownership over the land and outside it"

16. The word, "encumbrance" occurring in section 16(1)(a) of the Ceiling Act has to be given meaning in the context in which it appears and the object it seeks to achieve. The Ceiling Act is social welfare legislation and its primary object is that after commencement of the appointed date, no person or family unit should hold the land in excess of the permissible ceiling area and after determining the ceiling area to which such person or family unit is entitled, the excess land should be declared surplus and distributed to landless persons. After the land is declared surplus, the landholder must be given option to select the land which he wants to retain upto the ceiling area. However, the option of the landholder is not unrestricted and it is subject to two conditions, viz. that encumbered land should be retained by the landholder to the extent of permissible ceiling area and secondly the land which is covered by clause (bb) of section 18. The reason is that excess land which would vest in the State must be unencumbered so that it may be distributed to the landless persons promptly. A right of owner to resume possession from the tenant in accordance with law, is not a hindrance on the land nor is fetter on the land and once the owner of the land is divested of the title or ownership over the land on its vesting in the state, the expropriated owner cannot claim his erstwhile right to resume possession from the tenant and such land cannot be said to be encumbered or subject to encumbrance. Even otherwise for a owner of the land who owns the land, on occupation of land by

tenant is an encumbrance, but vice-versa is not true inasmuch as the land which is in possession of the tenant cannot be said to be an encumbered land qua land-owner and the right of owner to resume possession of the land which has been given on tenancy cannot be said to be an encumbrance on such land. The right of a landowner may be subject to and limited by, that of a tenant or to be the right of a mortgagee to sell or take possession or to the right of a neighbouring land-owner to the use of way or other easement, or to the right of the vendor of land in respect of restrictive convenient entered into by purchaser as to use of it, for example, a covenant not to build upon it and the land or the property which is subject to a limit by such restriction, can be said to an encumbered land or property, but a tenant, when he occupies land under tenancy, for the rights of the tenant, it cannot be said that such land in encumbered land since the land owner can get back possession from tenant or resume possession. A tenancy right or lease is the "encumbrance" on the property vesting in the owner, but right of the owner to get back possession or resumption of possession is not an "encumbrance" on the property and, therefore, in my view, the right of the owner-trust to resume possession of the land of Survey No. 23 situated at village Wadali after fulfilment of conditions u/s 19 of the Tenancy Act cannot be said to be an "encumbrance" on the land which was in tenancy of Sanaullah Khan and which Sanaullah Khan was holding under the -Ceiling Act as tenant and, therefore, restriction imposed in sub-section (1) of section 16 was not attracted and it was open to Sanaullah Khan to give his option for delimitation of the land comprising of survey no. 23 which was in his tenancy and it was not obligatory on the part of Sanaullah Khan to retain the land comprising of Survey No. 23 which the was holding as tenant.

17. Recently, the Supreme Court construed the provisions of the Ceiling Act including Section 16(1) and (2) thereof and the Maharashtra Restoration of Lands to Scheduled Tribe Act and held that the land restored under the Restoration Act is not covered by definition of "transfer" u/s 8 of the Ceiling Act and, therefore, section 10(1) of the Ceiling Act was not applicable and such land was not covered by section 16(1) as it was not subject to an encumbrance and, therefore, the land-holder was entitled to select the land upto the ceiling area of the choice u/s 16(2) of the Ceiling Act. The Apex Court in *Bhupendra Singh v. State of Maharashtra & ors*³ (1996)1 Mh.L.J. 228, thus held :-

"12. u/s 16(2) of the Ceiling Act, a person or family unit is entitled to select the land he or it wishes to retain upto the ceiling area. This right is subject to section 16(1). Section 16(1), inter alia, provides that where a person or family unit holds land in excess of the ceiling area and the whole or part of such land is subject to an encumbrance, then the person or family unit shall retain such land upto the extent of the ceiling land. The High Court has treated the land restored to the Tribal as encumbered land of the appellant. We fail to see how the land can be so treated. Prior to the Restoration Act, the land belonged to the appellant who had a clear title. After the Restoration Act came into force, appellant lost the land which was restored to the Tribal's heirs much prior to the order of the Surplus

Land Determination Tribunal. The provisions of section 16(1) do not apply to such a situation. The appellant's family unit was, therefore, entitled to select the lands."

18. Applying the ratio of the Apex Court in - Bhupendra Singh's case 1996(1) Mh.L.J. 228 in the present facts, it would be seen that the respondent No. 4 Trust/owner had clear title over the land in question and the Competent Authority had already exempted the lands of the Trust including the disputed land comprising of Survey No. 23 situated at Wadali from the provisions of the Tenancy Act conferring ownership rights on the tenant and other provisions affecting the ownership of the Trust and merely because the said Trust has given the land comprising of survey No. 23 in tenancy to Sanaullah Khan it cannot be said that the land which belonged to the Trust and was owned by Trust qua tenant, was an encumbered land covered u/s 16(1)(a) of the Ceiling Act.

19. Resultantly, therefore, the finding recorded by the Additional Commissioner in his order dated 24.11.1987 that land comprising of Survey No. 23 was encumbered land because of ownership rights of the Trust and due to that Sanaullah Khan could not have given option for delimitation of that land, cannot be sustained and is liable to be set aside. The land comprising of Survey No. 23 situated at village Wadali was not subject to an encumbrance so far as Sanaullah Khan was concerned and, therefore, he rightly exercised his option before the Sub-Divisional Officer by submitting that excess area of 8 acres 26 gunthas may be delimited out of the field Survey No. 23 situated at village Wadali. The order passed by the Sub-Divisional Officer, was, therefore, in accordance with law and there was no justification for the Additional Commissioner to interfere with the just, right and proper order passed by the Sub-Divisional Officer.

20. Now, I may take up the objection raised by Mr. B.N. Mohta, the learned counsel for respondent No. 4 Trust/owner that the land comprising of Survey No. 23 has been sold by the Trust/owner to various purchasers and those purchasers who were parties before the Additional Commissioner, have not been impleaded in the writ petition and, therefore, no relief can be granted to the petitioners. The contention of the learned counsel for respondent No. 4 Trust is devoid of any merit. It would be seen that the order passed by the Sub-Divisional Officer on 8.10.1985 whereby 8 acres 26 gunthas of land was declared excess in the holding of Sanaullah Khan and the delimitation of excess land admeasuring 8 acres 26 gunthas from Survey No. 23 was not challenged by the purchasers though, according to Mr. Mohta, the Trust sold the said land in the year 1978. The Trust alone filed revision before the Additional Commissioner aggrieved by the order passed by the Sub-Divisional Officer, Daryapur on 8.10.1985 and in the revision application filed by the Trust u/s 45 of the Ceiling Act, the purchasers were impleaded only as proforma parties. At the instance of the Trust, the Additional - Commissioner allowed the revision application and set aside the order passed by the Sub-Divisional Officer. In this background, if the petitioners have not impleaded the purchasers as parties in the present writ petition, it

cannot be said that non-impleadment of purchasers would entail dismissal of the writ petition. The order dated 24.11.1987 passed by the Additional Commissioner was challenged in the revision application by the Trust-owner and the said Trust has been impleaded in the writ petition as respondent No. 4. In this background, there is no merit in the second contention raised by the learned Counsel for the respondent No. 4.

21. In view of the foregoing discussion, the order passed by the Additional Commissioner on 24.11.1987 cannot be sustained and has to be set aside.

22. Accordingly, the writ petition is allowed. The order passed by the Additional Commissioner, Amaravati Division, Amaravati on 24.11.1987 is quashed and set aside. No costs. Rule is made absolute in the aforesaid terms.