

(1983) 06 BOM CK 0022

In the Bombay High Court

Case No : Writ Petition No. 3352 of 1981

Kerba Bhivaji Shinde

APPELLANT

Vs

Salubai and Others

RESPONDENT

Date of Decision : 29-06-1983

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (1983) 2 BomCR 606 : (1983) MhLj 1009

Hon'ble Judges : M.P. Kanade, J

Bench : Single Bench

Advocate : D.Y. Lovekar and A.H. Vaishnav, for the Appellant; A.G. Godhamgaonkar, for the Respondent

Judgement

M.P. Kanade, J.—By an order dated December 13, 1982, S.J. Deshpande, J, directed that the Writ petition No. 3352, Writ petition No. 2060/1981, First Appeal No. 137/1979 and First Appeal No. 419/1979 be heard together not later than March 1983. Writ Petition No. 2060/1981 was not connected matter with the other three matters and, therefore, it was independently heard and disposed of by this Court. The rest of the three matters are heard together. However, it is advisable to dispose of these three matters by separate judgment.

2. By this writ petition under Article 227 of the Constitution of India the petitioner-Kerba Bhivaji Shinde who claims to be a tenant of Land Survey No. 2 (2-A) admeasuring 12 acres and 13 gunthas situated at village Rohi-Pimpalgaon, Taluka and District Nanded, challenged the order passed by the learned member of Maharashtra Revenue Tribunal, dated Occupier 12, 1981, whereby it is held that the application against the landlord would not be maintainable u/s 32(1) of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as "the Tenancy Act") but the application ought to have been filed u/s 98 of the Tenancy Act.

3. Few facts leading to this petition are:---That Santuka Nagorao (respondent No. 3) herein is the recorded landholder of Land Survey No. (2-A). The

respondent No. 1 Salubai is the mother of respondent No. 3 and respondent No. 2 Venubai is the married sister of respondent No. 3. By an application dated May 18, 1976. Kerba-petitioner herein filed an application u/s 32(1) of the Tenancy Act against all the respondents. He contended in the application that he was a tenant of the said land with effect from 1966-67 on behalf of Santuka, (respondent No. 3) and accordingly the entries in the revenue register have been made in his favour. It is also contended that there was an agreement of sale of the said land dated April 15, 1968 and for that reason he filed a suit for specific performance in the Civil Court. The said application was opposed by written statement by the respondents and the claim of the petitioner was denied. After the due enquiry the Naib Tahsildar, Nanded, by his judgment and order dated December 24, 1980 allowed the application holding the petitioner to be the tenant of the land. The respondent preferred an appeal against the judgement and order before the Dy. Collector and the Dy. Collector, land reforms, Nanded allowed the appeal by judgment and order dated May 22, 1981, by setting aside the order of the trial Court. Feeling aggrieved by the judgment and order of Dy. Collector the petitioner filed a revision application to Maharashtra Revenue Tribunal. That application was dismissed by judgment and order dated October 12, 1981. It is that judgement and order that is challenged in this writ petition.

4. Shri D.Y. Lovekar, the learned Counsel appearing in support of this petition, submitted that the view taken by the learned Member of the Tribunal that the application of the petitioner u/s 32(1) of the Tenancy Act is not maintainable is erroneous and contrary to the provisions of Tenancy Act. It is pointed out by Shri Lovekar that the said application for possession is filed against the landlord of the said land and the application u/s 98 of the Tenancy Act would not be maintainable against the landlord. It is, therefore, the view taken by the learned Member of the Tribunal is erroneous on the face of the record and is liable to be set aside.

5. Shri A.G. Godhamgaonkar, the learned Counsel appearing in support of the respondent submitted that section 32 of the Tenancy Act is a procedural section and unless the petitioner shows that he is entitled to possession of the land the application u/s 32 of the Tenancy Act would not be maintainable. In the instant case it is urged by Shri Godhamgaonkar that the petitioner has not shown that under any of the provisions of the Act he is entitled to the possession and, therefore, the application u/s 32(1) of the Tenancy Act is not maintainable. He tried to support the judgment of the learned member of the Tribunal.

6. The learned Member of the Tribunal has not reasoned out the finding recorded by him. The judgment of the learned Member of the Tribunal reads that:

"The decision of the Divisional Bench in Digambar v. Vithal No. 10/A/73- Beed, decided on 14-4-1975 was reconsidered by the Full Bench of this revision Tribunal in Nama and others v. Ganpat and others No. 76/B/76-Parbhani."

In the said Full Bench judgment it is held that---.....

"the provisions of section 32 are merely procedural and the remedy for the tenant for taking possession does not lie under the said provisions. However, it is held in Nama and others v. Ganpat and others that the law laid down by the Divisional Bench in Digambar v. Vithal would be made applicable to all the cases instituted subsequent to that decision in order to avoid hardship and inconvenience which may be caused to the tenants for whose benefits, the tenancy legislation has been mainly enacted."

It must be stated that the Full Bench judgment of the Maharashtra Revenue Tribunal was not cited before me, even the copy of the said judgment was not made available to this Court. It is, therefore, necessary to decide independently as to whether section 32 of the Tenancy Act is merely a procedural section or it creates a substantive right in favour of the persons who made an application u/s 32 of the Tenancy Act.

7. Marginally, it is stated to the said section "the procedure for taking possession." Sub section (1) of section 32 of the Tenancy Act lays down that.....

"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, within a period of two years from the date of the commencement of the Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1957, or the date on which the right to such possession accrued to him whichever is later, apply to the Tahsildar in writing in the prescribed form for such possession."

Sub-section (2) of section 32 of the Tenancy Act lays down that.....

"Save as otherwise provided in sub-section 3-A no landholder shall obtain possession of land or dwelling house held by a tenant except under an order of the Tahsildar, for which he shall apply in the prescribed form within a period of two years from the date of the commencement of Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1957, or the date on which the right to such possession accrued to him whichever is later."

Sub-sections (1) and (2) enable the tenant and the landlord to make an application to the Tahsildar in a prescribed form for possession. This can be said to be the procedure for the landlord and the tenant for making an application for possession. Sub-section (3) of section 32 of the Tenancy Act lays down that.....

"On receipt of an application under sub-section (1) or sub-section (2) the Tahsildar shall, after holding an enquiry, pass such order thereon as he deems fit.."

8. There are certain sections in the Act which enable the landlord to make an application u/s 32(2) of the Tenancy Act such as on termination of a tenancy of the tenant under any of the provisions of the Act. For instance if there is a surrender by a tenant in respect of his tenancy, the landlord should make an application u/s 19 read with section 32(2) of the Tenancy Act. If the tenant has

committed three successive and consecutive defaults his tenancy can be terminated u/s 28(2) of the Tenancy Act and the landlord can ask for possession u/s 32(2) of the Tenancy Act. If the landlord desires to possess the land for the bona fide personal cultivation of the land he could terminate the tenancy u/s 44 of the Act and make an application u/s 44 read with section 32(2) of the Tenancy Act for possession. The order passed under sections 19, 28 and 44 of the Tenancy Act gives right to the landlord to claim the possession u/s 32(2) of the Tenancy Act but there is no section in the whole of the Tenancy Act which enables the tenant to make an application independently u/s 32(1) of the Tenancy Act. I asked the learned Counsel Shri Godhamgaonkar to point out any provisions in the Tenancy Act which make the tenant entitled to possession u/s 32(1) of the Tenancy Act. He was unable to point out any such provisions. If the tenant is dispossessed by a landlord he can make an application u/s 8 of the Tenancy Act for a declaration that he is or was tenant of the land and ask for the possession of the land u/s 32(1) of the Tenancy Act. Apart from this, there is no provision. When a tenant makes an application u/s 32(1) of the Tenancy Act for possession of a tenanted land he claims a right to be entitled to possession because he is a tenant of the land. Every lawful tenant of the land under the Act is entitled to possession unless otherwise evicted by the landlord, resorting to any other provisions of the Act u/s 32(2) of the Tenancy Act. Taking possession without resorting to the provision of section 32(2) by the landlord is stated to be an offence and penalty is provided under sub-section (4) of the section 32 of the Tenancy Act as provided in section 96 of the Tenancy Act. So whenever an application is made u/s 32(1), of the tenancy Act by the tenant it means that the is a tenant of the land, and, therefore, entitled to possession of the land. The Tahsildar is supposed to make an enquiry and record a finding that the tenant is a lawful tenant of the land, and, therefore, entitled to possession u/s 32(1) of the Tenancy Act. Section 32 can be said to be a procedural section and also a substantive section to obtain possession from the landlord or tenant.

9. The following sections in the Act, provided remedy for possession, namely.....

Sections 32, 38-E(1) explanation, and section 98 of the Tenancy Act: These are not alternative remedies. These provisions deal with different claims and the rights of the parties. When mean not alternative remedies I mean to say that the tenant as he likes cannot make an application under sections 32, 38-E or 98. These sections deal with independent cause of action. The application u/s 32(1) by a tenant for possession is always against the landlord. If a landlord has dispossessed him without resorting to the provisions of sub-section (2) of section 32, he acquires a right to possession established his status as a tenant. He acquires a cause of action to make an application u/s 32(1) against the landlord to obtain possession without relying upon any substantive section in the provisions of the Tenancy Act. In view of the reasons stated above it is an error to hold that section 32 is merely a procedural section and it does not create any right in the tenant to make an application u/s 32(1) of the Tenancy Act for possession. Having regard to the scheme of section 32 itself it can be said that it

is a procedural law and also creates a substantive right to claim possession against the landlord u/s 32(1) of the Tenancy Act. A tenant, if dispossessed by a third person viz. a trespasser probably then an application u/s 32(1) may not lie. Although he is a tenant on the land against the third person the tenant should file an application u/s 98 and not u/s 32(1) of the Tenancy Act. When there is dispute between the tenant and the landlord as to the possession of the tenanted land the only section available to the tenant is section 32(1) and his application against the landlord u/s 98 probably may not be maintainable. There may arise some cases where an application u/s 98 against the landlord may lie. For instance a landlord transfers the land under a registered deed in favour of the third person and that third person is put in possession by landlord, in such a situation it will not be a dispute as to the possession between the landlord and the tenant because his landlord has lost all his rights, title and interests in the land in favour of the transferee and, therefore, an application against the landlord for seeking possession may be ineffective, and, hence an application u/s 98 may be proper remedy for a tenant who has been wrongfully dispossessed. Suffice it to say that whenever there is a dispute between the landlord and tenant in respect of the tenanted land the tenant should resort to the provision of section 32(1) of the Tenancy Act and no other section is available to him.

10. In the facts and circumstances of the case the view taken by the learned Member of the Tribunal appears to be erroneous and legally not sustainable. It is in this view of the matter, the order passed by the learned member of the Tribunal deserves to be quashed.

11. Shri. A.G. Godhamgaonkar, the learned Counsel appearing for the respondents submitted that the Appellate Court which is a final Court of Act (sic) has recorded a finding that the application filed by the petitioner is time-barred and he has not established his tenancy rights in respect of the disputed land and it is, therefore, that no interference is called for by the Court while entertaining an application under Article 227 of Constitution of India. I have carefully gone through the judgment of the Appellate Court. It appears that a perfunctory judgment has been given. There is no appreciation of evidence by the Court of appeal which is a final Court of Act (sic) The Appellate Court had failed to exercise the jurisdiction to decide the question of fact in the appeal on proper appreciation of evidence and, therefore, that judgment is also not in accordance with law. It is, therefore, that judgment also deserves to be quashed. Since the Appellate Court has not appreciated the evidence and correctly recorded the finding it would be in the fitness of the things that the matter should be remanded back to the Appellate Court for the decision of the case. It is, therefore, that the order dated May 22, 1981, passed by the learned Dy. Collector, Land Reforms, Nanded, deserves to be quashed.

12. In the result the judgment and order dated October 12, 1981, passed by the learned Member, Maharashtra, Revenue Tribunal and the order passed by the learned Dy. Collector, Land Reforms, Nanded, dated May 22, 1981 are set aside.

The matter is remanded to the Dy. Collector, Land Reforms, Nanded for decision of the appeal on merits after giving opportunities to the parties to be heard in the matter. In the facts and circumstances of the case, however, there will be no order as to costs. Parties shall maintain status quo as to the possession till the final disposal of the appeal before the Dy. Collector.