
(1987) 01 BOM CK 0002
In the Bombay High Court
Case No : Writ Petition No. 2381 of 1983

Kisan Niswade

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 08-01-1987

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 106(2), 36(1), 36(2)
Constitution of India, 1950 — Article 226, 227

Citation : (1987) 3 BomCR 477

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : S.G. Shukle, for the Appellant; M.B. Badiye, for respondent Nos. 5, 6, 9 and 10 and H. Ahmad, A.G.P. for respondent Nos. 1 and 3, for the Respondent

Final Decision : Allowed

Judgement

H.W. Dhabe, J.—This is a writ petition arising out of the proceedings under the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (for short the Tenancy Act).

Briefly the facts are that the petitioner claimed to be a tenant of 2 acres and 16 gs. of land from fields No. 34/2 area 7 acres of Village Karajgaon, Tahsil Warud, District Amravati. When the original landlord Sunderlalji learnt in 1960-61 that the petitioner claimed to be the tenant of the suit land, he initiated proceedings u/s 38(2) read with section 36 of the Tenancy Act claiming the land for personal cultivation. However, the said Sunderlalji lost in these proceedings because the land was bagait land for which notice u/s 58 of the Tenancy Act was necessary. The petitioner thereafter commenced proceedings for purchase of the suit lane. His application was rejected throughout by all the Tenancy Courts, and ultimately by this court also holding that the petitioner was not the tenant of the suit land and had, therefore, no right to purchase the same. The above order was passed

by this Court on 29-4-1980. According to the respondents 5 to 10, who are the legal representatives of the original landlord Sundarlalji, although the copy was applied for on 15-5-1980, the same was delivered to them on 1-10-1982.

2. After the receipt of the certified copy of the order of this Court the respondents 5 to 10 filed an application for possession of the suit land u/s 36(2) of the Tenancy Act. The said case was registered as Revenue Case No. 102/59/10 F/61-62/102/59(8)(11)/60-61. On 21-3-1983. the petitioner was noticed. However, on 1-7-1983, as per the order sheet in the above case, the petitioner was absent and was, therefore, proceeded ex parte. The learned Additional Tahsildar directed issue of warrant of possession on the same date pursuant to which it appears that the respondents 5 to 10 were placed in possession of the suit land. According to the petitioner, on the earlier date i.e. 23-5-1983 no date was given by the learned Additional Tahsildar although the order sheet of that date shows that the case was fixed on 1-7-1983. It is this order dated 1-7-1983 passed by the learned Additional Tahsildar, directing issue of warrant of possession of the suit land which is challenged in the instant writ petition by the petitioner.

3. The learned Counsel for the petitioner has urged before me that part from his contention that the date 1-7-1983 was fraudulently and surreptitiously entered behind the back of the petitioner in the order sheet dated 23-5-1983, the impugned order dated 1-7-1983 is per se without jurisdiction. It is, however, urged on behalf of the respondents 5 to 10 that the instant petition cannot be entertained because the petitioner had adequate remedy by way of an appeal and thereafter a revision against the order passed by the learned Additional Tahsildar u/s 36(2). Another contention raised on behalf of the respondents 5 to 10 is that if the possession was obtained by the respondents 5 to 10 in contravention of section 36(2), it was open to the petitioner to file an application u/s 36(1) of the Tenancy Act for restoration of possession.

4. Considering first the contentions raised on behalf of the respondents 5 to 10. It is true that normally the High Court would not entertain a writ petition in its writ jurisdiction if there is an adequate alternative remedy available to a writ petitioner. However, the said rule is a rule of discretion and does not affect the jurisdiction of the Court to entertain a writ petition if the ends of justice require that the High Court should interfere in the impugned order of a subordinate authority. It may also be seen that there are certain well-recognised exceptions to the rule of exhaustion of statutory remedies such as the provisions of law under which the Tribunal functions being ultra vires and the breach of the principles of natural justice. See Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, . As I would presently show, the order of the learned Additional Tahsildar which is challenged before me is not only pre se illegal and without jurisdiction but it shocks judicial conscience also as there is no adjudication made by the learned Additional Tahsildar worth the name before issuing the warrant of possession in the instant case.

5. As regards the question about the availability of the remedy u/s 36(1) of the Tenancy Act for restoration of possession, the said contention deserves to be stated for being merely rejected. In the instant case an application is filed by the respondents 5 to 10 u/s 36(2) for restoration of possession to them. It is pursuant to the order of the Additional Tahsildar in the application u/s 36(2) of the Tenancy Act that the possession is delivered to the respondents 5 to 10. In such a case an application for restoration of possession by the petitioner cannot lie u/s 36(1) of the Tenancy Act. Even otherwise, the remedy u/s 36(1) of the Tenancy Act would be available to the petitioner because it is held that he is not a tenant of the suit land. It may be seen in this regard that the remedy u/s 36(1) of the Tenancy Act is available to a tenant only. As regards the question whether the petitioner should have preferred a civil suit, in my view, the said remedy cannot be said to be an efficacious remedy, particularly when the jurisdiction of the Civil Court is barred if the subject matter of the proceedings is covered by the provisions of the Tenancy Act. At any rate, as already pointed out, none of the alleged remedies can bar the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. The above contention raised on behalf of the respondents 5 to 10, therefore, deserves to be rejected.

6. As already pointed out it was held in the proceedings which the petitioner had initiated for purchase of the suit land that he was not its tenant. It is well settled that a remedy u/s 36(2) of the Tenancy Act is available to the landlord only against the tenant unlike the remedy u/s 36(1) which is available to a tenant against any person. The application filed by the respondents 5 to 10 u/s 36(2) of the Tenancy Act was, therefore, incompetent and not maintainable.

It is also material to notice that in none of the previous proceedings there was an adjudication on the question of entitlement of the respondents 5 to 10 to claim possession of the suit land from the petitioner and the application u/s 36(2) was thus not in the nature of an execution proceeding. There was therefore, substantive adjudication involved in the said proceedings and unless by proper evidence led in that regard by the respondents 5 to 10 either by a proper affidavit as may be directed by the competent authority in the absence of the petitioner or in any other mode, it is proved that the respondents 5 to 10 were entitled to obtain possession of the suit and from the petitioner, it was not open to the Additional Tahsildar to direct restoration of possession of the suit land to the respondents 5 to 10. Even otherwise, the order which is to be passed u/s 36(2) of the Tenancy Act is the order for restoration of possession and not an order for directing an issue of a warrant of possession which is a subsequent stage in the execution proceeding for restoration of possession u/s 106(2) of the Tenancy Act.

8. The Additional Tahsildar has not passed any substantive order holding that the respondents 5 to 10 are entitled to possession of the suit land from the petitioner and therefore directing him to restore the possession of the suit land to them. The procedure followed by the learned Additional Tahsildar is, therefore, wholly

contrary to the well established norms of judicial procedure apart from the fact that the order is wholly illegal, untenable and without jurisdiction. The impugned order passed by the learned Additional Tahsildar on 1-7-1983, directing issue of warrant of possession is thus wholly illegal without jurisdiction and is liable to be set aside. Any possession obtained pursuant to the said order would also be illegal and the petitioner would therefore be entitled to restitution of possession of the suit land.

In the result, the instant writ petition is allowed. The impugned order of the Additional Tahsildar dated 1-7-1983 is set aside and the concerned authority is directed to restore possession of the suit land to the petitioner. The petitioner would then be entitled to continue in possession of the suit land unless and until the respondents 5 to 10 obtain its possession by following due procedure of law. Costs of the petition are saddled upon the respondents 5 to 10. The possession of the suit land be obtained from the respondents 5 to 10 only after April 30, 1987.