

(1990) 09 BOM CK 0065

In the Bombay High Court

Case No : Civil Revision Application No. 587 of 1986

Kishan Naikwade

APPELLANT

Vs

Asrabai Naikwade and Others

RESPONDENT

Date of Decision : 03-09-1990

Acts Referred:

Citation : (1991) 2 BomCR 24 : (1991) 1 MhLj 68

Hon'ble Judges : N.P. Chapalgaonkar, J

Bench : Single Bench

Advocate : R.M. Borde, for the Appellant; M.R. Challani, for the Respondent

Final Decision : Allowed

Judgement

N.P. Chapalgaonkar, J.—In Regular Civil Suit No. 380 of 1980, plaintiff Kishan sought the relief of declaration that the decree in Regular Civil Suit No. 105 of 1968 is not binding on him and is invalid and also for perpetual injunction restraining defendants from interfering into his possession. The property in dispute is Survey No. 196/A situated at Village Chousala in taluka and district Beed.

2. It is not in dispute that the property is an inam land which was abolished under the provisions of Hyderabad Abolition of Inams and Cash Grants Act, 1954 and is not service inam. The occupancy of the said land was given to Babu Gopala Naikwade- the husband of the defendant Nos. 1 and 2 and father of defendant No.3. It is also not in dispute that Kishan is the nephew of said Babu being brother of Dashrath who is real brother of Babu. It is the case of plaintiff that because of the oldness of Babu, he gave these lands for cultivation on batai basis to the plaintiff and, therefore, plaintiff is the tenant of the suit land. It appears that an issue was framed as follows :---

"Whether the plaintiff proves that he was cultivating suit land on the strength of this agreement entered with deceased Babu ?"

and this issue is referred u/s 99 A of the Hyderabad Tenancy and Agricultural Lands Act, 1950 to the tenancy authorities for decision. Subsequent to it, the defendant No. 2 approached Court with an application praying for calling back of the reference on account of the fact that the plaintiff is the nephew (son of brother of husband) of the defendant and, therefore, allegation of the plaintiff regarding his status as tenant is without any legal basis.

3. Learned Joint Civil Judge, Junior Division, Beed on 31-7-1986 passed an order that reference made to the tenancy Court be called back. He relied on judgment of this Court in the case of Nilavabai Sida Khajure v. Chanamalappa Bassappa Khajure and others, reported in 1977 M.L.J. 443. Today, Shri M.R. Challani, the learned Counsel appearing on behalf of the respondent, invited my attention to a judgment of this Court in Syed Ibrahim Syed Ashraf and another v. Zamarrudbi Nizamuddin and others, reported in 1990 M. L.J. 631, besides Nilavabai's case (supra) which was also cited in the trial Court. It is the submission of Shri Challani that plaintiff petitioner being the nephew of Babu and also defendant Nos.1 and 2, he cannot claim any tenancy rights because even assuming that he is separate from defendant No. 1 and 2, his cultivation shall be deemed to be the cultivation of the landlord and he cannot be deemed to be the tenant within the provisions of section 5 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter called "Hyderabad Tenancy Act" for the sake of brevity).

4. Relevant portion of section 5 of the Act of 1950 reads :

"5. A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the landholder and if such person is not---

(a) a member of the land-holder's family, or

Both Nilavabai's case reported in 1977 M.L.J. 443 and Syed Ibrahim's case reported in 1990 ML.J. 631 speak about the status of near blood relations in respect of right to claim tenancy. Both these cases go to show that if a near relation like nephew is cultivating the land and even if he is separated, he cannot be deemed to be a tenant u/s 5 of the Hyderabad Tenancy and Agricultural Lands Act because he is not cultivating the land belonging to another. Therefore, in cases wherein such a relation is found to be in possession of the property belonging to another, a near relation, the deeming provision of section 5 of the Hyderabad Tenancy and Agricultural Lands Act cannot be brought into play. But this does not mean that if a nephew or a like relation is separate from the family of landlord, he can in no circumstances enter into contract of tenancy with his uncle or like relation. Such a proposition has not been laid down in any of these two cases. Only thing to be borne in mind is merely because he is cultivating the land of another person who is a relation, no tenancy can be presumed u/s 5. Hyderabad Tenancy Act does not protect only deemed tenants u/s 5 but also contractual tenancies. In the instant case, Shri Borde submits that there was contract of tenancy with Babu and the required details have been given in the

pleadings. Therefore, it will have to be decided by the tenancy authorities whether he is a tenant of the suit land ignoring the provisions of section 5 of the Hyderabad Tenancy and Agricultural Lands Act. On this count, therefore, recalling of the reference was not proper.

5. Shri Challani further submits that admittedly this land is an inam land. Therefore, the provisions of the Hyderabad Tenancy Act are not applicable to this land and since tenancy statute itself is not applicable, reference is unwarranted. Section 102-A of the Hyderabad Tenancy Act specifies the categories of the land to which the provisions of the Act shall not be applicable. Under Clause (C) it mentions "service inam lands". It does not exempt other inams which stood abolished by virtue of the provisions of Hyderabad Abolition of Inams and Cash Grants Act, 1954.

6. Shri Challani then submits that assuming that there was a contract of tenancy between Kishan and his uncle, such a contract would be invalid by virtue of section 23 of the Indian Contract Act, object of the contract being forbidden by law. He submits that occupancy granted to a person under Hyderabad Abolition of Inams and Cash Grants Act, 1954 is restricted ownership and no valid lease can be created in respect of such land without previous sanction of Collector. Since in the instant case no sanction of Collector was there, the lease itself would be invalid, having been hit by section 6(3) of Inams Act and section 23 of Contract Act. He further submits that since lease itself is invalid, no reference to tenancy tribunal is necessary. Shri Challani in support of his contention relied on a judgment of this Court in Jain Shwetamber Sthanak v. Chintamani Bajirao Naiknavare and others, reported in 1984 M.L.J. 736. In this case, a tenant declared owner under the provisions of the Hyderabad Tenancy Act made a lease of the property to which he was declared as owner. Shri D.B. Deshpande, J., held that the lease by a tenant declared as owner u/s 38-E is invalid u/s 50-B and also u/s 23 of the Indian Contract Act. Section 50-B(1) of the Hyderabad Tenancy and Agricultural Lands Act reads as under :

"No land purchased by a tenant u/s 38, 38-A, 38-E, 38-F, 38-G, (38-H or 46-D or 48), or sold to any person u/s 53-F, 53-G, 53-H or 98-C shall be transferred by sale, gift, exchange, mortgage, lease or assignment without the previous sanction of the Collector."

7. What is prohibited under the provisions of section 58-B is not only the transfer but the sale, gift, exchange, mortgage, lease or assignment without the previous sanction of the Collector and, therefore, creation of a tenancy being a lease in respect of the property, ownership of which is granted to a person under the provisions of the Tenancy Act was held to be invalid on the ground of the prohibition u/s 50-B and also consequently under the provisions of section 23 of the Indian Contract Act being forbidden by law. Similar prohibition is not there in respect of the lease in the constraints laid down by section 6(3) of the Hyderabad Abolition of Inams and Cash Grants Act, 1954. Section 6(3) reads as follows---

"6(3) The occupancy granted under sub-section (1) shall not be transferable or partible by meets and bounds without the previous sanction of the Collector and except on payment of such sum to the State Government or the Central Government may by general or special order, determine."

This provision only forbids transfer and partition without the previous sanction of the Collector. Therefore, creation of the lease on the land granted to occupant under the provisions of the Hyderabad Abolition of Inams and Cash Grants Act is not prohibited, and on this count also, the submission of Shri Challani will have to be rejected. Shri Challani submits that the decree passed in earlier suit R.C.S. No. 105 of 1968 which is challenged in the present Regular Civil Suit No. 380 of 1980 is already executed. It is a question to be taken into consideration while passing the decree in the suit and has nothing to do with the reference proposed. Assuming that this is a suit for injunction, whether the plaintiff has any right to claim injunction sought for will have to be tested by looking to the grounds on which the plaintiff has claimed relief including tenancy. In Bhagwanrao Auti Vs. Ganpatrao Raut and Another, , it is held by the Division Bench of this Court that a reference is necessary even in a suit simpliciter for injunction since plaintiff's possession must be referable to a legal right.

8. The issue framed by the learned trial Judge needs modification. The issue should read as follows---

"Whether the plaintiff proves that he is cultivating the suit land on the strength of agreement of tenancy entered into with deceased Babu ?"

9. Revision is, therefore, allowed. Rule is made absolute. Order dated 31-7-1986 calling back the reference made by Joint Civil Judge, Junior Division, Beed in Regular Civil Suit No. 318 of 1980 is hereby quashed. There will be no order as to the costs.