

(1977) 09 BOM CK 0003

In the Bombay High Court

Case No : Special Civil Application No. 103 of 1973

Krishnabai and Others

APPELLANT

Vs

Baburao and Others

RESPONDENT

Date of Decision : 20-09-1977

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 100(2), 36, 38, 6(1), 8
Civil Procedure Code, 1908 (CPC) — Section 106, 11
Evidence Act, 1872 — Section 115

Citation : AIR 1978 Bom 290 : (1978) 80 BOMLR 582 : (1978) MhLj 85

Hon'ble Judges : Gadgil, J

Bench : Single Bench

Advocate : N.S. Munshi, for the Appellant; J.N. Chandurkar and V.M. Golwalkar, for the Respondent

Judgement

1. The short and interesting question that arises in this writ petition is as to whether the petitioners' contention that the respondents and their predecessor-in-title by name Ashru were the tenants, is barred on account of the decision in another tenancy case which was given on the hypothesis that they were the tenants.

2. The controversy arises in the following manner: Survey No. 177, admeasuring 34.19 acres and situated at Anjani Bk. was originally owned by the petitioner No. 1 Krishnabai and her husband Raghunath. Raghunath is now dead and the petitioners Nos. 2 to 10 are his legal representatives. The respondents Nos. 1 to 11 are the heirs and legal representatives of a person by name Ashru. After the new Tenancy Act, Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 came into force, the name of Ashru was entered as "tenant of Survey No. 177. Such an entry was made as laid down in S. 8 of the Tenancy Act. It reads as follows:

"8. (1) As soon as may be after this Act comes into force the Tahsildar shall

cause a list of persons, other than occupancy tenants, and protected lessees, who are deemed to be tenants under Sub-section (1) of Section 6 to be prepared for entry in the Record of Rights in accordance with the provisions of Chap. IX of the Code.

(2) After such list is prepared it shall be published in the prescribed manner and if no application is made by the landlord or the tenant or any other person interested within a period of six months of the date of such publication disputing the correctness or omission of any entry, such list shall be final.

(3) If an application is made to the Tahsildar by the landlord or the tenant or any other person interested in the prescribed manner within the aforesaid period, disputing the correctness or omission of such entry, the Tahsildar shall decide the dispute in accordance with the provisions of Sub-section (2) of Section 100 of this Act and such decision subject to appeal or revision under this Act shall, notwithstanding Section 106 of the Code, be final.

(4)"

3. The owners Krishnabai and Raghunath felt aggrieved by the entry of Ashru in the list of tenants prepared u/s 8. They, therefore, filed an application u/s 8 (3) of the Tenancy Act disputing that entry. The application was numbered as Revenue Case No. 72/59 of 1959-60. In that application it was alleged that Ashru was not a tenant but was a partner in cultivation, and that therefore, his name should be deleted from the list of tenants. The Tenancy Naib-Tahsildar heard the controversy. He recorded the evidence that was led before him. It is necessary to mention at this stage that Ashru died during the pendency of this proceeding and his heirs (viz. present respondents Nos. 1 to 111 were brought on record. The Tenancy Naib-Tahsildar held that the name of Ashru from the list of the tenants should be deleted as he was only a partner in cultivation. This order was challenged by some of the legal representatives of Ashru. It appears that at that time Raghunath was dead and his heirs were also brought on record. The appeal before the Sub-Divisional Officer was numbered as 9/59 of 1964-65. The appellate authority dismissed the appeal on 28-3-1970. The legal representatives of Ashru took the matter in revision to Maharashtra Revenue Tribunal in Revision Application No. 1432 of 1970. The Tribunal allowed the revision on 15-12-1971. He held that on account of certain decisions in proceedings u/s 38 of Tenancy Act, it would not be possible for the landholder to contend that Ashru was not a tenant. I will refer to the nature of these proceedings in details at later stage. It is this order of the Maharashtra Revenue Tribunal that is being challenged before me.

4. Section 38 of the Tenancy Act allows termination of the tenancy at the instance of the landlord if the landlord needs the property for his bona fide personal cultivation. That section contemplates that the landlord should give a notice to that effect on or before 15th of February 1961, and should make an application for possession u/s 36 on or before 31st March 1961. Krishnabai

accordingly gave notice and filed application No. 61/59 (8) of 60-61 against the heirs of Ashru for getting possession of her 1/2 share in the land. Raghunath in his turn filed application No. 63/59 (8) of 60-61 claiming that he should be awarded possession of his 1/2 share of the land. In those applications a statement was made that they have filed the application without prejudice to their other rights. The applications claiming possession u/s 38 were heard and decided on 28-10-1963. The Tenancy Naib-Tahsildar passed an order that Krishnabai should be placed in possession of 10.27 acres of land (out of her share of 17.9 acres) of the eastern side from Survey No. 177, and the legal representatives of Raghunath should be put in possession of 10.27 acres of land (out of Raghunath's share of 17.9 acres of land) of the western side of Survey No. 177. This order has become final as neither the landholders nor the heirs of Ashru have challenged it by filing any appeal or revision. This order has not been placed on record till the controversy u/s 8 of the Tenancy Act reached the Maharashtra Revenue Tribunal in revision application No. 1432 of 1970. The Member of the Maharashtra Revenue Tribunal construed the order of resumption of land in favour of the landholders as a sufficient ground for rejecting their case that Ashru and his heirs are not the tenants. The Maharashtra Revenue Tribunal has considered this aspect in the following words :--

"Even the landholders had started proceedings under Vidarbha Tenancy Act to resume the land for personal cultivation and orders were passed in the said proceedings in R.C. No. 61/59(8)/60-61 and 63/59 (8)/60-61 of village Sultanpur. The tenancy authority dealt with the case on the footing that deceased Ashru was a tenant and resumed the land to the landholders. It, therefore, did not lie in the mouth of the landholders to say that Ashru was not the tenant....."

It is principally on account of the above reasoning that the Maharashtra Revenue Tribunal reversed the orders of the lower tenancy authorities. Of course there are certain other factors that have also been taken into account.

5. Mr. Munshi for the petitioners contended that the orders passed in Revenue Case No. 61/59(8) of 1960-61 and 63/59(8) of 60-61 would not have any effect inasmuch as the application u/s 38 read with Section 36 of the Tenancy Act were filed by Krishnabai and Raghunath with a specific and express statement that Ashru was never a tenant and that the application has been filed without prejudice to the rights. He relied upon para. 5 of the application which reads as follows:--

"The non-applicant Ashru (dead) was never the tenant and the present non-applicant is also not the tenant. This application is filed without prejudice to the rights and reserving the rights to deny rights as tenant (R. C. No. 72 of 59)."

6. Mr. Munshi also submitted that the filing of such an application was absolutely essential in order to protect the rights of the landholders in case the decision in the previous proceeding No. 72/59 of 59-60 would go against them. He drew my

attention to the fact that Section 38 has prescribed a time limit within which a notice had to be given and application was to be filed for claiming possession. All this has to be done before 31st of March 1961. The argument of Mr. Munshi is that had the landholders not taken action u/s 38 of the Act, they would have suffered an irreparable loss if ultimately they would have failed to prove that Ashru was not a tenant. According to him, in such contingency the landholders would not have been able to file any proceeding for resumption of the land on the basis that Ashru was a tenant. I think that the landholders cannot be blamed if they filed the application u/s 38 for resumption of the land particularly when they pleaded that they were doing so without prejudice to their rights in the previous proceedings. But the matter has not stopped at the stage of making the application. Those applications have been decided and the question is as to what would be the effect of those decisions.

7. I have already stated that the Additional Tahsildar has granted resumption of certain portion of the land in favour of the landholders. Obviously, such a decision is possible only on the hypothesis that the non-applicants to those proceedings (viz. heirs of Ashru) were the tenants or the heirs of the tenant Ashru. The position of the landholders would not have been prejudicially affected if they had merely filed two separate proceedings containing inconsistent pleas. But here the landholders prosecuted one of those proceedings and have got a decision of resumption of the land. Thus the landholders have elected to choose one of the two inconsistent remedies and have obtained a relief u/s 38 of the Tenancy Act. It would be very difficult for them now to urge that Ashru was never the tenant. The landholders in these peculiar circumstances would not be allowed to approbate and reprobate. Otherwise an embarrassing situation is likely to arise. If the contention of the landholders is accepted in this writ petition, there will be a finding and an order that Ashru was not a tenant of the land. At the same time, there would be another order previously made. This previous order is final and effective inasmuch as it has not been got set aside by filing any appeal or revision. Such inconsistent orders would not normally be permissible. This is more so when the landholders have themselves secured an order in their favour on the hypothesis that Ashru, was a tenant. Such previous order would constitute a sort of estoppel.

8. Mr. Chandurkar also urged that the previous order would constitute a bar of res judicata. It is true that Section 11 of the Civil P.C. applies to suit. But the principle underlying the bar of res judicata would be applicable if it is proved that a particular issue has been previously decided by a competent Court in a proceeding between the same parties. It is not disputed before me that the previous orders u/s 38 read with Section 36 of the Tenancy Act were passed by the competent authorities under the Tenancy Act. Similarly it is common ground that those orders were passed in the proceedings between the parties who are now agitating the same controversy before me. I would, therefore, hold that the present claim made in this writ petition would be barred by the principles of res judicata on account of the previous order.

9. The result is that this petition is liable to be dismissed. The rule is, therefore, discharged. However, there would be no order as to costs.

10. Petition dismissed.