

(1969) 09 BOM CK 0024

In the Bombay High Court

Case No : Special Civil Application No. 1091 of 1967

Motiram Ramchandra Kharwade

APPELLANT

Vs

Maharashtra Revenue Tribunal

RESPONDENT

Date of Decision : 29-09-1969

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 46

Citation : (1971) 73 BOMLR 178 : (1970) MhLj 526

Hon'ble Judges : Chandurkar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Chandurkar, J.—The petitioner, who is a tenant, is challenging the order passed by the Maharashtra Revenue Tribunal holding that opponent No. 3, who is a landholder, is entitled to possession of field survey number 44/1, area 16 acres, 16 gunthas of Navasari, taluq and district Amravati, which was retained by the tenant after the landholder had resumed the remaining portion of that field for personal cultivation. In Revenue Case No. 295/59 (6) of 1960-61 the landholder, who had started a proceeding for resumption of field survey number 44/1 u/s 3D of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, referred to as the Tenancy Act, was held entitled to resume half the area of this field for personal cultivation by an order passed by the Naib-Tahsildar, Amravati on October 23, 1961. The appeal against this order filed by the tenant came to be rejected on December 31, 1963 and neither the tenant nor the landholder appears to have agitated this matter further. It is also an admitted position that the landholder was placed in possession of half of this field on March 19, 1964. In the meantime, however, the landholder had served a notice on the petitioner terminating the lease in respect of the entire field on the ground that he was in arrears of lease money for the years 1962-63 and 1963-64 and that he had leased out the field to some other person. Before, however, filing an application for possession the landholder had already acquired possession of half the area of

the said field and he, therefore, filed an application for possession on June 17, 1964 in respect of the remaining part of the field. This application was granted by the tenancy Naib-Tahsildar who found that the petitioner had granted a sub-lease to one Marotirao, who is also respondent No. 4 in this petition. It appears that the ground of failure to pay lease money was not urged before the Naib-Tahsildar and that matter was not put in issue by him.

2. The petitioner challenged this order by an appeal and the Special Deputy Collector who decided the appeal held that as the petitioner had become the owner of half of the field with effect from April 1, 1961 the application u/s 19 was not maintainable. He also set aside the finding that the petitioner has sublet the field to respondent No. 4. He thus allowed the appeal and this order was challenged by the landholder by revision application before the Maharashtra Revenue Tribunal.

3. The Revenue Tribunal found that many material facts were left out of consideration by the Deputy Collector, and therefore, the finding that the field was not sub-let by the petitioner was vitiated and on a fresh consideration of the evidence the Tribunal found that the field was not cultivated by the petitioner personally, and therefore, the landholder was entitled to evict the tenant from 16 acres and 16 gunthas of land of field survey number 44/1. The Tribunal then directed itself to the question whether the finding given by the Deputy Collector that an application for possession could not be made after April 1, 1961 was correct. The Tribunal took the view that the proceedings u/s 38 ended on March 19, 1964 on which date the landholder was placed in possession of half the area of the field and the petitioner would be entitled to become a statutory owner not on April 1, 1961 but on March 19, 1964 in view of the second proviso to Sub-section (1) of s. 46. The Tribunal, however, further took the view that before March 19, 1964 a notice u/s 19 was already served by the landholder on March 14, 1964 which was received by the petitioner on March 16, 1964, and therefore, the petitioner did not become the owner of the field in question on April 1, 1961 and his right to become owner was deferred not till March 19, 1964 but thereafter till the disposal of the proceedings instituted after serving the notice u/s 19. In this view of the matter the order passed by the Deputy Collector was set aside and that of the Naib-Tahsildar was restored. The petitioner-tenant has now challenged this order.

4. The first contention raised by the learned counsel appearing on behalf of the petitioner is that the Tribunal was not justified in holding that the proceeding for possession finally terminated on March 19, 1964. According to the learned counsel, in view of the provisions of the proviso to Section 46 of the Tenancy Act the date of statutory transfer of ownership could be extended only to March 31, 1963 when the appeal filed by the tenant challenging the order u/s 38 passed in favour of the landholder was dismissed. The obvious purpose of canvassing such a construction of the proviso to Section 46(1) is that if the proceeding would be terminated finally on December 31, 1963 the notice u/s 19 issued on March 14,

1964 would be after the date on which the statutory transfer of ownership would take place u/s 46 of the Tenancy Act and therefore, ineffective according to the petitioner. I am, however, not inclined to accept the construction placed on the second proviso to Section 46 by the learned counsel for the petitioner. Section 46(1) and its second proviso are in the following words :

46. (1) Notwithstanding anything in this Chapter or any law for the time being in force or any custom, usage, decree, contract or grant to the contrary, with effect on and from the first day of April 1961, the ownership of all lands held by tenants which they are entitled to purchase from their landlords under any of the provisions of this Chapter shall stand transferred to and vest in, such tenants and from such date such tenants shall be deemed to be the full owners of such lands :...

Provided further that where in respect of any such land, any proceeding under sections 19,20,21,86 or 88 is pending on the date specified in Sub-section (1) the transfer of ownership of such land shall take effect on the date on which such proceeding is finally decided and the tenant retains possession of the land in accordance with the decision in such proceeding. (*Italics are mine*).

Under Section 46(1) the ownership of all lands which are held by tenants and which they are entitled to purchase from their landlords stand transferred to and vest in them from April 1, 1961 and from that date the tenants are deemed to be the full owners of such lands. The date of transfer of ownership specified in Section 46(1), however, is extended in cases which are governed by the second proviso to that sub-section. The effect of the second proviso to Sub-section (1) of Section 46 is that if proceedings under any of the 5 sections referred to in the second proviso are pending on April 1, 1961, then the transfer of such ownership is to take place on the date on which such proceeding is finally decided and the tenant retains possession of the land in accordance with the decision in such proceeding. It will be noticed that in a proceeding which is initiated under each one of the five sections specified in the proviso reproduced above, the respective rights of the tenant and the landholder to remain in possession are adjudicated upon and the material date as extended by reason of the pendency of the proceedings referred to in the second proviso to Section 46(1) is when the tenant retains possession in accordance with a decision in that proceeding. The instant case is concerned with the decision of the question as to when a proceeding for possession u/s 36 started by the landholder in the exercise of his right u/s 38 is finally decided. The relief asked in an application u/s 36 in such a case is that the landholder should be placed in possession of land which he is entitled to resume. The extent of the land of which possession is granted has to be determined u/s 38 and an order finally be passed either granting or rejecting the application of the landholder in whole or in part. If the application is rejected by the Tahsildar or in appeal by the Deputy Collector or in a revision application by the Tribunal it would be the point of time when this proceeding finally terminated, that will be material. In a case, however, where the application of

the landholder is wholly or partially granted, merely because an order upholding the right of the landlord to obtain possession from the tenant is passed, it cannot be said that the proceeding in which a prayer for being placed in possession u/s 36 is made comes to be finally decided when such an order is passed by the Tahsildar, or when such an order passed by the Tahsildar is confirmed by the appellate or the revisional authority. u/s 106 of the Tenancy Act the order passed in favour of the landholder u/s 36 has to be executed and, Section 106(2) of the Tenancy Act lays down the manner in which such an order is to be executed. It provides that an order of the Tahsildar or the Tribunal awarding possession or restoring possession or use of any land shall be executed in the manner provided in Section 21 of the Mamlatdar's Courts Act, 1906 as if it was the decision of the Tahsildar under the said Act. The proviso to Section 106(2) also provides that such an order was not to be executed till expiry of the period of appeal as provided in Section 114. An order or decision of the Tahsildar in execution proceeding under Sub-section (2) is given a finality subject to an appeal, if any, to the Collector. Thus the action which is taken u/s 106(2) by way of execution is really a continuation of the proceeding for possession instituted u/s 36 of the Tenancy Act. A relief which is prayed for u/s 36(2) by the landholder cannot be said to have been effectively and finally granted unless the landholder is placed in possession of the land to which he has been found entitled. It is only when the landholder is placed in possession Of so much of land as he has been found entitled to that the tenant gets a right to retain the possession of the rest of the land in a case where the entire land in possession of the tenant is not resumed. In a proceeding u/s 38, therefore, where out of the total land held by the tenant possession of a part of the land is handed over to the landlord and the remaining land is retained by the tenant or when the landholder's application is rejected, then only there is retention by the tenant of the land in accordance with the decision in a proceeding u/s 38 as contemplated by the second proviso to Section 46(1) of the Tenancy Act. In my view, therefore, in a case where the landlord's application for possession is granted partially the words "finally decided and the tenant retains possession of the land in accordance with the decision in such proceeding" in second proviso to Section 46(1) do not refer to the point of time when merely by an order passed the rights of the parties are adjudicated upon, but they refer to the point of time when a landlord entitled to possession is finally placed in possession and consequently the tenant retains the remaining land in accordance with the decision u/s 38 of the Tenancy Act. To take an instance : in respect of an order u/s 38 in favour of a landholder a dispute might arise regarding the extent or the quality of the land of which the landholder should take possession. Till this dispute is settled and the landlord is placed in possession of any particular part of the land with the consequent result of the tenant retaining possession of the remaining land, it can hardly be said that the proceeding started for possession u/s 36 has been finally decided. Therefore, the view taken by the Tribunal that the date material for deciding when the proceeding u/s 38 was finally decided was March 19, 1964 was justified.

5. The learned counsel appearing on behalf of the petitioner further challenges the view taken by the Tribunal that the date April 1, 1961 was further extended because before the landholder was placed in possession of half the area of the field he had already served a notice u/s 19 and thereby he had initiated a proceeding u/s 19, and therefore, ownership did not stand transferred till this proceeding u/s 19 was finally decided.

6. It is not disputed that except the second proviso to Section 46(1) there is no other provision in the Tenancy Act the effect of which is to extend the date on which the statutory transfer of ownership contemplated by Section 46(1) takes place. I have reproduced above the second proviso to Section 46(1) of the Tenancy Act and in my view the point of time when the pendency of the proceeding under any of the sections referred to in the second proviso, that is, Section 19, 20, 21, 86 or 38 is to be considered is the date April 1, 1961. The words "pending on the date" in Sub-section (1) of Section 46 are significant and if no proceeding under any one of the above mentioned five sections is pending on April 1, 1961, there is no scope for the operation of the second proviso. The provisions of second proviso extending the date of the statutory transfer of ownership can only operate if proceedings under any of these five sections are pending on April 1, 1961. While the proviso extends this date April 1, 1961 till the date of final decision of any of these proceedings it does not refer to a final decision of any proceedings initiated after April 1, 1961 under any of those provisions during the pendency of the proceedings under any or some of those provisions which were initiated prior to April 1, 1961. If a proceeding u/s 36 read with Section 38 is pending on April 1, 1961, as it was in the instant case, there is no provision made in this second proviso to further extend the date of statutory transfer of ownership to a further date of a decision of a second proceeding initiated u/s 19 during the pendency of the proceeding u/s 86. The essential condition for extension of the date of statutory transfer of ownership which cannot be ignored is that the pendency of the proceeding under any one or more of these sections had to be on April 1, 1961 and no other. The Tribunal has placed a construction of this proviso as to mean that if a proceeding u/s 36 is pending and during the pendency of this proceeding another proceeding is started u/s 19, the statutory date of transfer of ownership is further postponed to the date of final decision of this later proceeding. Reading the section in the manner in which it has been done by the Tribunal would virtually amount to adding words in the proviso which are not there. In view of the significant words "pending on the date specified in Sub-section (1)" in the second proviso the construction placed by the Tribunal is not at all justified.

7. The learned counsel appearing on behalf of the landholder relied on a decision in *Kamlabai Rekhchand v. Nayabao* (1966) 68 Bom. L.R. 900 : [1966] Mh. L. J. 993 and contended that even after April 1, 1961 the landholder was entitled to terminate the lease of the petitioner. The question for decision in *Kamlabai's* case was not the same as is involved in the instant case. It will appear from the facts in that case that the question which fell for consideration was whether when

a notice u/s 19 of the Tenancy Act was served on the tenants before April 1, 1961 an application u/s 36 was maintainable after April 1, 1961 or not. The Tribunal had taken the view that an application made for possession against the tenants u/s 36 after April 1, 1961 was liable to be summarily rejected, because the tenants had become the statutory owners of the land. This Court took the view that a proceeding u/s 19 is initiated by a notice and if the notice is given before April 1, 1961 then the second proviso to Section 46 would operate in such a case. There are, however, some observations in Kamlabai's case which were made in connection with the construction to be placed on the proviso to Section 46(2). Apart from the fact that I see no difficulty in restricting the operation of the second proviso to Section 46(1) only to a case where a proceeding under any kind of five cases is pending on April 1, 1961, even in Kamlabai's case there are observations which support the view which I am taking. The learned Judge in the judgment has observed (p. 907):

...Even after the second proviso so long as any proceedings in the sense in which I have construed that word are pending and were pending on April 1, 1961, the transfer of ownership itself does not take effect till the date of final decision of that proceeding.

(Italics are mine).

Later the learned Judge has said (p. 910) :

...Under the first proviso the date differs according as the disability of the tenant ceases and one year thereafter, and under the, second proviso the date of transfer of ownership is made dependent on the final decision of any of the proceedings which were pending on April 1, 1961.

(Italics are mine).

In my view, the fiction created by Section 40 (1) of the Tenancy Act must be given effect to fully and the operation of that provision is not affected by the provision in Section 46(2) which requires that the tenant shall continue to be liable to pay to the landlord rent until the amount of the purchase price is determined u/s 48 as contended on behalf of the tenant. I am, therefore, unable to uphold the finding given by the Tribunal that by an overlapping of the proceedings under Sections 36 and 19 the date of statutory ownership would be extended beyond March 19, 1964.

8. The question, however, whether the petitioner had become or was entitled to become owner with effect from March 19, 1964 has not been enquired into by any authority. It is only if this question is decided in favour of the tenant-petitioner that an application u/s 19 would not be maintainable. If, however, he was not entitled to become the owner and he continued to be the tenant, then it is not disputed that the proceeding u/s 19 could validly be taken against him. The necessary enquiry in order to find out the extent of the land, which he was entitled to purchase and of which he is deemed to be the owner on the extended

date March 19, 1964 will, therefore, have to be determined. The application of the landholder cannot, therefore, be properly disposed of unless this enquiry is made. The matter is, therefore, remitted back to the Naib-Tahsildar for making the necessary enquiry whether the petitioner was entitled to become the owner of the disputed field on March 19, 1964 and if the finding is in favour of the petitioner, then the application filed u/s 19 will be held to be not maintainable.

9. The result, therefore, is that the petition is allowed. The case is sent back to the Naib-Tahsildar. He shall make the necessary inquiry u/s 46 of the Tenancy Act and shall then dispose of the case according to law. In the circumstances of the case there will be no order as to costs.