

(2001) 11 BOM CK 0042

In the Bombay High Court

Case No : Writ Petition No's. 4644 and 4881 of 1985

Murlidhar Anaji Kank (deceased) through his legal heirs and another

APPELLANT

Vs

Shankar Hari Gurav (deceased) through his legal heirs and another

RESPONDENT

Date of Decision : 05-11-2001

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29, 29(1), 32(b), 32F, 32G
Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226, 227, 32

Citation : (2001) 11 BOM CK 0042

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : N.S. Shastri, for the Appellant; Shriram S. Kulkarni, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—Twin Writ petitions, directed against two separate orders of Maharashtra Revenue Tribunal, Mumbai ("Tribunal" for short) concern the Agricultural lands admeasuring 3 Hectares, 6 Ares i.e. 7 acres, 11 gunthas, bearing Gat No. 227, situate at village : Odha, Taluka and District : Nasik (hereinafter referred to as "suit lands" for short), were heard together.

2. The source of litigation has its origin under the provisions of Bombay Tenancy and Agricultural Lands Act ("Tenancy Act" for short). The parties are common but issues involved are different. The same were heard together and are being disposed of by this common judgment.

3. The common introductory facts, to the extent they are common to both the petitions, are as under :

The suit lands originally belonged to the family of one Shri Bhika Raoji Sutar, who

expired on 26-12-1948, leaving behind him four sons as his legal heirs, namely, (1) Murlidhar (2) Babu (3) Shankar and (4) Dattu. The last two sons were minors. Since Murlidhar was the eldest in the family, his name was entered in the Record of Rights as Karta of Joint Family. He had two minor sons, namely, Waman aged about 4 years, and Keshao, aged about 3 months. Out of these two minor sons, Waman expired on 6-4-1956 leaving behind his minor brother Keshao, whose name after the death of Waman, was entered in the Record of Rights, vide Mutation Entry No. 1253, dated 3-11-1965. He was shown to be represented by his natural guardian mother Smt. Laxmibai.

4. It appears that one Murlidhar Annaji Kank was the tenant of the above suit lands. It further appears that the tenant, Murlidhar Kank had obtained a registered lease deed of the suit lands in his favour from the land owners, for a period of 11 years, on 31-1-1955 reserving an amount of Rs. 600/- as annual rent.

5. On tiller's day, i.e. on 1-4-1957, the suit lands stood in the name of Keshao (Minor). The mutation entry bearing M.E. No. 1253, dated 27-8-1963 revealed that the tiller's day was postponed with respect to various lands including suit lands.

6. The Tenancy Act came to be amended on 17-10-1969 by Bombay Act No. 149 of 1969. The effect of the amendment was that the tenants could exercise their right of purchase within 2 years from the date on which the disability of landlord ceased. In pursuance of this amendment, the Tahasildar issued notice to the tenant calling upon him to exercise his right of purchase, if not exercised.

7. The original tenant exercised his right of purchase by issuing to Keshav, who had attained majority on 1-6-1970. This exercise of right to purchase resulted in initiation of the proceedings u/s 32-G of the Tenancy Act. However, to defeat the fruits of the above amendment of 1969, i.e. after amendment to the Tenancy Act, the tenant was forcibly dispossessed by the landlord in the year 1971, which ultimately resulted in initiation of the proceedings u/s 84 of the Tenancy Act for restoration of possession of lands in question.

8. The facts common in both the writ petitions travelled together till this point of time. However, at this stage, two different proceedings i.e. one initiated u/s 32-G and another u/s 84 of the Act adopted their own different routes; resulting in two different judicial orders giving rise to two different writ petitions, one bearing No. 4644 of 1985 another bearing Writ Petition No. 4881 of 1984.

FACTS LEADING TO W.P. NO. 4644 OF 1985 ARISING OUT OF THE PROCEEDINGS u/s 84 OF THE TENANCY ACT.

First round of litigation :

9. This petition arises out of proceeding u/s 84 of the Tenancy Act for restoration of possession, on the allegation that tenant having become deemed tenant/purchaser was unauthorisedly evicted from the suit lands. The tenant

approached the Assistant Collector for restoration of the lands by evicting landlord from the suit lands. This claim of the tenant was accepted by the Assistant Collector vide its order dated 11-8-1976 and the landlord was directed to be evicted from the suit lands in exercise of powers u/s 84 of the Tenancy Act.

10. Aggrieved by the aforesaid order, the landlord preferred revision application being Tenancy Application No. 275/1981 to the Tribunal. The Tribunal after hearing the parties was pleased to set aside the order of the Assistant Collector vide its order dated 16-11-1976 on the ground that the tenant had lost possession in the year 1966 and that the tenant had a remedy u/s 29(1) of the Tenancy Act which was barred by time, as such, application filed by the tenant u/s 84 of the Tenancy Act came to be rejected. It was thus held that remedy u/s 84 could not have been availed of by the tenant.

11. Not satisfied by the above order, Special Civil Application No. 685 of 1977 was filed by the tenant which was subsequently allowed to be withdrawn by this Court.

At this juncture, it is necessary to mention that after tenant having lost the matter before the Tribunal and during the pendency of the above writ petition, the landlord sold the suit lands to one Shri Shankar Hari Gurav, by a registered sale deed dated 17-10-1978. After the suit lands were sold to Shri Gurav, the tenant made further attempt to claim possession of lands on the ground that he was illegally dispossessed without authority of law.

Second round of litigation:

12. The tenant Murlidhar accordingly, again approached the S.D.O., on 6-8-1979 and requested that the said Shri Gurav be evicted from the suit lands and possession therefrom be restored to him. This claim was resisted by Shri Gurav on the ground that previous decision of the Assistant Collector and Tribunal would operate as res judicata. This contention raised by Shri Gurav was accepted by the Sub-Divisional Officer and the claim of the tenant for restoration of possession came to be rejected vide the impugned order dated 29-8-1981 passed in Tenancy Application No. 9/81.

13. The tenant-Murlidhar (since deceased), not being satisfied with the aforesaid order, passed by the S.D.O. preferred revision being Revision Application No. 275 of 1981 so as to challenge the aforesaid order of the S.D.O. dated 29-8-1981. The Tribunal, after hearing the parties was pleased to reject the revision filed by the tenant vide its order dated 28th June, 1985.

14. Aggrieved by the aforesaid order, the tenant preferred instant writ petition under Article 227 of the Constitution of India to impugn the judgment and order of the Tribunal referred to hereinabove.

FACTS LEADING TO W.P. NO. 4881 OF 1985 ARISING OUT OF PROCEEDINGS u/s 32-G OF THE TENANCY ACT, WITH REGARD TO RIGHT TO PURCHASE SUITS LANDS.

First round of litigation :

15. The original tenant, as stated hereinabove, with a view to exercise of right of purchase issued statutory notice to the landlord on 12-11-1971. He, accordingly, applied to the Tenancy Tahasildar, and A.L.T. u/s 32(b) read with section 32-F of the Bombay Tenancy Act for purchase of lands on the ground that Keshao had attained majority. The said proceedings were registered as Tenancy Case No. 19 of 1974. The said application was allowed on 18-3-1975 and purchase price was fixed. This order was challenged by Keshao and others in Tenancy Appeal No. 22 of 1976. The said appeal was partly allowed by order dated 15-12-1976 and matter was remanded back to the Tahasildar and A.L.T. only for fixing price of the well.

16. Being aggrieved by the above order, Shri Keshao and others invoked revisional jurisdiction of the Tribunal. This revision came to be registered as Tenancy Revision No. 153 of 1977. The same was allowed by the Tribunal. The Tribunal was pleased to hold that since tenant was not in possession of the land on 25-7-1974, when the tenancy proceedings u/s 32-G of the Act were initiated and pending before the Tahasildar and A.L.T., he (tenant) was not entitled to purchase the lands in question u/s 32-G of the Act.

17. The tenant aggrieved by the aforesaid order invoked writ jurisdiction of this Court by filing writ petition registered a Special Civil Application No. 2019 of 1978, which was later on withdrawn by the petitioner-tenant on 6-2-1982.

18. At this stage, it is necessary to mention that the tenant after having lost the above matter before Tribunal and during the pendency of the above writ petition sold the suit lands to one Shri Shankar Hari Gurav by a registered sale deed dated 17-10-1978.

Second round of litigation :

19. The petitioner-tenant again on 30-3-1982 initiated fresh proceedings against Shri Gurav by moving the Tahsildar and A.L.T., Nasik for fixation of purchase price on the ground that he (tenant) had become deemed purchaser on 1-4-1957 and prayed for possession of suit lands u/s 29 of the Tenancy Act. The Tahsildar and A.L.T., Nasik opened Tenancy Case No. 12/82. The purchase price was fixed by the Tahsildar and A.L.T. Nasik holding that the tenant has become deemed purchaser of the suit lands on 1-4-1957, but refused relief of possession.

20. Aggrieved by the aforesaid order, the landlord preferred appeal before the Sub-Divisional Officer, Nasik, being Tenancy Appeal No. 2/83. The said appeal was rejected by the S.D.O. vide his order dated 3-11-1983, and the order of the Tahasildar and A.L.T., Nasik was confirmed.

21. Aggrieved by the above order, the landlord invoked revisional jurisdiction of the Tribunal. The revision came to be registered as Tenancy Revision No. 12 of 1984. The said revision was allowed by the Tribunal vide its order dated 28-8-1985 holding that in the facts and circumstances of this case the tiller's

day was 1-4-1958 and not 1-4-1957 as presumed by the Tahasildar and A.L.T., Nasik while allowing the application made by the petitioner-tenant.

22. Aggrieved by the aforesaid order, the tenant again preferred instant writ petition under Article 227 of the Constitution of India to impugn the judgment and order of the Tribunal referred to hereinabove.

RIVAL SUBMISSIONS IN W.P. NO. 4881 OF 1985.

23. The learned Counsel appearing for the petitioner contended that the Tribunal having held that the shares of the family who were under disability were not separated till 30-3-1958, the ownership of the suit lands ought to have been held as transferred by operation of law to the tenant on 1-4-1958 as provided for in the proviso to sub-section (1) of section 32-F, as such, the Tribunal erred in setting aside the orders passed by both the authorities below. He further contended that merely because the said orders mentioned the date of deemed purchase as 1-4-1957 instead of 1-4-1958 the Tribunal should not have set aside the said orders. It ought to have corrected the said order in its revisional powers since there was no estoppel against law.

24. The learned Counsel for petitioner further contended that the Tribunal misconstrued the provisions of section 32-G read with section 32F of the Act. He further went on to contend that even if the findings of the Tribunal, are accepted to be correct, even then, at any rate, the petitioner has to be treated as deemed purchaser on 1-4-1958. Merely because the petitioner had mentioned in the application that his right of purchase accrued to him on 1-4-1957 this itself could not have resulted in defeating the rights of the petitioner-tenant.

25. Per contra, the learned Counsel appearing for respondent Nos. 1 to 5 contended that the order passed by the Tribunal, in Tenancy Revision Application No. 153 of 1977 dated 27-3-1978 in 1st round of litigation would operate as res judicata and therefore, this petition is liable to be dismissed. He relied upon the judgment of the Supreme Court in the case of P.K. Vijayan Vs. Kamalakshi Amma and Others, in support of his submissions.

26. He further pressed into service the bar of Order 23, Rule 1 of Civil Procedure Code, relying upon the Supreme Court judgment delivered in the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, .

27. He further went on to contend that this principle of law based on Rule of public policy has been applied by this Court to the proceedings arising out of Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, in the case of Trimbak Purshottam Patil vs. Yashodabai, reported in 1971 Mh.L.J. 523 : AIR 1971 Bom. 291 , as such, he argued that the same principle should also be applied to the facts of the present case and prayed for dismissal of the writ petition on this count.

28. The learned Counsel for the petitioner in rejoinder contended that the

principles of res judicata could not be extended to the illegal order pertaining to the jurisdiction. Pure question relating to jurisdiction cannot be deemed to have been finally determined by erroneous decision. Abstract question, unrelated to facts which gives rise to right, cannot operate as res judicata. He further urged that procedural laws are only means to do justice/remove injustice and not an end in itself. He placed reliance on the Division Bench judgment of this Court in the case of Anusayabai vs. Union of India reported in 1992 Mh.L.J. 366 in support of his contention.

RIVAL SUBMISSIONS IN W.P. NO. 4644 OF 1985.

29. The learned counsel for the petitioner submitted that the petitioners were on the land on 1-4-1957 and also on 1-4-1958 and as such in accordance with the decisions in the case of Amrit Bhikaji Kale and others vs. Kashinath Janardhan Tavade and others, reported in 1983 Mh.L.J. 711 (SC), on the tiller's day landlords' interest in the lands gets extinguished, and simultaneously, by statutory sale without anything more by the parties, the extinguished title of the landlord is handled and created in the tenant. That very moment landlord tenant relationship comes to an end, the link and chain is broken and, this amounts to termination of tenancy. In view of this, it was wrong on the part of the tribunal to hold that the present petitioners could have filed an application u/s 29, because section 29 is applicable only to the case where relationship of landlord and tenant has not come to an end. According to the learned counsel, relationship between landlord and tenant came to an end on 1-4-1958 as per the law laid down by the Supreme Court in the case of Vallabbhai Nathabhai Vs. Bai jivi and Others, . Therefore, in the submission of the learned counsel for the petitioner, remedy u/s 29 was not available to him. The correct remedy was only u/s 84 of the Tenancy Act. as such, the decision of the Tribunal is bad and illegal and liable to be set aside.

30. The learned counsel for the petitioner also relied upon the judgment of the learned single Judge of this Court in the case of Vithoba Ram vs. Bhakhandra reported in 1993 Mh.L.J. 419, wherein it has been held that section 29 applies to a case where on the date of the application, the applicant continues to be a tenant. In this case, as on 1-4-1958, tenancy having stood determined, application u/s 29 could not have been filed. The application u/s 84 as such was very much maintainable and the tenant was entitled to resume possession.

31. In the above premises, the learned counsel for the petitioner prayed for setting aside the impugned judgment of the Tribunal and prayed for making sale absolute.

32. In reply, the learned counsel for the respondent reiterated his submissions made in reply to the writ petition No. 4881 of 1985 and reiterated the bar of the Order 23, Rule 1 of CPC and again placed reliance on the judgment of the Supreme Court in the matter of Surguja Transport Services (supra) and another judgment of this Court in the case of Trimbak Purushottam Patil (supra).

33. In addition to the above submissions, he further pressed into service doctrine of res judicata, in view of earlier order of Tribunal, in the earlier round of litigation having become final and placed reliance on the judgment of the Supreme Court in the case of P. K. Vijayan (supra).

34. The learned counsel for the petitioner in rejoinder, again repeated the same submissions and contended that no Court or Tribunal can be deprived of its jurisdiction on the basis of illegal order. Pure question relating to jurisdiction cannot be deemed to have been finally determined by erroneous decisions. That is how he tried to refute the submissions made by the learned counsel appearing for the respondents.

FINDINGS

35. Since I am inclined to decide both the petitions, on the ground common to both writ petitions, I propose to record common findings, so as to dispose of both writ petitions.

36. It is an admitted fact on record that the original petitioner has suffered adverse orders, at the hands of the Tribunal in the first round of litigation, in both the proceedings i.e. initiated u/s 84 as well as and u/s 32-G of the Tenancy Act. Those orders were passed by the Tribunal on two different dates i.e. on 16-11-1976 and 27-3-1978 under its revisional jurisdiction, while adjudicating the validity of the orders passed on the application filed u/s 84 and another in the proceedings initiated u/s 32-G of the Act. Both these orders were subject matter of two different writ petitions; being Special Civil Application No. 655 of 1977, and Special Civil Application No. 2019 of 1978. Both these petitions were withdrawn by the petitioner without obtaining leave or permission of the Court to institute fresh petitions or fresh proceedings. The question is : what is the effect of the withdrawal of these writ petitions. The Apex Court had an occasion to deal with more or less identical question in the case of Sarguja Transport Services (supra), wherein it was observed as under :

"... It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission referred to in sub-rule (3) of R. 1 of O. XXIII of the Code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying R. 1 of O. XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. *Invito beneficium non datur*. The law confers upon a man no rights or benefits which he does not desire. Whoever, waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of R. 1 of

O. XXIII. The principle underlying the above rule is founded on public policy, but is not the same as the rule of res judicata contained in section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of R. 1 of O. XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the Court." "The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying R. 1 of O. XXIII of the Code is adopted in respect of writ petitions filed under Art. 226/227 of the Constitution also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court....."

".... But we are of the view that the principle underlying R. 1 of O. XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the grounds of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Art. 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Art. 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ

petition had been withdrawn without permission to file a fresh petition...."

37. The aforesaid principles flowing from Order 23, Rule 1 of CPC were followed and applied by this Court to the proceedings arising out of tenancy legislation. The learned single Judge of this Court in the case of Trimbak Purshottam Patil Vs. Yashodabai, held that the principles flowing from Order 23, Rule 1 of CPC being the principles of general application should apply to a proceeding under the Tenancy Act and, if one litigation in respect of subject matter under tenancy law has come to an end or has been withdrawn without permission of the Court to institute fresh application, the subsequent application should be treated as barred in view of withdrawal of earlier application. In the case of Trimbak (supra) the widow had withdrawn her application u/s 38(1) of the Tenancy Act for resumption of a particular land without permission of the Court; she was precluded from filing another application for resumption of the same land.

38. Turning to the facts of the present case in hand the withdrawal of writ petitions will have to be treated as withdrawal of respective proceedings without permission of the Court to institute fresh. In this view of the matter, the petitioner was precluded from filing second application or from initiating fresh proceedings again for the same purpose, namely, for resumption of lands in possession of the respondents and also for claiming ownership. These petitions are, therefore, liable to be dismissed on this short ground based on sustainable principle of law deeply recognised in our legal jurisprudence.

In the result, both the writ petitions are dismissed with no order as to costs.