

(2003) 12 BOM CK 0036

In the Bombay High Court

Case No : Second Appeal No. 468 of 1986

Narayan Mugu Teli, Since deceased through heirs and legal representative (Smt. Bhagirathibai Narayan Rahate, Shri Vasant N. Rahate, Shri Sakharam N. Rahate, Shri Sakharam N. Rahate, Shri Anant N. Rahate, Shri Chandrakant N. Rahate, Smt. Vaishali Yeshwant Rahate, Smt. Indira Dhondur Salunke and Smt. Bhagyashri Prakash Ikade)

APPELLANT

Vs

Ramchandra Mugu Teli and Others

RESPONDENT

Date of Decision : 09-12-2003

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 32, 32F, 32F, 32P, 33C
Maharashtra Lands (Ceiling and Holding) Act, 1961 — Section 8

Citation : (2003) 12 BOM CK 0036

Hon'ble Judges : J.A. Patil, J

Bench : Single Bench

Advocate : V.A. Thorat, for the Appellant; Karandikar, for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal by original defendant No. 1 directed against the judgment and order dated 28.8.1986 passed in First Civil Appeal NO. 468/86 by the learned Addl. District Judge, Ratnagiri, whereby the judgment and decree dated 25.8.1982 passed in Civil Suit No. 7/79 by the learned Civil Judge, Jr. Dvn., was confirmed. Briefly, stated the relevant facts are as under:

2. The above mentioned suit was filed by respondent No. 1 for declaration of his title and for a direction to delete the names of the appellant and other respondents from the revenue record in respect of the suit lands. It is the case of respondent No. 1 that the 10 suit land which are agricultural land at village Ambad-Budruk, Tal. Sangmeshwar, Dist. Ratnagiri alongwith the other lands, were acquired by his father Mugu Balu Teli under the provisions of the Bombay Tenancy and Agricultural Lands Act (for short, the B.T. & A.L. Act). The appellant

and respondents Nos. 1 to 3 are the sons and deceased respondent No. 4 is the widow of the suit Mugu Balu Teli. The respondent o. 1 further contended that the said Mugu Balu Teli became purchaser of the suit land on 1.4.1957 u/s 32 of the B.T. & A.L. Act. Accordingly all the suit lands were entered in the name of Mugu Balu Teli as owner (Kabjedar) thereof. Respondent No. 1, further pleaded that Mugu Balu Teli died on 8.1.1976. But before his death he had made a registered will under which he bequeathed all the suit lands to respondent No. 1. However, after the death of Mugu Balu Teli, the Revenue Authorities made a mutation entry No. 3779 on 1.10.1976 as per which the names of the appellant and respondent Nos. 1 to 4 were entered in the revenue record in respect of the suit lands as the legal heirs of Mugu Balu Teli. Respondent No. 1 thereafter, approached the revenue authority with a request to make entry in his sole name as the suit lands were bequeathed to him alone by Mugu Balu Teli. This request was, however, not granted on the ground that Mugu Balu Teli had not obtained any previous permission of the Collector for bequeathing the suit lands in favour of respondent No. 1. Respondent No. 1 thereafter filed R.T.S. Appeal No. 6/1977 before the Dy. Collector, who allowed the same on 30.6.1978 and directed the entries in respect of the suit lands to be taken in the name of respondent No. 1 alone. Feeling aggrieved thereby the appellant filed an appeal before the Addl. Collector. Ratnagiri, who by his order dated 7.11.1978 allowed the same and set aside the order passed by the Dy. Collector. According to respondent No. 1, the appellant has no right in the suit lands and that he had separated himself from Mugu Balu Teli several years prior to his death and that he had also got some of the lands at Mugu Balu Teli entered in his own name. Respondent No. 1 further pleaded that he and his mother (deceased respondent No. 4) and Mugu Balu Teli were jointly residing together and cultivating the suit lands and that the appellant and two other brothers were living separately. Accordingly to him it was he who was maintaining the father Mugu Balu Teli.

3. The appellant resisted the suit by filing his written statement and contended that the suit lands are the joint family lands and not self acquired property of deceased Mugu Balu Teli. He further denied the execution of will by deceased Mugu Balu Teli in favour of respondent No. 1 and contended that it is not valid. The respondents No. 2 and 3 did not contest the suit while the deceased respondent No. 4, namely, the mother Janki filed a purshis, admitting the claim of respondent No. 1.

4. The trial court accepted the case of respondent No. 1 and decreed the suit. The appellants carried an appeal to the district court against the said order put the same was dismissed.

5. The present appeal has been admitted on substantial questions of law mentioned in ground No. (c), (d) and (e). They are to the effect whether respondent No. 1 has proved that the suit lands were the separate properties of the Mugu Balu Teli and whether the Mugu Balu Teli and whether Mugu Balu Teli was entitled to make a bequest thereof in favour of respondent No. 1.

6. I have heard Shri Thorat, the learned Advocate for the appellants and Shri Karandikar, the learned Advocate for respondent No. 1. Shri Thorat contended that both the courts below were in error in holding that the suit lands were not ancestral properties of Mugu Balu Teli. Shri Thorat pointed out that there is no material on the record to come to the conclusion, that the suit lands were self acquired properties of Mugu Balu Teli. Shri Thorat further contended that the bequest of the suit lands of Mugu Balu Teli in favour of respondent No. 1 under a will is barred by the provisions of Section 43 of the B.T. & A.L. Act. Shri Karandikar on the other hand submitted that the suit lands were taken for cultivation under tenancy rights of Mugu Balu Teli alone and that later on he purchased the same under the provisions of the B.T. & A.L. Act. Shri Karandikar further submitted that Section 43 of the B.T. & A.L. Act is not applicable since testamentary disposition of the suit lands is not a transfer of property.

7. So far as the first contention is concerned, it is seen from the will Exh. 56 that the suit lands were taken for cultivation as a tenant by Mugu Balu Teli himself. The will contains a vernacular recital to the effect :-

^^Hkh Lor% P;k fgerhus fufukl?;k ekydkaP;k tehuh dwd e`.kwu d"khv vlrk dqd dk;nk ykxw >kyk-**

(Tenancy Act became applicable when I was cultivating the lands of different land owners as tenant thereof on my own efforts).

Even the appellants witness Ganpat Gopal Rahate Exh. 61 gave admission to the effect that Mugu had taken some lands from Khots for cultivation. It is not the case of the appellant that the suit lands were taken for cultivation as a tenant by the father or grand-father of Mugu Balu Teli. No documentary evidence is produced. Under these circumstances both the courts below were right in accepting the evidence of respondent No. 1 that the suit lands were acquired by Mugu Balu Teli alone. The documentary evidence on record also confirms that the suit lands were purchased by Mugu Balu Teli under the provisions of the B.T. & A.L. Act.

8. Coming to the second contention regarding the restriction on transfer of land purchased or sold under the B.T. & A.L. Act, section 43 reads as under:-

(1) No land purchased by a tenant u/s 32, 32F (321I, 320, 33C or 43-1D) or sold to any person u/s 32P or 64 shall be transferred by sale, gift, exchange, mortgage, lease or assignment **** without the previous sanction of the Collector, (such sanction shall be given by the Collector in such circumstances, and subject to such conditions, as may be prescribed by the State Government:

Provided that, no such sanction shall be necessary where the land is to be mortgaged in favour of Government or a society registered or deemed to be registered under the Bombay Co-operative Societies Act; 1925, for raising a loan for effecting any improvement of such land.

(2) Any transfer ***** of land in contravention of Sub-section (1) shall be

invalid."

It is thus clear that the restriction contemplated by section 43(1) is not absolute and a land purchased by tenant under the provisions of the B.T. & A.L. Act can be transferred with the previous sanction of the collector. In the instant case, admittedly, no such previous sanction or permission was obtained by Mugu Balu Teli when he bequeathed the suit lands to respondent No. 1 under his Will Exh. 56. Shri Karandikar, however, submitted that the restriction is on sale, gift, exchange, mortgage, lease or assignment and that it does not apply to testamentary disposition. There is much substance in his submission for several reasons. In the first instance, there is no indication u/s 43(1) that the restriction also applies to testamentary disposition. Secondly, the transfer contemplated by Section 43(1) is transfer inter-vivo and thirdly, the bequest made under the Will cannot be regarded as a transfer of property. In this respect Shri Karandikar relied upon two decisions of this High Court. The first is Vimalabai Govind Juvekar v. The State, Spl. C.A. 3615 of 1976 decided on 8.10.1976 and reported in (1977) T LR 15 , wherein the learned single Judge had an occasion to interpret the word "any other disposition", occurring in the Explanation to Section 8 of the Maharashtra Lands (Ceiling and Holding) Act, 1961. It was held that the said words do not include testamentary disposition of property. The learned Judge referred to several decisions of various High Courts on the question as to what is nature of disposal of immovable property by a will. The learned Judge quoted the following observations made by the Full Bench of the Jammu and Kashmir High Court in the case of Lala Devi Dass v. Pannalal AIR 1959 J. & K. 62:-

"Disposal of immovable property by will would not amount to a transfer inasmuch as the property does not pass on to the donee at the time the will is executed. It is merely an intention expressed by the testator with respect to his property that after his death it should devolve on the donee. In my opinion, therefore, there is no specific provision in law prohibiting the disposal of immovable property other than the land as defined in the Land Alienation Act, by will in favour of a non-State subject and such a will cannot be held to be invalid."

9. The second decision relied upon by Shri Karandikar is Ramchandra Raoji Shendkar v. The State Spl. C.A. 2365 of 1971, decided on 14.9.1976 and reported in 1977 25 TLR 120, wherein it was observed that there is nothing in the language of Section 43 to indicate that the provisions thereof will apply to any testamentary document. It was pointed out that the will becomes operative from the date of death of the testator and so long as the testator is alive, the will is ambulatory in nature and as a result of the will, there is no transfer. In view of this position, there is no substance in the contention of Shri Thorat that the bar of Section 43 of the B.T. & A.L. Act also applied to testamentary disposition made by the tenant.

10. Both the courts below have concurrently held that due execution of the will made by Mugu Balu Teli is proved by respondent No. 1. There is no reason to disturb that finding as it is a finding of fact. Secondly, the claim of respondent

No. 1 of having become exclusive owner of the suit lands on the basis of the said will is proper and correct and the same has been rightly upheld by both the courts below. It is true that the prayer made in plaint is not properly worded. Instead of seeking a declaration of his title, the respondent No. 1 had prayed for deletion of the names of the appellant and other respondents from the record of rights in respect of the suit lands and to enter his name therein. It is neither the function nor the jurisdiction of civil court to issue direction for making or deleting entries in the records of rights. That is the function assigned to the revenue authorities under the Maharashtra Land Revenue Court. The proper relief which respondent No. 1 could have prayed for was declaration of his title to the suit lands on the basis of the will executed by deceased Mugu Balu Teli. Once he obtains such a declaration from the court, the revenue authority will have to make or correct the entries accordingly in the record of rights in respect of the suit lands. Although, therefore, the appeal is being dismissed, the order and decree passed by the courts below will have to be suitably modified.

11. In the result, the appeal is dismissed with cost.

12. Order and decree passed by the trial court is modified and substituted by grant of declaration of title to respondent No. 1 (original plaintiff) in respect of the suit lands on the basis of the will executed by his father Mugu Balu Teli. The appeal is accordingly disposed of.