

(2000) 07 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 3246 of 1987

Pandharinath Rambhau Kavitke

APPELLANT

Vs

Shaikh Hamaja Shaikh Husen

RESPONDENT

Date of Decision : 20-07-2000

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2000) 4 ALLMR 749 : (2000) 102 BOMLR 563 : (2001) 4 MhLj 43

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—This writ petition under Article 227 of the Constitution of India is directed against the judgment passed by M.R.T., Pune dated 12.8.1986.

2. Briefly stated, the petitioner was the tenant in respect of agricultural land bearing Survey No. 563/2+3 situated at Indapur, District Pune. The Petitioner was inducted as a tenant in the suit land prior to 1953 by the original owner Shaikh Jamal Shaikh Mohiddin and Shaikh Amir Ahmeaja Shaikh Hussain. Shaikh Amir A. Shaikh Hussain is the Respondent herein. It is common ground that the petitioner was cultivating the suit land as a tenant on the tiller's day i.e. 1.4.1957, By virtue of the provisions of B.T. & A.L. Act, the Petitioner, being deemed tenant, became deemed purchaser in respect of the suit land. It is the case of the Respondent that partition was effected by the landlords inter se some time on 30.12.1957. In the said partition, it is stated that the suit lands came to the share of the Respondent herein. It is relevant to point out at this stage that Respondent is a Muslim by religion. In the circumstances, he cannot be said to have a pre-existing right in the suit land. That the Respondent is the grandson of the original owner. Interestingly, no share has been given to the Respondent's father, which circumstance is inexplicable. Moreover the partition deed does not indicate that the partition was by metes and bounds. In any case the partition has been effected after the tiller's day on 30.12.1957. His claim of being an

exclusive owner of the suit land is based on the alleged partition effected on 30.12.1957. These facts are necessary to be highlighted as it is the case of the Respondent that he was minor on the tiller's day and as such the Petitioner could not have become deemed purchaser on account of his disability. For the present it is suffice to note that on 6.1.1961 the Respondent made an application for certificate u/s 88C of the Act for exempting the suit land from the application of the relevant provisions of Act which would entitle the Petitioner tenant to be declared as deemed purchaser. However, the said application was dismissed for default. Later on, the Respondent appears to have applied for restoration of the said application for certificate u/s 88C of the Act, which request was granted and the application stood restored. However, the T.A.K., Indapur, after hearing the parties, by his order dated 28.6.1963 was pleased to reject the application for issuance of certificate u/s 88C of the Act. That in the meantime A.L.T. and Mamlatdar, initiated proceedings u/s 32G of the Act for fixing the purchase price of the suit land. The said authority by order dated 15.7.1963, after due enquiry and after notice to the Respondent herein, fixed the purchase price in respect of the suit land at Rs. 3607. That the Respondent did not challenge the said order passed in Section 32G proceedings as late as till May, 1983, namely, after almost 20 years. Instead, the Respondent preferred an appeal only against the decision of T.A.K. Indapur dated 28.6.1963 rejecting the application for issuance of certificate u/s 88C of the Act, The Appellate Authority was pleased to remand the said matter for further enquiry with regard to the prayer for certificate u/s 88C. That pending the aforesaid remand the Revenue Authorities acting on the order passed by the Tenancy Authority u/s 32G of the Act dated 15.7.1963 recorded mutation entry in 7x12 extract regarding the fixation of the purchase price in favour of the Petitioner herein on 11.11.1966. That subsequent to the aforesaid steps taken by the authorities, the Tahsildar by order dated 27.2.1968 was pleased to grant certificate in favour of the Respondent u/s 88C of the Act. Against the said order the Petitioner preferred Tenancy Appeal No. 243 of 1968, which was allowed and the matter came to be remanded to the Tahsildar for further enquiry regarding Section 88C certificate to be issued in favour of the Respondent. The Respondent aggrieved by the said remand filed Writ Petition before this Court being Writ Petition No. 468 of 1969, which was, however, rejected on 8.8.1972. This Court, specifically, directed that application for issuance of the certificate u/s 88C to proceed before the Tahsildar, Indapur. Admittedly, the Respondent till this stage never challenged the order passed by the Tenancy Authority u/s 32G of the Act fixing the purchase price in favour of the Petitioner in respect of the suit land. It is pertinent to note that pursuant to the order passed by the Tenancy Authority fixing the purchase price in respect of the suit land the Petitioner paid the purchase price, consequent to which a certificate came to be issued in favour of the Petitioner u/s 32M of the Act and mutation entry in that behalf was also recorded. The effect of issuance of Section 32M certificate is that it is a conclusive evidence of purchase of the suit land by the petitioner.

3. Notwithstanding the aforesaid position, the Respondent, for the first time in May, 1983, almost after 20 years, filed an appeal before the Assistant Collector, Baramati challenging the order passed by the Tenancy Authority u/s 32G of the Act dated 15.7.1963. In the said appeal the petitioner specifically raised preliminary objection that the appeal was barred by limitation as it was preferred after 20 years and that too without any explanation regarding the delay. The Appellate Authority has noticed the said contention raised on behalf of the petitioner. Nevertheless, has not discussed the said aspect at all in its order. In other words, the Assistant Collector without considering the preliminary objection regarding the maintainability of the appeal on the ground of limitation proceeded to decide the matter on merits and allowed the appeal in favour of the Respondent on merits. It is contended that there is no formal order regarding condoning the delay. Moreover the order passed by the Appellate Court does not indicate that any application was filed by the Respondent for condonation of delay in filing the appeal. The petitioner has taken strong exception to the said approach of the Appellate Court contending that unless the delay was condoned the Appellate Court had no jurisdiction to decide the matter on merits. On merits, the Appellate Court was of the view that since the Respondent was minor on the tiller's day, by virtue of Section 32F of the Act, the tiller's day stood postponed. The Appellate Court further held that since the application for exemption u/s 88C filed by the Respondent was pending, the Tenancy Court had no jurisdiction to proceed with 32G proceedings. The Appellate Court, by order dated 28.2.1985, allowed the said appeal and was pleased to set aside the order passed by the Tenancy Court dated 15.7.1963 u/s 32G of the Act fixing purchase price in respect of the suit land and instead remanded the matter to the Tahsildar, Indapur for taking further steps in the matter. Being aggrieved, the Petitioner preferred revision application before the M.R.T., Pune. In the said revision application, the Petitioner specifically contended that the Appellate Court acted without jurisdiction in deciding the appeal on merits although the same was hopelessly barred by limitation. Even the Tribunal has not adjudicated the said contention as can be seen from the body of the judgment, and instead, proceeded to decide the matter on merits. The Tribunal held that since the application for exemption u/s 88C was pending, the Tenancy Court was in error in finally deciding the proceedings u/s 32G of the Act. Accordingly, the revision application filed by the Petitioner was also dismissed by order of Tribunal dated 12.8.1986.

4. The petitioner has challenged the aforesaid orders passed by the Appellate Court and the Tribunal respectively. The first issue raised on behalf of the Petitioner is that the Appellate Court as well as the Tribunal have clearly acted without jurisdiction in entertaining the appeal which was hopelessly barred by limitation as the same was filed almost after 20 years from the date of order passed by the Tenancy Court on 15.7.1963. The Petitioner further contended that in any case the Tribunal has clearly erred in deciding the matter on merits without there being any formal application for condonation of delay or for that

matter an order condoning the delay in filing of the appeal. According to the Petitioner, unless the delay was condoned, which in this case could not have been done as no sufficient cause has been shown, there was no question of entertaining the appeal on merits and as such the discussion entered into by the Appellate Court and Tribunal on merits of the case is wholly without authority of law and should be ignored in toto. Even on merits, the learned Counsel for the petitioner submits that the conclusion reached by the Appellate Court that due to the Pendency of the application for exemption u/s 88C no proceedings u/s 32G could be proceeded with is no res Integra, It is pointed out that the decision of this Court in Sitaram Balwant Patil and Others Vs. Madhukar Gopal Kulkarni and Others, has answered the said question against the Respondent. According to the Petitioner even on this count the impugned order passed by the Appellate Court and the Tribunal deserves to be set aside. It is further contended that at any rate the Appellate Court as well as the Tribunal have clearly overlooked the fact that i.e. Respondent at best could be said to have an interest in the suit land to the extent of half portion only and as such there was no propriety in setting aside the entire 32G proceedings even with regard to the other 1/2 portion of the suit lands. Inasmuch as the ground on which order passed u/s 32G has been interfered with, that will have no application to the said portion of the land.

5. The learned Counsel for the Respondent fairly concedes that the question as to whether pendency of the application for exemption certificate u/s 88C of the Act would take away the jurisdiction of the Tenancy Court to finally decide the proceedings u/s 32G of the Act is concerned, the same has been answered against the Respondent in the judgment reported in Sitaram Balwant Patil and Others Vs. Madhukar Gopal Kulkarni and Others, . In my view, the writ petition filed by the tenant should straight away succeed as that was the only reason which had weighed with the Courts below in interfering with the order passed by the Tenancy Court in Section 32G proceedings.

6. Nevertheless, since the Respondent has emphasised the other question, which according to him goes to the root of the matter, I thought it appropriate to adjudicate even the said aspect. It is contended on behalf of the Respondent that the order passed by the Tenancy Court in Section 32G proceedings is without jurisdiction and nullity. It is contended that since the Respondent was minor on the tiller's day, i.e. 1.4.1957, by virtue of the provisions of Section 32F of the Act the tiller's day stood postponed due to the disability of the Respondent on the relevant date and as such the Tenancy Court had no jurisdiction to proceed with Section 32G proceedings at all. The Respondent has further contended that since the order dated 15.7.1963 u/s 32G was nullity, the Respondent was entitled to file appeal challenging the said order being nullity even beyond the prescribed period of limitation for filing the appeal. In support of this plea, reliance has been placed by the learned Counsel for the Respondent on the Full Bench decision of this Court reported in 44 Bom. L.R. 577. Reliance has also been placed on the decision of the Apex Court in Kiran Singh and Others Vs. Chaman Paswan and Others, and Chiranjilal Shrilal Goenka (Deceased) through

Lrs. Vs. Jasjit Singh and Others, to contend that if a decree is nullity, passed by the Court without jurisdiction, its invalidity could be challenged by filing appeal even beyond limitation. To counter this submission, the learned Counsel for the Petitioner has relied upon the decision of this Court in Narhar Shamrao Deshpande Vs. Lakhu Raghu Dalvi (since decd.) through his heir, Yeshwant Laxman and Another, . Madhavdas Damodardas Gujar and Others Vs. Mahadu Keru Raut, Shri Kashinath Damu Gavate and others Vs. Damu Bala Kapase, Kamalammal and Others Vs. Parvathi Ammal and Others, and another decision of the Apex Court in State of Punjab and Others Vs. Gurdev Singh, .

7. Having considered the rival arguments, with regard to surviving issues, I would first proceed to discuss as to whether the order passed in proceedings u/s 32G dated 15.7.1963 by the Tenancy Court can be said to be nullity at all. In my view, the said contention raised on behalf of the Respondent is totally untenable. Admittedly, it is nobody's case that before 1.4.1957 the Respondent had any pre-existing right in respect of the suit land. The Respondent has claimed ownership right in respect of the suit land only on the basis of the alleged partition which was entered into by the original landlords on 30.12.1957. In the circumstances, we have to examine the case with reference to the ownership right in respect of the suit land as on 1.4.1957. From the material on record it is not possible to hold that on 1.4.1957 the Respondent had any pre-existing right in respect of the suit land. Whereas, the suit lands were owned by the grandfather of the Respondent Shri Shaikh Jamal Shaikh Mohiddin. In the circumstances on the tiller's day, since the Respondent was not the owner of the suit land, the question of application of Section 32F of the Act to the suit lands would not arise at all. In other words, the proceedings u/s 32G in respect of the suit land were rightly proceeded with by the Tenancy Court and the same cannot be said to be nullity or without jurisdiction.

8. Now, coming to the next contention of the Respondent that he had become owner of the suit land in view of the partition dated 30.12.1957, I am of the view that even the said plea is totally unstatable. Admittedly, the Respondent is a Muslim and would be governed by the Muslim Law whereunder he had no pre-existing right in respect of the suit land. On the other hand, the grandfather of the Respondent was the exclusive owner of the suit lands. There was no reason for the original owner to effect the alleged partition. There is no plausible explanation as to why the suit lands were given to the Respondent herein who was the grandson and no share was given to the Respondent's father, though alive, at the relevant time. This circumstance would lead to an inference that the alleged partition was created only with a view to defeat the right of the Petitioner of becoming deemed purchaser on the tiller's day, by taking advantage of the fact that Respondent was minor on 1.4.1957. There is no evidence on record to show that share of the Respondent was separated by metes and bounds before 31.3.1958. In my view, therefore, the contention raised on behalf of the Respondent that the Respondent's case was covered by the proviso to Section 32F(1)(a) of the Act, the said proviso will have no application to the present

case. In this view of the matter, there is no substance in the argument advanced on behalf of the Respondent that by virtue of Section 32F of the Act, the tiller's day stood postponed as the Respondent was minor on the tiller's day and for which reason the proceedings concluded by the Tenancy Court u/s 32G were without authority of law and nullity. In my view of said Shri Shaikh Jamal Shaikh Mohiddin, grandfather of the Respondent was the exclusive owner in respect of the suit land on 1.4.1957. Moreover, the alleged partition dated 30.12.1957 which has been relied upon, even assuming to be a valid document, the same would be of no avail for the simple reason that there is nothing on record to show that before 31.3.1958 the share of the Respondent in the joint family has been separated by metes and bounds so as to get the benefit of Section 32F of the Act. Accordingly, the said contention deserves to be rejected being untenable.

9. Now coming back to the contention raised on behalf of the Respondent that since the order passed by the Tenancy Court on 15.7.1963 in proceedings u/s 32G was nullity, the appeal preferred by the Respondent in May 1983 against the said order, although beyond limitation, was maintainable, I am afraid the same deserves to be stated to be rejected. In my view, if this stand taken by the Respondent is rejected, as a necessary corollary the appeal preferred by the Respondent ought to have been dismissed on the ground that the same was hopelessly time barred. The learned Counsel for the Respondent had placed reliance on the Full Bench decision of this Court reported in 44 Bom. L.R. 577 (supra). In my view the Full Bench has answered the question which was referred for its consideration as to whether a Revenue Officer purports to do an act or pass an order which is invalid his action does not operate to raise a bar u/s 11 of the Bombay Revenue Jurisdiction Act. The observations made in the said judgment, which have been forcefully relied upon by the Respondent that the order if nullity, it is not necessary even to file an appeal against the said order. Relying on the head note of the said decision, it is further contended that in such situation the law of limitation would not apply to an appeal which challenges the order on the ground of nullity. I have already taken the view that the order passed by the Tenancy Court u/s 32G is not nullity. That part, this decision will have to be reconciled with the recent decision of the Apex Court which has been relied upon by the Petitioner in AIR 1991 SC 2219 (supra). In the said decision, the Apex Court has taken the view that even though an order may be hypothetically nullity, the Court may refuse to quash it if the plaintiff had waived his right to challenge the same. It would be appropriate to reproduce paras 6 to 8 of the said decision, which reads thus:

Para 6. But nonetheless the impugned dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or Court. In *Smith v. East Elloe Rural District Council* (1956) AC 736 Lord Redcliffe observed:

An order even if not made in good faith is still an act capable of legal consequences, it bears no brand of invalidity upon its forehead. Unless the

necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

Para 7. Apropos to this principle, Prof. Wade states; "the principle must be equally true even where the "brand of invalidity" is plainly visible, for there also the order can effectively be resisted in law only by obtaining the decision of the Court (see : Administrative Law, 6thEd. p. 352) Prof. Wade sums up these principles:

The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances, the order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his right, or for some other legal reason. In any such the "void" order remains effective and is in reality void. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another (ibid p. 352)

Para 8. It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires the Court cannot give the declaration sought for.

The Apex Court has thus held that invalidity of the order, though plainly visible, it is necessary to take out necessary and appropriate proceedings to establish the case of invalidity and get it quashed, failing which the said order will remain as effective as any other valid order. In para 8 of the said decision the Apex Court has held that the person who claims the order to be nullity, must approach the Court within prescribed period of limitation, if that order is appealable one. That the person challenging the order to be invalid or nullity is thus under an obligation to challenge the said order by way of appeal within the prescribed period of limitation. In the circumstances it is no longer open for the Respondent to contend that since the order was nullity it was not necessary for the Respondent to challenge the same by way of appeal or that there would be no bar of limitation for filing the appeal which challenges the order to be nullity and without jurisdiction.

10. The other decisions relied upon by the Respondent to buttress his stand that it is well settled that a person can challenge the order to be nullity and without jurisdiction even in collateral proceedings, reliance was placed on the decision of the Apex Court reported in Kiran Singh and Others Vs. Chaman Paswan and Others, and Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, . In both these decisions the Apex Court has held that it is well settled that decree passed by the Court without jurisdiction is a nullity and its invalidity could be set up whenever and wherever, it is sought to be enforced or

relied upon, even at the stage of execution and even in collateral proceedings. The argument of the Respondent is that if the invalidity of the order can be questioned in collateral proceedings it can surely be question by way of appeal even if filed beyond limitation. In my view, the above mentioned decision of the Apex Court in the matter of State of Punjab and Ors. v. Gurdev Singh, (supra), squarely deals with the question involved in the present case. In the circumstances the said contention will have to be rejected as the Apex Court has authoritatively held that a party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him and that he must have approached the Court within the prescribed period of limitation. In other words, the Respondent was not only under obligation to challenge the validity of the order passed u/s 32G by filing an appeal but the said appeal ought to have been filed within limitation and not after a lapse of over 20 years, that too without giving any plausible explanation leave alone sufficient cause for condoning the delay of 20 years.

11. The view which I have been taken has already been considered by different Benches of this Court. In the case of Narhar Shamrao Deshpande Vs. Lakhu Raghu Dalvi (since decd.) through his heir, Yeshwant Laxman and Another, Justice R.D. Tulpule, as he then was, has dealt with similar contention and has rejected the same. In my view the said decision would squarely apply to the facts of the present case. In another decision in Madhavdas Damodardas Gujar and Others Vs. Mahadu Keru Raut, following the aforesaid decision of Justice Tulpule, this Court has reiterated the said legal position. Another decision of Justice R.M. Lodha reported in Shri Kashinath Damu Gavate and others Vs. Damu Bala Kapase, has also held that the appeal filed against an order which is alleged to be null and void needs to be filed within limitation or at least sufficient cause should be shown for condoning the delay. There is one more decision of this Court which has considered this question and answered the same against the Respondent reported in Udhav Jayram Katarnavare since deceased by his heirs Vs. Shri Bhima Jungal Katarnavare and others, of Justice D.G. Deshpande. In view of the consistent view taken by this Court, it is not open for me to take a different view and particularly because of the decision of the Apex Court referred to above. In the present case we have already noticed that neither the Appellate Court nor the Tribunal has examined the question of delay although vehemently raised on behalf of the petitioner, particularly when there was no formal application or formal order condoning the delay in filing the appeal. In other words, the Appellate Court acted without jurisdiction in deciding the appeal on merits without jurisdiction in deciding the appeal on merits without first condoning the delay. Unless the delay was condoned, the Appellate Court had no jurisdiction to entertain the appeal in law.

12. For the aforesaid reasons, I am of the view that the Appellate Court clearly acted without jurisdiction in entertaining the appeal which was barred by 20 years. That too, without condoning the delay in filing of the appeal. The learned

Counsel for the Respondent during the course of argument submitted that since neither the Appellate Court nor the Tribunal has given any reason with regard to the preliminary objection on the point of limitation, it would be appropriate to remand the matter to the Lower Court to consider the same in accordance with law. In my view, such a course would cause manifest injustice to the Petitioner inasmuch as 32G proceedings has been concluded on 15.7.1963, on the basis that the Petitioner has become deemed purchaser on 14.1.1957; and yet the petitioner has been driven from one Court to another during all these period. It was, therefore, suggested to the learned Counsel for the Respondent that instead an affidavit of the Respondent be filed before this Court to explain the cause for delay of 20 years in filing of the appeal before the Assistant Collector. Pursuant to the said liberty, the Respondent has filed affidavit in this Court and the only the defence or explanation offered reads as under:-

I say that I have repeatedly visited the office of the Tahsildar and Deputy Collector, in order to find out when proceedings u/s 88C will commence, but I could not get satisfactory reply from the office of the concerned authority. I therefore, after waiting for a considerable time filed Tenancy appeal. I say that the delay in filing the appeal was explained in the Appeal, however, the concerned authority has failed to make reference of it. However, my aforesaid explanation satisfied the concerned authority and that is why the appeal was entertained and allowed.

(Emphasis supplied)

13. This cannot be said to be an explanation at all, leave alone that it is satisfactory or would stand the test of sufficient cause for condoning the delay. In the circumstances, I have no option but to conclude that the appeal filed by the Respondent before the Assistant Collector was hopelessly time barred and ought to have been dismissed at the threshold by the Appellate Court. In other words, the Appellate Court has clearly acted without jurisdiction in addressing itself to the issues on merits, when it had no jurisdiction to entertain the appeal as presented by the Respondent. What is important to note is that pursuant to the order passed in Section 32G proceedings on 15.7.1963 the Petitioner not only paid purchase price but the authorities have also issued certificate in favour of the Petitioner u/s 32M coupled with the fact that mutation entries have been recorded in the village record as back as in the year 1966. For all these years till May, 1983 the Respondent did not think it proper to challenge the said decision. This would also mean that the Respondent had waived his right to challenge the said order by filing appeal within the prescribed time and was therefore disentitled for any indulgence. I have already observed that even on merits the stand taken by the Respondent is wholly untenable. In the circumstances the Appellate Court as well as the Tribunal were completely in error in accepting the stand taken by the Respondent. Accordingly the order passed by the Appellate Court as well as the Tribunal which is under challenge in this writ petition deserves to be quashed and set aside and the order passed by the Mamalatdar

and A.L.T. Indapur dated 15.7.1963 in Section 32G proceedings is restored.

14. For the aforesaid reasons the writ petition is allowed with costs all throughout. Rule is made absolute. The order passed by the Assistant Collector, Baramati Division, Baramati dated 28.2.1985 in TNC Appeal No. 36 of 1983 and the order passed by the M.R.T., Pune dated 12.8.1996 in Revision No. 7 of 1985 are quashed and set aside and instead the order passed by the Mamalatdar and A.L.T. Indapur dated 15.7.1963 is restored.

Certified copy expedited.

Parties to act on the copy of the order duly authenticated by Sheristedar of this Court.