

(1979) 02 BOM CK 0044

In the Bombay High Court

Case No : Special Civil Application No's. 330 and 1073 of 1974

Pandharinath Sakharam Chavan

APPELLANT

Vs

Bhagwan Ramu Kate and Others

RESPONDENT

Date of Decision : 13-02-1979

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 14, 29, 29(1), 29(2), 32, 32
Limitation Act, 1908 — Section 28
Limitation Act, 1963 — Section 27

Citation : AIR 1980 Bom 203 : (1980) 82 BOMLR 341 : (1979) MhLj 337

Hon'ble Judges : Naik, J;Deshpande, J

Bench : Division Bench

Advocate : K.J. Abhyankar and G.B. Karandikar, for the Appellant; D.M. Rane, N.D. Bhatkal and M.H. Solkar for H.A. Solkar, for the Respondent

Judgement

Naik, J.—This writ petition raises an interesting question as to whether the heirs of a deceased tenant are entitled to the benefit of Sub-section (1B) of Section 32 of the Bombay Tenancy and Agricultural Lands Act, 1948, hereinafter referred to as "the Act".

2. The question arises on the following facts:

3. One Rama Krishna Kate was the tenant of four agricultural lands situate at village Venegaon, Tahsil and district Satara. He was dispossessed by the landlord Raghunath Krishna Panchpor, after 15th June, 1955 and prior to 1st April, 1957.

4. Sub-section (1B) of Section 32 of the Act was inserted by Section 2, Schedule of Maharashtra Act No. 49 of 1969, which came into force on 17th Oct., 1969. Prior to the coming into force of that sub-section, the tenant Ram Krishna had died. The Tahsildar started suo motu enquiry under Sub-section (1B) of Section 32 and directed restoration of the possession to the heirs of the deceased tenant Ramu Krishna Kate. That order was disturbed by the Assistant Collector but the Tribunal allowed the revision application and restored the order of the Tahsildar,

Satara. This would now enable the heirs to exercise the right of statutory purchase of the said land in terms of Sections 32 to 32-R of the Act.

5. The correctness and the legality of that order is challenged by this petition -- Special Civil Application No. 330 of 1974.

6. When the matter was called on for hearing before Pendse, J. it appears that reliance was placed for the landlords on the judgment of Chandurkar, J., in Special Civil Appln. No, 2487 of 1973 decided on 1st Mar., 1978. (reported in Madhukar Yeshwant Patankar and Others Vs. Savleram Gotiram Teli and Others, Pendse J. thought that the decision requires reconsideration and as in his opinion, the point involved arises in several cases, it was desirable that it should be decided by a Division Bench. The papers were placed before the learned Chief Justice and that is how the matter has come before us.

7. Sub-section (1B) of Section 32 of the Act which is to be interpreted reads as under:

"(1B) Where a tenant who was in possession on the appointed day and who on account of his being dispossessed before the 1st day of Apr., 1957 otherwise than in the manner and by an order of the Tahsildar as provided in Section 29, is not in possession of the land on the said date and the land is in possession of the landlord or his successor-in-interest on the 31st day of July, 1969 and the land is not put to a non-agricultural use on or before the last mentioned date, then, the Tahsildar shall, notwithstanding anything contained in the said Section 29, either suo motu or on the application of the tenant, hold an inquiry and direct that such land shall be taken from the possession of the landlord or, as the case may be, his successor-in-interest, and shall be restored to the tenant; and thereafter, the provisions of this section and Sections 32-A to 32-R (both inclusive) shall in so far as they may be applicable, apply thereto, subject to the modification that the tenant shall be deemed to have purchased the land on the date on which the land is restored to him:

Provided that, the tenant shall be entitled to restoration of the land under this sub-section only if he undertakes to cultivate the land personally and of so much thereof is together with the other land held by him as owner or tenant shall not exceed the ceiling area.

"Explanation: In this sub-section "successor-in-interest" means a person who acquires the interest by testamentary disposition or devolution on death".

8. It was argued by Mr. Abhyankar and Mr. Karandikar for the landlords that Sub-section (1B) of Section 32, creates a new right, of tenancy in the land, and statutory purchase thereof with effect from its enforcement on 17-10-1969 and since that right of tenancy was not subsisting when the tenant died, Section 40 of the Act was not attracted, and therefore, the heirs of the deceased tenant are not entitled to the benefit of Sub-section (1B).

9. As against that, it is submitted by Mr. Rane, learned advocate for the tenant,

that Sub-section (1B), does not create a new right but it only restores the : remedy to effectuate the right of tenancy in recognition of its continued subsistence which had become unenforceable due to the expiry of the period of limitation prescribed u/s 29 of the Act. It being thus a case of subsisting tenancy, Section 40 of the Act is certainly attracted.

10. In support of his submission that Sub-section (1B) of Section 32 creates a new right Mr. Abhyankar urges that the tenancy of the tenant was already extinguished after expiry of the two years period from the date of dispossession, under the provisions of Section 29 of the Act long prior to the coming into force of Section 32 (1B) of the Act. Developing his arguments Mr. Abhyankar urges that u/s 29 of the Act, a tenant who was entitled to possession was required to make an application within two years from the date on which the right to obtain possession of the land had accrued to him. Therefore, the remedy of making such an application was barred after the expiry of two years after the dispossession. If the remedy to recover possession was barred, submits Mr. Abhyankar, the tenancy rights therein also were extinguished. He submits that it is settled law that the principle enunciated in Section 27 of the Limitation Act, 1963 which is analogous to Section 28 of the Limitation Act, 1908, is of general application. If under a special law like Section 29 of the Act, the remedy of recovering possession was barred, the right of tenancy was also extinguished.

11. In support of that submission Mr. Abhyankar has drawn our attention to the observations of the Supreme Court in *Dindayal and Another Vs. Rajaram*, . The relevant observations in para. 10 are to this effect:

"It is well settled that the principle underlying Section 28 of the Indian Limitation Act, 1908 (same as Section 27 of the Indian Limitation Act, 1963) is of general application. It is not confined to suits and applications for which a period of limitation is prescribed under the Limitation Act."

12. Reliance is also placed on the decision of the Allahabad High Court in *Dalip Rai v. Deoki Rai*, ILR (1899) 21 All 204, where it is held that the failure of a tenant to apply u/s 95 (a) of the North-Western Provinces Rent Act, 1881, for the recovery of the occupancy of the land, of which he has been wrongfully dispossessed, within the period of six months after the date of dispossession prescribed for such applications by Section 96 (e), has the effect not only of barring the tenant's remedy, but of extinguishing the tenant's right to the occupancy of the land.

13. Similar view is taken in AIR 1940 49 (Nagpur) and also by Dharmadhikari, J. in *Baswant Motiram v. Ganpat Dhanji*, 1975 Mah LJ 9 and more recently also a similar view is taken by one of us (Desh-pande, J.) on a difference of opinion between Deshmukh, J. (as the learned Chief Justice then was) and Bridul, J. in *Shivgonda v. Chandrakant*, 1978 Mah LJ 169.

14. Relying on the above authorities, Mr. Abhyankas urges that since by the time Sub-section (1B) came into force the tenancy rights of a tenant who is since

deceased were already extinguished due to the loss of remedy to recover possession u/s 29 of the Act, there was no subsisting tenancy when the tenant died. When the deceased tenant himself was not holding tenancy rights in the land, question of his heirs claiming to continue the same by reference to any statutory right u/s 40 of the Act cannot arise. Admittedly the deceased tenant was holding statutory tenancy in this case. The argument which is, therefore, urged upon us with considerable force is that, there being thus no subsisting tenancy when the tenant died, prior to the coming into force of Sub-section (1B), the heirs of such tenant, not being able to claim to inherit it cannot claim the new rights conferred u/s 32 (1B) of the Act. Section 40 (1) reads as under:

"Where a tenant (other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy."

15. No doubt, the argument at first blush would appear to be of considerable force. But then in our opinion, on a plain reading of the provisions of Sub-section (1B), it is not possible to hold that that sub-section creates a new tenancy or a new tenancy right.

16. Section 32 and the other sections which follow up to Section 33 are to be found in Part II, Chap. III of the Act, under the heading "Purchase of land by tenants". Section 32 provides that the tenants who were in possession of the land on the tillers" day, viz. 1st day of Apr., 1957, would be deemed to have purchased the land subject to the provisions of that section and the succeeding sections. The legislature realised that there were certain tenants who by virtue of their being dispossessed before the 1st day of Apr., 1957 could not avail of the provisions of Section 32, although they might have filed application for possession u/s 29 (i) of the Act or had still time to make such applications. Therefore, the Legislature introduced Section 32 (1A) by Bombay Act No. 63 of 1958 which provides that where a tenant on account of his eviction from the land by the landlord before the 1st day of Apr., 1957 is not in possession of the land on the said date but had made or makes an application for possession of the land under Sub-section (1) of Section 29 within the period specified in that sub-section, then if the application is allowed by the Mam-latdar, or as the case may be, in appeal by the Collector or in revision by the Maharashtra Revenue Tribunal, he shall be deemed to have purchased the land on the date on which the final order allowing the application is passed. Care was, therefore, taken by this provision to give the benefits of Section 32 to the tenants who were dispossessed on 1st day of Apr., 1957 and who had either made the application u/s 29 with success or made the application u/s 29 within the prescribed period with success.

17. The Legislature also appears to have realised that notwithstanding the provisions of Sub-section (1A) there were several tenants who for obvious reasons could not or did not avail of the beneficial provisions of Sub-section (1A) by making an application u/s 29 within the prescribed period. It was precisely

with a view to benefit such class of ignorant, docile, gullible and unfortunate tenants that, Sub-section (1B) was enacted and special care was taken to empower the Tahsildar to act under the sub-section either suo motu or on the application of the tenant by Maharashtra Act No. 49 of 1969.

18. While effectuating such an intention, the Legislature had to provide for (1) restoration of possession of the land to such tenants, (2) removal of the hurdle of limitation created by Section 29 of the Act, (3) removal of the legal effect of inaction of tenant in claiming such restoration for a period of more than twelve years, (4) protecting the innocent transferees and changes in user of land, occasioned in the ordinary course relying on such inaction, and (5) ensuring that the tenant cultivates the land personally on such restoration in terms of Section 32 (1) (a) (ii), and (6) ensuring that the total area so held does not exceed the ceiling area in terms of Section 32A.

19. In the absence of any reason and express provision, it will also be reasonable to assume that heirs of the tenant, dying during this period, would also be entitled and enable to avail of the benefits under Sub-section (1B) in the same manner as the tenant himself, as Section 40 of the Act is expressly enacted to ensure all benefits for the heirs of any tenant which the tenant himself could have availed of. Sub-section (1B) shall have to be examined by reference to these legislative intendments and requirements.

20. Close examination of this Sub-section (1B) of Section 32, would show that it seeks to ensure, the right of statutory purchase of such tenants also who were dispossessed before 1st Apr., 1957 "otherwise than in the manner and by an order of Tahsildar as provided in Section 29", and were unable to avail of it because of their such dispossession, on condition that they cultivate the land so restored personally, and their total holdings do not exceed one ceiling area. These two conditions are applicable to the tenant, covered by Sections 32 (1) and 32 (1A) also. The tenants of lands, converted to non-agricultural use or transferred to strangers in ordinary course during this period, excepting under testamentary disposition, however are excluded, to prevent dislocation of their occupants.

21. Secondly, notwithstanding the tenants being out of possession, during the period from August, 1955 till 17-10-1969, when this sub-section (1B) is introduced in the Act, they are referred to in this sub-section advisedly as the "tenant", and provisions of Sections 32A to 32R are made applicable to them on such restoration of possession, as if they continued to be such tenants. This legislative assumption and fiction is in keeping with (1) Section 14 of the Act which does not recognise termination of tenancy otherwise than by recourse to procedure contemplated thereunder, notwithstanding anything contrary in any enactment, agreement or usage and (2) Section 29 (2) of the Act which prevents any landlord from taking possession excepting under the order of the Mamlatdar.

22. Thirdly, it not only restores the lost remedy to the tenant of getting back

possession through Tahsildar, but also authorises the Tahsildar to take action suo motu to that effect, notwithstanding the provisions of Section 29 of the Act. This non obstante clause has twofold plain implications. In the first place, it makes Section 29 inapplicable to the claim of the class of the tenants covered under this sub-section and removes the hurdle of limitation from the way of such restoration of the land to them. In the second place, it also consequently wipes out the effect of the inaction of the tenants in not seeking possession within the period of two years prescribed thereunder. This indeed must follow, once Section 29 ceases to have any application to them retrospectively. The legislative fiction of the continued subsistence of tenancy adverted to earlier, thus appears to have been based on this non obstante clause also. The ratio of the cases, relied on by Mr. Abhyankar and Mr. Karandikar would thus not be attracted and tenancy rights therein cannot be said to have been extinguished. Extinction of the rights in the land under these authorities, is supposed to be the result of the failure, of the persons entitled, to avail of the remedy of restoration of possession within the time prescribed. When any period ceases to be prescribed for such possession on the application of Section 29, question of extinction of the rights involved in the property also cannot arise. The contention of Mr. Abhyankar and Mr. Karandikar, therefore, that tenancy rights stood extinguished on the expiry of the period of two years prescribed under S, 29, and the rights conferred on the said tenant under Sub-section (1B) are new rights, is liable to be rejected. Secondly, once the tenancy rights are held to be subsisting in spite of the tenant's being out of possession for several years, any question of such tenant's not holding tenancy on the date of his death and his heirs being unable to inherit such statutory tenancy rights u/s 40 also cannot arise. The contention of the learned Advocates to that effect also is liable to be overruled.

23. It is true that Sub-section (1A) of Section 32 introduced earlier in the Act does not exclude the lands transferred, or converted to non-agricultural use after the dispossession of the tenant, as does Sub-section (1B). It is, however, an error to suggest, as contended by Mr. Karandikar that it makes any difference to the contents of the rights of the tenant conceived under either of these provisions. It was not necessary to exclude these lands from the purview of sub-section (1A). Possibility of the tenant claiming restoration of the land, within the period prescribed u/s 29 could be assumed to be present to the mind of every one concerned. But the same could not be said to be true of the changes in the land brought about after the expiry of the prescribed period, covered by Sub-section (1B). Exclusion of such lands from Sub-section (1B) does not affect the contents of the right as such though it results in depriving the tenants of such lands from the benefit due to their own inaction. This contention has no bearing on the point under consideration.

24. It does not appear to have been argued before Chandurkar, J., as was argue before us, that rights under Sub-section (1B) were new rights. The learned Judge accepted that, the tenant dispossessed during the period indicated in the Sub-section, would be entitled to rights of statutory purchase under this sub-section

notwithstanding his being out of possession for more than 12 years. The learned Judge, however, held that, heirs of such tenant would not be so entitled because of the absence of any express indication to that effect. According to him, the tenant dying after two years of dispossession before the enforcement of Sub-section (1B) cannot be assumed to have been "holding" the "tenancy" at the time of his death to warrant any fiction raised u/s 40 of the Act, of the landlord having continued it to the tenant's heirs, as the tenant himself had lost his remedy after the expiry of two years. This is what the learned Judge observes:

"Now, admittedly the provisions of Section 32 (1D) have themselves come into operation more than 12 years after the 1st day of April 1957, absence of possession on which day is material before Section 32 (1B) begins to operate. Therefore, even under the general law of the land, if a tenant was not entitled to be restored to possession by virtue of the passage of the period of 12 years, unless there are compelling reasons in Section 32 (1B) to deprive the landholder of the rights which might have accrued to him by the law of limitation it may not be possible to enlarge the scope of Section 32 (1B) of the Tenancy Act beyond what was intended by the Legislature....."

The learned Judge then observed :

"Section 32 (1B) does not refer to any restoration of tenancy. It merely refers to a restoration of possession and all that has been done by the provisions is that after the possession is restored, the provisions of Sections 32A to 32R become operative. However, unless it is possible to hold that the tenancy was treated as subsisting by the legislature, it will not be possible for the heirs to invoke the provisions of Section 40 of the Tenancy Act and there is no indication in Section 32 (1B) of the Tenancy Act that right up to the date of making the order or on the day on which Section 32 (1B) was inserted, the tenancy was to be treated as having been subsisting".

25. We have already indicated how Sub-section (1B) is based on the legislative fiction of the continued subsistence of the tenant's tenancy notwithstanding his being out of possession beyond the period within which he could have claimed restoration thereof. Section 29 is expressly made inapplicable to facilitate such statutory fiction. We have also discussed how the wording of this section referring to him as "tenant", and applying Sections 32A to 32R to him on restoration of possession, itself implies legislative declaration of such continued subsistency. With respect, the learned Judge does not appear to us to be right in assuming that the tenant's tenancy was not subsisting at the time of his death and on that basis further holding that heirs could not inherit the same.

26. It is not suggested that the tenant must be in physical possession of the land to enable his heirs to succeed to the tenancy in exercise of his statutory right u/s 40 of the Act. Now, the expression, "the tenant was holding the tenancy at the time of his death" referred to in Section 40 does not mean that the tenant should be in possession of the land at the time of his death, for the simple reason that

the provisions also apply to a tenant who has been dispossessed. What is meant by a tenant holding at the time of his death is the right to be restored to possession by reason of his being a tenant who has been dispossessed unlawfully. Surely, if the tenant could be restored to possession notwithstanding the fact that the limitation provided by Section 29 to be restored to possession has elapsed, there is no reason why any more specific words were required, to ensure the same advantage to the heirs of a deceased tenant. Once the provisions of Section 29 of the Act have got to be ignored as we have pointed out earlier, it would appear that the right of a tenant is a subsisting right and since it is a subsisting right, we find no difficulty in the heirs of the tenant being able to press into their service the provisions of Section 40 of the Act and take the advantage of Section 32 (1B).

27. The learned Judge referred to the fact that there is no express provision made in Sub-section (1B) of Section 32 about giving the benefit of that provision to the heirs and legal representatives of the tenant. When the expression "tenant" has been used in that provision and if the tenancy is deemed to be subsisting as we have held, it would follow that the provisions of Section 40 are immediately attracted and that is precisely why no express provision was considered necessary, so as to cover the heirs and legal representatives of the tenant.

28. The learned Judge, as we have pointed out, has observed that Section 32 (1B) does not refer to any restoration of tenancy and that it merely refers to restoration of possession and all that has been done by the provision is that after the possession is restored, the provisions of Sections 32A to 32R become operative. In our opinion, the very expression "tenant" occurring in the opening part of this Sub-section. (1B) and indication of application of Sections 32A to 32R on restoration of the land to the tenant referred to therein, could be explained on the solitary legislative hypothesis of the tenancy being subsisting.

29. Expiry of 12 years from the date of dispossession would not operate against heirs for the same reason for which it cannot operate against the tenant himself. We have thus no hesitation in holding that the heirs of any tenant dying during the period are as much entitled to rights under Sub-section (1B) as the deceased tenant himself.

30. Having expressed our views on the reference, about the true and correct interpretation of Section 32 (1B) in its application to the heirs of a deceased tenant, as desired by the learned Advocate for both the sides, we direct that the matter may be sent back to the learned single Judge for disposing of the case on merits. The costs to abide the result.

31. Order accordingly.