
(1967) 01 BOM CK 0008

In the Bombay High Court

Case No : Special Civil Application No. 1038 of 1964

Pandharinath Sone Shinde

APPELLANT

Vs

Ramjan Aimat Musalman

RESPONDENT

Date of Decision : 31-01-1967

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (1967) 69 BOMLR 574 : (1967) MhLj 871

Hon'ble Judges : Palekar, J

Bench : Single Bench

Judgement

Palekar, J.—This application under Article 227 of the Constitution arises out of proceedings u/s 3313 of the Bombay Tenancy and Agricultural Lands Act, 1948. The petitioner is a tenant of Survey No. 191/1/1 admeasuring 3 acres 34 gunthas in village Raver, District Jalgaon. Respondent No. 1 Ramjan is the landlord. The landlord, who had. no other lands, obtained an exemption certificate u/s 88C of the above Act and filed an application for possession on the ground of bona fide requirement u/s 33B. All the Courts below have held that the land was required by respondent No. 1 bona fide for his personal cultivation. There was a difference, however, as to how much land should be given to the landlord. At the date of the application, the petitioner had under his personal cultivation 6 acres and 24 gunthas in Survey No. 200/2. The question, therefore, was raised whether u/s 33B (5) of the Act, that land was to be taken into account for determining how much of the leased land the landlord was entitled to resume from the tenant. The Tenancy Awal Karkun was of the view that for the purposes of that section, the other land held by the tenant in Survey No. 200/2 was, not held by him either as an owner or a tenant, and, therefore, it could not be taken into consideration. The Deputy Collector in appeal differed from the view of the Tenancy Awal Karkun. He held that the land was in the personal cultivation of the tenant and must, therefore, be taken into account. In revision, the Revenue Tribunal confirmed the view of the Deputy Collector, especially as the tenant had become the full owner of Survey No. 200/2 on or from February

5, 1964. Aggrieved by that decision, the petitioner-tenant has come to this Court under Article 227 of the Constitution of India.

2. The application u/s 33B was filed by respondent No. 1 on March 16, 1962. It is no longer in dispute that the holding of the landlord and tenant as at the date of the application only must be taken into account. There is no dispute also that the petitioner-tenant was in actual possession for personal cultivation of Survey No. 200/2 admeasuring 6 acres and 24 gunthas. The petitioner's case was that this land had been transferred to him under a mortgage by conditional sale, whereas, respondent No. 1 contended that it was really a sale with a condition of repurchase. The issue as to the real nature of this transaction dated July 3, 1961, has not been determined by the Courts below. There is a very thin line between a transaction which could be described as a mortgage by conditional sale, and, a sale with a condition of repurchase. Even so, there is a real difference between the two types of transactions, because, one is a mortgage and the other is a sale. And, since, the Courts have not applied their mind to the real nature of the transaction as appearing from the document and the other circumstances in the case, the case will have to be remanded for a finding on that issue. It is not disputed that if it is held that the transaction was really a sale, the petitioner would be holding the land for personal cultivation as an owner on the date of the application, in which case, it would have to be taken into account for the purposes of Section 33B(5)(b).

3. But, what is the position if the Court comes to the conclusion that the transaction was a mortgage by conditional sale? Mr. Walawalkar, for the petitioner, contends that for the purpose of Section 33B(5)(b), what is relevant is the holding of the landlord and the tenant which has some characteristic of permanency and not the precarious character of a holding of a mortgagee in possession. Mr. Walawalkar submits that a land held either by a landlord or a tenant as a mortgagee is held by him on an unstable tenure, because, as soon as the amount secured by the mortgage is paid by the owner of the property to the mortgagee, the land has to be reconveyed to the owner. In the present case itself, there was a period of three years which ended on June 3, 1964, that is, within a couple of years of the filing of the application. In fact, the period had come to a close during the pendency of these proceedings. On the other hand, in the general scheme of the Bombay Tenancy and Agricultural Lands Act, 1948, whereby, the tenants were constituted full owners of the property held by them on lease on a certain date, what was really intended by the Legislature was that, after the various remedies permitted to the landlord and tenant under the Act were exhausted, there should be, as far as possible, just one class of agriculturists, viz., owners in personal cultivation of lands. A large number of tenants became owners on April 1, 1957?others at some deferred dates. Even the tenants of small landlords, known as certificated landlords, were entitled to become owners if the landlords failed to resume possession of the lands for personal cultivation u/s 33B. Therefore, according to Mr. Walawalkar, holding for personal cultivation within the contemplation of Clause (b) of Sub-section (5) of

that section was equivalent to holding or being in possession of land as either owner or tenant. In this connection, Mr. Walawalkar invited my attention to the definition of the expression "to hold land" in Section 2(6C) of the Act. To hold land as an owner or tenant means, for the purposes of Clauses (2D) of Section 2, and Sections 32A, 32B and 63, to be lawfully in actual possession of land as an owner or tenant, as the case may be. Mr. Walawalkar admits that this definition does not refer to Section 33B, but, he contends that it could not possibly have some other meaning in the context of the Act.

4. Section 33B(5)(b) reads as follows:?

The landlord shall be entitled to terminate a tenancy and take possession of the land leased but to the extent only of so much thereof as would result in both the landlord and the tenant holding thereafter in the total an equal area for personal cultivation?the area resumed or the area left with the tenant being a fragment, notwithstanding, and notwithstanding anything contained in Section 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

This provision has been construed by this Court, and, it is now settled law that for the purposes of Sub-clause (b) of Section 33B(5) the land in the personal occupation of the landlord and the tenant is to be separately taken into consideration, and then the leased land should be so distributed as to result in the landlord and the tenant having eventually, as far as possible, an equal area for personal cultivation. For example, if the landlord has two acres of his own in his personal cultivation, and, his tenant has in his cultivation four acres of land of his own and four acres of the landlord as a tenant, then, the leased land will have to be divided between the landlord and the tenant in such a way that the landlord gets in all five acres and the tenant also gets five acres for personal cultivation. In order to give the landlord five acres, three acres out of the leased land will have to be given to the landlord and one acre will have to remain with the tenant.

5. The question is whether all the lands held by the landlord and the tenant in their personal cultivation at the date of application should be taken into this computation, or, just those lands which are held as either owner or tenant. Mr. Jathar, for respondent No. 1, contends that even the mortgaged property in the possession of the landlord or the tenant must be taken into consideration if it could be shown that on the date of the application, the landlord or the tenant was in possession of that land for personal cultivation, It may be that the land held as a mortgagee may have a precarious tenure, but that fact is not material. It has been held by this Court in *Madhav Vithoba v. Dhondudas* (1966) 68 Bom. L.R. 524, that,

In deciding the area of the leased land to which a certificated landlord is entitled u/s 33B (5)(b) of the Bombay Tenancy and Agricultural Lands Act, 1948, the Court should be guided by the circumstances prevailing at the time of the certificated landlord's application for possession and not by the circumstances

prevailing at the time of the final order.

That implied that any acquisition made or loss suffered by the landlord or the tenant in respect of the total area of land after the date of application is of no consequence for deciding as to what area should go to the landlord from out of the leased property. Mr. Jathar emphasized, not the word "holding" in the sub-clause referred to above, but, the words "personal cultivation". The landlord and the tenant should hold the land for personal cultivation. According to Mr. Jathar, holding in this, context has no particular significance. It only means "to be in occupation of, or, to be in actual possession of". In other words, according to Mr. Jathar, once it is shown that "either the landlord or the tenant is in possession for personal cultivation of any land at the date of the application in whatever capacity, including the capacity of a mortgagee, that land will go into the computation.

6. I think, both the points of view, which have been forcefully put before me by learned Counsel have their distinct points, and, I must confess, that the question is not easy of solution. The question ultimately boils down to the intention of the Legislature in this respect. Was it the intention of the Legislature that lands which are held on a tenure" like that of a mortgage should be considered for computing the areas u/s 33B ? That would require some investigation.

7. Section 32, which was introduced in the Act by Bombay Act No. XIII of 1956, gave the tenant, for the first time, a very valuable right. It was provided in that section that, on the first day of April 1957, every tenant shall be deemed to have purchased from his landlord, free of all encumbrances subsisting thereon on the said day, the land held by him as a tenant. It has been hold by the Supreme Court in Dahya Dala v. Basul (1962) 65 Bom. L.R. 328, that, a tenant inducted by the mortgagee¹ in possession is a person who lawfully cultivates the land belonging to another person and is, therefore, a deemed tenant of the land u/s 4 of the Act. It would, therefore¹, follow that the tenant of a land, though he might have been inducted by a mortgagee in possession of the land will be deemed to have purchased the land u/s 32 free from all encumbrances. Section 32Q makes provision with regard to the payment of encumbrances. It provides?

(1) During an inquiry held u/s 32G the Tribunal shall determine any encumbrances lawfully subsisting on the land on the tiller's day.

(2)(a) If the total amount of the encumbrances is less than the purchase price so determined,

(i) where the purchase price is paid in lump sum it shall be deducted from the purchase price and the balance paid to the former landlord ;

(ii) where the purchase price is made payable in installments, the Tribunal shall deduct, such amount from such installments towards the payment of the encumbrances :...

In other words, even a tenant of a mortgagee in possession is deemed to have

purchased the land from the owner thereof, and, the encumbrances created by the owner are liable to be paid off out of the purchase price paid by the tenant u/s 32Q. It is important to note that when the tenant is deemed to purchase the land, he does it free of all encumbrances subsisting on the land. That is one way how the mortgagee is excluded in the general scheme of the Act. Section 33B also, with which we are now concerned, appears to exclude him. Section 33B has to be read in the context of Section 88C. Section 88C deals with persons who are known as certificated landlords as defined in Section 33A. A certificated landlord means a person who holds a certificate issued to him under Sub-section (4) of Section 88C, and, it is only such a certificated landlord who can terminate the tenancy on the ground of bona fide personal cultivation under Section 33B. Now, a certificate is issued to a landlord u/s 88C under certain circumstances. Section 88C provides:

- (1) Save as otherwise provided by Sections 33-A, 33-B and 33-C, nothing in Sections 32 to 32R (both inclusive) shall apply to lands leased by any person if such land does not exceed an economic holding and the total annual income of such person including the rent of such land does not exceed Rs. 1,500 :...
- (2) Every person eligible to the exemption provided in Sub-section (1) shall make an application in the prescribed form to the Mamlatdar
- (4) If the Mamlatdar decides that the land is so exempt, he shall issue a certificate in the prescribed form to such person....

It is clear from these provisions that leased lands are excluded from the operation of Section 32 and the other sections, if certain conditions are fulfilled by the holder of the land. In the first place, the land should not exceed an economic holding; and in the second place, the person's total annual income including the rent of that land should not exceed Rs. 1,500. It is clear that Sections 88C and 33B have been deliberately enacted for the benefit of the small landlord. If the land which is leased is less than an economic holding and his total income does not exceed Rs. 1,500, the landlord is given the last chance to claim possession from his tenant if he bona fide requires the land for his personal cultivation. The question now is whether Section 88C has been enacted for the benefit of the mortgagee in possession also. In other words, whether a mortgagee in possession who has let out his land to a tenant is entitled to make an application for the eligibility certificate. Section 88C by itself does not say what should be the status of the "person" who makes the application. It does not say in so many words that he must be the owner of the land. It only says that certain provisions of the Act shall not apply to lands leased by any person. Broadly, this "any person" would not only include an owner but also a mortgagee in possession, because, in the case of a mortgagee in possession also, it is possible to postulate that the land leased by him to the tenant does not exceed an economic holding and the total annual income of that person including the rent of that land does not exceed Rs. 1,500. But Mr. Walawalkar submits that a mortgagee in possession is impliedly excluded from the expression "any person"

by its juxtaposition with the expression "economic holding". That person, who is, described u/s 88C, must be a person who has leased the land, which, in turn, does not exceed an "economic holding". The expression "economic holding" has been defined in Clause (6 A) of Section 2 of the Act and means in relation to land held by a person whether as, an owner or tenant or partly as owner and partly as tenant, the area of land fixed as an economic holding u/s 6 or 7. In other words, the expression "economic holding" is defined with reference to the holding as owner or tenant or partly as owner or partly as tenant. That, according to Mr. Walawalkar, gives the clue to the real meaning of the word "person" in Section 880. "Any person", according to Mr. Walawalkar, must be a person whose leased land is less than an economic holding, that is to say, whose leased land held as an owner must be less than an economic holding. I think, there is considerable force in this contention. u/s 88C, the person described is the owner of the property, and, not a mortgagee in possession.

8. The same conclusion is deducible in another way. If the mortgagee is held entitled to an exemption certificate, he would be; able to obtain possession from the tenant of the mortgaged lands, partly or wholly, depending upon their other holdings in accordance with Section 33 B(5)(b). This will, however, have the effect of nullifying the right of the mortgagee's tenant to be considered the purchaser of the whole land from its owner u/s 32. So far as the mortgagee's tenant is concerned, the mortgagor-owner is incapable of applying for the exemption certificate u/s 88C, because the mortgagee's tenant is not the tenant of the owner as the latter has not leased the land to him. Therefore, the owner is not competent to apply for the certificate. Consequently, the land held by the mortgagee's tenant will not be exempted from the operation of Section 32 and the other sections referred to in Section 88C and will vest in the tenant as purchaser from April 1, 1957. But, if the mortgagee is held eligible to a certificate, the tenant loses or at least is in danger of losing the whole of the leasehold land in his possession, Such a serious anomaly can only be avoided by holding that the mortgagee in possession is not entitled to apply for an exemption certificate u/s 88C.

9. And, since, u/s 33B, it is only the certificated landlord who is entitled to apply for possession on the ground of bona fide personal, cultivation, it would follow that the "landlord" must be one who is other than a mortgagee in possession. Clause (b) of Section 33B (5) is not the only place where the word "landlord" is equated with the word "owner". Similar is the position in Section 32 also. In Section 32, the tenant is deemed to have purchased from his "landlord" the land free of all encumbrances. Obviously, the word "landlord" in that section could not have included the mortgagee in possession, because, his encumbrances have come to an end, and the only person from whom the property could be purchased is the original owner of the property.

10. Thus, the "landlord" in Section 33(5)(b) being the owner of the land, the holding that is to be considered is the holding of the owner and his tenant. The

"total" holding of the owner and tenant may consist, apart from the leased land, of the lands owned by the owner and lands owned by the tenant, in addition to lands in their present cultivation as tenants of third parties. It may look surprising that two different categories of lands viz. lands held as owners and lands held as tenants should be grouped together on an equal footing to determine the total area for the purpose of equalization. The reason, however, is that both categories form essentially one category after the tillers' day, viz. ownership lands. The lands held by them as tenants after the tillers' day or the deferred date are deemed to have been purchased by them and hence the old distinction between the two categories disappears. And, it is on that footing that "the result of the landlord and tenant holding in the total equal area for personal cultivation" is provided for. To include in the computation any other type of tenure falling short of ownership would result in gross inequality. Therefore, land held by the owner or the tenant as a mortgagee in possession could not have been intended to be taken into account in determining the total area in personal cultivation for the purpose of equalization u/s 33B(5)(b).

11. In the present case, therefore, if it is held that the transaction was in the nature of a mortgage, the land held by the petitioner as a mortgagee will have to be excluded from the computation as is, done by the Tenancy Awal Karkun. It has not been determined, however, by any of the Courts below, whether the transaction dated July 3, 1961, is a mortgage by conditional sale or a sale with a condition to repurchase. After determining that issue, the case will be finally disposed of.

12. In the result, the case is sent down to the Mamlatdar, Raver, District Jalgaon, to be disposed of in accordance with law in the light of observations made above. Parties shall be allowed to lead evidence. Costs shall be costs in the cause.