

(2000) 07 BOM CK 0071

In the Bombay High Court

Case No : Writ Petition No. 2839 of 1987

Pandurang Vishnu Zodage

APPELLANT

Vs

Baburao Baban Goswami and Another

RESPONDENT

Date of Decision : 20-07-2000

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 326, 32O, 32P(2)
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 7

Citation : AIR 2001 Bom 123 : (2000) 4 ALLMR 762

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

Bench : Single Bench

Advocate : Dilip R. Bhosale, for the Appellant; R.P. Apte, for No. 1, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This writ petition under Art. 227 of India is directed against the judgment and order passed by the Maharashtra Revenue Tribunal, Pune dated 13-6-1986 in Revision No. 2 of 1984.

2. The respondent No. 1 is the owner in respect of the land bearing S. No. 149/1 /B1 situated at Ghodegaon village, admeasuring 2 H 33 Ares. The respondent No. 1 on 1-10-1997 filed an application before the A.I.T. and Addl. Tahsildar, Ambegaon u/s 32-O of R.I. and A.I. Act, contending that he is the owner of the land in question, whereas the petitioner and respondent No. 2, though claim to be tenants in respect of the suit land have failed to exercise right to purchase the suit land as prescribed u/s 32-O of the Act, and therefore, become liable to be evicted from the suit land and possession thereof be made over to the respondent No. 1. In the said application, the respondent No. 1 disputed that he had created any tenancy rights in favour of the petitioner and the respondent No. 2 in respect of the suit land, nevertheless contended that since the petitioner and the respondent No. 2 claim to be tenants, they were under an obligation to exercise right to purchase the suit land within the

specified period and having failed to exercise the said right become liable to be evicted from the suit land. The petitioner as well as the respondent No. 2, who are brothers and were living jointly, appeared in the said proceedings. It was asserted on behalf of the petitioners as well as the respondent No. 2 that they were tenants in respect of the suit lands and have paid the rent some times in the form of crop share and also paid the land revenue essential of the suit lands. According to them they were cultivating the suit land as tenants for last more than 9/10 years from the relevant time which could be substantiated by the entry in tenancy column from the year 1968-69 in the village records of VF 7 x 12 extract. What is interestingly to note is that in the said proceedings the petitioner admitted that he had failed to exercise the right to purchase the land within the specified time. In the circumstances, the A.I.T. and Addl. Tahasildar Ambegaon by his order dated 14-12-1977 allowed the application preferred by the respondent No. 1. The said authority declared that the tenants have failed to exercise right to purchase the land and thus ordered that the suit land be disposed of in the manner provided in Sub-section (2) of Section 32B of the Act. Against the said decision the petitioner alone preferred an Appeal u/s 74 of the Act before the Assistant Collector. On the other hand, the respondent No. 2 acquiesced of the order of eviction by not challenging the same before the competent Court. Although " the petitioner preferred appeal, however, no such appeal could be maintained in law against an order passed by the Tenancy Court u/s 32-O of the Act. In the circumstances the Assistant Collector treated the said appeal as revision application filed on behalf of the petitioner. The Assistant Collector was pleased to allow the said revision application and set aside the order passed by the Tenancy Court. According to the Assistant Collector, Section 32-O of the Act would merely empower the tenant to purchase the suit land but did not invest any right in favour of the owner to get back the possession of the land in the event, the tenant fails to exercise the said right. Being dissatisfied by the order passed by the Assistant Collector, the respondent No. 1 preferred revision before the M.R.T. Pune u/s 76 of the Act. The respondent No. 1 contended that the Assistant Collector acted without jurisdiction inasmuch as neither an appeal nor any revision could be maintained against the order of tenancy Court passed u/s 32-O of the Act. With regard to the merits, respondent No. 1 contended that there was no infirmity in the order passed by the first Tenancy Court, particularly in view of the admission on behalf of the petitioner that he had failed to exercise his right to purchase the suit lands within the specified time. It is relevant to point out that the revision preferred by the respondent No. 1 was barred by limitation. However, by a speaking order dated 14-6-1985 the Tribunal condoned the delay and directed that the revision be heard on merits. The order condoning the delay in filing the revision application has not been challenged by the petitioner on the respondent No. 2 at any point of time. The Tribunal, after carefully considering the rival stand, by its order dated 30-6-1986, held that no appeal u/s 74 or revision u/s 76 or Section 76A of the Act could be maintained before the Assistant Collector against the order passed by the Tenancy Court u/s 32-O of the Act. Accordingly the Tribunal held

that the order passed by the Assistant Collector dated 21-10-1980 was nullity and without jurisdiction. The Tribunal having held that the order passed by the Assistant Collector was nullity and without jurisdiction it was wholly unnecessary for the Tribunal to examine the merits of the contentions. Nevertheless, the Tribunal in the first place held that the claim of the petitioner and the respondent No. 2 that they were tenants could not be established merely on the strength of their possession of the suit lands. The Tribunal held that since the petitioner and respondent No. 2 have admitted that they did not exercise right to purchase the suit lands within the specified time as required u/s 32-O of the act, they became liable for being dispossessed from the suit land as per the provisions of Section 32P of the Act. The Tribunal accordingly affirmed the order passed by the first Tenancy Court dated 14-12-1977.

3. Against the said decision the petition alone has preferred the present writ petitioner under Article 227 of the Constitution of India. The alleged other tenant has been impleaded respondent No. 2 in this writ petition. However, during the pendency of the said writ petition, the respondent No. 2 has expired and no steps were taken by the petitioner to bring his heirs on record due to which the name of the respondent No. 2 has been deleted. In other words, the order passed against the original respondent No. 2 has become final inasmuch as he did not challenge the order passed by the Tenancy Court nor he has challenged the impugned order passed by the Tribunal before this Court. There is another important development which has taken place during the pendency of this writ petition that the petitioner is said to have handed over possession of the suit lands to the respondent No. 1 on 22-6-1987. In view, of this development, this writ petition, in my view, has in fact become infructuous.

4. The learned counsel for the petitioner, taking advantage of the observations made by the Tribunal that the petitioner has failed to establish his status that of a tenant in the suit lands, would contend that since the relationship of landlord and tenant is not established between the parties, Section 32-O of the act cannot be invoked and as such the proceedings initiated before the Tenancy Court were void ab initio. It is further contended that even the respondent No. 1 in his application had clearly stated that he had not created tenancy rights in respect of the suit land in favour of the petitioner. It is submitted that in view of the said assertion in the application the tenancy court ought to have dismissed the application preferred by the respondent No. 1 at the threshold as relationship of the landlord and tenant was in serious dispute in which case the provisions of Section 32-O have had no application. To buttress the aforesaid submission, reliance has been placed on the decision of this Court reported in 1973 M LJ 344 : Bhila Keshav Patil and Another Vs. Ganpati Chunilal Kabre and Another, 1974 M LJ 44 Chand Ladlesahab Sheikh v. Dattatraya Shankar Malkhare (1998) 1 B LR 210 Laxman Balappa Bokade v. Vithoba Khandappa Bokade. Relying on the aforesaid decisions it is contended that since the respondent No. 1 has denied the tenancy of the petitioner in the suit lands, the petitioner tenant was prevented from exercising his right to purchase the suit lands as a tenant within

the prescribed time and it is only after the competent Court would adjudicate upon the tenancy rights of the petitioner that the period for exercising the right to purchase can be said to have commenced from that date. In other words, it is contended that the respondent No. 1 could not have invoked provisions of Section 32-O since he was disputing the tenancy of the petitioner in the suit lands at the relevant time. I am afraid, this contention clearly overlooks two relevant aspects. Firstly although in the application filed by the respondent No. 1 an assertion has been made that he had not created tenancy in respect of the suit land in favour of the petitioner or respondent No. 2, however, at the same time the applicant proceeds to state that since mutation entry has been effected in the village record as back as on 5-1-1970 indicating that the petitioner and the respondent No. 2 were cultivating the suit land as tenants from year 1968-69, it was incumbent upon the petitioner/tenant to exercise the right of purchase as envisaged u/s 32-O of the Act and having failed to do so the tenants had become liable to be dispossessed by following procedure under 32P of Act proceedings. In other words, the case made out by the respondent No. 1 in the said application was very categorical that because of the entry effected in the village record, that the petitioner and the respondent No. 2 were cultivating the suit land as tenants since 1968-69, tenancy rights in favour of the petitioner and the Respondent No. 2 was created and since the tenancy rights were created it was incumbent upon the tenants to exercise right to purchase within one year from that date. The petitioners contention that the first tenancy court had no jurisdiction to entertain the application clearly overlooks that the jurisdiction of the tenancy Court to entertain the application u/s 32-O cannot be doubted, however, whether to grant the relevant prayed for in the said application or not would depend upon the nature of pleadings and evidence placed on record. In the present case the tenancy court proceeded on the basis that the matter pertained to landlord and tenant and having held that the petitioner and the respondent No. 2 being tenants were under obligation to exercise option to purchase the suit land within specified time as required u/s 32-O. To reach at the said conclusion the tenancy Court was fully competent and had rightly exercised its jurisdiction vested in it by law. Apart from this aspect the second important factor which would non-suit the petitioner is that the case of the petitioner all throughout in pleadings and evidence has been that the petitioner is the tenant in the suit lands. In my view, it is too late in the day for the petitioner to contend that he is not the tenant in the suit land or that no relationship of landlord and tenant existed between the petitioner and respondent No. 1 inter se, No litigant can be allowed to take inconsistent pleas so as to place the opponent at a great disadvantage by raising a question of jurisdiction". This exposition is well settled. It would be advantageous to refer to the decision reported in AIR 1926 18 (Privy Council) , where it has been held thus :

"A litigant who has all along maintained a position in support of one branch of his unit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary more especially when he thereby places his

opponent at a great disadvantage,"

5. In my view reliance placed on the decision of this Court reported in Bhila Keshav Patil and Another Vs. Ganpati Chunilal Kabre and Another, would be of no avail to the petitioner. In the said case the landlord had sued the tenant in the Civil Court restraining the tenant from interfering with his possession and in the said suit the defendant claimed to be the tenant from 1959-60 while the plaintiff landlord contended that he was only a labourer. The Revenue authorities had held that defendant was cultivating the land as a tenant from 1959-60 and on the strength of this finding mutation entry was effected in favour of the tenant on 20-4-1967. The tenant had thereafter applied for declaration as purchaser and for fixation of price contending that he had given necessary notice for purchase on 30-6-1967- The question which was therefore, raised in that case was whether the tenant was entitled to purchase the land having failed to give notice within 1 year from creation of tenancy in 1959-60. It is in that context this Court has held that tenancy could not be said to be created by the landlord who was disputing the tenancy until revenue authorities held against him finally and that the notice within 1 year from mutation entry was within the period prescribed u/s 32-O of the Act. In my view, the principle underlying the said decision appears to be that the tenant was entitled and obliged to give notice u/s 32-O to purchase the tenanted land within one year from the mutation entry was effected in his favour indicating that he was cultivating the agricultural land as tenant thereof. On the other hand, In the present case, it is admitted position that mutation entry in favour of the petitioner and the respondent No. 2 was recorded pursuant to the order passed by the Tahsildar dated 5-1-1970 indicating that the petitioner and the respondent No. 2 were cultivating the suit land as tenants since year 1968-69 and yet no notice/intimation is given by the petitioner within the meaning of Section 32-O within one year therefrom, ought to have given notice of purchase within one year from the date on which the mutation entry was effected, however, admittedly the petitioner and the respondent No. 2 have not given any such intimation at any point of time. Accordingly the decision relied upon by the petitioner would be of no assistance to the petitioner. It is no doubt true that In the application filed by the respondent No. 1, it Is stated that no tenancy was created in favour of the petitioner or respondent No. 2 in respect of the suit lands, however, at the same time the respondent No. 1 had clearly asserted that the petitioner and the respondent No. 2 ought to have exercised the right to purchase within 1 year from the date when the mutation entry was effected in their favour indicating that they were cultivating the suit lands as tenants. In the circumstances, the aforesaid judgment relied upon by the petitioner would be of no avail in the petitioner.

6. Another decision relied upon by the petitioner reported in 1974 M LJ 44 is also of no avail. In that said case this Court was called upon to examine the purport of Section 32F of the Act. The facts of that case were that in the proceedings started u/s 32B read with Section 32F of the Act, the tenant had stated that he

wanted to purchase the land which the successor in title of the widow contended that right had been lost as the tenant had failed to give intimation within a period of one year from the date of death of widow as required u/s 32F(1A) of the Act. This Court, on considering the fact of that case, held that since the tenancy itself was challenged the tenant was prevented by successor in title of widow in giving notice within the period prescribed by Section 32F(1A) of the Tenancy Act and consequently the successor in title could not take advantage of the proceedings instituted u/s 84 and seek in defeat the right of the tenant to purchase the land u/s 32F (1 A) of the Act. In the facts of that case this Court held that even though the tenant did not expressly send the intimation to the landlord as required under Sub-section (1A) of Section 32F, however, there was substantial compliance of the said requirement as the landlord was put to notice in the previous proceedings that the tenant was willing to purchase the land. On the contrary, in the present case, undisputedly, although the mutation entry in favour of the petitioner and the respondent No. 2 was recorded on 5-1-1970, however, they did not give necessary intimation u/s 32-O of the Act. Admittedly, the respondent No. 1 herein did not challenge the mutation entry or dispute the correctness thereof by taking out appropriate proceedings before the competent court. On the other hand, relying on the self-same mutation entry the respondent No. 1 moved an application u/s 32-O only on 1-10-1977. In other words, the petitioner and the respondent No. 2 did not exercise their right to purchase the land by giving intimation in any manner, leave alone that they had substantially complied with the requirement of Section 32-O of the Act. In the circumstances, tenants having failed to exercise right to purchase u/s 32-O, have made themselves liable for dispossession as per Section 32P of the Act. As aforesaid even this decision relied upon on behalf of the petitioner is of no assistance to the petitioner.

7. Now coming to the third decision relied upon on behalf of the petitioner reported in (1998) 1 B LR 210. In the said case it has been held that whether the tenancy was created by 1969 was disputed by a suit and the Tribunal ultimately held that the tenancy was created and the tenant was in possession of the land. It was held that right to give intimation as contemplated u/s 32-O of the Act would arise only within one year of the commencement of tenancy when there is no dispute about the tenancy and its case of dispute within one year from the date when tenancy declaration is given by the competent authority. In the present case, however, admittedly, the mutation entry within would create right in favour of the petitioner and the respondent No. 2 indicating that they were cultivating the suit land as tenants since the year 1968-69 has not been challenged at all by the respondent No. 1. In that sense no dispute was raised by the respondent No. 1 within one year from 5-1-1970 which would have prevented the petitioner and respondent No. 2 from exercising their right to purchase the suit land. However, it is only on 1-10-1977 that the respondent No. 1 filed the present application that tenants have failed to exercise right to purchase the land within one year from 5-1-1970 as required u/s 32-O of the

Act. For this reason alone the said decision cited on behalf of the petitioner will be of no assistance.

8. In my view, all the three decisions, cited by the petitioner would in fact answer the points pressed into service on behalf of the petitioner, against the petitioner. In my view, if the principle underlying all the aforesaid decisions are applied to the facts in hand. The conclusion that could be reached is that the petitioner and the respondent No. 2 ought to have exercised option to purchase the suit land within one year at least from 5-1-1970 on which date the Tahasildar by his order directed entry to be effected in the mutation record which would go to show that they were cultivating the suit lands as tenants since the year 1968-69. Accordingly, in my view, the argument now sought to be advanced on behalf of the petitioner that since the respondent No. 1 had contended that the petitioner and the respondent No. 2 were not his tenants . Section 32-O had no application and therefore, the proceedings initiated before the Tenancy Court were itself nullity and void ab initio cannot be entertained at all. The said contention deserves to be stated to be rejected on plain reading of the pleadings as well as the evidence which has come on record.

9. As a matter of fact the Tribunal having held that the Assistant Collector acted without jurisdiction as the order passed by the Tahasildar u/s 32-O could neither be challenged u/s 76 by way of appeal or u/s 76 or Section 76A by way of revision, ought not to have examined the matter any further and thus the discussion recorded by the Tribunal on the merits of the case is totally irrelevant and besides the real issue involved before it. In my view the petitioner cannot be permitted to take advantage of some observations in the judgment of the Tribunal, when the substance of the matter is that the petitioner had all throughout pleaded that he was a tenant in respect of suit land along with the respondent No. 2. At no stage, the petitioner questioned the jurisdiction of the tenancy court to proceed in the matter, though same is now sought to be raised for the first time in the writ jurisdiction, which cannot be countenanced.

10. Besides what has been discussed hereinbefore it has already been pointed out that the original respondent No. 2 did not challenge the order passed by the tenancy court either by way of appeal or even the impugned order passed by the Tribunal before this Court. In other words, the original respondent No. 2 who was jointly cultivating the suit land along with the petitioner has not questioned the said order and has allowed the same to attain finality. Furthermore, the respondent No. 2 has died during the pendency of this writ petition and no steps have been taken by the petitioner on account of which the name of the respondent No. 2 stands deleted. That apart, undisputedly, during the pendency of this writ petition the petitioner has handed over possession of the suit land on 12-6-1987, on this count alone the writ petition deserved to be dismissed without examining the merits of the contentions, for having become infructuous. In my view, since the writ petition is directed against the order passed by the tenancy court for ordering handing over possession of the suit land, and the

possession having been handed over nothing more required to be done in this case, Moreover the order passed by the Assistant Collector hi appeal, which alone can be said to have created some right in favour of the petitioner, is nullity and totally without jurisdiction. Taking any view of the matter, the writ petition is totally devoid of any merits and deserves to be dismissed.

In the circumstances the writ petition is dismissed with costs. Rule stands discharged. The order passed by the M.R.I. Pune dated 30-6-1986 is affirmed.

Certified copy expedited.

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