

(1991) 07 BOM CK 0005
In the Bombay High Court
Case No : W. P. No. 2329 of 1984

Purushottam Patond

APPELLANT

Vs

Duryodhan Nathu Nandurkar and others

RESPONDENT

Date of Decision : 04-07-1991

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1991) MhLj 1302

Hon'ble Judges : M. S. Deshpark, J

Bench : Single Bench

Advocate : N. S. Munshi, for the Appellant; V. G. Palshikar, for the Respondent

Judgement

M. S. Deshpark, J.—By this writ petition under Articles 226 and 227 of the Constitution, the petitioner challenges the order passed by the Maharashtra Revenue Tribunal in revision, setting aside the orders passed by the Additional Tahsildar and the Sub-Divisional Officer, Akola and directing restoration of land to the Respondents Nos. 1 and 2.

2. Survey No. 56/1, 2 acres 1 guntha situated at Wadad was part of the larger field admeasuring 4 acres 3 gunthas. Proceedings were initiated by the respondents Nos. 1 and 2 claiming that they were tenants. The respondent No. 3 moved an application for resumption of the entire land for personal cultivation and was allowed to resume 2 acres 1 guntha land by order dated 14-7-1969 for personal cultivation. The petitioner purchased that area from respondent No. 3 by the Sale-deed dated 17-2-1975 for Rs. 3,845/-. The respondents Nos. 1 and 2 then applied to the Tahsildar u/s 52 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (for short "the Tenancy Act") for restoration of the land alleging a breach of the statutory obligation to cultivate the land personally for a period of 12 years. The Additional Tahsildar by his order dated 20th January, 1979 held that the matter was privately settled between the respondents 1 and 2 and respondent No. 3 and there was nothing on record to show that the possession was, taken by the respondent No. 3 as per the order of

the Tahsildar, u/s 38 of the Tenancy Act. He, therefore, dropped the proceedings u/s 52 of the Act. An appeal was filed by the respondents Nos. 1 and 2 against this order before the Sub-Divisional Officer, Akola. The Sub-Divisional Officer, Akola also held that there was a private settlement and the respondent No. 3 had not taken possession under any order u/s 38 of the Tenancy Act. He, therefore, dismissed the appeal.

3. The Maharashtra Revenue Tribunal in revision took the view that there was no compromise on the record of the proceeding u/s 38 of the Tenancy Act and the Naib Tahsildar had not signed any order in that proceeding and it was necessary for the land holder to establish that possession was obtained only through compromise and not in pursuance of an order u/s 38 of the Tenancy Act. It regarded mere filing of the application u/s 38(i) as sufficient to invoke section 52 of the Tenancy Act. The Maharashtra Revenue Tribunal ultimately held that the tenants were entitled to be restoration of possession and he therefore set aside the orders passed by the two Courts below and directed restoration of possession to the tenants under section 52 of the Tenancy Act.

4. Shri Munshi, learned counsel for the petitioner urged that the Maharashtra Revenue Tribunal was not justified in taking in revision a view different from the one taken by the Additional Tahsildar which was affirmed in appeal by the Sub-Divisional Officer and in directing the restoration of the land the possession of which had not been taken in pursuance of the order u/s 38 of the Tenancy Act, to the tenants, u/s 52 of the Act. On the other hand, Shri Palshikar, the learned counsel for the respondents Nos. 1 and 2 (tenants) urged that all that is necessary u/s 52(1) of the Tenancy Act is that there should be a termination of the tenancy u/s 38 of the Tenancy Act and the landlord having taken possession of such land had failed to use the land for the purposes specified in the notice u/s 38 of the Act within one year from the date he took possession or ceased to use it at any time for any of the aforesaid purposes within 12 years from the date on which he took such possession, before the tenant claims restoration of possession. He urged that section 38 which deals with the question of termination of the tenancy by the landlord for cultivating the land personally, provides that notwithstanding anything contained in section 9 or 19, but subject to the provisions of sub-sections (2) and (5), a landlord may after giving to the tenant a notice in writing at any time on or before the 15th day of February, 1961 and making an application for possession u/s 36 on or before the 31st day of March, 1961, terminate the tenancy of the land held by a tenant other than an occupancy tenant if he bona fide requires the land for cultivating it personally. Now if a literal construction were to be placed on sub-section (1) the mere sending a notice and making application for possession would be sufficient, but this is not the interpretation which that section has received. A learned Single Judge of this Court pointed out in *Sitaram Narhar Waikhade and others vs. Amru Chelaram Jat*, 1976 Mh.L.J. 303, after considering the provisions of section 38(1) that the notice is merely a step in proceedings to terminate tenancy and not an effective instrument of termination. In the learned Judge's view the common law

right of terminating the lease is eclipsed by other provisions of the Tenancy Act and the rights are to be worked out in the manner prescribed and it could be only on conclusion of such proceedings that the landlord could derive the benefit. In effect he observed, it would be the order that eventually be passed would be determinative whether for bona fide personal cultivation the tenant's lease would stand terminated and if so to what extent and that was the plain statutory scheme. The Full Bench decision of this Court in Harikisan vs. Krishnji, 1976 Mh.L.J. 537, settles the position in this respect by laying down:

"The tenancy of the tenant does not terminate only on giving of notice but takes place on giving notice and applying for possession. Moreover, this only puts an end to the contractual tenancy. The tenant still gets statutory protection and the termination does not become effective till date of order of possession. Termination even cannot be said to have become operative strictly. Ordinary rule of rights getting crystallised on date of application is inapplicable to proceedings u/s 38, Bombay Tenancy and Agricultural Lands (V.R.) Act, in view of the scheme under which rights do not get crystallised till date of order.""

5. A learned Single Judge of this Court in Yeshwant Shamrao Deshpande and another vs. Laxman Kadjaji Takote, 1980 Mh.L.J. 221 pointed out:-

""For exercise of right u/s 52, Bombay Tenancy and Agricultural Lands (V.R.) Act the possession must have been taken by landlord in pursuance of termination as required by law under orders of Revenue Officer. Though on this interpretation it would be possible for the landlord to retain the land in spite of his not using the land for personal use it cannot be said that any infringement of any particular provisions of law has taken place. There is a well recognised distinction between "evasion" and "infringement" of law. Whether or not law has been infringed will again depend on what the law is and not upon supposed intention behind it which is not expressed in the words of the statute. Section 52 is quite plain and does not cover cases of restoration of land where possession is taken by the landlord otherwise than after termination of tenancy in terms of the provisions of the Berar Regulation of Agricultural Leases Act or Bombay Tenancy and Agricultural Lands (V.R.) Act"

6. Shri Palshikar, however referred to Eknath Namdeo Matey and another vs. Kondba Laxman Gadhav and others, 1975 Mh.L.J. 114, where the learned Judge took the view that if the proceedings for resumption of land and restoration of land are consolidated, the landlord must be taken to have obtained possession under sections 38 and 29 and the tenant would be entitled to regain possession u/s 52 of the Tenancy Act. This decision does not lend any support to the contention that it is not necessary that the termination should have been brought about only as required u/s 38 of the Act and by actually taking possession under provisions of the section 36 of the Tenancy Act. With regard to the contention that it is not permissible to read into section 52(1) of the Act, something which was not expressly provided in that section or to read therein that the landlord has taken possession of such land under sections 38, 39 or 39(A) of the Tenancy

Act, it may be pointed out that here it is merely the question of giving the expression, "where after terminating the tenancy of any land" a proper meaning in the context of the scheme of the Act so as to bring that expression in harmony with the other related provisions, the Full Bench having held that the tenancy cannot be terminated without the order of the Tahsildar, which must lead to the necessary conclusion that taking possession u/s 52 of the Tenancy Act must be the possession to be taken in pursuance of the order of the Tahsildar under the provisions of the Tenancy Act.

7. I, therefore, respectfully agree with the view taken by the learned Single Judge in *Yeshwant Shamrao Deshpande vs. Laxman Kadjaji Takote*, 1980 Mh.L.J. 221.

8. In the present case possession had not been obtained by the landlord under the orders of the Tahsildar as a consequent of the termination of the tenancy as contemplated by section 52 of the Tenancy Act. The Maharashtra Revenue Tribunal was not therefore justified in reversing the well considered orders passed by the Tahsildar and the Sub- Divisional Officer.

9. In the result, the order passed by the Maharashtra Revenue Tribunal is set aside and that of the Tahsildar as affirmed by the Sub-Divisional Officer is restored. In the circumstances there will be no order as to the costs, of the petition.