

(1970) 07 BOM CK 0023
In the Bombay High Court
Case No : Special Application No. 144 of 1969

Purushottam Shankar Desai

APPELLANT

Vs

Dayaram Jayaram Dhande

RESPONDENT

Date of Decision : 01-07-1970

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29

Citation : (1971) 73 BOMLR 313 : (1971) MhLj 1017

Hon'ble Judges : Wagle, J

Bench : Single Bench

Judgement

Wagle, J.—This is a petition by the landlords against an order passed by the Maharashtra Revenue Tribunal directing that possession of the disputed land be restored to the tenant Dayaram and the heirs of the co-tenant Jayaram. The facts of this case, which are not much in dispute, are the following:

2. Survey No. 195 admeasuring 2 acres and 5 gunthas belongs to petitioners Nos. 1 and 2. In or about March 1960 possession of this land, inter alia, was obtained by the two petitioners by an order u/s 31 read with Section 29 of the Bombay Tenancy Act for personal cultivation. A consolidation scheme was thereafter framed by which survey No. 195, which belonged to petitioners Nos. 1 and 2, was exchanged for survey No. 56/1, which admeasured 2 acres and 20 gunthas. On a subsequent occasion survey No. 56/1 was given Gat No. 463.

3. After the consolidation was made, petitioners Nos. 1 and 2 continued in possession till 1965, when they sold Gat No. 463 to petitioner No. 3. This was done after the sanction of the Collector was obtained as required by the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. In January, 1966 by Tenancy Application No. 1 of 1966 respondent No. 1 applied for restoration of possession of Gat No. 463 under the provisions of Section 39 read with Section 37 of the Bombay Tenancy Act. The submission made by respondent No. 1 was that under the provisions of Section 39 of the Bombay Tenancy Act, the landlord, who had obtained possession under the provisions of Section 31

read with Section 29 of the Tenancy Act, was bound to restore possession to the tenant if the landlord had ceased to cultivate the land personally.

4. An objection was taken that Jayaram having died in or about 1962, respondent No. 1 was not the only person entitled to seek possession; and that the other heirs not having been made parties, the application was not maintainable. An application for amendment was made for bringing respondents Nos. 2, 3 and 4 on record as the heirs interested in the tenancy as they had inherited the tenancy along with respondent No. 1 upon the death of Jayaram. The amendment was permitted but on July 30, 1966, the Extra Awal Karkun rejected the application on the ground that since the application was made by respondent No. 1 alone, it was not maintainable. Against this order, an appeal was filed by respondent No. 1. The Sub-Divisional Officer came to the conclusion that an error was committed by the lower Court, firstly, in holding that respondents Nos. 2, 3 and 4 did not want to continue the tenancy, and secondly, in holding that the application made by respondent No. 1 alone was not maintainable. The order passed by the Extra Awal Karkun was, therefore, set aside and the matter was remanded for verifying which of the heirs of the deceased tenant would continue the tenancy, and for passing orders according to law. Against this decision, the landlords went in revision before the Revenue Tribunal. The Tribunal confirmed the decision of the Sub-Divisional Officer in appeal; and it also passed an order that possession of the suit land should be restored to the tenants, Dayaram and opponents Nos. 2, 3 and 4. The landlords have filed this petition.

5. Mr. Raghavendra Jahagirdar raised several points, one of which, to which there was no answer, was that the Revenue Tribunal had not only dismissed the revision application filed by the landlords, but it also gave relief to the opponents for which they had not approached the Revenue Tribunal. Originally the Extra Awal Karkun dismissed the application in limine. The appeal Court felt that the dismissal was erroneous and after having set aside the order, remanded the case for finding out which of the heirs of the deceased Jayaram desired to continue the tenancy, and for the purpose of passing necessary orders according to law. Against this order no revision petition was filed by the respondents that they were aggrieved by the order refusing immediate possession to them or to any of them and that, therefore, the Revenue Tribunal may do the needful. Mr. Jahagirdar contended that in the absence of any revision petition by the opponents, to whom relief was given, no orders granting the same could have been passed by the Tribunal upon an application made by the landlords only. Mr. Divekar, who appears for the respondents, was himself hard put to support this order of the Tribunal.

6. Mr. Divekar's case was that under the provisions of Section 40 of the Bombay Tenancy Act, the tenancy was inherited by the heirs. For the purpose of continuing the tenancy it was necessary that the heirs must express their willingness. He referred to a statement made by the advocate for these heirs i.e.

respondents Nos. 2, 3 and 4, that they are willing to continue the tenancy. He, therefore, urged that the statement made by the advocate should be considered to be an expression of willingness by the opponents. I do not think the matter can rest there only. It may be that all the heirs did not want to continue the tenancy. The statement is not made by any of the other heirs on affidavit. A statement by the advocate cannot be equated with an expression of willingness by the heirs. In these circumstances, it is not possible to support the order passed by the Revenue Tribunal that possession should forthwith be given to respondents Nos. 2, 3 and 4, along with respondent No. 1. The order, therefore, to that extent will have to be set aside.

7. The second point that was urged by Mr. Jahagirdar was that the other heirs had not joined respondent No. 1 in making the petition, that they did not even appear in the original proceeding, that after the application of respondent No. 1 was rejected they did not join respondent No. 1 in filing the appeal, and that there is no expression of willingness of any of these other heirs made at any time. In view of these circumstances, Mr. Jahagirdar contended that an application made remains an application made by one of the co-heirs and as such it would not be maintainable. One more fact to be taken into consideration in this connection is that during the pendency of the original application, an amendment was effected by which the other heirs viz. respondents Nos. 2, 3 and 4 were added as respondents to the application. Mr. Divekar, therefore, relied upon the decision of a Division Bench of this Court in *Cooverji v. Amir Abdul Ali* (1960) 65 Bom. L.R. 1, to urge that if all the parties are before the Court, then irrespective of the question that some of the persons who are entitled to a relief had not joined others who had instituted the proceedings, the Court can consider the relief to be given to the parties. The observations of the Privy Council in *Monghibai v. Cooverji* (1989) 41 Bom. L. R. 1127., which were relied upon, were the following (p. 1134) :-

It has long been recognised that one or more of several persons jointly interested can bring an action in respect of joint property, and, if their right to sue is challenged, can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not, ... Once all the parties are before the Court, the Court can make the appropriate order, and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants,...

In view of this decision of the Division Bench, which relied upon the observations of the Privy Council, the argument advanced by Mr. Jahagirdar loses all its force.

8. The last argument advanced by Mr. Jahagirdar was that the provisions of Section 39 of the Tenancy Act will not apply to a land which was taken in exchange for the original land under the Consolidation and Fragmentation Proceedings. The argument was that originally the land which was cultivated by two tenants, one of whom was respondent No. 1 and the other was his father, was Survey No. 1"95. That land was taken in possession by petitioners Nos. 1

and 2 for personal cultivation. That land, therefore, was attached with a burden of revival of tenancy if the condition for personal cultivation was not observed by the landlords. Mr. Jahagirdar's contention, however, was that the burden attached only to Survey No. 195 and did not get itself transferred to Gat No. 463 which was a land different from the one which was originally cultivated by respondent No. 1, and the father of respondents Nos. 1, 2, 3 and 4. His argument in short was that once a substitution was effected, the right of a tenant to get restoration under the provisions of Section 39 of the Tenancy Act is lost.

9. On being pointed out the provisions of Section 29A (2) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, which provided for the attachment of the burden to the land substituted in the Consolidation proceedings, the argument advanced by Mr. Jahagirdar was that such orders which transferred the burden to other land could only be effective, provided there was a subsisting lease at the time the Consolidation proceedings were given effect to. The clarification of this argument was that if on the date of consolidation there was a tenant cultivating the land at the time, having a subsisting lease, then alone can the terms of the lease attach themselves even to the land substituted in the Consolidation proceedings after an order to that effect was passed by the Consolidation Officer. Section 29A(2) of the said Act provides as follows:-

If the Consolidation Officer determines that such lease shall be transferred from the original holding it shall attach itself to the holding allotted to the owner under the scheme or such part of it as the Consolidation Officer may, subject to any rules made u/s 57, appoint and the lessee shall exercise his rights accordingly. The provisions of Sub-sections (2) and (3) of Section 29 shall apply to such lease as if the lease were a mortgage or other encumbrance.

Emphasis was laid by Mr. Jahagirdar on the word "lease" to urge that the provisions of Section 29A(2) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as the Fragmentation Act), would apply only if there was a subsisting lease at the time the order was required to be passed u/s 29(2) of the said Act.

10. Mr. Jahagirdar's further argument was that when possession was obtained by the landlords under the provisions of Section 31 read with Section 29 of the Bombay Tenancy Act, the lease of the tenant was necessarily terminated; the lease was, therefore, not subsisting; and since no lease was subsisting of land survey No. 195, there could be no transfer of any burden to the land allotted upon consolidation in substitution of land survey No. 195. If the word "lease" is given a restricted meaning as a "subsisting lease" only, then there would be some substance in the argument advanced by Mr. Jahagirdar. But taking as a whole, the provision of the Bombay Tenancy Act and the Fragmentation Act, it appears to me that this argument has no substance. Section 39 of the Tenancy Act defines the right of a tenant from whom the land in his possession was ordered to be delivered to the landlord under the provisions of Section 31 read

with Section 29 of the said Act. Under the provisions of Sections 31 and 29 possession cannot be obtained by the landlord unless he determines the tenancy. Section 39, therefore, which determines the rights of the ex-tenant, postulates that his tenancy has been properly determined according to the provisions of the Tenancy Act. In spite of the fact that the tenancy has necessarily to be terminated, the expression by which the ex-tenant is described in Section 39 is "as a tenant". In spite of the fact, therefore, that the tenancy has been terminated, his status continued to be that of a tenant; and the provisions of Section 39 show that no fresh tenancy is created upon restoration of possession. Section 39 of the Tenancy Act does not provide for creation of a fresh tenancy, but it only provides for the restoration of possession. The utmost, therefore, that could be said about the provisions for obtaining possession from the tenant under Sections 29 and 31 for personal cultivation would be that the tenancy is kept in a sort of suspended animation; it is not completely extinct, and it is capable of reviving on the happening of certain contingencies. It cannot, therefore, be held that there was 110 right such as that of a lessee or a tenant from whom possession was taken by the landlord for personal cultivation.

11. The second point which militates against the acceptance of the argument advanced by Mr. Jahagirdar is that a discrimination will necessarily have to be made between the right of tenants who were out of possession and tenants who were in possession. If Section 29A of the Fragmentation Act would have operation only in respect of tenancies wherein the tenant is in possession, then the provisions of Section 39 of the Tenancy Act could be negated by an act either of the landlord or of the Consolidation Officer. If upon consolidation another land is obtained in substitution for the original land, which was taken in possession by the landlord, no order could be passed by the Consolidation Officer in respect of the right of the tenant from whom possession was taken. It would, therefore, be a simple matter for the landlord to get over the provisions of 12 years" cultivation by getting an order from the Consolidation Office,)-, under which he could get another land in substitution of the land in respect of which an obligation was subsisting. If such a thing can be done, then Section 39 of the Fragmentation Act would definitely discriminate between tenants whose rights were recognised by the Tenancy Act but whose rights ceased to be in operation by reason of the consolidation of holding under the Fragmentation Act. If such was the intention of the Legislature that the rights, which were available to a tenant from whom possession was taken under the Tenancy Act, were to be set at naught by reason of any other provision of the Fragmentation Act, the position would have been stated in very clear terms. It is not as if the provisions of the Tenancy Act were entirely ignored by the Fragmentation Act, because in the very next Sub-section (3) of Section 29A a reference is made to the relevant Tenancy law. I am, therefore, of opinion that the provisions of Section 29A(2) of the Fragmentation Act would also apply to the exchanged land under a lease under which a tenant had held the property and whose possession was disturbed by an order of the authority acting under the provisions of Section 31 read with Section

29 of the Bombay Tenancy Act, and who was given a further right upon certain contingencies taking place. The word "lease", therefore, must be construed to include such a right of a lessee which was held in suspended animation. In this view of things, if an order u/s 29(2) of the Fragmentation Act had been passed by the Consolidation Officer, it would be of good effect under the Act. In the instant case the order is produced by respondent No. 1 as having been received by him from the Consolidation Officer, determining that the rights of the tenants in respect of land Survey No. 195 were transferred to the land Gat No. 463, Survey No. 56/1. admeasuring 2 acres and 20 gunthas. The order, therefore, having been passed the right obtainable against Survey No. 195 becomes operative on Gat No. 463.

12. The petition, therefore, fails except in regard to the last part of the order passed by the Maharashtra Revenue Tribunal. As I have pointed out earlier, that part of the order is passed without jurisdiction and has to be set aside.

ORDER

13. Rule discharged subject to the modification of the order passed by the Revenue Tribunal by deleting the part of the order beginning with " I further order...." and ending with "before this Court."

14. No order as to costs.