

(1975) 10 BOM CK 0001
In the Bombay High Court
Case No : Second Appeal No. 674 of 1968

Rajaram Bhau Kadam and others	Vs	APPELLANT
Babu Shankar Kadam and another		RESPONDENT

Date of Decision : 20-10-1975

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 33B, 85, 88C

Citation : (1976) MhLj 425

Hon'ble Judges : P.M. Mukhi, J

Bench : Single Bench

Advocate : H.D. Gole, for the Appellant; B.P. Apte and K.J. Abhyankar, for the Respondent

Final Decision : Allowed

Judgement

P.M. Mukhi, J.—The question which arises for determination in this second appeal is whether the original defendants, who had in certain tenancy proceedings taken up a stand that they were not tenants but owners of the suit lands, can now be heard to say in the suit from which this appeal arises that even though the Civil Court has now held that title of the property is in the plaintiffs, the defendants can once again plead that they are tenants so that the Civil Court will have no jurisdiction to recover possession from them.

2. In order to answer this question it becomes necessary to notice the history of this litigation.

3. One Bhau Bala alias Babaji Kadam claiming as owner of the suit lands applied for and obtained a certificate u/s 88- C of the Bombay Tenancy & Agricultural Lands Act, 1948 (hereinafter referred to as "the Tenancy Act").

4. After the said certificate was obtained, Bhau Bala filed an application u/s 33-B of the Tenancy Act against the defendants and this application was numbered as Tenancy Application No. 264 of 1962. By this application u/s 33-B, Bhau Bala sought to terminate the tenancy of the defendants on the footing that as the

landlord he bona fide required the said lands for personal cultivation.

5. In the Tenancy Court the defendants had taken up a definitive stand that they were not tenants of the suit lands and contended that they were cultivating the suit lands as owners. In other words, the stand taken up by the defendants was that because they were owners, the Tenancy Aval Karkun had no jurisdiction to determine whether the defendants as tenants should be evicted from the suit lands because the plaintiffs who claimed title to the suit lands required them bona fide for their personal cultivation. In these circumstances the Tenancy Aval Karkun after noticing the stand taken up by the defendants in the application u/s 33-B of the Tenancy Act before him observed: -

This shows that the opponents claim to be the owners of the suit lands. There is no reliable evidence on record to disprove their claim regarding their ownership. This Court has no jurisdiction to decide the question of title over the suit lands. The question of title being involved in this case I pass the following order.

The order that the Tenancy Aval Karkun then proceeded to pass was that the parties may get their rival claims decided from the proper Court of law, till then the proceeding is dropped.

6. It is substantially clear that the Tenancy Aval Karkun appears to have considered the proceedings before him to have come to an end because the defendants were claiming title to the suit lands and he had obviously no jurisdiction to decide the question of title.

7. As the learned Civil Judge, who heard this suit, being suit No. 103 of 1966, from which this second appeal arises rightly observed, the conduct of the defendants before the Tenancy Aval Karkun clearly showed that the defendants did not wish to agitate any claim regarding the tenancy rights before the Tenancy Court which was the competent Court to decide such a question.

8. In any event, it requires to be noticed that the position taken up by the defendants before the Tenancy Court was clear and unequivocal and that was that they were not the tenants of the suit lands.

9. Faced with this impasse the plaintiffs proceeded to file the suit and in that suit they claimed a declaration of their title to the suit lands so as to get rid of the defendant's claim that they (defendants) were the owners of the suit lands. The plaintiffs also claimed possession from the defendants who on their own showing did not claim any tenancy rights in respect of the suit lands.

10. The defendants by their written statement took up several pleas and in particular denied the title of the plaintiffs over the suit lands. They further contended that the suit lands were the joint family lands between the Plaintiff's family and their family. It is significant that after pleading as to the question of title the defendants claimed alternatively that they were the tenants of the suit lands and even went to the extent of saying that as tenants they, the defendants, were cultivating the lands and in view of the issue of a certificate u/s

88-C of the Tenancy Act and in view of the Tenancy Case No. 264 of 1962 the suit was not tenable as the jurisdiction vested in the Tenancy Court.

11. The learned trial Judge framed the necessary issue and, in particular issues as to the question of title and whether the defendants were estopped from taking a plea in the suit that they were tenants of the suit lands. The trial Judge found that the plaintiffs had proved their title to the suit lands and that the defendants were in wrongful possession of the same. He also came to the conclusion that the defendants were estopped from now taking up a contention that they were tenants in view of the stand taken up by them before the Tenancy Aval Karkun.

12. The learned trial Judge observed that ordinarily when the defendants in a civil suit claimed that they were the tenants of agricultural lands the question relating to the relationship of landlord and tenant as between the plaintiffs and the defendants was to be decided by the Tenancy Court in view of section 85 of the Tenancy Act and that the Civil Court was required to refer such an issue to the Tenancy Court and wait until the finding of the Tenancy Court was received by the civil Court. The learned trial Judge, however, went on to say that in the present case, it was not necessary for the civil Court to do so because the defendants themselves had in the proceedings before the Tenancy Aval Karkun in Tenancy Application No. 264 of 1962 disclaimed any tenancy rights and that, therefore, there was no question to be referred to the Tenancy Court. This is what the trial Judge said:-

""... the defendants had taken a specific stand that they are not the tenants in the suit land. Thus, they will be estopped from again contending in this Court that they are tenants in the suit lands and that this issue be referred to the tenancy Court over again to decide whether the defendants are tenants in the suit lands.

13. On the findings arrived at by the learned Civil Judge he decreed the plaintiff's suit for possession and for past mesne-profits and gave the necessary directions for determination of future mesne-profits.

14. The original defendants being aggrieved by this decision of the trial Court filed an appeal, being Civil Appeal No. 367 of 1966, in the Court of the District Judge at Kolhapur. The learned District Judge while holding that the plaintiffs had proved their exclusive title to the suit lands, took the view that the defendants notwithstanding their conduct and the stand that they had taken in the previous tenancy proceedings (that they were not tenants) were not estopped from taking or falling back on the alternative plea of tenancy. On this view the learned District Judge allowed the appeal and set aside the trial Court's decree for possession and mesne-profits.

15. This is the history of the litigation and these are the facts on which this second appeal has been filed by the original plaintiffs who are the heirs and legal representatives of Bhau Bala.

16. Mr. Gole, the learned Advocate for the appellants-original plaintiffs, has contended that the District Judge fell to error when he held that the defendants were not estopped from once again contending that they were tenants and that possession against them could only be granted by the tenancy Court. Mr. Gole says that the defendants by taking up a positive stand before the tenancy Court that they were not the tenants denied the jurisdiction of the Tenancy Court and compelled the Tenancy Court to refer the parties to a civil Court because the Tenancy Court could not itself determine the question of title.

17. Mr. B. P. Apte, the learned Advocate for the respondent-original defendants, has sought to support the view of the learned District Judge and has contended that there was nothing in law to prevent the defendants from setting up an alternative case and pleading that they were the owners of the suit lands but that if it was found by the civil Court that they were not the owners and the plaintiffs were the owners then they, the defendants, claimed to be tenants. Mr. Apte says that if under the procedural law the defendants could take up an alternative case even though it was inconsistent, then the result would be that the Civil Court would only grant a declaration of title and then leave it to the Tenancy Court to decide whether the plaintiffs as landlords were entitled to possession under the tenancy law.

18. Mr. Apte did not say as to by what procedure the plaintiffs could now seek possession through a Tenancy Court since the original application u/s 33-B of the Act was disposed of and a fresh application would not lie.

19. The question that falls for ray consideration now is, whether under the circumstances of the case the defendants are estopped from taking up a stand before the civil Court that even if they failed to prove their own title they could still (notwithstanding their earlier stand to the contrary) claim to be the tenants of the suit lands and could not be dispossessed by the plaintiffs through the civil Court.

20. Mr. Gole based his case on estoppel by inconsistent position, or what is some times referred to as "approbation and reprobation" or "blowing hot and cold".

21. Mr. Gole referred to a passage from Bigelow, which is required to be set out in extenso because, according to Mr. Gole, that sums up his position. The passage reads as follows:-

If parties in Court were permitted to assume inconsistent position in the trial of their causes, the usefulness of Courts of justice would in most cases be paralysed, the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the right of all men, honest and dishonest, are in the keeping of the Courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot

play fast and loose.

22. Mr. Gole contended that this doctrine of estoppel by inconsistent position is not restricted to successive stages of the same suit but is also applicable in a new suit which arises or grows out of the previous proceedings. Mr. Gole then cited a judgment of the Allahabad High Court in *Udrej Singh v. Ram Bahal Singh* A I R 1946 All. In that case the Counsel for the parties made a statement on the 25th of August 1941 before the Special Judge to the effect that the question of payment of costs may be postponed until the disposal of the appeal against the order dated the 18th of August 1941. On the 22nd of December 1941 the appeal was dismissed by the learned District Judge. On the 30th of April 1942 the record was received by the Special Judge, who directed that the costs of Rs. 40 payable in accordance with the order dated the 18th of August 1941 should be paid within two weeks. The opposite parties then took up the, position that the learned Special Judge had no power to fix afresh the time for payment of costs. On these facts, it was argued before the Allahabad High Court that after the statement made by the parties on the 25th of August 1941 it was not open to the parties to take up the position that the learned Special Judge had no power to grant fresh time for payment of costs. Pathak J., then went on to observe:-

If the parties had taken up a particular position before the Court at one stage of the litigation, it is not open to them approbate and reprobate and to resile from that position.

23. The learned Judge then went on to say that this principle had been laid down in a number of cases and in particular he referred to a ruling of the Calcutta High Court in *Dwijendra Narain Roy Vs. Joges Chandra De and Others*, , in which Sir Asutosh Mookerjee had made the following observations :-

It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent. This wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first.

24. The Allahabad High Court then went on to state that the principle cited had been applied by the Allahabad High Court even in cases where the question involved was one of jurisdiction and a reference was made to *Ram Khelawan Singh and Others Vs. Maharajah of Benares*, , where a Bench consisting of Sulaiman, J. (as he then was) and Pullan, J. had held that a party upon whose objection an appeal was returned by the Commissioner for presentation to the proper Court was estopped from raising the question of jurisdiction later as, by his objection before the Commissioner, he had accepted the jurisdiction of the High Court as the proper forum of appeal.

25. I find myself in respectful agreement with the views expressed by the Allahabad High Court and in my opinion notwithstanding the procedural

possibility of a litigant pleading an alternative case under the provisions of the Civil Procedure Code, a litigant cannot assume a position inconsistent to the one which he has taken in the previous proceedings on the basis of which the earlier Tribunal had disclaimed jurisdiction, to the advantage of the litigant.

26. Mr. Gole then referred to a judgment of the Andhra Pradesh High Court in *Amritlal N. Shah Vs. Alla Annapurnamma*, . In that case an application had been made for eviction u/s 7 of the Madras Buildings (Lease and Rent Control) Act, 1946. The opponents-defendants took up a plea that as the premises in question did not fall within the definition of a building he was not a tenant within the meaning of the Act. The subordinate Judge accepted the contention and held that the application before him was not maintainable on that ground.

27. It would appear that in later proceedings the tenant urged that the lease related to a building within the meaning of the Act. The Andhra Pradesh High Court held that after getting the earlier application dismissed on the stand taken up by him it was not open to the tenant to turn round and contend in the subsequent civil suit for eviction that the lease related to a building within the meaning of the Act and that the Civil Court had no jurisdiction to entertain the suit.

28. It is interesting to notice that the Andhra Pradesh High Court went on to observe:-

It is well settled that "'estoppels" in the sense in which the term is used in English legal phraseology are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Chapter VIII of the Evidence Act.

The Andhra Pradesh High Court then referred to an interesting observation of Garth, C. J. in a Calcutta case, viz. *Ganges Manufacturing Co. v. Sourujmull* I L R 5 Cal. 669, in which the learned Chief Justice said: "a man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular arguments or contention, which the rules of equity and good conscience prevent his using as against his opponent.

29. Mr. Gole referred to yet another decision of the Andhra Pradesh High Court in *Venigella Parendhamayya Vs. Sri Somasekharaswamy Temple Kotipalli*, , where a single Judge of the Court following the decision in *A. N. Shah v. A. Annapumamma* (supra) held that the principle of estoppel would apply if a party seeks to take up an inconsistent position as to the jurisdiction of a Civil Court. In that case a lessee had succeeded on the question of jurisdiction before the Tahsildar under the Andhra Tenancy Act and had obtained an adjudication that no petition for fixation of fair rent lay against him on the footing that he was not a person governed by that Act. The learned Single Judge held that such a person could not be allowed to question the jurisdiction of the Civil Court to entertain a suit for recovery of possession and profits filed by lessor only in view of the findings given by the Tahsildar in the previous proceedings under the Andhra Tenancy Act. The learned Single Judge, therefore, went on to say that the

appellant before him was not entitled to the benefits of the provisions of the Andhra Tenancy Act and to resist the plaintiff's claim for the recovery of possession and profits.

30. In view of this state of the law, I find no difficulty in coming to the conclusion that the learned District Judge, Kolhapur was wrong when he held that the original defendants were not estopped from taking up an inconsistent position in the suit before the Civil Court which suit was filed by the plaintiffs by reason of the Defendant's original stand before the Tenancy Aval Karkun that they (the defendants) were not tenants and that the Tenancy Court had no jurisdiction over them.

31. The learned District Judge seems to have felt that if it had been shown to him that the defendants had abandoned their plea of tenancy and had elected to prefer the defence of being landlords then the doctrine of estoppel may have been successfully invoked. I find it difficult to appreciate this line of reasoning. The question is not whether the defendants elected to take up one particular line of defence as against another. The real question is that the defendants unequivocally took up a definitive stand before the Tenancy Aval Karkun that they were not tenants. In view of the stand so taken up the Tenancy Aval Karkun had no choice but to refer the parties to a Civil Court for determination of their rival claims to title. I may observe that in my view a better approach may perhaps have been for the Tenancy Aval Karkun to stay the proceedings before him and ask the defendants to obtain a declaration of title from the Civil Court within a period of time, particularly as it would appear that the Record of Rights prima facie showed the plaintiffs as the owner of the suit lands.

32. However, the Tenancy Aval Karkun chose to terminate the proceedings before him and seemed to think the parties had no choice but to approach the Civil Court for reliefs. This relief could only be that that the Civil Court should give them a declaration that the plaintiffs were the owners of the land and if they were so held then give them consequential relief for possession because the question as to whether the defendants were not tenants was concluded by the stand which they had taken before the Tenancy Court.

33. It is appropriate to notice that in the proceedings before the Tenancy Court for a certificate u/s 88-C of the Tenancy Act a notice of which must be presumed to have been served on the defendants as tenants the defendants did not take up the defence that they were not tenants but owners of the suit lands. The defendants took up this clear stand only before the Tenancy Court and obtained the clear advantage of having those proceedings dismissed.

34. In the view that I have taken which appears to me to be the correct view both on principle and authority, a party cannot be permitted to take up an inconsistent position and seek to drive his opponent from one Court to another with a view to delay the evil day on which ultimately a decision against him may be obtained.

35. It is settled law that a party cannot after taking advantage under a particular order turn round and say that that order was after all not correct and that the proceedings should commence anew. If such a thing were to be permitted, then as the learned trial Judge had pointed out there would be no end to litigation and a dishonest litigant could demonstrate that technicalities of the law could be used to defeat justice.

36. In the result, the appeal is allowed and the order and judgment of the learned District Judge is set aside and that of the trial Court restored. The original defendants will pay the costs of the plaintiffs throughout.