

(1968) 04 BOM CK 0004

In the Bombay High Court

Case No : Spl. Civil Application No. 642 of 1966

Runjaji Suryabhanji and Others

APPELLANT

Vs

Manjurabai Urkudaji and Others

RESPONDENT

Date of Decision : 23-04-1968

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 33, 33(1), 36

Citation : AIR 1969 Bom 319 : (1969) 71 BOMLR 129 : (1969) ILR (Bom) 826 : (1969) MhLj 53

Hon'ble Judges : Padhye, J

Bench : Single Bench

Advocate : V.R. Manohar, for the Appellant; R.N. Deshpande, for the Respondent

Judgement

1. The fields involved in this case are Survey Nos. 77/1, area 12 acres 10 gunthas, 34/1, area 1 acres 20 gunthas and 17/3, area 8 acres 20 gunthas of mouza Kushta Buzruk, taluq Achalpur, District Amravati. In Survey Nos. 34/1 and 17/3 Suryabhan alone was recorded as the joint tenants. In survey Nos. 34/1 and 17/3 Suryabhan died on 3-5-1962, Suryabhan had three sons Runjaji, Punjaji and Urkuda and a wife Bhagirathi and two daughters whose names have not come on record anyway. Urkuda, one of the sons of Suryabhan, predeceased him having died in the year 1957. Urkuda left behind him a widow Manjurabai and son Nagorao.

2. On the death of Suryabhan the widow and son of Urkuda, namely, Manjurabai and Nagorao, the respondents 1 and 2 to the present petition, made an application u/s 36 read with Section 33 of the Bombay Tenancy and agricultural Lands Act, 1958, by which they claimed that they be put in joint possession of the fields in question or the fields may be partitioned and they be put in possession of their respective shares. In this application, the other sons of Suryabhan, namely Runjaji and Punjaji and also Hari, the joint tenants in field survey No. 77/1, were added as non-applicants. In this application it was alleged

by the respondents 1 and 2 that Suryabhanji had taken the fields on lease about 20 years back. It was also alleged that the deceased Suryabhanji was the karta of the joint family of himself and his three sons Runjaji, Punjaji and Urkuda and he was the manager or the karta of the joint family till his death in 1962 and had taken the fields on lease as such. It was further alleged by the respondents 1 and 2 that after the death of Suryabhanji, they were also entitled to cultivate the fields as lessees, but taking advantage of their helplessness the petitioner Runjaji did not allow them to cultivate the fields in suit in the year 1962-1963 and had ousted them without any such authority. It was on these allegations that they prayed joint possession of the fields as lessees and in the alternative claimed partition and separate possession with respect to their share.

3. The petitioner No. 1 Runjaji opposed the said application. It was his contention that he was the real lessee of these fields and the deceased Suryabhan was only a benamidar for him. He himself was cultivating these fields as a lessee on his own account and that Suryabhanji had no interest in the said fields. He denied that there was a joint family with Suryabhanji as the manager or the karta. According to him, he was separate and had taken the lease of these fields for himself alone. He alleged that in about the year 1954; there was a partition between Urkuda, Suryabhan and Punjaji and Urkuda and Punjaji had taken their separate shares and had become separate and since then, they were not the members of the joint Hindu family. Punjaji and Bhagirathi supported the claim of Runjaji.

4. The Naib Tahsildar held that Suryabhanji and his sons formed a joint family and that Suryabhanji was the manager or the karta. It was also held that Haribhau was the joint tenant of the field survey No. 77/1 and Suryabhan had only half share in that field and thus along with the other fields Survey Nos. 34/1 and 17/3, the land available for partition was only 15 acres and 28 gunthas, that is, half of survey No. 77/1 and the Whole of Survey Nos. 34/1 and 17/3. The Naib Tahsildar also held that the respondents 1 and 2 together and the petitioners 1, 2 and 3 were each entitled to one-fourth share in the fields. He, therefore, made directions that Survey No. 34/1 should be given fully to the respondents 1 and 2 and -2 acres and 34 gunthas should be given to them out of the other fields S. Nos. 77/1 and 17/3. The further direction was given that the respondents 1 and 2 should be entitled to select the aforesaid land. This order of the Naib Tahsildar was confirmed by the Special Deputy Collector and further confirmed by the Maharashtra Revenue Tribunal.

5. Section 36 (1) of the Bombay Tenancy Act prescribes the procedure of taking possession by a tenant. Omitting the surplus ages, it reads

"A tenant entitled to possession of any land under any of the provisions of this Act or as a result of eviction in contravention of sub-section (2) may apply in writing for such possession to the Tahsildar."

On the death of Suryabhan, who according to the respondents 1 and 2, was the

karta of the joint family consisting of himself and his sons, the respondents 1 and 2 along with the petitioners 1 to 3 would be surviving members of the said family and along with the petitioners 1 to 3 would be surviving members of the said family and along with the petitioners 1 to 3 they would also be entitled to the possession of the fields which stood in the name of Suryabhan. It appears that after the death of Suryabhan, the petitioner No. 1 Runjaji alone came into possession of the said fields Runjaji claimed that he alone was the tenant of the said fields to the exclusion of the joint family and Suryabhan was only a benamidar for him. That case, however, has been negated by the revenue authorities. The respondents 1 and 2 would, therefore, be entitled to the possession of those lands, of course, along with the other surviving members of the said family.

6. Section 33 of the Bombay Tenancy Act prohibits sub-division or sub-letting or assignment of any interest in the land held by a tenant. If the section stood at that then the respondents Nos. 1 and 2 could not have asked for the partition or the division of the fields in question and would have been entitled only to the joint possession of the said fields along with the petitioners 1 to 3. There are however two provisos to sub-section (1) of Section 33 and they are exceptions to the general rule laid down in sub-section (1) of Section 33. Hence, though a sub-division of the land is ordinarily prohibited, in the circumstances mentioned in the provisos, a sub-division is permissible. That partition or sub-division, however, is also subject to the conditions laid down in clauses (a) to (e) to the proviso (ii). Under the proviso to sub-section (1) of Section 33, on a tenant dying, the partition or sub-division of the land leased can be allowed in two cases, namely, (i) if the tenant is a member of a joint family, then the surviving members of the said family are entitled to partition and sub-divide the land leased and (ii) if the tenant is not a member of a joint family, his heirs are entitled to partition and sub-divide the land leased. In view of the case of the respondent Nos. 1 and 2 themselves who were the applicants for partition and in view of the findings given by the revenue authorities, proviso (ii) is not attracted and the case would fall under proviso (i). In Survey Nos. 34/1 and 17/3 Suryabhan was a sole tenant so far as the landlord was concerned. He, however, being a member of the joint family and the tenancy being for the joint family, the petitioners 1 to 3 as well as the respondents 1 and 2 who were surviving members of the said family were entitled to partition and sub-divide the said lands. After the death of Suryabhan the respondents 1 and 2 together would have a one-fourth share in the joint family property. The position with respect to Survey No. 77/1, is, however, a little different as would be shown hereafter. The respondents 1 and 2 being entitled to claim the same by making an application and by virtue of the proviso (i) to sub-section (1) of Section 33, they were entitled to have their share separated in the two lands above.

7. So far as Survey No. 77/1 is concerned, it has been found that Suryabhan was not the sole tenant, but was a joint tenant along with one Haribhau. In the absence of anything to show what their shares were in the leased lands, they

would have equal shares and thus Suryabhan would have only half share in Survey No. 77/1. The right which Suryabhan held in the said field as a member of the joint family would, on his death, survive to the surviving members of the said family who are petitioners 1 to 3 and the respondents 1 and 2. On the death of Suryabhan, therefore, all the five members, namely, the petitioners 1 to 3 and respondents 1 and 2, would be the joint tenants with respect to the share which was held by Suryabhan and would also be joint tenants Haribhau. The wording of proviso (i) to sub-section (1) of S. 33 shows that the partition and sub-division can be claimed by the surviving members of the joint family is alone the tenant and he dies. It does not contemplate a case where a member of the joint family is a tenant jointly along with other persons who are not members of the family. It has been urged on behalf of the respondents 1 and 2 that where the lease is jointly held by more persons than one, then all the joint tenants must be taken to be one unit as a tenant and the proviso (i) would apply even to such cases. It is also contended that when a member of a joint family is a tenant, then the whole joint family as such, is a tenant and the surviving members of the family would be entitled to claim partition. Such an interpretation cannot flow from proviso (i) to sub-section (1) to Section 33. It opens with the words, "if the tenant dies...", which means that a living person who is a tenant and an individual dies. A joint family as such, does not die unless all the joint tenants die simultaneously in which case alone perhaps the proviso (ii) to sub-section (1) of Section 33 may have any application. The Bombay Tenancy Act does not provide for a partition or sub-division of the land between two or more co-tenants and during lifetime of Suryabhan he could have claimed a partition of the leased land with Haribhau under the provisions of the Bombay Tenancy Act. The surviving members of the said family would take the place of the deceased Suryabhan and would be joint tenants along with Haribhau who is not a member of the joint family and hence not a surviving member of the said family. In such a case, the surviving members of the family of Suryabhan would not be entitled to claim any partition and sub-division of the land leased. Since Suryabhan himself could not have asked for such a partition, the field Survey No. 77/1 could not, therefore, be partitioned and sub-divided at the instance of the respondents 1 and 2 and that will have to remain joint, the co-tenants being Haribhau, the petitioners 1 to 3 and the respondents 1 and 2.

8. The revenue authorities have held that in Survey No. 77/1 the joint family of Suryabhan has half share, namely, 6 acres and 5 gunthas and thus along with Survey No. 34/1 and Survey No. 17/3, the joint family was a lessee of 15 acres and 28 gunthas and as such, the respondents 1 and 2 together had one-fourth share in this area of 15 acres and 28 gunthas. In order to give that share to the respondents 1 and 2, the revenue authorities have directed that the whole of survey No. 34/1 having an area of 1 acre 3 gunthas should be given to the respondents Nos. 1 and 2 and for the remaining area of their share they should be given a choice to select the land either from Survey No. 77/1 or Survey No. 17/3. It is contended on behalf of the petitioners that no such direction could

have been given by the revenue authorities by allotting the whole of Survey No. 34/1 to the respondents 1 and 2 and further directing the remaining land to be taken from Survey Nos. 77/1 and 17/3. It was further contended on behalf of the petitioners that the respondents 1 and 2 could not have been given any right of selection from the two survey numbers, as such a selection or the choice by the respondents 1 and 2 was not contemplated by the provisions of the Bombay Tenancy Act. It is contended, on the other hand, that Survey No. 77/1 was not divisible and the respondents 1 and 2, if at all, could have been given a one-fourth share from each of the fields Survey Nos. 34/1 and 17/3. It has been contended on behalf of the petitioners that the respondents 1 and 2 could not be given a joint one-fourth share in either of these fields, but each of them would be affected by the provisions of Clause (c) to the proviso (ii) to sub-section (1) of Section 33 of the Bombay Tenancy Act and hence no partition could be made. This contention cannot be wholly accepted. It must be seen that the respondents 1 and 2 claim from the same stock, namely, Urkuda, who was one of the sons of Suryabhan. Had Urkuda been alive on the death of Suryabhan, he would have got one-fourth share and the said share of Urkuda passes to the respondents 1 and 2, who are his widow and son respectively. Since the respondents 1 and 2, as between themselves, do not claim their share inter se, there is no reason why they together should not be given one-fourth share as claimed by them.

9. So far as Survey No. 77/1 is concerned, I'm of the view that neither the respondents 1 and 2, nor the petitioners 1 to 3 could claim partition or sub-division of the said Survey No. 77/1 since Haribhau, a stranger, is also a co-tenant and that field will have to be left intact wherein Haribhau, as well as the petitioners 1 to 3 and the respondents 1 and 2 will be the joint tenants having their respective shares. This survey number has, therefore, to be left out of account for the purposes of partition and sub-division. So far as Survey Nos. 34/1 and 17/3 are concerned, the total area of these two fields is 9 acres 23 gunthas and ordinarily if the two lands are of the same quality, the one-fourth share would be equivalent to 2 acres and 15 $\frac{3}{4}$ gunthas. If the contention of the learned counsel for the petitioners were to prevail, then a one-fourth share would have to be carved out of 8 acres and 20 gunthas of Survey No. 17/3. Such a course would be most inappropriate as there will be very small pieces of these lands on partition. On an equitable consideration it is possible, if it can be, to allot the whole field to one sharer and to adjust the shares in the remaining lands. Since the respondents 1 and 2 would be entitled to 2 acres and 15 $\frac{3}{4}$ gunthas, the revenue authorities exercised their discretion properly in allotting the whole of Survey No. 34/1 comprising of 1 acre and 3 gunthas to the respondents 1 and 2. For the remaining 1 acre and 12 $\frac{3}{4}$ gunthas the share of the respondents 1 and 2 would have to be carved out from 8 acres and 20 gunthas of Survey No. 17/3. However while doing so, the qualities of the two lands namely, Survey No. 34/1 and Survey No. 17/3, will have to be taken into consideration and the remaining land to make the one-fourth share of the respondents 1 and 2 will have to be carved out of Survey No. 17/3 having due

regard to the qualities of the two lands. If the petitioners 1 to 3 also want their shares be separated, they may also convey their intention to the Revenue Officer concerned so that their shares in Survey No. 17/3 could also be separated. The Bombay Tenancy Act does not provide for a choice or a right of selection being given to any one of the co-sharers as to which land he should choose. It will be left for the decision of the Revenue Officer to make a just and equitable partition between the different co-sharers. However, the Revenue Officer will take into consideration the convenience of the parties and desirability of having a compact area to each co-sharer.

10. The orders of the Revenue authorities, therefore, are modified to the extent indicated above. In the result, Survey No. 77/1, area 12 acres 10 gunthas will neither be partitioned nor sub-divided, but the petitioners 1 to 3 and respondents 1 and 2 will be shown as co-tenants along with Haribhau, Survey No. 34/1, area 1 acre and 3 gunthas will be wholly allotted jointly to the respondents 1 and 2 towards their share. In Survey No. 17/3 area 8 acres and 20 gunthas, the respondents 1 and 2 will be given additional land if any, to make their one-fourth share along with 1 acre 3 gunthas of Survey No. 17/3, area 8 acres 20 gunthas (excluding the land to be given to the respondents 1 and 2), the petitioners 1, 2 and 3 will be given their separate possession. The respondents 1 and 2 jointly should be immediately put in possession of their respective shares in Survey No. 17/3 after it is partitioned. With these modifications the petition is dismissed, but in the circumstances of the case, I make no order as to costs.

11. Petition dismissed. Order modified.