

(2005) 07 BOM CK 0030

In the Bombay High Court

Case No : Writ Petition No. 1170 of 1989

Sandu Patil since deceased through his LR. Gulab Patil **APPELLANT**

Vs

Gulab Tadvi since deceased by his heir and LRs. Manibai **RESPONDENT**
Gulab Tadvi and Others

Date of Decision : 27-07-2005

Acts Referred:

Constitution of India, 1950 — Article 227
Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 — Section 45(2)
Maharashtra Land Revenue Code, 1966 — Section 149
Maharashtra Restoration of Lands to Scheduled Tribes (Amendment) Act, 1977 — Section 5A
Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 — Section 3, 4, 4(3), 5A, 5A(1)
Maharashtra Restoration of Lands to Scheduled Tribes Rules, 1975 — Rule 3, 3(4), 3(5)

Citation : (2005) 4 ALLMR 811 : (2006) 2 BomCR 799 : (2006) 1 MhLj 396

Hon'ble Judges : A.B. Naik, J

Bench : Single Bench

Advocate : V.J. Dixit, for the Appellant; P.S. Pawar, for respondent Nos. 1B and 2A, M.P. Bhaskar, for respondents No. 1C(v) and V.H. Dighe, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

A.B. Naik, J.—By this writ petition filed under Article 227 of the Constitution of India, the petitioner deceased Sandu through his heirs and legal representatives Gulab Challenging the judgment and order passed by the Additional Commissioner, Nasik Division, Nasik. Present proceeding arises out of the action taken by the Assistant Collector, Jalgaon, Division Jalgaon, under the provisions of Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 (hereinafter referred to as the Act). It was noticed by the Assistant Collector that land Gat No. 71 admeasuring 2 hectares 11 Ares (hereinafter referred to as the land) was sold by the tribal to the non-tribal and therefore, in exercise of power conferred on him by Sub-section (3) of the Act issued a notice to non-tribal under Rule 3

Sub-rule (4) of Maharashtra Restoration of Lands to Scheduled Tribes Rules, 1975 and accordingly, a notice in the prescribed form was issued on 3-12-1975 to the tribal and non-tribal, wherein it was stated that the land so transferred will be restored to the tribal. On receipt of the notice, the parties i.e. tribal and non-tribal appeared before the Collector. On 13-12-1975 the Collector recorded the statement of the tribals namely Gulab (Bhil) and Supadu Dagdu (Bhil), wherein they have stated that the land was of their ownership and they have sold the land to Shri Sandu Dayaram on 27-5-1971 for a consideration of Rs. 12,000/- and the purchaser is in possession of the land and the land is being cultivated by him. In the statement they have stated that they are ready to cultivate the land in case the land is restored to them and they are ready to pay compensation as determined as per law. Thereafter, the enquiry was adjourned and on 22-12-1975 again a statement of the tribals came to be recorded by the Assistant Collector, wherein they have retracted their earlier statement by stating that the statement which was recorded on 13-12-1975 is not acceptable to them. It is contended that they being Muslim by religion and they are not the members of the Scheduled Tribe. It is stated by them that land was sold for Rs. 12,000/- by obtaining necessary permission. Therefore, they stated that they are not ready to take the land back as they have no agricultural implements nor bullocks etc., further they are not in a position to pay the amount and further stated that the land be retained with non-tribal. The tribals also stated before the Assistant Collector, that the statement which was made by them on 13-12-1975 was under misunderstanding, therefore, they stated that no pressure was brought on them nor any consideration is paid for that to make subsequent statement. On that day i.e. 22-12-1975 the statement of non-tribal was also recorded, where he stated that as the tribals have refused to take the land for the reasons stated in their statement and therefore, he stated that the land may not be restored. On the basis of these statements of the parties the Assistant Collector Jalgaon, dropped the proceeding as the tribals are not ready to take the land and accordingly, by the order dated 31-12-1975 the Assistant Collector, Jalgaon, dropped the proceeding.

2. After 31-12-1975 nothing has happened and the non-tribal transferee continued and enjoyed the possession of the land as before. One Abbas Gulab Tadvī claiming to be the heir of Gulab Tadvī filed an application before the Assistant Collector, Jalgaon claiming that the possession be handed over, as the transferee belong to scheduled tribe. It appears that on the basis of this application of which the copy was forwarded to the Hon"ble Minister, the authorities took cognizance and initiated the proceeding. On the basis of the application filed by Abbas Tadvī, Collector Jalgaon on 5-2-1982 requested the Commissioner to initiate suo-motu enquiry u/s 7. In that communication, the Collector stated that the order of dropping the proceeding was passed by the Asstt. Collector on 31-12-1975 and the application was filed by Shri Abbas on 10-11-1981 before the Hon"ble Minister. As the order was passed on 31-3-1975, and to pass order u/s 5A as amended in 1977 was required to be taken to initiate

the proceeding and he requested the Commissioner to seek appropriate permission from the State Government u/s 7 proviso of the Act. On receipt of the communication from Collector, Jalgaon, the Commissioner moved the matter to the Government seeking necessary permission u/s 7 proviso. The Commissioner has apprised the Secretary, Revenue and Forest Department, Mantralaya, Mumbai, that the Collector, Jalgaon, has requested him to revise the order dated 31-12-1975 but as three years period is over, suo motu proceeding to revise the order cannot be taken unless the State Government grants the permission, therefore, he requested the Secretary to give special permission. On receipt of this communication from the Commissioner, the State Government by its communication dated 10-5-1982 accorded sanction to revise the order dated 31-12-1975. On receipt of the sanction from the Government vide letter dated 10-5-1982, a notice came to be issued by the Commissioner on 4-11-1988 calling upon the parties to appear before him on 12-12-1988. In the notice the cause for invoking suo motu powers u/s 7 is given as the Assistant Collector, Jalgaon has passed an order dropping the proceeding on the ground that the tribals are not ready to take back the lands which is not in consonance with the provisions of Section 5A of the Act. Thus the reason for dropping proceedings are not just and proper, and as per provisions of the Act, the land should have been taken by the Government which was not done now the tribal is seeking possession of the land, the order dated 31-12-1975 is to be revised.

3. Pursuant to the notice from the Commissioner the parties appeared before him. The non-tribal filed an application on 22-12-1988 and sought time to file reply. Accordingly, the Commissioner adjourned the matter and kept further hearing on 16-1-1989. On 16-1-1989 son of non-tribal filed an application seeking time to file reply. On 31-1-1989 the statement of the tribal (i.e. applicant Abbas) was recorded wherein he has expressed his desire to purchase the land. He also produced documentary evidence to show that they belong to Tadvi Bhil a Scheduled Tribe. The documents which were produced on record are the extract of birth and death register issued by the Tahsildar Jalgaon, wherein an entry is made on 4-12-1916 in relation to a birth of a child in the family of Dagdu Supadu, wherein the caste is mentioned as "Tadvi". Another document shows that in the year 1938 there was a birth in the family and the entry in extract of register indicates that caste "Tadvi" is mentioned. The non-tribal filed an application on 31-1-1989 informing Commissioner that original non-tribal Sandu has expired in the meantime and an application for substitution and bringing heirs of deceased non-tribal is required to be filed and for that purpose time was sought. Accordingly, the time was granted. Shri Gulab heir of deceased Supadu filed written arguments, wherein it is contended that once the proceedings are dropped, there is no provision to restore the proceeding as tribals have recorded the statement and they stated that they did not want to purchase the land and they have failed to give undertaking under Sub-section (3) of the Act. It was contended that they are not tribals but they are Muslims. It was contended that as once the tribals have refused to take the land, there is no provision to file

fresh application for claiming the same land back. The heir also challenged the locus-standi of Shri Abbas who filed the said application. It was contended that Section 5A was inserted in 1977 while the case was decided in 1975 and no action u/s 5A can be taken as Section 5A was not on the statute book. It is contended that the Commissioner has no jurisdiction to initiate the proceeding after lapse of 13 years, thus, it was prayed for dropping of the proceeding. One aspect has to be recorded before going to the order that in the lifetime of Sandu Dayaram by making an application to revenue authorities requesting them to mutate the land in favour of his grand son Subhash as he has transferred the land in favour of his grand son Subhash. On the basis of that application, mutation entry came to be sanctioned showing that now the land is in possession of Gulab Patil.

4. On the basis of the written submissions filed by the heirs of the non-tribal and the application of the tribal dated 1-2-1989 the Commissioner passed an order setting aside the order dated 31-12-1975 passed by the Assistant Collector, Jalgaon and directed that the land should be restored to the tribal transferor after obtaining necessary undertaking. Accordingly, the order was communicated to the parties.

5. Feeling aggrieved by the order passed by the Additional Commissioner, Nasik Division, Nasik in Adiwasi Case No. 4/1985 decided on 20-3-1989, the petitioner has approached this Court by filing this writ petition.

6. The writ petition was heard by this Court for motion hearing on 11-5-1989 and this Court pleased to pass order - notice of admission and granted interim relief. After notice the petition was heard on 20-8-1989 and this Court issued Rule nisi and directed interim relief to continue. During pendency of this petition, Gulab Patil who was shown as minor has attained majority and he filed an application for discharge of his guardian. Accordingly, by the order dated 27-2-1998 in C. A. No. 61/95 this Court discharged the guardian and permitted Gulab to proceed with the petition. Civil Application for substitution of heirs of deceased respondent came to be filed vide Civil Application No. 127/91 which was allowed by this Court on 9-2-2002. Accordingly, the heirs of deceased Supadu are brought on record and now they are prosecuting this petition. Though, the rule nisi was granted in the year 1989, no returns were filed either by the tribal or by the Additional Commissioner, Nasik Division, Nasik who is respondent No. 3 in the petition.

7. Shri Dixit, learned advocate appearing for the petitioner submitted before me that the proceedings initiated by Commissioner are without jurisdiction as power of suo-motu revision has been exercised belatedly. He submitted that the order of dropping the proceeding was passed on 31-12-1975. Till 1981, no action was taken either by the parties under the Act nor the tribals have challenged the order of dropping the proceeding by filing an appeal u/s 6 of the Act. Shri Dixit, contended that in the year 1981 an application was directly filed before the Hon"ble Minister for Revenue and Forest Department and copy of that application

was forwarded to the Collector and thereafter, the Collector moved the Commissioner with a request to initiate the proceeding of revision u/s 7. Shri Dixit, therefore, submitted though the sanction was granted on 10-5-1982, for six years thereafter, notice was not issued. Therefore, Shri Dixit, submitted that exercise of power by the Commissioner u/s 7 proviso is without jurisdiction and being nullity. Shri Dixit, further submitted that assuming that the notice was issued in time but the notice which is served on the petitioner was not as per the Rules. He submitted in the notice it is stated that the action u/s 5A was required to be taken. Shri Dixit, therefore, submitted that by issuing such a notice prejudice is caused to the petitioner. Shri Dixit, further submitted that notice so issued indicates that the land is to be restored to the tribal. He submitted that once the proceedings are dropped on the statement made by the tribal to the effect that the tribal was unwilling to purchase the land, therefore, he submitted that as the law stood then, the Collector has no authority to initiate the proceeding as there is no power to restore the land to the tribals who expressed their unwillingness to purchase the land. Shri Dixit, therefore, submitted that even assuming that Section 5A was deemed to have been inserted in the Act since inception, the tribal who declined to accept the land is not entitled to receive the land. Shri Dixit, submitted that under the provisions of the Act the Commissioner has no jurisdiction to order restoration of land to the tribals who have refused to accept the land at the initial stage. Therefore, he submitted that the order being thus per se illegal.

8. Shri Dixit, further submitted that deceased Sandu Dayaram has transferred the land in favour of Gulab and he has intimated the fact of transfer to the revenue authorities as required u/s 149 of the Maharashtra Land Revenue Code and acting upon that application of Sandu, mutation entry No. 1164 is taken by the orders of Tahsildar dated 15-1-1988. Therefore, Shri Dixit, submitted that under these circumstances the provisions of Section 3 of the Act are not attracted as is contended that the said transfer cannot be termed as transfer within the meaning of Sections 3 and 4 of the Act. He therefore, submitted that without looking to the aspects of the matter, the Commissioner has passed the impugned order. This contention of Shri Dixit, learned advocate is without any substance in view of the law declared by the Apex Court in Lingappa Pochanna Appelwar Vs. State of Maharashtra and Another, . Thus, this contention is rejected outright. Shri Dixit, further submitted that the transferor has not produced any certificate issued by the competent authority certifying that the transfer belong to Scheduled Tribe community. He submitted in absence of such evidence it was not proper on the part of the Commissioner to come to the conclusion that the transferors are Scheduled Tribe.

9. Per contra, Shri Bhaskar, learned Counsel appearing for the tribals submitted that the tribals have made a statement initially on 13-12-1975, whereby they expressed their willingness to take possession of the land but subsequently a statement of the tribals was recorded thereby, they have expressed that they are not ready to restore the land. He submitted that the transferors being Scheduled

Tribe, they are not aware of the niceties of the law. Therefore, in the year 1981 they applied to the authorities under the Act expressing their desire to have the land and they also desired to cultivate the land personally. On these circumstances, Shri Bhaskar, learned advocate submitted that the learned Commissioner was justified in allowing the revision application.

10. Shri Bhaskar, learned advocate further submitted that the Act is meant for the benefit of the tribal and considering this aspect of the matter, the learned Commissioner was justified in directing the land to be restored to the tribals.

11. Shri Dighe, learned A.G.P. appearing for the respondent No. 3 has submitted that the Commissioner has exercised the power of revision u/s 7 only after the Government accorded sanction. He submitted that no doubt it is true that on 31-12-1975 the Collector passed an order closing proceeding on the ground that the tribals have refused to accept the land. Thereafter, the tribals approached the State Government making grievance against the order passed by the Assistant Collector on 31-12-1975 and noticing this aspect of the matter the Government accorded sanction to initiate proceeding u/s 7 proviso of the Act. However, the learned A.G.P. could not assign any satisfactory answer as to why a period of 6 years was taken for issuance of notice to the parties when the permission was granted on 10-5-1982. Shri Dighe, therefore, submitted that the order passed by the Commissioner required to be upheld.

12. Having considered the respective contentions advanced before me by counsel and on perusing the record which is produced before this Court following aspects emerged for which there is no dispute. On commencement of the Act, it was noticed by the Collector that the tribals have transferred the land to non-tribal and according to the Assistant Collector the transaction is covered by provisions of Sub-section (3) of Section 4 of the Act. Accordingly, a notice in prescribed form was issued to the parties. Before issuance of such notice the revenue record of the land was called by the Assistant Collector. From the revenue record and in particular the mutation Entry No. 1110 sanctioned by the Tahsildar on 1st October, 1971 is indicative of the fact that the land S. No. 71 was transferred under registered sale deed dated 27-5-1971. Both the parties though appeared before the Assistant Collector, have not produced the sale deed. The Assistant Collector conducted enquiry as required by rules. Accordingly, by following the procedure as contemplated under Rule 3 he called the parties and as per Sub-rule (5) of Rule 3 a joint statement of the tribal was recorded on 13-12-1975. From the record produced before this Court it appears that the cross-examination of tribals was incomplete on that day. In the statement recorded on 13-12-1975 the tribals have accepted that they are ready to cultivate the land personally. As from the record it appears that the cross-examination was incomplete. Thereafter, again on 22-12-1975 the tribals filed an application expressing their inclination to purchase the land. This application was verified presence of the Assistant Collector. On the same day, statement of non-tribal Sandu was also recorded and accordingly on 31-12-1975 the Assistant Collector

dropped the proceedings. Upto this there is no dispute. Shri Bhaskar, learned Counsel for the tribals was not in a position to make any statement whether the tribals have challenged the order dated 31-12-1975 by filing an appeal u/s 6 of the Act.

13. In the meantime, the State Legislature have amended the Act and by Act No. 30/77 Section 5A came to be inserted. Section 6 of the Act No. 30/77 reads thus :

Section 6 - Insertion of Section 5A in Maharashtra (XIV of 1975) after Section 5 of Principal Act, the following section shall be, and shall be deemed always to have been inserted, namely

(underline by me)

Section 5A deals with the situation where the lands which cannot be restored to the tribals are to be vested in the Government. Section further makes a provision that the land so vested in the Government then has to be granted to other tribal subject to certain conditions. As I stated earlier in 1981 an application was made to the State Government and the copy of which was sent to the Assistant Collector. The Collector initiated the proceeding by making a request to the Commissioner to exercise suo motu power u/s 7 of the Act. Accordingly, the Government has accorded sanction subsequently. Thereafter, a notice was issued to the tribal for initiation of suo motu proceeding u/s 7(a). The reason assigned for exercising power was to the effect that in view of non-inclination of the tribal to accept the land, the lands will be taken by the Government u/s 5A of the Act. The grievance which is made by Shri Dixit, learned advocate in the petition that by the notice dated 4th November, 1988 an impression was given that the Commissioner is exercising power u/s 7 but the reason for exercise of the power u/s 5A of the Act, according to Shri Dixit, cannot be a ground to review the order passed on 31-12-1975. The grievance of Dixit, is justifiable. When the Assistant Collector, dropped the proceeding on 31-12-1975 on the ground that the non-tribal refused to accept the land. The only remedy which was available to the tribals to challenge the order by filing appeal u/s 6. But in my opinion exercising of revisional power for the grounds stated in the application thus not available. More so, the Commissioner has not demonstrated either in the order or by filing any affidavit as to why immediate action on getting sanction from the Government is not taken in the matter. Therefore, in my judgment, issuance of notice and the subsequent orders therefore, cannot be accepted as the learned Commissioner has exercised his power beyond the statutory period. Section 7 proviso which reads thus :

Provided that no such record shall be called for after the expiry of three years from, the date of such order except in cases where directions are issued by the State Government; and no order of the collector shall be modified, annulled or reversed unless opportunity has been given to the interested parties to appear and be heard.

From the abovesaid provision it is clear that the Commissioner on his own if he decides to exercise the power suo motu has to call for the record within three years from the date of the order. In the present case admittedly, no such record was called within the specified period but the authorities under the Act started moving only after the application was submitted by the son of the tribal and thereafter, the collector requested the Commissioner to initiate the proceeding and later on a request was made to the Government to seek directions and that directions accordingly were issued in the year 1982, in my judgment therefore, the Commissioner should have exercised the power to revise the order within reasonable time. On the facts of this case it cannot be accepted that issuance of notice after 6/7 years from the date of direction from the Government cannot be called as reasonable one and also it runs contrary to law declared by the Full Bench decision of this Court in Manohar Ramchandra Manapure and Ors. v. State of Maharashtra and Anr. reported in 1989 Mh.L.J. 1011. Though this case arose out of proceeding taken by the Commissioner u/s 45(2) of Maharashtra Agricultural Lands (Ceiling on Holdings) Act, the principle stated therein can be made applicable in case at hand. Therefore, in my judgment, exercising of power u/s 7 by the Commissioner cannot be considered to be valid and proper.

14. On arriving at the above conclusion really this petition could have been allowed but in view of the insertion of Section 5A of the Act, the question that arises before me whether any relief can be granted to the non-tribal i.e. the petitioner. It is true that when the order was passed by the Assistant Collector dropping the proceeding, provisions like Section 5A was not on the statute book but those were inserted by Act No. 30/77 giving retrospective effect to that section. Therefore, Section 5A has to be construed that it was in the Principal Act when the Act was enacted. To understand why Section 5A was inserted and what was necessity for the legislature to enact Act No. 30/77, it will be appropriate to refer to the statement of objects and reasons for passing the Act. For my purpose para 4 Clause (6) will be relevant.

4. Clause (6).-- It was noticed that in some cases the land which is liable to be restored to a Tribal-transferor u/s 3 of Mah. XIV of 1975 could not be restored to him due to his failure to give an undertaking to cultivate the land personally and to pay the amount payable by him as determined by the Collector and consequently the proceedings for restoration had to be dropped. As the object of the Act is to restore the land to the tribal, so that he may earn his livelihood by cultivating the same personally, it is considered expedient to amend the Act to provide that in such cases the land should be acquired and vest in the State Government. Provision has been made for payment by the State Government to the non-tribal transferee of an amount equal to 48 times the assessment of the land plus the value of the improvements. After the land vests in the State Government, it is proposed that it shall be granted by the Collector to any other needy tribal residing in the village, who undertakes to cultivate the land personally and whose total holding does not exceed an economic holding. Restrictions have also been proposed on the transfer of lands granted to such

other tribal under these provisions and any such transfer shall be only with the previous sanction of the Collector.

When the tribals refused to receive the land, the provisions of Section 5A will come into play and the land will have to be taken in possession by the Government and stand vested in the Government. Therefore, at any rate the non-tribal or for that purpose the tribals or their heirs who has declined to receive the land initially in terms of provisions of Section 5A Sub-section (3), the land has to be given to any other tribal residing in the village as per the Rules framed by the Government. Therefore, in my view, contention of Shri Bhaskar, cannot be accepted as he contended that the original tribals now decided to have the land and they are ready to cultivate the land personally. If I accept this contention, then I am giving go by to the provisions of Sub-section (3) of Section 5A of the Act. Therefore, in my judgment, the land which is in possession of non-tribal at first instance required to be acquired by the Government and then further procedure allowing compensation for improvement etc. made by the non-tribal has to be followed and paid to him. Therefore, in my judgment, to the extent the possession of the non-tribal is protected till enquiry contemplated u/s 5A read with Rules that might have been framed by the State Government, the possession of the non-tribal cannot be disturbed. Similarly, the land cannot be allotted to the tribal who have refused to receive possession initially. No provision was pointed out before this Court, where the tribal can withdraw the statement made earlier. Even the tribals have not filed application immediately making any grievance about their statement dated 22-12-1975 but they have raised grievance in the year 1981 i.e. six years after the order was passed. Therefore, in my judgment, considering these facts in right perspective, the tribals are not entitled to receive the land but the land has to be taken by the Government as per Section 5A(1) of the Act and the land will be available to the State Government or for that purpose the Collector to allot it to any other tribal residing in the said village in terms of Sub-section (3) of Section 5A. To that extent the order passed by the Commissioner, whereby the Commissioner has directed the land should be restored to the tribal is set aside. With this modification, the petition stands dismissed. Rule discharged. No order as to costs.