

(2010) 03 BOM CK 0048

In the Bombay High Court

Case No : First Appeal No. 284 of 2003 and 115 of 2004

Smt. Kalyan Madgaocar

APPELLANT

Vs

Shri Dattaram Shiva Harmalkar (Since deceased represented by his legal heirs Smt. Sitabai Dattaram Harmalkar and Others)
 Shri Dattaram Shiva Harmalkar (Since deceased through his L.Rs. Smt. Sitabai Dattaram Harmalkar and Others) Vs Vivian Niwas Charitable Society, Smt. Kalyan Madgaonkar and Smt. Sidhali Shivanand Korgaonkar

RESPONDENT

Date of Decision : 10-03-2010

Acts Referred:

Goa, Daman and Diu Agricultural Tenancy Act, 1964 — Section 320, 32M, 58(2)
Land Acquisition Act, 1894 — Section 30

Citation : (2010) 03 BOM CK 0048

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : M.S. Usgaonkar and Sudin M.S. Usgaonkar, in First Appeal No. 284 of 2003 and S.G. Bhobe, in First Appeal No. 115 of 2004, for the Appellant; S.G. Bhobe in First Appeal No. 284 of 2003 and M.S. Usgaonkar and Sudin M.S. Usgaonkar in First Appeal No. 115 of 2004, for the Respondent

Judgement

R.M. Savant, J.—The above First Appeals take exception to the Judgment and Award of the Reference Court dated 28.7.2003 in Land Acquisition Case No. 90/1994. By the said Judgment and Award the said reference u/s 30 was partly allowed. The compensation awarded by the Land Acquisition Officer in respect of the acquired lands was directed to be apportioned equally between the Applicant on one side and the Respondent Nos. 1 and 3 on the other in the proportion of 50 : 50.

2. The subject matter of the acquisition in question was land bearing survey No. 249/2 Part in an area of 15075 square metres and 250 Part in an area of 5 square metres for the purpose of construction of left bank main canal for Tillari Irrigation Project. In view of the rival claims between the parties, the dispute

was referred to the District Court u/s 30 of the Land Acquisition Act for apportionment.

3. The said reference came to be numbered as LAC No. 94/2004. It was the case of the Respondent i.e. Appellant in First Appeal No. 284/03 that the Applicant i.e. the Respondent No. 1 in the companion Appeal No. 115 of 2004 is the owner of the property 249/2 and 250/0 situated at Siolilm of which she was the tenant and paying rent to the Applicant. The Respondent Nos. 2 and 4 in the said reference also claimed to be tenants but their cases are not relevant for the purpose of the instant First Appeals. The Appellant in First Appeal No. 115/2004 i.e. Dattaram Shiva Harmalkar filed his written statement in the said reference application. It is the case of the said Dattaram Shiva Harmalkar in the said written statement that he was co-tenant of the property in question and was entitled to 1/4th share in the entire compensation. The Respondent No. 1 i.e. Smt. Kalyan Madgaonkar filed a detailed written statement in the said application. She has averred in para 10 of the written statement that her claim that she is tenant of the acquired land is also supported by the owner i.e. the Applicant Vivian Niwas Charitable Society. In para 7 of the written statement she has claimed that the compensation awarded be apportioned in the ratio 50% to the Applicant Vivian Niwas Charitable Society and 50% to her on the basis that she is a tenant and the claim put forth by the other Respondents i.e. Respondent Nos. 2 and 3 should be dismissed.

4. The parties went to trial in the said reference. On behalf of the Applicant's society it was deposed by AW1 i.e. Sister Lidvina Martina that the father of the Respondent No. 1 was cultivating the land as tenant during his life time and the remaining portion i.e. unacquired land was also cultivated by the late father of the Respondent No. 1. The said deponent has admitted that the Respondent No. 1 is the sister of Dattaram Shiva Harmalkar.

5. On the basis of the said evidence, the Reference Court though having observed that the case of the Respondent No. 1 that the compensation is to be apportioned in the ratio 50:50 between the Applicant and the Respondent No. 1 has gone un rebutted, but considering that the Respondent No. 1 was claiming to be a tenant through her late father and since Respondent No. 3 Dattaram Shiva Harmalkar being her brother would be equally entitled for the share in the compensation, held that the compensation would have to be apportioned between the Applicant in one part and the Respondent Nos. 1 and 3 in other part i.e. between Vivian Niwas Charitable Society, Smt. Kalyan Madgaonkar and Dattaram Shiva Harmalkar. It is aggrieved by the said Award of the Reference Court apportioning the compensation in the ratio as mentioned hereinabove that the instant First Appeals have been filed.

6. In so far as First Appeal No. 284/03 is concerned, the sum and substance of the case of the Appellant i.e. Smt. Kalyan Madgaonkar in the said First Appeal is that she has produced the documents in support of her possession and cultivation. She therefore alone ought to have been held by the Reference Court

to be entitled for 50% of the compensation which was to be awarded on account of the tenancy. The said case of the Appellant is culled out in ground Nos. II, III, VI and VII of the memo of Appeal. The Applicant therefore seeks to claim exclusive tenancy to the acquired land in question.

7. In so far as First Appeal No. 115/2004 is concerned, it is the case of the Appellant i.e. Dattaram Harmalkar in the said First Appeal that the agricultural tenant being a deemed purchaser is entitled to the entire compensation awarded excluding the purchase price which goes to the original owner. The said ground epitomizes the case of the Appellant in the said First Appeal. The Appellant is therefore claiming the entire compensation on the basis that his father and the father of the said Smt. Kalyan was a deemed purchaser on the appointed date under the tenancy law.

8. I have heard Shri M. S. Usgaonkar, the learned Senior Counsel appearing for the Appellant in First Appeal No. 284/03 and Shri S. Bhobe, the learned Counsel appearing for the Appellant in First Appeal No. 115/2004 and for the Respondents in the cross Appeals.

9. The principal submission made by Shri Usgaonkar was that Dattaram Shiva Harmalkar has not produced any evidence in support of his case that he is cotenant whereas Smt. Kalyan has produced documents evidencing her exclusive possession and therefore she ought to have been exclusively held as entitled to the compensation on account of the tenancy. The learned Senior Counsel Shri Usgoankar submitted that the written statement filed by the said Dattaram Harmalkar beyond claiming that he is cotenant is bereft of any particulars and therefore the Trial Court rightly concluded that the case of Smt. Kalyan has gone un rebutted and therefore has erred in apportioning 50% compensation on account of tenancy between Smt. Kalyan and Dattaram. The learned Counsel in so far as the First Appeal of the said Dattaram is concerned urged that entertaining the said case of the said Dattaram would amount to enlarging the scope of reference.

10. Per contra, it is submitted by Shri Bhobe, the learned Counsel appearing for Dattaram Harmalkar, that since the issue of tenancy had cropped up before the Reference Court, in view of the provisions of the Goa, Daman and Diu Agricultural Tenancy Act, 1976, the Reference Court could not have gone into the said aspect. The learned Counsel drew my attention to the grounds of Appeal filed by Smt. Kalyan and submitted that the grounds of Appeal reflect that Smt. Kalyan was claiming exclusive tenancy. The learned Counsel submitted that in the light of the evidence of the Applicant Vivian Niwas Charitable Society the case of the said Dattaram Harmalkar could not be brushed aside. The learned Counsel sought to buttress his submission that the Reference Court should not have gone into the aspect of tenancy and should have referred the matter to the Mamlatdar for determining the said issue of the tenancy as claimed by Smt. Kalyan, by relying an unreported decision of the Division Bench of this Court in First Appeal No. 17/2002 and First Appeal No. 30/2003 dated 3.5.2005.

Paragraphs 19 and 22 of the said judgment are material and are reproduced hereunder:

19. In our view, the learned reference Court could have been justified in ordering the payment of compensation to the respondent - Benjamin Pereira who had claimed to be a tenant only in case he had produced a valid declaration obtained from the Mamlatdar to the effect that he was a tenant or a certificate of purchase issued by the Mamlatdar. A certificate of purchase is a document which is issued by the Mamlatdar, namely a competent authority under the Tenancy Act and on the basis of the same, one could safely presume that it was given to persons who were tenants in respect of the property which is deemed to have been purchased. This view has been expressed by this Court in more than one decision on which, reliance was placed by Shri Kantak. In the case of Bhagwanrao Sadashiv Gaikwad v. Narhari Jayavant Zagiap 2004(3) IJ SOFT (URC) 83, this Court observed that:

Even though the reference was made to the Tenancy Authority, the Tenancy Authority was bound by its earlier decision which was allowed to attain finality. If those decisions were to prevail and so long as they are not upset by the Court of competent jurisdiction and, if Tenancy Authority was bound by said decisions u/s 320 and Certificate issued u/s 32M in favour of the Petitioner, it would necessarily follow that there is presumption that the Petitioner was tenant in respect of the suit land, and only in that capacity, became deemed purchaser by operation of law owner of the suit land on depositing the purchase price determined by the Tenancy Authority.

22. However, in our view, the learned reference Court could not have considered the other pieces of evidence such as Forms No. I and XIV or the rent receipts or the proceedings of earlier acquisition etc., by way of proof in support of the claim of tenancy because such proof could be given only before the Court which had jurisdiction to declare a person as a tenant or not and not before the Reference Court which had no jurisdiction to decide whether a person was a tenant or not in view of the embargo created by Section 58(2) of the Tenancy Act.

11. In the light of the pronouncement of the Division Bench (supra), the Reference Court could not have considered the evidence produced by Smt. Kalyan Madgaokar in support of her case of tenancy as such evidence could only be produced before the Court which had jurisdiction to declare a person as a tenant and not before the Reference Court which could not do so in view of the embargo postulated in Section 58(2) of the Tenancy Act.

12. A perusal of the judgment of the Reference Court in the instant case ex-facie indicates that the Reference Court had gone into the aspect of the tenancy and considered the evidence produced by Smt. Kalyan in support of her case. In the light of what has been held by the Division Bench in the judgment (supra) the Reference Court was prohibited from doing so in view of the statutory embargo in Section 58(2) of the Tenancy Act. Considering the grounds of Appeal in the

Appeal filed by Smt. Kalyan where she wants to assert her right against her brother Dattaram being a co-tenant, in my view the Reference Court could not have adjudicated upon the said issue and ought to have relegated the matter to the authority prescribed under the Tenancy Act namely the Mamlatdar. Hence, the same course of action as followed by the Division Bench in the judgment (supra) would have to be followed, the above First Appeals would have to be allowed and are accordingly allowed. The impugned judgment and Award of the Reference Court dated 28.7.2003 is set aside and the LAC No. 90/94 is relegated back to the Reference Court for a de novo consideration. In view of the claim raised by Smt. Kalyan, the Reference Court is directed to refer the issue of tenancy to the concerned Mamlatdar. On such issue being referred, the Mamlatdar is directed to decide the issue as expeditiously as possible and not later than one year from the date on which a reference is made by the Reference Court. Needless to say, the order of the Mamlatdar would be subject to further challenges as are available to the parties in law.

13. Appeals allowed.

14. In so far as First Appeal filed by Dattaram Harmalkar is concerned i.e. First Appeal No. 115/2004, in view of the direction as above, in my view there is no warrant to consider the said First Appeal on merits. The Appellants i.e. heirs of Dattaram Harmalkar would be entitled to file an appropriate application in respect of the claim raised in the First Appeal before the Reference Court. The Appellant in First Appeal No. 284/2003 Smt. Kalyan Madgaokar would be entitled to oppose the application on such grounds as are available in law. None of the contentions raised in the said First Appeal are dealt with in the instant order and are kept open for adjudication before the Reference Court. In the light of the above order, the above First Appeals to stand disposed of.