
(1977) 08 BOM CK 0042

In the Bombay High Court

Case No : Spl C. A. No. 230 of 1972 with Spl. C. A. No. 235 of 1972

Trimbak Bhikaji Patil

APPELLANT

Vs

Pundlik Krishnaji and others

RESPONDENT

Date of Decision : 10-08-1977

Acts Referred:

Berar Regulation of Agricultural Leases Act, 1951 — Section 8, 8(1)(c)(f)
Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 132

Citation : (1977) MhLj 817

Hon'ble Judges : B.C. Gadgil, J

Bench : Single Bench

Advocate : M.T. Dharmadhikari, for the Appellant; S.N. Kherdekar, for the Respondent

Final Decision : Allowed

Judgement

B.C. Gadgil, J.—These two writ petitions involve question as to the right of the landlord to terminate the tenancy and obtain possession under the provisions of the Berar Regulation of Agricultural Leases Act, 1951 (hereinafter referred to as the Berar Act) and the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (hereinafter referred to as the Tenancy Act). The dispute is with respect to three pieces of agricultural lands situated at Shioni Armal in Chikhali tahsil. They belonged to Trimbak Bhikaji and his brother Keshao. The petitioner Trimbak has filed an application u/s 8 (1) (c) (f) of the Berar Act for an order of the Revenue Officer to terminate the tenancy in respect of these lands. On 30-4-51 three lands were let out to Pundalik Krishnaji, respondent No. 1 and the allegation of Trimbak was that Pundalik has partitioned and sublet S. No. 67/5 by handing over a part of the property to respondent No. 2 Keshao. Section 8 of the Berar Act (relevant portion) reads as follows:

8(1)- Notwithstanding any agreement, usage, decree or order of a Court of law, the lease of any land held by a protected leases shall not be determinated except under orders of a Revenue Officer made on any of the following grounds,

namely :

(c) he has partitioned the leasehold right;

(f) he has transferred his interest under the lease in contravention of section 7;

With the above mentioned allegation of partition and transfer, Trimbak made an application on 24-9-1955. That application was originally registered and numbered. However, after remand, it was again re-numbered as Rev. Case No. 1/59 (I-B)/55-56. With regard to other two Nos. 102/2 and 104/1, Trimbak alleged that the tenant Pundalik respondent No. 1 has transferred, partitioned and sublet these two lands in favour of Keshao and Zipa (respondents 2 and 3). Trimbak, therefore, filed another application which was 1/59 (4-A)/65-66 (this number was given after the matter was remanded by the appellate authority) for an order for terminating the tenancy with respect to these lands. Under the Berar Act, the applications are required to be made to the Sub-Divisional Officer (S. D. O.). It is not necessary to give details as to how these applications were originally decided and later on remanded for enquiry by the appellate authority. Suffice it to say that both the applications were pending on 30-12-1958 when the Tenancy Act came into force and the Berar Act was repealed. Section 132 of the Bombay Tenancy Act deals as to how a proceeding filed under the Berar Act should be dealt with. Sub-section (2) is concerned with the rights or obligations already acquired or incurred under the Berar Act. For deciding these petitions, the relevant provision in sub-section (3), which reads as follows:

Notwithstanding anything contained in sub-section (2) (a) all proceedings for the termination of the tenancy and ejectment of a tenant or for the recovery or restoration of the possession of the land under the provision;; of the enactments so repealed, pending on the date of the commencement of &h Act before a Revenue Officer or in appeal or revision before any appellate or revising authority shall be deemed to have been instituted and pending before the corresponding authority under this Act and shall be disposed of in accordance with the provisions of this Act.

Thus, these proceedings went to the Naib Tahsildar for being dealt with. The Naib Tahsildar, after holding the enquiry and recording evidence, held that the tenant respondent No. 1 held sub-let the holdings in favour of respondents 2 and 3. The order was passed in favour of the petitioner that the possession of the lands be restored to him. The respondents preferred appeal No. 12/59 (10-B)/67-68. (This appeal was against the decision in Rev. C. No. 1/59 (1-B) and appeal No. 11/59 (10-B) was against the decision in Rev. C.No. 1/59 (1-A), Both these appeals were dismissed on 13-2-1969. The respondents took the matters to the Maharashtra Revenue Tribunal (M. R. T.) in revision. The revisions were Ten-A-368/69 and Ten-A-369/69. The M. R. T. allowed the revisions and dismissed the applications filed by the landlord Trimbak. This dismissal was principally on the ground that the applications filed by Trimbak were bad as he had not added his brother Keshao as a party to the proceedings. There is also an observation

that there was a dispute as regards the validity of the lease-deed dated 30-4-1951. It appears that at the stage of the arguments a contention was raised that the said lease-deed was a forgery and the M. R. T. has observed that it was necessary to find out as to whether the lease-deed dated 30-4-1951 was genuine or not. Of course, the only ground on which the revision applications have been allowed is that the proceedings were bad for not joining Keshao as a party. These orders of the M. R. T. are being challenged in the present writ petitions.

2. The orders were passed by the M. R. T. on 25-3-1970 and the writ petitions have been filed on 4-8-1971, i.e. after about one year and four months. Mr. Kherdekar, for the respondents raised a preliminary objection that the writ petitions should not be entertained and decided on account of this delay and laches on the part of the petitioner. This argument was considered for the first time on 24-1-1977 when the matter was heard by Mr. Justice Masodkar. On that day an order was passed that the petitioner should explain the delay in filing the petitions. Thereafter the petitioner's advocate Mr. V. R. Manohar filed his own affidavit in both the applications. In those affidavits he has stated that he was engaged by Trimbak Bhikaji for arguing the matters before the M. R. T. and that after the M. R. T. decided the revisions, the petitioner had instructed him (Mr. Manohar) to file writ petitions in the High Court challenging the validity of the matters. Mr. Manohar has also stated in the affidavit that the papers in his office remained unattended due to oversight and pressure of work and for this reason the filing of the petitions was delayed. There is no counter-affidavit filed on behalf the respondents challenging this statement. The effect of delay in filing a writ petition has been considered by the Supreme Court in *Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others*, .

The relevant head note is as follows:

The rule which says that a Court may not enquire into belated or stale claims is not a rule of law but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay the Court must necessarily refuse to entertain the petition. The question is one of discretion to be followed on the facts of each case.

3. Thus it will not be open for the respondents to contend that these petitions should be dismissed simply because they are filed late. This is more so when the petitioner's advocate Mr. Manohar has filed an affidavit explaining therein the reason for not filing the writ petitions diligently. On account of the oversight and pressure of work of the advocate the delay has occurred. In these peculiar circumstances, I do not think that the petitions should be dismissed simply because they are filed late.

4. A new contention has been urged for the first time in this Court on behalf of the respondents. The contention is that the two applications filed under the Berar Act cannot be continued under the Bombay Tenancy Act, though section 132 (3)

thereof makes a specific provision in that respect. Section 132 has repealed a number of Acts including the Berar Act. Sub-section (2) keeps in tact the rights and obligations already acquired or incurred. The question as to whether by making an application u/s 8 of the Berar Act a person can be said to have acquired a right has been considered by the Full Bench, of this Court in Smt. Joharabi v. Member, Maharashtra Revenue Tribunal 1971 Mh. L J 818. Before the Full Bench the question was as to whether a notice given u/s 9 (1) of the Berar Act terminates the tenancy. That section lays down that notwithstanding contained in section 8, the landlord may terminate the lease by giving a requisite notice if the landlord requires the land for cultivating them personally. However, section 8 also says that a tenancy with respect to which a notice u/s 9 has been given cannot be terminated except under the orders of the Revenue Officer. These two provisions have been considered by the Full Bench and the relevant head note is as follows:

A notice simplicities u/s 9 (J) of the Berar Regulation of Agricultural Leases Act (24 of 1951), by itself does not terminate the lease of the tenant. For the effective termination of the lease, a further order u/s 8 (1) (g) is necessary.

Where the landlord has served a notice u/s 9 (1), Berar Regulation of Agricultural Leases Act no order of termination had been obtained, no right accrues to the landlord and on the coming into force of the Bombay Tenancy and Agricultural Lands (V. R.) Act, he has to comply with the provisions of sub-sections (3), (4) of section 38 of that Act.

There is no dispute that the Full Bench has held that a proceeding filed u/s 8 has to be continued as contemplated by section 132 (3). These two applications, that were filed by Trimbak u/s 8, have been rightly continued under the provisions of section 132 (3). The main contention of Mr. Kherdekar, however, is that the continuance of such proceedings under the new Act would be impossible inasmuch as there would not be any compliance of the provisions of section 19 of the new Act. That section lays down that a tenancy shall not be terminated unless one of the contingencies mentioned therein is available. The relevant clause is (d), which says that there must be subletting or assignment of the land which would enable the landlord to terminate the tenancy. Section 19 also lays down that the tenancy cannot be terminated unless the landlord has given three months' notice in writing. In the present case, proceedings have been tiled u/s 8 of the Berar Act, which did not require giving of any notice. In spite of this position, Mr. Kherdekar contended that a proceeding u/s 8 of the Berar Act must comply with all the requirements of section 19 of the Bombay Tenancy Act if at all that proceeding is to be continued as contemplated by section 132 (3). Under the Berar Act, a mere application for an order of termination of tenancy was sufficient. But under the Bombay Tenancy Act, there should be a termination of tenancy by a notice and thereafter an application for possession u/s 36. The necessity of a notice u/s 19, even in a case where a proceeding has already been started u/s 8 of the Berar Act, is urged on the basis of section 132 (3). According

to the section, pending proceedings under the old Act shall be disposed of in accordance with the provisions of the Bombay Tenancy Act, and it was, therefore, urged that the proceedings under the old Act will have to be disposed of after taking into consideration all the provisions of the Bombay Tenancy Act. The reply to this argument is given by Mr. Dharmadhikari. According to him, the construction to be put on section 132 (3) by Mr. Kherdekar should not be accepted, and I think that there is much substance in this respect.

5. For taking action against the tenant, under the Bombay Tenancy Act, the landlord has to give a notice u/s 19 and then file an application u/s 36. Thus, giving of a notice is a condition precedent for filing an application. But there was no such condition precedent for making an application u/s 8 of the Berar Act. A question was posed by Mr. Dharmadhikari as to how the petitioner would comply with the provisions of section 19 of the Bombay Tenancy Act, so far as it relates to the proceedings pending under the Berar Act. According to him, the proceeding has already been filed under the Berar Act and consequently there could not be any notice which is a condition precedent for filing an application u/s 36. One could not give any notice u/s 19 of the Tenancy Act. This is obvious as the Tenancy Act, 1958, was not at all in existence in 1955. It would, therefore, mean that a condition of giving notice under the Bombay Tenancy Act cannot be complied with even if a landlord intends to comply with it, particularly with respect to a proceeding pending u/s 8 of the Berar Act, what could happen of such condition is considered by the Supreme Court in *Cochin State Power and Light Corporation Ltd. Vs. State of Kerala*, . In that case, the question was, as to whether the requisite notice of 18 months in respect of the option of purchase of the electricity supply concern is considered. The relevant note reads as follows:

Sub-section (1) of section 6 expressly vests in the State Electricity Board the option of purchase on the expiry of the relevant period specified in the licence. Under sub-section (2) of section 6, the State Government would be vested with the option only where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking. The effect of sub-section (4) read with sub-section (2) of section 6 is that failure of the Board to give the notice prescribed by sub-section (4), the option vested in the Board under sub-section (1) of section 6 was liable to be divested. Sub-section (4) of section 6 imposed upon the Board the duty of giving after the coming into force of section 6 a notice in writing of its intention to exercise the option at least 18 months before the expiry of the relevant period. Section. 6 came into force on September 5, 1959. Where the relevant period expired on December 3, 1960, the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of December 2, 1960 was impossible from the very commencement of section 6. The performance of this impossible duty must be excused in accordance with the maxim, *lex non cogit ad impossibilia* (the law does not compel the doing of impossibilities), and sub-section (4) of section 6 must be construed as not being applicable to a case where compliance with it is impossible. Under the circumstances, it must be held that the State Electricity

Board was not required to give the notice under sub-section (4) of section 6 in respect of its option of purchase. It must follow that the Board could not be deemed to have elected not to purchase the undertaking under sub-section (4) of section 6.

6. As a matter of fact, the Supreme Court has considered in express terms the question of a notice under the new Act with respect to a proceeding that was pending under the Berar Regulation of Agricultural Lands Act. This matter arose before the Supreme Court in *Ramchandra v. Tukaram*. It was the case of an application u/s 9 of the Berar Act for an order for terminating the tenancy on the ground that the land was required by the landlord for personal cultivation. Necessary orders were passed u/s 8. In the meantime the Berar Act was repealed and the Bombay Tenancy Act came into force. The landlord filed an application for getting possession of the land in pursuance of that order. The Naib Tahsildar dismissed the application on the ground that the landlord has to comply with the requirements of section 38 of the new Tenancy Act. This decision was confirmed in appeal by the Sub-Divisional Officer and also by the Revenue Tribunal. The matter came up before this Court in a writ petition. This Court set aside the orders of the revenue authorities and remanded the case for passing appropriate orders. It is this order that was challenged before the Supreme Court. It is true that there an order u/s 8 of the Berar Act was already passed and only a proceeding u/s 19 for ejectment was later on filed. It was contended before the Supreme Court that as the said application (for possession) was to be continued under the Bombay Tenancy Act, it was necessary for the landlord to comply with the various provisions of section 38. It this section which prescribes certain limitations on the rights of the landlord to obtain possession for personal cultivation. That section says that the landlord must give a notice terminating the tenancy on or before 15th February 1961 and must apply for possession u/s 36 on or before 31-3-1961. Sub sections (3) and (4) lay down as to how much portion of the holding can be given in possession of the landlord. It depends upon the extent of the holding already possessed by the landlord. Similarly, the landlord has to prove that the income from the disputed land would be the principal source of income of his maintenance. Sub-section (4) says that possession shall not be delivered in such a manner which will result in leaving with the tenant less than half the area of the leased land. The following are the relevant observations as to the scope of section 132 (3):

The exception made by sub-section (3) of section 132 in respect of proceedings for termination of the tenancy and ejectment of a tenant which are pending on the date or the commencement of the Tenancy Act is limited in its content. Proceedings which are pending are to be deemed to have been instituted and pending before the corresponding authority under the Act and must be disposed of in accordance with the provisions of the Tenancy Act. By the use of the expression ""shall be disposed of in accordance with the provisions of this Act"" apparently the Legislature intended to attract the procedural provisions of the Tenancy Act, and not the conditions precedent to the institution of fresh

proceeding....

The High Court was therefore also right in observing :

The Notice referred to in sub-section (1) of section 38 could not obviously have been given in respect of proceedings which were pending or which are deemed to have been pending on the date of the commencement of this Act. It does not also appear that it was the intention of the Legislature that such proceedings should be kept pending for a further period until a fresh notice as required by sub-section (1) of section 38 had been given for same reasons, the proviso to sub-section (2) of section 36 will not apply in such cases.

7. The same question has been considered by the Full Bench in Smt. Johrabi's case cited supra, in the following words: "That appeal no doubt could be continued and heard as an appeal under the new Tenancy Act by virtue of section 132 (3), but pending that appeal there was no right whatsoever which had accrued or arisen in favour of the "landlord". Therefore, the provisions of sections 36 and 38 of the new Tenancy Act would become applicable to the "landlord". Of course, the "landlord" need not give a fresh notice as was held in the Full Bench case as also in the Supreme Court decision, but that she had to fulfil the additional conditions laid down in sub-sections (3) and (4) of section 38, there can be no doubt.

8. The net result is that a proceeding pending u/s 8 has to be continued u/s 132 (3) of the Bombay Tenancy Act, but that would not necessarily mean that all the conditions precedent that must be in existence for a proceeding under the Bombay Tenancy Act must be available in a pending proceeding u/s 8 of the Berar Act. It has been rightly under on behalf of the petitioner that a condition precedent of giving notice u/s 19 of the Bombay Tenancy Act cannot by any stretch of imagination be held applicable to a proceeding u/s 8 of the Berar Act, which was already pending when the Bombay Tenancy Act came into force.

9. Mr. Kherdekar, however, relied upon the decision of Mr. Justice Padhye in Special Civil Application No. 420 of 1965. decided on 19-9-1966. It was a case originally started u/s 8 of the Berar Act for terminating the tenancy on the ground of default. That proceeding was pending when the Bombay Tenancy Act came into force and the orders passed in that proceeding were being challenged in the said above petition. Therein it has been held that the provisions of section 30 of the Bombay Tenancy Act would be applicable to the pending proceeding. Under that section, the Tenancy authority is entitled to give relief against the termination of tenancy for non-payment of rent. However, sub-section (2) says that no such relief shall be granted if the tenant has failed for any three years to pay rent and landlord has given intimation to the tenant to that effect within a period of three months on each default. In view of these peculiar facts, it is laid down that the landlord could not get an order for termination and further order for possession unless the requirements of the provisions of section 19 at the Bombay Tenancy Act are fulfilled. The following are the relevant observations :

The proceeding which are already initiated under the Berar Leases Act for termination of the lease, in which no order was passed for termination and were pending on the date the Bombay Tenancy Act came into force could not be taken help of by the landlord and on the basis of that application, he could not get an order for termination and further order for possession, unless the requirements of the provisions of section 19 of the Bombay Tenancy Act were fulfilled. This provision required a notice of three months to be given for terminating the tenancy and it was only after such termination that the provisions of sub-section (1) of section 30 of the Act could be applied. There being no termination of tenancy, the Tahsildar could not pass any order u/s 30 (1) of the Bombay Tenancy Act.

10. It will not be possible to accept the contention of Mr. Kherdekar that the above decision is applicable to every proceeding of any type that was pending u/s 8 of the Berar Act. The matter has been made clear by the Supreme Court as also the Full Bench of this Court, wherein it is laid down that a notice which would be a condition precedent for making an application would not be necessary when the proceeding is already pending. I would, therefore, hold that the petitions have been rightly continued and decided under the provisions of the Bombay Tenancy Act even though notice u/s 19 has not been given; particularly when such a notice could not have been given when the applications were originally filed in 1955.

11. The Naib-Tahsildar and the Sub-Divisional Officer have both accepted the case of the landlord-petitioner that there was a unlawful sub-tenancy in favour of respondents 2 and 3. Even this finding has not been set aside by the M. R. T. Even then, Mr. Kherdekar submitted that the sub-tenancy by respondent No. 1 and respondents 2 and 3 was not at all pleaded in the original applications, and as such, there was an error in giving a finding thereon. The pleading in both the applications are somewhat vague. But that would not make any difference particularly when the parties went to trial with a specific idea that the question was regarding the sub-tenancy. The Naib Tahsildar, while deciding the cases, has framed issues for his determination and one of these issues was as to whether the land in suit was sub-let by the tenant. This issue has been decided by him in the affirmative. The appellate authority has also made a reference to this alleged sub-tenancy and has held that the sub-tenancy proved. Mr. Kherdekar relied upon the decision of the Privy Council in AIR 1930 57 (Privy Council) , wherein it is laid down that no amount of evidence can be looked into upon a plea which, was never put forward. In the present case, the parties understood the pleadings to mean that it was a case of sub-tenancy. Not only that but this plea has been agitated, discussed and decided upon by the Naib-Tahsildar and the S. D. O. Before these authorities as also before the M. R. T. no grievance was made on behalf of the respondents that the pleading was vague and uncertain and that, therefore, the question as to sub-tenancy should have been decided. I think that it will be too late in the day for the respondents to make a grievance about the vagueness of the pleadings, when the matters are at the stage of writ petitions.

12. There are concurrent findings of the Naib-Tahsildar and the appellate authority that respondent No. 1 has sub-let the land to respondents 2 and 3. It will not be possible for the respondents to challenge these findings particularly when such a challenge was not seriously made even before the M. R. T.

13. The only ground on which the M. R. T. rejected the claim of the petitioner is that the original applications were bad as petitioner's brother Keshao was not joined as a party. It may be noted that the case of the petitioner was that the petitioner was a manager of the joint family consisting of himself and his brother and that in that capacity he has filed the applications. Chandrabhan Tulsiram petitioner's witness No. 1 has stated in his evidence that so long as the family of the petitioner and his brother was living as one family, it was the petitioner who used to look after the affairs of this joint Hindu family and that the applications in both the cases have been made by the petitioner as a head of this joint family. This Chandrabhan is the manager looking after the agricultural of the family lands. Pundalik (respondent No. 1) has made certain statements consistent with this case. He has stated that till 1959 Trimbak and Keshao lived jointly and that Trimbak was elder between the two. Keshao, respondent No. 2 has stated that Trimbak Bhikaji being the elder, the property is looked after by him. Of course, he had tried to retrace above statement by further saying that he did not know who looked after their house-hold affairs. Mr. Kherdekar urged that Chandrabhan has made a statement in the cross-examination that this property was purchased by the petitioner and his brother and that it has not been inherited. The Naib-Tahsildar and the S. D. O. have both held that the petitioner was a karta of the joint Hindu family and that he was managing the affairs. This will be a finding of fact and it will not be open for the respondents to challenge it at the stage of the writ petition. The M. R. T. has accepted the point as to the non-maintainability of the application as follows:

It is not disputed that the fields in question belonged to the two joint brothers Trimbak Bhikaji and Keshao Bhikaji. Trimbak had not made the applications for terminating the tenancy of Pundalik joining Keshao, his brother also, as the co-applicant to his applications. He had neither made applications in his capacity as the manager or the Karta of the joint Hindu family. Finding of the lower Courts to that effect was perverse and wrong. It appears to me that Keshao was a necessary party to the applications made by Trimbak alone and without the applications made by Trimbak alone were incompetent.

It is not necessary to specifically state in the application that it was being filed as the Karta of the family. This has been so held by the Supreme Court in *Devidas and Others Vs. Shrishailappa and Others*, . In paragraph 13, their Lordships have held as follows :

Plaintiff No. 1 did not describe himself as a manager in the plaint, but failure to so describe himself is not decisive of the question whether the suit was instituted by him in his capacity as a manager. It must depend upon the circumstances of each case whether the suit was instituted by the manager in his personal

capacity or as representing the family...

The Naib-Tahsildar and the Sub-Divisional Officer have, after considering the evidence before them, come to the conclusion that the petitioner has filed both the proceedings as a manager of the family. It will be very difficult to accept the contrary finding of the Maharashtra Revenue Tribunal. This is more so, when the two authorities below have assessed the evidence for deciding that the proceedings were filed as a manager.

14. There is one more circumstance. The lease deed that was executed in respect of the suit lands was in favour of the petitioner. It is dated 30-4-1951. The lessee is respondent No. 1. Thus, the relationship of landlord and tenant came into existence between the petitioner and respondent No. 1. It will not be normally open for respondent No. 1, to urge that the petitioner alone is not his landlord. To get over this difficulty, it was suggested at the time of the arguments that this lease-deed is forged one. The Maharashtra Revenue Tribunal has considered this question in a slipshod manner. The point as to the alleged forgery of lease-deed was not taken in the writ on statement by any of the respondents. In spite of that the Maharashtra Revenue Tribunal has stated that the contention of forgery should have been enquired into, I am not able to accept this reasoning particularly then the Naib-Tahsildar and the Sub-Divisional Officer have accepted the lease-deed as genuine one.

15. The result, therefore, is that the two petitions succeed. The rules in Spl. C. A. Nos. 230 and 235 of 1972 are made absolute. The decisions given by the Maharashtra Revenue Tribunal in Revision No. Ten-A-368 /69 and Ten-A-369/69 are set aside and the decisions in Appeal Nos. 12/59 (10-B) and 11/59 (10-B) /59 are restored. The petitioner to get his costs from the respondents in both the applications.