(1975) 11 BOM CK 0030

In the Bombay High Court

Case No : Spl. C.A. No''s. 591 and 592 of 1971

Umabai Trimbakrao Talukdar — APPELLANT

Vs

Sitaram Govind Shirbhate and another — RESPONDENT

Date of Decision : 20-11-1975

Acts Referred:
Hindu Succession Act, 1956 — Section 19

Citation : (1976) MhLj 505

Hon'ble Judges : V.S. Deshpande, J;C.S. Dharmadhikari, J

Bench : Division Bench

Advocate : V.M. Kulkarni and V.R. Talukdar, for the Appellant; S.R. Kolarkar, for the Respondent

Judgement

V.S. Deshpande, J.—These two Special Civil Applications raise common question of fact and the law. One Kashibai was the holder of lands survey number 223, measuring 1 acre 37 gunthas, and survey number 211/2, area 7 acres 38 gunthas. Both these lands are situated at Shendurjana in district Amravati and were held by the tenant, respondent No. 1 in both these cases. The two cases arise out of the claim over the lands of having been statutorily purchased by the tenant u/s 41 read with section 46 or section 40-A of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, referred to hereinafter as the Tenancy Act.

2. It is not in dispute that Kashibai was a widow since her husband died in 1950 or 1951. Kashibai died on 4-2-1964 leaving behind her 3 daughters, Radhabai, Umabai and Shakuntala. Umabai has been the widow since 1921. Suo motu proceedings for determining the purchase price of the lands payable by the tenant under sections 46 or 49-A were instituted by the Agricultural Lands Tribunal on or about 11th June 1965 on the assumption that tenant became statutory purchaser on the expiry of one year from Kashibai''s death on 4-2-1964. By order dated 26th July 1968 the Agricultural Lands Tribunal upheld the claim of the tenant that he had become such purchaser of the interest of the

3 sisters in the land and proceeded to fix the price thereof. Two appeals were preferred by one of the 3 sisters, Umabai, the appeals having been decided in her favour on 26-11-1968 and 21-4-1969 it being held that the tenants would be entitled to purchase only to the extent of2/3rd share in the land belonging to Radhabai and Shakuntala. It was held that interest of Umabai, the widow, could not have been purchased by the tenant during her life time.. Two Revision Applications were preferred by the tenant against these orders. The same were allowed by the Revenue Tribunal on 12-2-1971. Validity of these orders in these two Revision Applications is challenged by Umabai in these two Special Civil Applications. In view of important questions of law being involved in these cases, the two cases have been referred to the Division Bench.

3. Mr. Kulkarni, the learned Advocate appearing for the petitioner, contends that the Tribunal was not justified in condoning the delay when the tenant had not placed any material for the condonation of delay in filing the revision applications. It is not in dispute that one revision had become time-barred by 218 days, while the other was barred by time by 137 days. The case of the tenant before the Revenue Tribunal appears to have been that he relied on the advice of his pleader that limitation period for filing the revision application before the Revenue Tribunal was one year. Apart from the affidavit of the tenant''s brother the Revenue Tribunal also relied on the letter of Advocate Mr. Futane addressed to Advocate Mr. Bhangde, who appeared for the tenant before the Revenue Tribunal. No affidavit seems to have been filed on behalf of the present petitioner before the Revenue Tribunal. The Tribunal seems to have relied on the affidavit filed on behalf of the tenant and the letter of the Advocate and thought it fit to condone the delay.

4. Mr. Kulkarni contends that the Tribunal was not justified in condoning the delay when no affidavit from the tenant personally or from the Advocate concerned was placed on record and particularly when the letter of the Advocate does not find place in the record of the case.

5. We do not think that we will be justified in examining this question of condonation of the delay so minutely, once it is found that condonation of the delay was a matter exclusively within the discretion of the Revenue Tribunal. True, some irregularities seem to have been committed in not insisting on exhibiting of the letter of the Advocate and making the same as part of the record of the Court as also not insisting on the affidavit of the tenant himself. But the circumstances under which not the tenant but the brother was required to swear the affidavit could. have been asked for by the petitioner before the Revenue Tribunal insisting on the cross-examination. She also did not care to file any counter affidavit to challenge the facts relied upon on behalf of the tenant. It is difficult to hold that the Revenue Tribunal did not exercise its discretion in condoning the delay judicially or without any material at its disposal. The preliminary contention of Mr. Kulkarni on this point does not deserve serious consideration.

6. Mr. Kolarkar, the learned Advocate appearing for the tenant drew our attention to the observations made by the trial Court as also the Revenue Tribunal indicating as though Kashibai herself had made an application for resumption of the land and the same was rejected during her life time. Relying on these observations Mr. Kolarkar contends that question of the heirs of the widow Kashibai claiming any right of resumption and postponement of the tillers day any further could not arise once the said right of resumption was exercised by the widow herself. The said application for resumption is shown to have been rejected in these orders in the year 1952 itself.

7. Unfortunately, however, the records of these two cases do not bear out these observations and there is no knowing on what basis these observations were made. Mr. Kulkarni stoutly refuted the correctness of these observations. In view of this it is not possible for us to rely on these observations to shut out the claim of the present petitioner from having inherited the right in the lands as also a right of resumption from Kashibai on her death.

8 Mr. Kulkarni then contends that in either case Umabai herself being the widow, the question of Umabai exercising her right to resume the land within one year in terms of section 38 (2) (b) of the Tenancy Act cannot arise. According to Mr. Kulkarni, where the heir of the widow happens to be also a widow the tenant''s right to purchase the land gets automatically postponed till such widow''s interest ceased to exist and her heir exercises the right of resumption within one year from the death of even such heir-widow. In support of his contention Mr. Kulkarni relied on a Division Bench judgment of Gujarat High Court in Bai Ganga v. Bai Kamla 15 Guj. L R 345.

9. Mr. Kolarkar, on the other hand, contends that the widow referred to in section 38 (2) or 39-A (3) as also the corresponding provisions of section 41 (2) and 49-A (3) of the Tenancy Act is the widow who happens to be the holder of the land on tillers day on 1-4-1961 or 1-4-1963. Any widow happening to be the successor of any such widow is not entitled to further extension of right of resumption contemplated u/s 38 (2) of the Tenancy Act and consequential postponement of tenant''s statutory tight of purchase. There is undoubtedly much substance in this contention. However, the consideration of this question any further appears to us to be unnecessary in the present case, as-even on such assumption, the period for resumption and the date of land vesting in the tenant statutorily cannot get postponed in this case beyond one year of the death of Kashibai, as two of the joint holders of the land, i.e. successors of Kashibai, happen to be outside the categories of disabled holders specified u/s 38 (2), and the advantage available to such disabled landholder is denied under the second proviso to section 32 (2) read with first proviso to section 41 (2) of the Act.

10. Statutory right of purchase is conferred on the tenants u/s 46 of the Tenancy Act Ownership of the lands stands transferred and vests in them; however, only when "they are entitled to purchase from their landlords under any of the

provisions of this Chapter". Section 41 regulates the circumstances under which a tenant is entitled to purchase the land from landlord held by him as a tenant. Sub-section (2) of section 41, however, postpones the entitlement of the tenant to purchase the landlord''s interest in the land where the landlord happens to be of a category which is otherwise referred to as a disabled one. A widow is one of such disabled landholder referred to in section 41 (2) (b). Her tenant''s entitlement to purchase the land stands postponed under this sub-section (2) till "her interest in the land ceases to exist," under sub-clause (iv) of section 41 (2) of the Tenancy Act. This postponement, however, is subject to two provisos which follow immediately after this sub-section (2) of section 41. We are concerned with the first proviso of this sub-section which is to the following effect:

'''provided that where land is held by the tenant under two or more joint landlords this sub-section shall not apply if at least one joint landlord is outside the categories specified in clauses (a), (b) and (d) of this sub-section.

It is obvious thus that where a disabled landlord, such as a widow, holds any land as joint landholder along with other non-disabled landlords, sub-section (2) of section 41 ceases to apply and consequently the tenant''s entitlement to purchase the land also ceases to stand postponed. Consequently the tenant of a land held by the disabled landlord, like a widow jointly along with non disabled landlord, becomes entitled to the statutory purchase of the land u/s 46 read with section 41(1) and ownership of the land so held by him stands transferred to and vests in him under the scheme of section 46 with effect from the tillers'' day. The scheme of sub-section (2) of section 41 read with section 46 can better be understood if the same is read along with section 38 (2) of the Act. Ordinarily a landlord''s right to apply for resumption comes to an end if he has not applied before the fixed date, namely, 31st March 1961 or the extended date u/s 39 or 39-A. However, exception is made under sub-section (2) in case of disabled category of landlords referred to in sub-section (2) of section 38, including the widow. Her successor is enabled to apply for resumption of the land within one year from the date on which "the widow''s interest in the land ceases to exist". As indicated earlier, we are not going into the controversy whether the widow referred to in section 38 (2) (b) also includes a widow who happens to be the successor of the widow who was the holder on the tillers day, as the decision of that question is unnecessary. Second proviso to section 38 (2), however, makes it clear that a right of such landlord to resume the land beyond 31st March 1961 would not stand postponed where the disabled landlord like a widow holds as joint landholder along with other non-disabled landlords. If section 38 (2) is read along with section 41 (2) and section 46, it would be clear that vesting of the statutory, ownership u/s 46 does not get postponed beyond tillers'' day where land is held by a disabled landlord as joint holder along with some non-disabled landlord as the right to resume the land itself of such landlord is not contemplated to be postponed beyond 31st March 1961.

11. Thus if widow is a joint holder of the land on tillers'' day i.e. 1-4-1961 or 1-4-1963, her right to resumption comes to an end unless proceedings for termination of tenancy are pending on that day and tenant of the land becomes statutory purchaser with effect from the tillers'' day. Secondly even if her successor widow is assumed to be possessed of the same immunity from tenant''s right to purchase during her life time, the immunity would not be available if she inherits the land along with non-disabled successor and thereby becomes joint landlord within the meaning of first proviso to section 41 (2) and second proviso of section 38 (2) of the Act. Even if it is assumed that the petitioner''s case is covered by section 39-A and not by section 38, and therefore, the tillers'' day is 1st of April 1963 and not 1st of April 1961 and right to purchase the land statutorily by the respondent No. 1 tenant is governed by section 49-A (3) and not by section 46 read with section 41 (2) of the Tenancy Act, the result would not in any manner be different, once it is found that the land is held by a disabled landholder jointly along with non-disabled landholder.

12. Mr. Kulkarni''s contention, however, is that the holder of land such as a widow succeeding to her mother, along with other sisters, cannot be said to be a joint holder contemplated under the first proviso of section 41 (2) of the Act. According to him, where the land is inherited by the 3 sisters from their widowed mother, they do not happen to be "joint landlords" within the meaning of second proviso to sections 39-A (3) and 38 (2) and the first proviso to section 41 (2) of the Tenancy Act. Reliance is placed on the judgment of Padhye, J. in the case of Umabai v. State of Maharashtra 1971 Mh. L J 815. Curiously enough the petitioner in the said case happens to be the petitioner in these cases also though ''he dispute therein pertained to the land situated at village Jarud which once belonged to their mother Kashibai and which was inherited by the very 3 sisters, i.e. the daughters of Kashibai. As held by Padhye, J. in that case, the petitioners happen to be co-heirs u/s 19 of the Hindu Succession Act and each one of them became the tenant in-common of the land with other sisters. They obviously cannot be considered to be joint tenants in any sense of terms. Their interest in the land would pass by succession and not by survivorship. There also cannot be any quarrel with the proposition laid down in the quotation from the judgment of the Allahabad High Court in Azizunnisa v. Assistant Custodian A I R 1952 All. 561, referred to by the learned Judge at page 817. It is, however, difficult to see how the same supports the view adopted by the learned Judge. The words "joint owners" cover both the cases when holders of land happen to be joint tenants or tenants-in-common. That is what the quotation expressly says. It is difficult to see any difference in the connotation of the words "joint owners" and "joint landlords". We are unable to see why the sisters when they are tenants-in-common of the property, cannot be described as joint holders and cannot attract the first proviso to section 41 (2) of the Tenancy Act. All of them held definite shares in the lands inherited by them from Kashibai. Their shares are not divided by metes and bounds and each one of them can claim joint interest in every inch of the land. Their being not joint tenants in legal sense of

the term, cannot prevent being the joint holders, as contemplated under first proviso of section 41 (2) of the Tenancy Act. In fact the provision of sections 38 (2) and 41 (2). couched in identical terms in between them, cover the case of lands held by tenants-in-common as well as joint tenants. First proviso of section 38 (2) and second proviso of section 41 (2) deal with a specie of joint landlords who happen to be the members of the joint family. The distinction between the incidence of land held by tenants in common and joint tenants, relied on by Padhye J., appears to us to be irrelevant and of no consequence in this context. With respect, we are unable to agree with the conclusion drawn by Padhye J. in the above case, though we find ourselves in agreement with the statement of law that the sisters happen to be the tenants-in-common of the property in dispute.

13. The disabled landlords holding lands jointly with non-disabled landlords are thus no doubt been placed at some disadvantage compared to the other disabled landlords mentioned in section 38 (2) and section 41 (2) holding lands exclusively. This differential treatment, however, is not without reason and basis. The provisions of the Tenancy Act are intended mainly at making the tenant owner of the land with effect from the tillers'' day. However, tillers day is postponed in case of tenants against whom landlords'' proceedings for terminating tenancies are pending on the tillers* day fixed under the Act. Landlords capable of becoming actual tillers were given opportunity to seek resumption for their maintenance by making application till one day before the tillers'' day. Legislature, however, provided for further postponement of the tillers'' day for tenants of certain disabled landlords such as mentioned in section 38(2) to enable them to avail of this rights of resumption on cessation of their disabilities. This was obviously on the hypothesis that their statutorily assumed disabilities may prevent them from personally cultivating land. However basis for such assumption is assumed to be non-existent when the land is held by such disabled person jointly with other non-disabled person as one such disabled person is assumed to be competent to personally cultivate the land for himself and his disabled joint holder. This explains underlying basis of the two provisos of section 38 (2) and section 41 (2), one dealing with the land held by joint family of which such disabled person happens to be a member and other with the land held by such disabled member jointly with other non-disabled landlords on the tillers'' day. In each of the cases, notwithstanding the disability of the one, the land can be personally cultivated by the other equally interested in doing so, if they are so minded. Legislature seems to have seen no basis for further postponing the tillers day in cases of the tenants of such lands. Section 41 (2) is just a counterpart of section 38 (2) as section 49-A (3) happens to be the counterpart of section 39-A (3), postponement of statutory right of purchase being the necessary consequence of extension of the right to resume.

14. In this view of the matter, the view adopted by the Revenue Tribunal seems to be correct. There is no force in these two Special Civil Applications Rules are discharged. In the circumstances of the case, there will be no order as to costs in both the Special Civil Applications.

