
(2016) 08 BOM CK 0190
In the Bombay High Court
Case No : Writ Petition No. 1411 of 2014

Vishwanath Gopinath Borude

APPELLANT

Vs

Pandharinath Gopinath Borude

RESPONDENT

Date of Decision : 23-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Hyderabad Tenancy and Agricultural Lands Act, 1950 — Section 38(6), Section 40

Citation : (2017) 2 MhLJ 75

Hon'ble Judges : T.V. Nalawade, J.

Bench : Single Bench

Advocate : Shri. D.P. Palodkar, Advocate, for the Petitioners in Writ Petition No. 1411 of 2014; Shri. D.R. Bhadekar and Mrs. J.H. Patki, Advocates, for the Respondent No.1 in Writ Petition No. 1411 of 2014; Shri. V.D. Salunke holding for Shri. B.A. Shinde, Advocates

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—Rule. Rule made returnable forthwith. Heard both sides for final disposal by consent.

2. The first two proceedings (Writ Petition Nos.1411/2014 and 1432/2014) are filed to challenge the orders made by the Tenancy Court and the appellate authorities like the order of the Tahsildar Paithan dated 30-11-2009, the order of the appellate authority, Sub Divisional Officer given in Appeal No.3/2011 and the order of the revisional authority ? M.R.T. (Maharashtra Revenue Tribunal, Aurangabad) in Revision No.61-B-2012. The Tahsildar, Tenancy Court, has given direction to issue ownership certificate under the provision of Section 38(6) of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as "the Act") in favour respondent No.1 Pandharinath Borude (now deceased and represented by his legal representatives). It is the case of the petitioners of the present two petitions who are brothers of Pandharinath that all the brothers of Pandharinath are entitled to get the certificate under section 38(6) of the Act as

successors of the father Gopinath, who was inducted as tenant in the suit lands by the owner.

3. The disputed property consists of two portions of agricultural lands bearing Gat No.19 (old Survey No.6) to the extent 10 acres and Gat No.123 (Old Survey No.53) to the extent of 11 acres situated at village Dinnapur, Tahsil Paithan, District Aurangabad. One Madhavrao Khatik was the owner of these two lands and respondent Nos.3-A to 3B-II-b are the successors of Madhavrao. Gopinath, father of Pandharinath was cultivating entire area of these lands on Batai basis from prior to the year 1955. Name of Gopinath was entered in the revenue record as tenant and as per crop cultivation column he was in possession till his death. He died in the year 1957.

4. Gopinath left behind four sons, viz Murlidhar, Pandharinath, Vishwanath and Dashrath. One Rangnath was eldest son of Gopinath but he had died prior to the death of Gopinath. The present matters involve only four sons of Gopinath. Petitioner No.1 of the first proceeding, respondent No.1 and respondent No.4 of the first proceeding are the sons of Gopinath. Heirs of other deceased son were on the record during the hearing of the proceeding.

5. It is the case of the petitioners of the first two proceedings that Murlidhar was the second son of Gopinath but as Murlidhar was simpleton person, after the death of Gopinath, Pandharinath gave report to the revenue authority and got entered his name in the revenue record as tenant but his name was entered as successor of Gopinath and his name was entered for the joint Hindu family consisting of all the successors of Gopinath. It is the case of these petitioners that the owner Madhavrao Khatik died prior to 1959 and he was succeeded by his two widows like Sunderabai and Anusaya. It appears that Sunderabai had no issue and she bequeathed her property to her brother Limba Garad who was on the record. Limba died during pendency and his legal representatives are brought on the record. Sunderabai died in the year 1967, Anusabai died in the year 1971 and her heirs are already on the record who are two daughters.

6. It is the case of the petitioners of the first two proceedings that during her life time, prior to 1959, Sunderabai had started proceeding under section 44 read with section 32 of the Act for possession of the entire area of two lands. It is contended that after the death of Sunderabai, the proceeding was prosecuted by Limba Garad in view of the will executed in his favour but Limba could not succeed in the said proceeding and the proceeding came to be dismissed. The said decision became final in the year 1984.

7. It is the case of the petitioners that as Gopinath was in possession of these lands as tenant till his death, till the year 1957, and as all his sons had become tenants, due to the provisions of the law, and as they were in possession of the lands, they were entitled to purchase the lands as provided by the law. It is contended that on the relevant date like 26-1-1956 Gopinath was in possession and on subsequent dates like 11-7-1958 and in the year 1965 successors of

Gopinath were in possession and so the successors of Gopinath were entitled to get declaration under the provisions of the Act like Sections 38-E or 38-F. It is the case of the petitioners that they could have got the declaration and certificate of ownership automatically in view of the provisions of law and the issuance of declaration or the certificate under section 38(6) of the Act was mere formality but that could not be done due to aforesaid proceeding which was started under the provision of section 44 read with 32 of the Act by Sundarabai. It is contended that the certificate could have been issued even after making declaration under section 38G of the Act as in the year 1965 also the successors of Gopinath were in possession of the lands.

8. It is the case of the petitioners of the first two proceedings that declaration was not issued under section 38E of 38F, 38G of the Act till the year 1984, till the decision given in the proceeding started by Sundarabai became final. It is contended that in the past suit was filed by all the successors of Gopinath against the owners as the owners were illegally interfering in the possession of the successors of Gopinath over the lands. It is contended that the four sons of Gopinath then started cultivating separate portions in accordance with the shares to which they were entitled and accordingly entries were made in the revenue record from the year 1985 onwards. It is contended that their names were also then entered as owners in the revenue record by effecting the mutation entries on the basis of report given by all the brothers. It is contended that till year 2006, there was no dispute amongst these brothers and Pandharinath had not disputed the rights of the petitioner and other brothers to get the shares as successors of Gopinath in the two lands.

9. It is the case of the petitioners of the first two proceedings that in the year 2006 Pandharinath joined hands with the revenue authority and paid the price in respect of aforesaid two portions of the two lands for obtaining declaration and sale certificate. It is contended that no notices of these proceedings were issued to the petitioners or other brothers of Pandharinath but the record was created to show that the notices were served. It is contended that even when there was revenue record of aforesaid nature showing that all the sons of Gopinath were entitled to succeed to the property as they were the tenants in possession, some record of the year 2007-08 was created in favour of Pandharinath. It appears that there was one proceeding between the owner and these brothers in which order of possession was also made in favour of the owner and due to that possession was shown to be taken over by owner and then proceeding under section 145 of the Criminal Procedure Code was started. There is some record like handing over the possession to Pandharinath on the basis of ownership certificate but the revenue record and the sale transactions made by brothers of Pandharinath show that they had transferred portions of their shares on the basis of mutation.

10. Under the order under challenge declaration is made in respect of 21 acres of land (10 acres from first Gat number and 11 acres from second Gat number, one

family holding) and certificate is ordered to be issued in respect of these portions under section 38(6) of the Act.

11. Writ Petition No.3534/2014 is filed by successors of the owner, Madhavrao Khatik, daughters of Ansabai. It is their case that Ansabai was entitled to have equal share in the property left behind by the owner but neither Ansabai nor her legal representatives were brought on the record in the proceeding which was started for issuing certificate under section 38(6) of the Act and so the said order of the tenancy Court is not binding on them. Thus, the decision of the Tenancy Court is challenged by the brothers of Pandharinath and also the successors of the owner.

12. The other writ petitions are filed either by successors of deceased Gopinath or by the purchasers from the petitioners and other successors of Gopinath of some portions of the two lands. It is already mentioned that one mutation was effected in favour of all the four sons of Gopinath and they were shown as owners in the revenue record. On that basis they had sold portions separately under separate sale deeds in favour of the petitioners of the remaining petitions and one petition is filed by son of Dashrath, the grand son of Gopinath (Writ Petition Nos.1939/2014). Writ Petition No.1944/2014 is filed by Sumanbai who is daughter of other son of Gopinath like Vishwanath as action is taken against her also and the property is shown to be transferred in her name due to partition. It appears that as the transfers in favour of these persons are shown to be made, separate proceeding is started by authority under the Act, under the provisions of Section 50-B read with section 98 of the Act. These persons are afraid that possession of the land will be taken from them as the transfers are hit by provision of section 50-B of the Act. So, they have also challenged the orders of Tenancy Court made in favour of Pandharinath.

13. Before Tahsildar, there was nobody to contest the claim of Pandharinath that he was only entitled to get the certificate. Due to this circumstance not much discussion of the record is made by the Tenancy Court, the Tahsildar about the record and the position of law. In appeal filed by the brothers of Pandharinath, Sub Divisional Officer, appellate authority, has held that there is no record on the basis of which inference is possible that Pandharinath got the possession of the lands as Karta of joint Hindu family consisting of Pandharinath and his brothers. After making such observations it is held that only Pandharinath was in possession and so declaration needs to be given in his favour and certificate needs to be issued in his favour. The revision filed against this decision of the Sub Divisional Officer before the Maharashtra Revenue Tribunal is dismissed.

14. It is the case of Pandharinath that he had taken the land for cultivation from the original owner and as he was in possession of the land on the relevant dates mentioned above, he is entitled to declaration and the certificate.

15. The parties are Hindus. Pandharinath never disputed that the owner of the land had given the land for cultivation on Batai basis to Gopinath. Till his death,

Gopinath was cultivating the land as tenant. There is also revenue record in that regard. Khasra Pahani Patrak of the years 1955-56, 1956-57 and 1957-58 show that Gopinath was cultivating these lands on Batai basis as tenant. It is not disputed that Gopinath died in the year 1957. Thus on the first relevant date, 26-1-1956 Gopinath was in possession of the lands as tenant and his name was also entered in the record accordingly. It is not disputed that Sundarabai, daughter of the owner had stated proceeding under sections 44 and 32 of the Act for getting possession of these lands in the year 1959. In that proceeding Sundarabai had contended that the lands were given by her father to Gopinath for cultivation and after the death of Gopinath all his sons were in possession of the lands as tenant. These contentions of the landlord cannot be ignored. On the other hand there is no record whatsoever with Pandharinath to show that after the death of Gopinath, the lands were given to him for cultivation by the landlord on Batai basis. The admission of the landlord is consistent with the aforesaid revenue record. This record was created prior to the starting of the dispute, prior to year 1960 and so the record needs to be given due weight. On the 7/12 extracts there is entry showing only due to death of Gopinath name of Pandharinath was entered and it was as successor of Gopinath. This record is ignored by the Tahsildar, the Sub Divisional Officer and the Maharashtra Revenue Tribunal.

16. It is not disputed that in the revenue record, in crop cultivation column, entries of the names of all the brothers of Pandharinath were made from 1985-86 and they were shown to be in possession of separate portions. It is the case of the petitioners that partition had taken place and accordingly separate possession was given to the brothers of different portions. It can be said that even when no declaration was made under the law about the tenancy rights and no sale certificate was issued in favour of these brothers, these brothers were shown even as owners in the revenue record on the basis of so called partition effected by them. On the basis these mutations most of the portions which had come to the shares of brothers of Pandharinath were sold by these brothers under sale deeds to third parties who have filed aforesaid different writ petitions. The record shows that even Pandharinath had agreed to sell his share. Such mutation was sanctioned in year 1995-96 and on that basis the transactions were made by these brothers. Due to these circumstances, the Tahsildar, Court under the Act has started proceeding against the purchasers.

17. The provision of section 50-B of the Act puts restrictions on the transfers of the lands purchased or sold under the Act. These restrictions are applicable to the lands purchased by tenant under sections 38-A, 38-E and 38-F and also 38-G. The provision shows that it is mandatory that before any such transaction previous sanction of the Collector is taken. The provision of section 50(B)(2) shows that transfer without sanction of the Collector shall be invalid. Under section 98 of the Act summary eviction of the persons in whose favour such transfer is effected is made possible. In view of this settled position of law, the purchaser cannot contest the proceeding if it is taken to conclusion under section

98 of the Act. So the proceedings filed by the purchaser cannot be allowed.

18. It is true that the mutation and the transactions could not have been made, the fact remains that these circumstances are certainly against the claim of Pandharinath that the land was given to him for cultivation by the owner and he alone was the tenant in possession on the relevant dates.

19. Regular Civil Suit No.285/1989 was filed by Pandharinath and his two brothers like Murlidhar and Vishwanath against the owner and also the persons who were acting through the owner. The suit was filed for relief of declaration and injunction. Declaration was claimed to the effect that Pandharinath and his brothers were in possession as tenants for more than 50 years and injunction was claimed to prevent the owners from interfering in the possession without following due process of law. The record shows that in this suit civil court had made order of reference to the Tenancy court and following issue was referred to the Tenancy Court :-

"Whether the plaintiffs prove that they are tenants in the suit land ?

Copy of order dated 29-1-1993 is on the record and it shows that this issue is answered in affirmative by the Tenancy Court. There is nothing on the record to show that the landlord challenged this finding. Pandharinath was plaintiff in that suit and it can be said that in one way the finding was against Pandharinath if he wants to contend that he alone is the tenant in possession of the land. This record is not considered by the Tahsildar and the Sub Divisional Officer. The present matter was decided by the Tahsildar on 30-11-2009 but previous decision of the tenancy Court given in the year 1993 that all the brothers are the tenants was there and so the Tenancy Court ought to have presumed that all the brothers were entitled to declaration and they are entitled to get certificate under section 38(6) of the Act. Thus it was not possible for the Tahsildar in the year 2009 to hold that only Pandharinath was the tenant in possession on the relevant date.

20. It appears that Regular Civil Suit No.176/1999 was filed by Murlidhar against Pandharinath for the relief of partition and present lands were included in that suit. The said suit was dismissed. From the record it can be said that the decision of 1993 given by the Tenancy Court in the previous proceeding was not made available to the Civil Court when Regular Civil Suit No.176/1999 was decided. Further, there was no declaration and sale certificate was also not available and so the Civil Court dismissed the suit. Even if some observations are made by the Civil Court in the suit filed by Murlidhar in favour of Pandharinath those observations cannot be used in support of the case of Pandharinath as such declaration can be given only by Tenancy Court and the Civil Court has no jurisdiction in that regard. Thus Pandharinath cannot make out much on the basis of the decision of Regular Civil Suit No.176/1999.

21. The provisions of section 40 run as under :-

"40. Rights of tenants are heritable:- (1) Where a tenant dies, the land holder shall be deemed to have continued the tenancy -

(a) if such tenant was a member of an undivided Hindu family, to the surviving members of the said family, and

(b) if such tenant was not a member of an undivided Hindu family, to his heirs, on the same terms and conditions on which such tenant was holding it at the time of his death.

(2) The surviving members, or as the case may be, the heirs to whom the tenancy is continued under sub-section (1) shall be entitled to partition and subdivided the land leased subject to the following conditions.

(a) each sharer shall hold his share as a separate tenant.

(b) the rent payable in respect of the land leased, shall be apportioned among the sharer according to the share allotted to them.

(c) the area allotted to each sharer shall not be less than the unit which the State Government may, by general or special order, specify in this behalf having regard to the productive capacity and other circumstances relevant to the full and efficient use of the land for agriculture.

(d) the area is less than the unit referred to in clause (c), the sharer shall be entitled to enjoy the income jointly, but the land shall not be divided by metes and bounds.

(e) if any question arises regarding the apportionment of the rent payable by the sharers, it shall be decided by the Tahsildar whose decision shall be final."

22. The provision of section 40 of the Act shows that rights of Gopinath who was tenant on the relevant date had passed to his heirs, sons, and it was possible for the heirs of Gopinath to partition the land amongst themselves for cultivating the respective portions separately. This could have been done subject to conditions mentioned in section 40(2) of the Act. On the basis of this provision the tenancy shall be deemed to have been continued in favour of all heirs of the tenant and so Pandharinath alone cannot claim that he had become tenant after the death of Gopinath. Further, the landlord was treating all the heirs of Gopinath as tenant. For the same reasons, when more heirs are present, one heir of the tenant cannot become exclusive owner under the law. At the most the heir who has paid the purchase price can say that if other heir wants to assert his right, he should pay the price in respect of his share.

23. On the aforesaid point learned counsel for the petitioners from Writ Petition No.1411/2014 placed reliance on the cases reported as (1) 2001 (3) Mh.L.J. 90 (Bombay High Court) (Vasudeo Ramchandra v. Vijay Bhikaji); and, (2) (2011) 3 SCC 755 (Ramdeo v. Board of Revenue, Uttar Pradesh). In these cases it is laid down that only one heir cannot be declared as exclusive tenant when there are other heirs, co-sharers. Similar observations are made by this Court in the case

reported as 2010 (2) Mh.L.J. 970 (Sarjerao v. Pralhad).

24. Learned counsel for the landlord placed reliance on the case reported as 2010 (6) Bom.C.R. 787 Aurangabad Bench (Vaijnath v. Afsar Begum). In view of the facts of that case, this Court had observed that when no record is available to prove that a party was protected tenant, entries made to the effect that party had become statutory owner under section 38 of the Tenancy Act need to be treated as null and void and the certificate of ownership issued on the basis of such entry also can be declared as null and void. There cannot be dispute over this proposition. The relevant facts of the present matters are already quoted. At least on two occasions the Tenancy Court has held that Gopinath was the tenant and his successors like Pandharinath and brothers of Pandharinath are the tenants and there is also admission to that effect of Pandharinath in legal proceeding.

25. The learned counsel for Pandharinath placed reliance on the observations made in one case reported as 2001(3) Mh.L.J. 380 Bombay High court (Bharatlal v. Kondiba). In this case, the procedure for declaration to be made under section 38-E of the Act is discussed and it is laid down that there is no provision to issue notice to the landlord or others before issuing declaration and so no appeal would lie against the declaration given under this provision. The facts show that it was the challenge of the landlord to the declaration. It is already observed that the relevant record contains the declaration that all the heirs of Gopinath were the tenants. When there was such declaration which was with the Tenancy Court, the Tenancy Court could not have issued the certificate only in favour of one successor of Gopinath by holding that said successor, Pandharinath, was the tenant and he was not holding the property for his brothers. So, in the present matter, the observations made by this Court in the case of Bharatlal (cited supra) are of no use.

26. In view of the discussion made, this Court holds that the Tenancy Court has committed error in giving direction to issue certificate under section 38(6) of the Act only in favour of Pandharinath. Such decision cannot sustain in law. However, there is no need to interfere in other action taken by the Tenancy Court like taking action for making transaction in breach of the provision of section 50-B of the Act. In the result, following order is made.

27. Writ Petition Nos.1411/2014 and 1432/2014 are allowed. The order made by the Tahsildar which is confirmed by the first appellate Court is hereby set aside. The orders of the Tahsildar, the Sub Divisional Officer and the Maharashtra Revenue Tribunal are hereby set aside. Direction is given to issue certificate in favour of all the four sons of Gopinath in respect of one family holding. In those terms rule is made absolute. The other writ petitions stand dismissed and rule is discharged in those proceedings.