
(1987) 01 BOM CK 0011
In the Bombay High Court
Case No : Writ Petition No. 328 of 1984

Vithalrao Khandagale and Others

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 19-01-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 25

Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 — Section 33(3), 34

Citation : (1988) 4 BomCR 417

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : V.S. Sohani, for the Appellant; M.M. Gadkari, for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—This is a writ petition arising out of the proceedings under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (for short "the Old Ceiling Act")

2. The petitioner No. 1, the surplus holder, filed a return u/s 12 of the Old Ceiling Act showing his total holding as 221.71 acres. The learned Assistant Collector, held by his original order dated 15- 11- 1970/6-12-1970 that the holding of the petitioner No. 1 was 246.40 acres . After determining the potkharab land as 6. 51 acres and after allowing the members of the family of the petitioner No. 1 who were six in number to retain 174 acres of land the Assistant Collector declared 37,03 acres as surplus land holding to the petitioner No. 1, the ceiling area for the village Paloti being 108 acres. The petitioner No. 1 challenged the aforesaid order of the Assistant Collector by filing an appeal before the Maharashtra Revenue Tribunal (For short , "the M.R.T."). The learned M.R.T. found that the findings rendered by the learned Assistant Collector in regard to the partition the potkharab land and other findings referred to by him were not in accordance with law and were not proper on the basis of the material on record .

The learned M.R.T., therefore, set aside the impugned order of the Assistant Collector and remanded the proceedings to him for a fresh decision on merits according to law in the light of its judgment. It may be stated here that the State did not prefer any appeal or cross-objection against the aforesaid order of the Assistant Collector.

3. After remand, the learned Sub-Divisional Officer (for short "the S.D.O.") determined the total holding of the petitioner No. 1 as 221.25 acres. He allowed the family members of the petitioner No. 1 to retain 126 acres of land and declared 95.25 acres as surplus land belonging to the petitioner No. 1. The petitioner No. 1 and the other members of his family, i.e. the other petitioners in this petition, preferred an appeal against the aforesaid order of the learned S.D.O.. The learned M.R.T., however, maintained the aforesaid order of the learned S.D.O.. Being aggrieved, the petitioners have preferred the instant writ petition in this Court.

4. The first question which is raised on behalf of the petitioners in this writ petition is that there is no power to the learned M.R.T. to order the remand of the proceedings in an appeal before it u/s 33 of the Old Ceiling Act. The second question which is raised on behalf of the petitioner is that the absence of any appeal or cross-objection being preferred by the State, the learned M.R.T. had no jurisdiction to pass any order making an unqualified remand for a fresh decision by the learned trial Court. Both these questions can be conveniently dealt with together.

5. As regards the power of the learned M.R.T. to pass an order of remand in appeal, the submission on behalf of the petitioners is that the powers of the learned M.R.T. in appeal are codified in section 34 of the old ceiling Act and, therefore, except the powers which are conferred u/s 34 the M.R.T. cannot exercise any other power in appeal in support of his submission the learned Counsel for the petitioners has relied upon a decision of this Court in the case of *Bhagwan Sonaji v. State of Maharashtra* 1979 Mh.L.J. 476 which is a decision upon the provisions of the old Ceiling Act itself. He has also relied upon the decision of the Punjab High Court in the case of *Raghu Nath Jalota Vs. Romesh Duggal and Another*, regarding the power of the appellate Court under the Rent Control Act of the State of Punjab. He has further invoked certain canons of construction relying upon the decision in the following cases *Wasudeo Madhaorao Assarkar and Another Vs. The State of Maharashtra*, ; *R.K. Pamkh Vs. Uma Verma*, and *Ram Ran v. State of Bihar* AIR 1979 NOC 29 .

6. In considering the above submission made on behalf of the petitioners it must be seen that section 33(1) provides for an appeal to the M.R.T. against the order of the collector u/s 21 of the old Ceiling Act. Sub section (3) of section 33 provides that in deciding an appeal provided for u/s 33(1) the M.R.T. shall exercise all the powers which a Court has and follow the same procedure which a Court follows in deciding the appeals from a decree or an order under the CPC (for short, "CPC"). It is thus clear that sub section (3) of section 33 provides for

the powers as well as procedure to be followed by the M.R.T. in deciding an appeal Section 34 provides that the M.R.T. in deciding an appeal u/s 33 may confirm, modify or rescind the decision or award or can amend the declaration or award, as the case may be.

7. It is clear from section 34 that it provides for the substantive powers to be exercise in appeal by the learned M.R.T.. In my view, section 34 is merely declaratory and even in its absence, the Appellate Court can and has to exercise the powers given to it in the said section as such powers are inherent in the appellate jurisdiction itself. A power of remand is also, in my view, an inherent power in every appellate Court and Tribunal which is necessary to do justice to the lis before the Appellate Court and to deal with all the questions raised before it effectively. In particular it may be seen that when the order of the trial Court is liable to be set aside and re-trial is necessary in the interest of justice upon certain issues which the learned appellate Court thinks fit and proper for fair disposal of the case a power of remand to the trial Court must be available to it is pertinent to see that prior to insertion of rule 23-A in order XLI of CPC there was a settled view that the appellate Court had an inherent power to remand the proceedings to the trial Court in the interest of justice in cases which did not fall within the scope of rules 23 and 25 of order XLI of the CPC. In this view of the matter it self the contention raised on behalf of the petitioners that there is no power of remand to the learned M.R.T. in an appeal preferred u/s 33(1) of the old Ceiling Act, is liable to be rejected. However, in my view such a power is explicitly conferred in view of the provisions of section 33(3) of the old Ceiling Act.

8. Section 33(3), as already pointed out, enable the learned M.R.T. in deciding the appeals preferred before it u/s 33(1) to exercise all the powers to which a Court has and follow the same procedure which the Court follows in deciding the appeals against a decree or an order under the CPC. The relevant provisions of order XLI of the CPC dealing with the appellate powers and procedure thus stand incorporated in the old Ceiling Act for the purpose of appeals u/s 33(1) thereof. A power of remand dealt with under rules 23, and 25 of order XLI of the CPC will therefore, be available to the learned M.R.T. in view of the provisions of section 33 (3) of the Old Ceiling Act. In construing the provisions of sub-section (3) of section 33 it must be borne in mind that the Old Ceiling Act is a social Legislation and the construction which should be put upon its provisions should be such which would further the object of the said enactment. A power of remand, as already pointed out, is a necessary adjunct of the power to decide an appeal properly and effectively and thus to do justice to the lis before the appellate Court. It is with this object that the M.R.T. is armed with the powers which an appellate Court has under the CPC i.e. under order XLI of the CPC. The explicit power of remand therefore, can thus be spelt out from the provisions of section 33(3) of the Old Ceiling Act.

9. Turning now to the cases relied upon on behalf of the petitioner, it may be

seen that in the case of *Bhagwan v. State* cited supra, this Court was concerned with the question whether in the absence of an appeal being filed on behalf of the State of power analogous to order XLI, Rule 33 CPC, can be exercise by the M.R.T.. After referring to the scheme of the Old Ceiling Act this Court held that since it is open to the State also to file an appeal u/s 33 of the Old Ceiling Act, it cannot be held that such a power can be spelt out from sub section (3) of section 33 of the Old Ceiling Act. In taking the above view this Court in the aforesaid case relied upon its previous decisions in which it was held that in the absence of a cross objection it was not open to the tribunal to pass an order which is adverse to the appellant before it. In my view, the question which was decide in the aforesaid case was entirely different. The question was whether in an appeal preferred by the surplus holder, relief can be given to the State which has not preferred any appeal. Here in the instant case the power is to be exercised in the appeal preferred by the surplus holder itself. In my view the provisions of sub-section (3) of section 33 can be invoked for the purpose of exercise of the power of remand by the M.R.T. It may be seen that not only the procedure but the power of the Court under the CPC are also conferred upon the M.R.T. u/s 33(3) which must in my view, be given full effect so that the appellate power can be exercised effectively by the M.R.T. to do justice between the parties.

10. The Punjab judgment which the learned Counsel for the petitioners has relied upon interprets the provision regarding the remand itself and has, no bearing on the question raised in this petition under the specific provisions of the Old Ceiling. Act regards the canon of construction the cases relied upon on behalf of the petitioners for the said purpose have no relevance in construing sub-section (3) of section 33 of the Old Ceiling Act. The contention on behalf of the petitioners that there is no power of remand to the M.R.T. cannot, therefore, be accepted.

11. The other question which is raised and which has to be considered along with the above question is whether in the absence of any appeal or cross objection being filed by the State a remand can be made in favour of the State in the sense that the whole case could be reopened before the learned M.R.T.. In my view the above question is in terms answered by the Supreme Court in the case of *State of Maharashtra Vs. Harishchandra and Others*, . The Supreme Court has held in the above case that if the surplus holder does not object to the order of remand and thus waives his right to object to the same if is not open to him to challenge the said order of remand and after the decision is rendered by the trial Court in regard thereto. It may be seen that in the aforesaid case before the Supreme Court also no cross examination was filed on behalf of the State questioning or assailing any findings made by the trial Court against it. In view of the above judgment of the Supreme Court it is not open to the petitioner to raise now the above contention which thus deserves to be rejected. I may observe that the reasoning of the Supreme Court in the above judgment would equally apply to the first question raised on behalf of the petitioners viz., whether the learned M.R.T. has power to remand the proceedings to the trial Court because

after the order of remand the petitioners have submitted to the jurisdiction of the trial Court. Both the above contentions raised on behalf of the petitioners, therefore, cannot be accepted.

12. On merits two questions are canvassed before me. The first question is about the partition which, according to the petitioners, is effected in 1957 and the second question is about pot kharab land. As regards the partition the case of the petitioners is that the partition was effected orally on 15-12-1957 by preparing a list of shares of each of the parties to the partition and by giving possession of the share of such as per the same. In support of the above case of partition, the petitioner No. 1 inter alia examined Dr. Gholap, an Assistant Medical Officer at General Hospital, Wardha and also one Patwari by name Wadgu it is however not in dispute that the alleged partition was recorded in the revenue records on 7-1-1962. The learned Courts below held that no such partition was effected on 15-12-1957 as alleged on behalf of the petitioners and if at all the said partition was effected on 7-1-1962 as per the shares shown in the revenue records. The learned Courts below merely held that if the partition was effected on 7-1-1962 it was hit by section 10 (1) of the Old Ceiling Act being within the prohibited period thereunder.

13. The learned Courts below have considered the evidence of Dr. Gholap who was examined on behalf of the petitioners to show that the petitioner No. 1 was suffering from T.B. and that the said partition was, therefore, effected as per the advise of the doctor. The learned courts below have found that the evidence of the doctor does not show that the petitioner No. 1 was examined by him on or about the time of the alleged partition in 1957, and that it does not show that the petitioner No. 1 was his regular patient and that he was always visiting him. The learned Courts below have also found that the story of partition itself did not appear to be genuine as the alleged partition was between the husband, wife and the minor sons aged 5 and 1 respectively. They held that even after the death of the petitioner No. 1 the said persons would have inherited his property and, therefore, there was no need to partition the property on the ground that the petitioner No. 1 was suffering form T.B.

14. The learned Counsel for the petitioners has, however, strongly relied upon the evidence of Patwari Wadgu, who stated that he was the Patwari in Paloti from 1955 to 1959 and that list of shares made in the partition in 1957 were shown to him of which he had taken a note. He, however, admitted that till 1959 he said partition was not certified. The learned courts below rightly observed that the evidence of the witness is not worthy of credence because in the first place there is no evidence that any intimation was given by the petitioners for taking note of the aforesaid alleged oral partition in 1957 which cannot be taken note of suo motu since admittedly it is not by a registered document. It the said partition was noted by the aforesaid Patwari in 1957 itself he has not explained why it was no certified upto 7-1-1962 or at any rate till 1959 which time even according to him he was working as a Patwari in the village Paloti. The above evidence was

therefore rightly discarded by the learned Courts below. The finding rendered by the learned ceiling authorities about the partition cannot be said to be perverse and cannot be interfered with in the writ jurisdiction of this Court. In fact when as oral partition is alleged to be effected it can best be evidenced only by the entries in the revenue record which would show the dates on which each member or co-owner was put in separate possession of his share. It is only from the evidence of possession and separate enjoyment of share of each of the co-share that the oral partition can be proved. No interference is therefore, called for in the finding of the learned ceiling authority as on the question of partition raised in the instant case.

15. The next question which is raised on behalf of the petitioners is about the pot-kharab land. As regards the question of pot-kharab land the learned M.R.T. while originally reminding the case held that the report of the Naib Tahsildar allowing 6.51 acres of land was not in itself an evidence. The said report, therefore, could not have been relied upon by the learned S.D.O. after the proceedings were remanded to him. It was thus necessary for the petitioners to lead independent evidence in regard to the pot-kharab land which they failed to do. The learned S.D.O., therefore, after remand determined the pot-kharab land after perusing the khasra entries in respect of the field survey numbers in question in the instant ceiling case. The said finding rendered by him which is affirmed in appeal thus cannot be said to be illegal or perverse. If the petitioners claimed any pot kharab land it was necessary for them to lead appropriate evidence to prove the same particularly when the report of the Naib Tahsildar was excluded from consideration by the learned M.R.T. in its remand order. The finding in regard to pot-kharab land, cannot therefore, be interfered with.

16. In the result, the instant writ petition fails and is dismissed. In the circumstances, however, there would be no order as to costs.