

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3771 OF 1987

Shri Samastha Mahar Samaj of
Rajapur, through

1] Lahu M. Kamble and ors.

.. Petitioners

vs.

Balgonda Malgonda Patil
(since deceased through his
Legal Heirs and Representatives
1-A] Ergonda B. Patil and ors

.. Respondents

Mr. M.L. Patil for the Petitioners.

CORAM : M. S. SONAK, J.

DATE : 19 NOVEMBER 2015.

ORAL JUDGMENT :-

1] The challenge in this petition is to the orders dated 19 May 1981 and 16 January 1985 made by the Secretary (Revenue and Forest Dept.) and Officer on Special Duty (Revenue and Forest Department) to the extent, they hold that the Respondent-Balgonda M. Patil (since deceased) was the tenant in respect of property surveyed under S.No. 37, ad-measuring 2 Acres and 24 Guntas situated at Rajapur, Tal. Shirol, Dist. Kolhapur (suit property)

2] The Petitioners claim that the suit property was granted to them as an Inam Land, as they were Harijans from the Village of Rajapur. The lands adjacent to the suit property, i.e., land bearing

Survey No. 36 admeasuring 1 Acre and 4 Guntas belongs Balgonda M. Patil (Mr. B.M. Patil), who had purchased same on 7 February 1949 from one Watve. The suit property as well as the land admittedly owned by Mr. B.M. Patil are located on the banks of river Krishna. In the course of time, on account of change in the river flow pattern, alluvial land ad-measuring 13 Acres and 39 Guntas was created between the suit property and the river, so also alluvial land ad-measuring about 2 Acres and 24 Guntas was created between Mr.B.M. Patil's property and the river. Some disputes arose between the parties in the matter of possession of such alluvial lands.

3] On 12 February 1955, the SDM, North Division, Kolhapur in Miscellaneous Proceedings No. 2 of 1955 initiated under Section 145 of the Code of Criminal Procedure 1908 (Cr.P.C) attached not only the alluvial lands, but also the suit property owned by the Petitioners and the lands owned by Mr. B.M Patil. The SDM appointed Circle Inspector as Receiver in respect of all these lands, i.e., lands Surveyed Nos. 36 and 37 as also the two portions of alluvial lands by invoking the provisions of Section 146 of Cr.P.C.

4] On 1 May 1955, the Receiver held public auction to lease out the attached properties and Mr. B.M. Patil being the highest bidder, obtained lease for a period of one year, i.e., 1955-56. Yet another auction was held for the year 1956-57, in which again Mr. B.M. Patil, being the highest bidder secured the lease for yet another year, i.e., 1956-57. Thereafter, there is no record of any further auction nor is there any record of any fresh lease having been executed in favour of Mr. B.M. Patil. However, Mr. B.M. Patil is reported to have continued in possession of all the attached lands.

5] By order dated 22 April 1958, the Assistant Collector, Shirol Taluka, in Revenue Application No. 11 of 1957 made certain orders in relation to the alluvial land, mainly in the context of assessment in respect thereof. The order pertained not only to the alluvial land adjoining the suit property and the property of Mr. B.M. Patil, but also alluvial land or lands affected on account of diluvian in respect of lands surveyed under Nos.35,38,39 ,40 and 41. In Revenue Appeal No. 1 of 1958 instituted by the owners of lands surveyed under Nos.35, 38, 39,40 and 41, the aforesaid order was set aside and it was directed that the alluvial lands be leased out by holding a public auction. Mr. B.M. Patil, instituted a Revision Application and

the revisional authority by the order dated 27 January 1965 directed the exclusion of alluvial lands adjacent to the properties surveyed under Nos. 36 and 37 and eventual allotment/lease to the occupants of the said lands, in terms of the rules relating to disposal of alluvial lands.

6] Mr. B.M. Patil, in 1964, instituted Tenancy Case No. 322 of 1964 before the Tenancy Avval Karkoon, Shirol for determination of reasonable rent in respect of the properties in his possession, in pursuance of the auctions held by the Receiver for the years 1955-56 and 1956-57. To these proceedings, the Petitioners were not impleaded as parties. Only the Receiver, Akiwat Circle, C/o. Sub-Divisional Magistrate, Karveer Division, Kolhapur, was impleaded as party. These proceedings were disposed of by order which is at Exhibit-D of the paperbook. The order records that despite efforts no service could be effected upon the Court Receiver and therefore, the order was made *ex-parte*. In any case, the Petitioners were admittedly not parties to these proceedings before the Tenancy Avval Karkoon. The operative portion of the said order *inter alia* indicates that the reasonable rent in respect of property surveyed under Nos. 36 and 37 inclusive of accrued portion thereof are fixed at 169.37

from the year 1956-57 onwards and that the lessor is not entitled to recover anything in excess of this amount.

7] By order dated 20 January 1971, the SDM, North Division, Kolhapur, lifted the order under attachment under Section 146 of the Cr.P.C. The Assistant Collector called for the report of alluvial lands in respect of both the properties and the report indicates that there was increase of 13 Acres and 34 Guntas *qua* property surveyed under No.37 and increase of 2 Acres and 24 Guntas *qua* property surveyed under No. 36. The Assistant Collector, on the basis of such report, ordered the allotment of 2 Acres and 24 Guntas of alluvial land adjacent to property surveyed under No. 36 to Mr. B.M. Patil and lands admeasuring 13 Acres 39 Guntas of alluvial land adjacent to Survey No. 37 to the Petitioners. However, in the said order dated 20 January 1971, the Assistant Collector made an endorsement that the possession be handed over to respective parties and “*subject to rights of existing tenants*”.

8] On 11 July 1971 or thereabouts, Mr. B.M. Patil applied to District Magistrate for possession claiming that he was the tenant in respect of all attached properties. On 11 August 1971, under a Kabje

Patti (possession receipt) actual and physical possession of the lands, in terms of order of the Assistant Collector dated 20 January 1971 were handed over to the respective parties. It is the case of the Petitioners that they were placed in possession of the property surveyed under No.37 and the alluvial lands adjacent to the same. Mr. B.M. Patil thereupon instituted a revision petition claiming that the issuance of Kabje Patti was void. The revisional authority by order dated 23 July 1972 held that the issuance of such Kabje Patti was indeed void, since Mr. B.M. Patil was the tenant in respect of the properties surveyed under No.37, i.e., suit property though Mr. B.M. Patil was not held to be tenant in respect of the adjacent alluvial property. This was notwithstanding circumstance that the tenancy had been created in favour of Mr. B.M. Patil by the Receiver, during the course of management in pursuance of proceedings under Section 145 of the Cr.P.C.

9] The Petitioners as well as Mr. B.M. Patil instituted the proceedings before the Commissioner, but the same were dismissed by order dated 11 December 1972. The Petitioners as well as Mr. B.M. Patil carried the matter further by way of revision petitions, but the same were dismissed by the impugned order dated 19 May 1981.

The review petition filed by the Petitioners was also dismissed on 16 January 1985. Hence, the present petition, by which the Petitioners impugn the orders dated 19 May 1981 and 16 January 1985 (impugned orders) to the extent they hold that Mr. B.M. Patil as acquired tenancy rights in respect of suit property surveyed under No.37.

10] Mr. M.L. Patil, learned counsel for the Petitioners, has submitted that the impugned orders are vitiated by jurisdictional errors inasmuch as they have failed to appreciate that the lease created by a Receiver during the course of his management, terminates with the termination of the management and the possession, if any, of such erstwhile lessee is that of a trespasser. Mr. Patil pointed out that the authorities, in making the impugned orders, have relied upon the decision of this Court in case Special Civil Application NO. 1769 of 1967, which was in the facts and circumstances of the present case, not at all applicable. Besides, Mr. Patil points out that the said decision was specifically distinguished by this Court in case of *Keshav V. Mhatre Vs. Arvind R. Parekh and anr.*¹, whilst laying down that the proposition that the lease granted by the Receiver during the course of management terminates with

1 AIR 1974 Bombay 94

the termination of the management. Finally, Mr. Patil pointed out that the sole basis for holding that Mr. B.M Patil was the tenant in respect of suit property is the order made in Tenancy Case No. 322 of 1964, which was nothing but self serving order obtained by Mr. B.M. Patil. In any case, the Petitioners were not even impleaded as parties to the said proceedings and therefore, on basis of said order, there was no question of affecting the Petitioners right. For all these reasons, Mr. Patil submits that the impugned orders to the extent, they affect the Petitioners right, are liable to be interfered with.

11] Although, notices were served initially upon Mr. B.M. Patil and thereafter upon his legal representatives, they have chosen not to appear in these proceedings, at the stage of final hearing. This Court had already protected the Petitioners by way of interim reliefs granted on 19 August 1987.

12] The short issue which arises for consideration in this matter is whether the tenancy rights created by the Receiver for the year 1955-56 and 1956-57 survive beyond the said two years or in any case beyond the termination of management and consequent discharge of the Receiver pursuant to lifting of attachment in terms

of Section 146 of the Cr.P.C. As a matter of principle, the tenancy created by the Receiver will have to be regarded as co-terminus with the tenure of the Receiver. This Court, in case of *Garbad Dhanu Dhangar (since deceased by L.Rs.) Vs. Pandurang A. Athawale (since deceased by L.Rs.)*² relying upon the decision in case of *Keshav Mhatre (supra)*, has held that the tenancy cannot be created in respect of any land taken under the management under the Courts of law or Government body in his official capacity as a guardian under Guardians and Wards Act, in view of the immunity contained in Government lands under Section 88 (1) (c) of the Bombay Tenancy and Agricultural Lands Act, 1948 (said Act).

13] In case of *Keshav Mhatre (supra)*, the learned Single Judge of this Court has held that a lease granted by the management under Section 45 of the said Act during the course of his management must come to an end with the termination of such management and the land must be restored by the State to the possession of the landholder under Section 61. Even if the lessee remains in cultivating possession in contravention of Section 61, his possession cannot be regarded as lawful and he must be deemed to be a trespasser. It was further held that there could not be an annul tenancy unless it was

2 2009(2) ALL MR 68

granted by the management. Moreover, the provisions of Section 83 of the Bombay Revenue Code, 1875, which recognised irrespective of contract an annual tenancy, ceased to apply to agricultural tenancy in view of Section 90 and Schedule II of the said Act.

14] From the perusal of the impugned orders, it appears that the authorities have relied upon an earlier decision of this Court in Special Civil Application No. 1769 of 1967 to hold that the tenancy once created by the Receiver will survive the termination of the management of the Receiver. Reliance was placed upon same decision in case of *Keshav Mhatre (supra)*. This Court, however, distinguished the said decision. In this regard, the observations in paragraph '4' requires reference:

4. *Lastly, Mr. Parulekar argued that after the tenancy granted by the manager came to an end, the petitioner must be considered to be an annual tenant. There could not be an annual tenancy unless it was granted by the Manager. When none had granted him annual tenancy, it is difficult to see how the tenant can claim the status of an annual tenant. Moreover the provisions of Section 83 of the Bombay Land Revenue Code, 1875, which recognised irrespective of contract an annual tenancy, ceased to apply to agricultural tenancy in view of Section 90 and Schedule II of the Bombay Tenancy and Agricultural Lands Act, 1948. The plea of annual tenancy is, therefore, wholly misconceived. Mr. Parulekar, however, submitted that the decision of Bhasme, J.D/- 3-8-1971 in Special Civil Appln. No. 1769 of 1967 (Bom) supports his argument. I find nothing in the said judgment which helps the petitioner. In the first place, observations which he relies upon*

with respect to interpretation of Section 88(1)(d) are all obiter as Bhasme, J. himself pointed out that the point did not arise in the matter for determination. The only observation on which Mr. Parulekar relied upon was as follows:

“In some cases there will be conflict between the former statutory tenants, and the contractual tenants who came on the land only during the period of the management. In the case of any such conflict, the former statutory tenants will have to be preferred to the contractual tenants. In the absence of any such conflict, the contractual tenants inducted on the land by the managing authority and whose tenancy is subsisting on the date of termination of the management will be entitled to the protection of the Tenancy Act. In the present case, there is no such conflict but it is just to consider the point fully that I have expressed my views.”

With respect, these observations were made on certain postulates and were guardedly made. They are applicable only where there was contractual tenancy subsisting on the date when the management ceased. That is possible, as stated above, only when the tenancy existed before the management commenced or the lease was granted by the Manager in exercise of his powers under Section 58 of the Bombay Tenancy and Agricultural Lands Act. Such contractual tenancy cannot subsist where the manager granted a lease in exercise of his powers under Section 47 of the Bombay Tenancy and Agricultural lands Act, as in the present case.”

(emphasis supplied)

15] In view of the aforesaid, there was no question of placing reliance upon the decision of this Court in Special Civil Application No. 1769 of 1967. Rather the matter had to be decided in the light of ruling in case of *Keshav Mhatre (supra)*. In the present case as well, Mr. B.M.Patil has not claimed any prior contractual tenancy, but the claim of tenancy is on the basis of annual lease for the year

1955-56 and 1956-57 in terms of auction held by the Receiver, wherein Mr. B.M. Patil was adjudged the highest bidder for the said two years. Thereafter no action was held, but Mr. B.M. Patil continued in possession. In such circumstances, it is only proper that upon termination of management of receivership, the so called tenancy rights held by Mr. B.M. Patil, even assuming that the same continued beyond the year 1956-57, ceased to operate.

16] In case of *Shyam Sunder Dutta Vs. Baikuntha Nath Banerjee (dead) by LRs. And others*³, question which arose before the Hon'ble Apex Court was whether the Respondents in the said Appeal had had acquired any tenancy rights pursuant to the tenancy created by the Receiver. In this context, it was observed that it is settled law that a Receiver when appointed to manage the suit property acts as an officer of the Court. Unless the Court grants permission to induct any third party into the possession as a tenant in accordance with the directions contained in the order or as per the law then prevailing, the person inducted by the Receiver into possession would only remain as a licensee under the Receiver. As soon as the Receiver is discharged, the possession of the licensee being a limited right to remain in possession during the period when the Receiver

3 (1994) 6 SCC 545

was in management of the suit property, it comes to an end. On the discharge of the Receiver, the licensee has no right to remain in possession either as a tenant or a licensee. Consequently, the declaration given by the High Court that the Respondents had acquire tenancy rights was held to be clearly illegal.

17] The Division Bench of this Court in case of *Radheshyam H. Nimodiya Vs. Court Receiver, High Court Bombay and ors.*⁴, has held that it is settled law that even a mortgagee in possession cannot create a lease which would subsist after the extinction of the mortgagee's interest and that, if a lease of that nature was purported to be created, it would not be an act of prudent management. Such a lessee cannot claim the protection of the Rent Act⁵. The tenancy created by the mortgagee in possession does not survive the termination of the mortgagee's interest. The termination of the mortgagee's interest terminates the relationship of landlord and tenant. There being no landlord and tenant, the tenant cannot claim the protection of Rent Control Legislature. Now, what a mortgagee in possession could not have done, the Court Receiver also could not do, unless he was specifically authorised to do so in exceptional

4 1993(2) Bom.C.R.137

5 Om Prakash Vs. Ganga Sahai- A.I.R. 1978 S.C. 108

circumstances. The power to grant lease or tenancy which was to subsist even beyond the period during which the Court Receiver was to remain in possession was not expressly conferred upon the Court Receiver. Such a power cannot be implied by reason of conferment upon the Receiver of the power of management of the suit property in view of the fact that no rights can be created in the property *pendente lite* which would defeat the ends of justice and incapacitate the Court from giving relief in accordance with the decree or final order that may be passed by the Court.

18] Further, Mr. Patil is right in his contention that no relief could have been granted to the Respondents relying almost entirely upon the order in Tenancy Case No. 322 of 1964. In the first place, the Petitioners were not parties to the said proceedings. Secondly, even the Court Receiver was not properly served in the said proceedings and thirdly, the said proceedings though proceeded on the basis that Mr. B.M Patil was the tenant, do not either adjudicate upon the said issue or declare Mr. B.M. Patil to be a tenant in respect of suit property. On the basis of assertions by Mr. B.M. Patil that he was the tenant, reasonable rent came to be determined in the said proceedings. This assertion was not disputed in the said proceedings,

because the Petitioners were not even impleaded as parties to such proceedings and further even the Receiver from whom Mr. B.M. Patil claimed tenancy was not properly served. The order made in these proceedings does not even formally declare Mr. B.M. Patil as tenant in respect of suit property. On the basis of such order, therefore, there was no question of holding that Mr. B.M. Patil was the tenant in respect of suit property post 1956-57 or in any case beyond the termination of management of receivership.

19] As a result of the impugned orders, an anomalous situation has arisen, the Petitioners are held entitled to the alluvial lands adjacent to the suit property, but Mr. B.M. Patil is held entitled to the suit property as the tenant thereof. Insofar as the property bearing survey No.36, which is admittedly owned by Mr. B.M. Patil, no doubt, Mr. B.M. Patil is held entitled not only to the same but also to the alluvial lands adjacent thereto. The finding with regard to entitlement of Mr. B.M. Patil to the suit property, as noted earlier is clearly unsustainable, particularly since the possession of the suit property was taken over by the Receiver, in pursuance of proceedings under Sections 145 and 146 of Cr.P.C., from the Petitioners. Upon termination of receivership, therefore, the suit

property was rightly restored to the Petitioners. On the basis of annual tenancies for the years 1955-56 and 1956-57 created by the Receiver in pursuance of public auction wherein Mr. B.M. Patil was adjudged highest bidder, there was no question of Mr. B.M. Patil claiming acquisition of tenancy rights even post 1956-57 or in any case post termination of management of receivership.

20] There is really no dispute that the possession of the suit property was taken over by the Receiver from the Petitioners in pursuance of proceedings under Sections 145 and 146 of the Cr.P.C. There is also no dispute that Mr. B.M. Patil was inducted as the tenant of the suit property by the Receiver in pursuance of public auction for the years 1955-56 and 1956-57. Ultimately, the order of attachment has been lifted and the management of receivership terminated. In terms of Kabje Patii issued, the Petitioners were put in possession of the suit property as also alluvial lands adjacent to the same. Mr. B.M. Patil was also placed in possession of the property surveyed under No.36 and the alluvial lands adjacent to the same. The finding that the so called tenancy rights of Mr. B.M. Patil certified post 1956-57 or for that the matter post termination of management of receivership, are clearly in excess of jurisdiction and

therefore, unsustainable. The finding is vitiated by perversity, inasmuch as reliance has been placed upon irrelevant material and further, in arriving at such finding the decisions of the Hon'ble Apex Court as well as this Court have not been taken into consideration. Instead, reliance came to be placed upon the decision of this Court in Special Civil Application NO. 1769 of 1967, which was not at all attracted to the facts and circumstances of the present case. For all these reasons, the impugned orders, to the extent, they affect the Petitioners' right *qua* the suit property are liable to be set aside and are hereby set aside. Rule is, therefore, made absolute in terms of prayer clause (b), to the extent ofcourse, the impugned orders purport to affect the rights of the Petitioners *qua* the suit property.

21] Rule is made absolute in the aforesaid terms. There shall, however, be no order as to costs.

(M. S. SONAK, J.)

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