

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2469 OF 2010

1. Smt. Girjabai Maroti Kudade,
Age 35 years, Occ. Agriculture
and Household, R/o Jamb (Bk)
Tq. Mukhed, Dist. Nanded.

2. Sow. Kashibai Sambhaji Kastewad,
Age 70 years, Occ. Household,
R/o Honwadaj, Tq. Mukhed,
District Nanded.

3. Sow. Parvatibai Eknath Marakwad,
Age 66 years, Occ. Household,
R/o Honwadaj, Tq. Mukhed,
District Nanded.

4. Sow Prayabgai Gangadhar Girwane,
Age 62 years, Occ. Household,
R/o Kasrali, Taluka Biloli,
District Nanded.

..Petitioners

Versus

1. Shri Rajaram Ganpati Pampatwar,
Age 66 years, Occ. Business,
R/o Jamb (Bk), Tq. Mukhed,
District Nanded.

2. Shri Hari Rajaram Pampatwar,
Age 46 years, Occ. Business,
R/o as above, deceased through L.Rs.

A. Premalabai Hari @ Harichandra
Pampatwar, age 52 years,

B. Gajanan Hari @ Harichandra
Pampatwar, age 36 years,

C. Digambar Hari @ Harichandra
Pampatwar, age 27 years,

D. Jayshree Chandrakant Zarkar
Age 40 years,

E. Urmila Ulhas Padamwar,
Age 38 years,

F. Ashwini Narayan Bandawar,
Age 34 years,

G. Pushpanjali Udaykumar Ainapur
Age 32 years,

H. Gitanjali Sandeep Muttepwar,
Age 30 Years

All residing at C/o Rajeshwar
Provision, Kranti Chowk,
Parbhani.

3. Shri Kishan Rajaram Pamaptwar,
Age 41 years, Occ. Business,
R/o as above, deceased, through L.Rs.

A. Chaya Kishan Pampatwar,
Age 45 years.

B. Kailas Kishan Pampatwar,
Age 30 years.

C. Ganesh Kishan Pampatwar,
Age 28 years.

Presently all residing at C/o
Rajeshwar Provision, Kranti Chowk,
Parbhani.

4. The State of Maharashtra. ..Respondents

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Advocate for Petitioners : Shri Chincholkar G.N.
Advocate for Respondents 1 to 3C : Shri Deshmukh M.S.
h/f Shri Yeramwar S.C.
AGP for Respondent 4 : Smt. Raut S.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: April 13, 2016
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ORAL JUDGMENT :-

1. While admitting this petition by the order dated 20.4.2010, this Court had directed the respondent not to create the third party interest in the

suit property.

2. Pursuant to the orders dated 3.3.2016, 17.3.2016 and 7.4.2016, I have heard the learned Advocates for the respective sides at length.

3. The petitioners are aggrieved by the order dated 20.6.2000 passed by the Tahsildar and the orders dated 31.12.2009 passed by the Maharashtra Revenue Tribunal, thereby rejecting the claim of the petitioners seeking restoration of the possession of the land under Section 36(2) and (3) of the Maharashtra Land Revenue Code, 1966 and the provisions of the Maharashtra Restoration of Lands to Scheduled Tribes Act (No.14 of 1975).

4. The contention raised by the petitioners for the first time before this Court is that the Tribe Mannerwarlu was declared as a Scheduled Tribe by the First Presidential Order on 6.9.1950. By entry at Sr. No. 27 in the Constitution (Scheduled Tribes) Order, 1950, Mannerwarlu tribe was included in the Scheduled Tribes. It is, however, conceded that by the Parliament's Act No. 108 of 1976, dated 27.7.1977, the Mannerwarlu tribe was included in the Scheduled Tribe's category for the first time for the State of Maharashtra

5. Shri Chincholkar, learned Advocate has strongly contended that by the effect of the First Presidential Order, though Mannerwarlu was not included in the Scheduled Tribes category till 27.7.1977 in the State of Maharashtra, it was always existing in that category at entry No. 27 by the

First Presidential Order dated 6.9.1950. He, therefore, submits that the transaction of sale of land in between the original landlord and the original purchaser at issue, would amount to a sale of land by a tribal to a non-tribal.

6. Shri Chincolkar, learned Advocate states that he had taken sufficient efforts to look up at reported judgments in order to support his contention that notwithstanding the entry of Mannerwarlu in the Scheduled Tribe for the first time in the State of Maharashtra on 27.7.1977, it would not make a difference as it continued to be in the Scheduled Tribe Category by the First Presidential Order, he was unable to lay his hands on any such reported or unreported judgments. He, however submits that this Court may consider these submissions.

7. Shri Deshmukh, learned Advocate appearing on behalf of the respondents has placed his reliance on the following judgments:-

- 1] Tukaram Laxman Gandewar v. Piraji Dharmaji Sidarwar (1989 Mh.L.J. 815)
- 2] Sheikh Mohammed Sheikh Gulab v. Additional Commissioner, Aurangabad Division, Aurangabad. (1997(2) Mh.L.J. 450)
- 3] Gopal Jianna Madrewar v. Poshatti Bhojanna Khurd (1997(2) Mh.L.J. 296)
- 4] Lachmanna Malanna Alurwar v. Maharashtra Revenue Tribunal & others (1992 (2) Mh.L.J.1139)

8. He submits that this issue is no longer res integra. By the mere inclusion of the tribe Mannerwarlu by the first Presidential Order, would

not affect the sale transactions. It is trite law that the benefits flowing from the provisions applicable in particular State would, therefore, be unaffected. He submits that what is important is that Mannerwarlu was included in the Scheduled Tribes in the State of Maharashtra for the first time on 27.7.1977 and as such, any sale transaction between the parties would be unaffected if the said sale transaction dates prior to the Parliament Act No.108 of 1976, dated 27.7.1977.

9. He refers to the sale deeds dated 10.3.1972, 2.3.1974 and 2.5.1975. He states that all these transactions are prior to 27.7.1977. He further submits that these aspects are undisputed.

10. I have considered the submissions of the learned Advocates in the light of the specific facts of this case.

11. The facts of this case are peculiar. The certificate dated 2.5.1998 produced by the petitioners was a photostat copy. The same has been held to be not proved by the lower authorities. Secondly, it is a scheduled caste certificate and not a scheduled tribe certificate. Considering the above, the competent authority i.e. the Tahsildar has rejected the claim of the petitioners that they are tribals and are included in scheduled tribes.

12. Even before the learned Maharashtra Revenue Tribunal, Aurangabad, in Appeal, the petitioners have not produced the original certificate to indicate whether they would fall in scheduled tribes or scheduled castes.

Moreover, only one legal heir of the deceased owner of the land has raised the issue against the sale transaction effected on 10.3.1972 by the original owner. The mother and sisters of the petitioners have executed the sale deeds on 2.3.1977 and 2.5.1977. They were not made parties to the proceedings. As such, in the face of a denial by the respondents that the petitioners belong to Mannerwarlu caste, the petitioners were bound to prove that they are triabals before the lower authority. It is in these peculiar facts of the case that I have considered the submissions of the petitioners.

13. In the case of Tukaram (supra), the learned Division Bench of this Court has considered the effect of the land belonging to a person, who was not a tribal as on the date of transaction, under Section 36A of the Maharashtra Land Revenue Code, 1966 ("MLRC"). It was concluded by the learned Division Bench that the subsequent inclusion of a tribe in the list as a scheduled tribe would not affect the validity of the transfer as effected, which at the time was between non-tribals.

14. Section 36A was introduced as an amendment on 6.7.1974. Sections 36(2), 36(3) and Section 36A of the MLRC reads as under:-

"Section 36 - Occupancy to be transferable and heritable subject to certain restrictions -

Of the Grant of land

(2) Notwithstanding anything contained in the foregoing sub-

section occupancies of persons belonging to the Scheduled Tribes (hereinafter referred to as the 'Tribals') (being occupancies wherever situated in the State), shall not be transferred except with the previous sanction of the Collector:

Provided that nothing in this sub-section shall apply to transfer of occupancies made in favour of persons other than the Tribals (hereinafter referred to as the 'non-Tribals') on or after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974.

(3) Where an occupant belonging to a Scheduled Tribe in contravention of subsection (2) transfers possession of his occupancy, the transferor or any person who if he survives the occupant without nearer heirs would inherit the holding, may, within thirty years of such transfer of possession, apply to the Collector to be placed in possession subject so far as to the Collector may, in accordance with the rules made by the State Government in this behalf, determine to his acceptance of the liabilities for arrears of land revenue or any other dues which form a charge on the holding, and notwithstanding anything contained in any law for the time being in force, the Collector shall dispose of such application in accordance with the procedure which may be prescribed:

Provided that, where a Tribal in contravention of sub-section (2) of any law for the time being in force has, at any time before the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974 transfer possession of his occupancy to a non-Tribal and such occupancy is in the possession of such non-Tribal or his successor-in-interest, and has not been put to any non-agricultural use before such commencement, then, the Collector shall, notwithstanding anything contained in any law for the time being in force, either suo motu at any time or on application by the

Tribal (or his successor-in-interest) made at any time⁵[within thirty years] of such commencement, after making such inquiry as he thinks fit, declare the transfer of the occupancy to be invalid, and direct that the occupancy shall be taken from the possession of such non-Tribal or his successor-in-interest and restored to the Tribal or his successor-in-interest.

Provided further that where transfer of occupancy of a Tribal has taken place before the commencement of the said Act, in favour of a non-Tribal, who was rendered landless by reason of acquisition of his land for a public purpose, only half the land involved in the transfer shall be restored to the Tribal.

“36A. Restrictions on transfers of occupancies by Tribals

(1) Notwithstanding anything contained in sub-section (1) of Section 36, no occupancy of a tribal shall, after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974, be transferred in favour of any non-tribal by way of sale (including sales in execution of a decree of a Civil Court or an award or order of any Tribunal or Authority), gift, exchange, mortgage, lease or otherwise, except on the application of such non-tribal and except with the previous sanction -

(a) in the case of a lease, or mortgage for a period not exceeding 5 years, of the Collector; and

(b) in all other cases, of the Collector with the previous approval of the State Government:

Provided that, no such sanction shall be accorded by the Collector unless he is satisfied that no tribal residing in the village in which the occupancy is situate or within five kilometers thereof is

prepared to take the occupancy from the owner on lease, mortgage or by sale or otherwise.

(2) The previous sanction of the Collector may be given in such circumstances and subject to such conditions as may be prescribed.

(3) On the expiry of the period of the lease or, as the case may be, of the mortgage, the Collector may, notwithstanding anything contained in any law for the time being in force, or any decree or order of any court or award or order of any Tribunal or Authority, either suo moto or on application made by the Tribal in that behalf, restore possession of the occupancy to the tribal.

(4) Where, on or after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974, it is noticed that any occupancy has been transferred in contravention of sub-section (1) the Collector shall, notwithstanding anything contained in any law for the time being in force, either suo moto or on an application made by any person interested in such occupancy, within thirty years] from the date of the transfer of occupancy hold an inquiry in the prescribed manner and decide the matter.

(5) Where the Collector decides that any transfer of occupancy has been made in contravention of sub-section (1), he shall declare the transfer to be invalid, and thereupon, the occupancy together with the standing crops thereon, if any, shall vest in the State Government free of all encumbrances and shall be disposed of in such manner as the State Government may, from time to time, direct.

(6) Where an occupancy vested in the State Government under sub-section (5) is to be disposed of, the Collector shall give notice in writing to the tribal-transferor requiring him to state within 90 days

from the date of receipt of such notice whether or not he is willing to purchase the land. If such tribal-transferor agrees to purchase the occupancy, then the occupancy may be granted to him if he pays the prescribed purchase price and undertakes to cultivate the land personally; so however that the total land held by such tribal-transferor, whether as owner or tenant, does not as far as possible exceed an economic holding.

Explanation.- For the purpose of this Section, the expression "economic holding" means 6.48 hectares (16 acres) of jirayat land or 3.24 hectares (8 acres) of seasonally irrigated land, or paddy or rice land, or 1.62 hectares (4 acres) of perennially irrigated land, and where the land held by any person consists of two or more kinds of land, the economic holding shall be determined on the basis of one hectare of perennially irrigated land being equal to 2 hectares of seasonally irrigated land or paddy or rice land or 4 hectares of jirayat land."

15. The conclusions arrived at by the learned Division Bench in paragraph Nos.8 to 10 of the judgment in the case of Tukaram (supra) read as under:-

"9. The provisions of section 36-A, therefore, provide that no such occupancy of a tribal shall be transferred in favour of any non tribal by way of sale, etc. except on the application of such non tribal and except with the previous sanction of the Collector. This section, therefore, provides that no occupancy of the tribal can be transferred by way of sale without permission of the Collector in favour of a non tribal. The restriction is provided for transfer. The status of the parties, therefore, has to be considered at the time or prior to completion of the transfer. The change in status after the transfer, if any, has no relevance and restriction provided under section 36-A are not at all attracted. The sale may be even after

1974 but the sale must be between tribal and non tribal. The parties must have that status of being tribal at the time of the transfer and not subsequently. That does not seem to be the intention of the Legislature. The Legislature wanted to extend protection to the person who are tribal at the time of transfer. The protection, therefore, cannot be extended to the persons who were not tribals at the time of transfer but the status of belonging to Scheduled Tribe is conferred thereafter. In our opinion, the provisions of section 36-A are not at all attracted in the present case in view of the admitted fact that the status of respondent No. 1 as Scheduled Tribe is conferred on him by the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976, which came into force on 27th day of July, 1977. The respondent deceased Piraji could claim status of belonging to Scheduled Tribe on or after 27th day of July, 1977 and not before that. The transfer under a sale deed dated 9-9-1974, was therefore not between tribal and non tribal but between non tribals to which provisions of section 36-A cannot apply.

10. The argument of Shri Dhuldhvaj that the provisions of Amendment Act No. 108/1976 includes Naikada Caste in Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976, and will have to be given retrospective effect to confer the benefit to the tribal under section 36-A of the Maharashtra Land Revenue Code. It is not possible to accept this contention because in order to give retrospective effect there must be intention of the Parliament or Legislature expressed in so many words or such intention must be gathered by necessary implication from the language used therein. The wording of the Amendment Act is clear and there is nothing expressed regarding retrospective effect nor it is possible to gather such intention by necessary implication. Reference can be made in this connection to the decision of Madhya Pradesh High Court in *Mangilal and others v. Registered Firm Mittilal Radheylal Rastogi and others* : AIR1978MP160 where the provisions of this Amendment

Act No. 108/1976 were considered and it is held that the Amendment Act is not retrospective in effect.”

16. This Court had once again dealt with a similar issue in the matter of Sheikh Mohammed (supra). Paragraph No.11 of the said judgment reads as under:-

“11. The learned A.G.P. Mr. Kadam made a feeble attempt to show that this ground was nowhere raised in the petitions by the petitioners and according to him, the petitioners should not be allowed to raise the same at this stage. I am not ready to accept this argument. Though the ground is not raised in the main petitions, the learned Counsel for the petitioners was allowed to argue on this point as per se the initial transactions are found to be the transactions between non-tribals only. Exercising the jurisdiction vested in me judiciously, I have allowed the petitioners to raise this point and particularly in view of the Division Bench judgment of our High Court reported in Tukaram v. Piraji Sidarwar : (1989) 338 BOM LR 91 , wherein it is specifically stated that the provisions of the Act are not to be given retrospective effect. Shri Khandare, learned Counsel for the petitioners also referred to a decision in Writ Petition No. 621-A/1982 Shankar v. Baliram, wherein the same point was under consideration. The learned Counsel for the petitioners also brought to my notice a decision given by this Court in Writ Petition No. 807/1986 decided on 1-8-1991 wherein, His Lordship of this Court relying on the judgment of the Division Bench : 1989 Mh.L.J. 815 has observed that the benefit of the Act cannot be given to those whose names have been included in the Scheduled Tribes' list after the date of the transaction. I fully agree with the contentions of the learned Counsel for the petitioners, who has taken much labour to argue on this point and I have no hesitation in

coming to the conclusion that the order passed by the Reviewing Authority below deserves to be quashed and set aside, and the same is quashed and set aside. The question of restoration of lands to the original owner Gangaram Raghoji Bele, in both the matters, does not arise. The petitions are therefore, allowed. Rule is made absolute with no order as to costs.”

17. In the case of Gopal (supra), the issue was with regard to Mannerwarlu tribe as like in this case. This Court, in the said judgment has concluded that since the Mannerwarlu tribe was recognized as a Scheduled tribe in the State of Maharashtra on 27.7.1977, the transaction prior to the said date will remain unaffected as it would be a transaction between the two non tribals. The specific observations of this Court in paragraph Nos. 6 to 8 read as follows:-

“6. Shri Patki, learned Counsel for the petitioner brought to my notice two decisions of this Court. The first being in the case of Tukaram Laxman Gandewar v. Piraji Dharmaji Sidarwar by LRs. Laxmibai : 1989 Mh. L.J. 815, in which it is specifically laid down that if the tribe of a transferor is recognized to be Scheduled Tribe any time after the date of sale-deed, then he is not entitled to the benefit of the provisions of the Maharashtra Restoration of lands to the Scheduled Tribes Act, 1974. The second decision relied on by Shri Patki, the learned Counsel for the petitioner, which is brought to my notice, is an unreported judgment of this Court in Writ Petition No. 807/1986 in the case of Gemsing s/o Ramlal Chavan v. Govindu s/o Vyankanna, decided on 1.8.1991, in which the same view is followed relying on the judgment of the Division Bench cited above. In view of this position, the present transfer dated 24.4.1968 is liable to be declared as a transfer not by a tribal but by a non-tribal.

7. *From the Judgments of the lower Court, it is seen that unnecessarily lengthy discussion is made as regards the caste of the present petitioner-Gopal so-much-so that it is said that he is son of Dasi-putra. There was no proof as regards his caste i.e. Naikpod and the certificates which he had produced as regards his caste were not considered by the Authorities below and the same are said to be of no help to him. Even assuming for the sake of argument that the petitioner did not belong to Naikpod or that he did not belong to the Scheduled Tribe caste, at the most it could be said that it was a transaction of transfer between non-tribals only and, therefore, the question of the transaction being hit by the provisions of the present Act did not arise. Consequentially, the question as regards restoration of land to the tribal also did not arise.*

8. *In view of the legal position above and the judgments referred to above of this Court, I have no hesitation to hold that the transaction, dated 24.4.1968 was between non-tribals only, and hence the question of restoration of the land to the respondents does not arise.”*

18. In the case of Lachmanna (supra), the learned Single Judge of this court has considered the earlier judgments of this Court to consider the effect of a tribe being notified as a Scheduled Tribe by the Act 27 of 1976. In the said case, the issue with regard to the Presidential Order declared at the commencement of the Constitution and thereafter amended from time. This Court has held that the community “Pradhan” was declared as a Scheduled Tribe for the first time on 1.11.1975 as per the Notification of the State Government issued under Section 1(3) of the Restoration Act. It was thus held that the judgment delivered by the learned Division Bench of

this Court in the case of Tukaram (supra) would be squarely applicable and the sale transaction effected prior to the date of the inclusion of the tribe in the Scheduled Tribe category would not affect the said transaction.

19. Shri Chincholkar, learned Advocate for the petitioner strenuously contended that the inclusion of the Mannerwarlu tribe by the first Presidential Order would impact the transaction between the landowner and the purchase. He has been unable to support his contention with any judicial pronouncements. Though he has contended that Mannerwarlu was declared a Scheduled Tribe by the first Presidential Order, he was unable to support his submissions.

20. As such, on considering the fact that the petitioners have not established before the lower authorities that they are tribals, I do not find that the impugned order could be termed as being perverse or erroneous. This petition being devoid of merits is, therefore, dismissed.

21. Rule stands discharged. No order as to costs.

(RAVINDRA V. GHUGE, J.)

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