

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.417 OF 2013

Dhondiba Mhatoji Kalate (decd) through his legal heirs
Pandurang Dhondiba Kalate and another ... Applicants
Vs.
Mukund Govind Purandare and others ... Respondents

Mr. Sandeep S. Salunkhe for Applicants.

CORAM : R. G. KETKAR, J.
DATE : MAY 03, 2016

P.C. :

Heard Mr. Salunkhe, learned Counsel for applicants at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants have challenged the judgment and order dated 16.01.2013 passed by the learned 7th Joint Civil Judge, Junior Division, Pune below exhibit-43 in Regular Civil Suit No.1846 of 2006. By that order, the learned trial Judge rejected the application made by the defendants No.A1 and A2 under Order VII, Rule 11 of C.P.C. for rejection of the plaint.

3. Respondents No.1 to 3, hereinafter referred to as plaintiffs, have instituted Suit inter alia praying for declaration that the order dated 21.04.1980 passed in tenancy proceedings No.56 of 1980 and all further orders arising therefrom are void ab initio and nullity and the plaintiffs have 1/4th share in the property, more particularly described in paragraph 1 of the plaint (for short 'suit property') and the said share is continuing and subsisting and for declaration that plaintiffs are the owners of the same; for perpetual injunction restraining defendants from transferring /

alienating / creating third party interest in respect of the suit property.

4. On behalf of defendants No.A1 and A2, say and written statement was filed on or about 16.10.2009. In paragraph 6, it was contended that plaintiffs have adopted the remedy under the Special Law i.e. Bombay Tenancy and Agricultural Lands Act, 1948 (for short 'Act') before different authorities. Appeal preferred by them before the Divisional Commissioner i.e. M.R.T., Pune is also pending and therefore, they cannot simultaneously prosecute two remedies. The Suit as also application exhibit-5 are not maintainable and as such are liable to be dismissed. In paragraph 7, it was contended that the Suit is not maintainable in view of Section 85 of the Act. In paragraph 9, it was contended that the Civil Court has no jurisdiction to decide the validity of the order passed by the Tenancy Court as they have already adopted remedies under the Act and the Appeal preferred by them is pending.

5. During the pendency of the Suit, defendants No.A1 and A2 filed application under Order VII, Rule 11(d) of C.P.C., exhibit-43 on 13.11.2009 for rejection of the plaint on the ground that the Suit is time barred and the Civil Court has no jurisdiction to decide the issues arise out of the Act. Reliance was placed on Section 85 of the Act. Plaintiffs filed their say at exhibit-45 resisting the application. One of the contentions advanced by the plaintiffs is that the landlady Saraswatibai Kate was widow. Original tenant failed to issue statutory notice under Section 32-F of the Act, and as such, lost the right to purchase the suit property. A.L.T., Mulshi passed order declaring purchase ineffective and for disposal of the suit property as per Section 32-P of the Act. The jurisdiction to hold inquiry under Section 32-G of the Act was barred and the orders are null and void.

6. By the impugned order, the learned trial Judge rejected the application, against which, the present Civil Revision Application is filed by defendants No.A1 and A2.

7. In support of this Application, Mr. Salunkhe strenuously contended that plaintiffs have prayed for setting aside the order dated 21.04.1980. In fact the order is passed on 02.02.1981, and wrongly, order dated 21.04.1980 is mentioned. He submitted that on 28.09.1979, A.L.T., Mulshi had passed order. Against that order, Revision Application No.56 of 1980 was preferred by A.L.T., Mulshi for deciding the question about the maintainability of second proceedings under Section 32-G. Order dated 28.09.1979 was also challenged in Tenancy Appeal No.93 of 1979 by Shantabai Daji Joshi and three others. By order dated 19.08.1983, S.D.O. set aside the order dated 28.09.1979 and remitted the matter to A.L.T., Mulshi. On 11.06.1987, A.L.T., Mulshi decided the proceedings and declared that Dhondiba Kalate, original tenant, has become the purchaser as also prayer made by the landlady on 25.02.1986 for obtaining possession of the suit property under Section 32-P was rendered infructuous. The order of the A.L.T. was confirmed by the S.D.O. in Tenancy Appeal No.50 of 1987 and the said order was not challenged. Instead of challenging that order, review application was filed seeking review of the order passed in Tenancy Appeal No.50 of 1997. By order dated 31.03.2006, S.D.O. dismissed the review application. Aggrieved by this order, Appeal No.118 of 2006 was preferred before the M.R.T. He submitted that plaintiffs have prayed for setting aside the order dated 02.04.1981, which was already set aside. As the prayers stand today, the Suit is not maintainable. Whether the orders passed by the tenancy authorities are legal or otherwise can be decided by M.R.T. in Appeal No.118 of 2006. Apart from that, plaintiffs cannot prosecute two parallel proceedings simultaneously, one before the M.R.T. and other before the Civil Court. The plaint is, therefore, liable to be rejected under Order VII,

Rule 11(d) of C.P.C.

8. Mr. Salunkhe invited my attention to the order dated 02.02.1981 passed by the S.D.O., Haveli in Revision under Section 76 of the Act. In that order, it is recorded that as on 01.04.1957 i.e. tillers day, Saraswatibai Kate, landlady was widow and the right of purchase by tenant was postponed under Section 32-F of the Act. Order to that effect was made by A.L.T., Mulshi on 12.06.1962. The landlady died on 15.11.1965. As her successors in title did not make any efforts to get the land exempted under the provisions of the Act, A.L.T., Mulshi made inquiry and declared purchase ineffective on the ground that tenant did not exercise his right of purchase. He also invited my attention to the order dated 28.02.2003 passed by the S.D.O., Pune in Tenancy Appeal No.50 of 1987. Review Application was filed before the S.D.O., which was rejected on 31.03.2006 and the said order is under challenge before M.R.T. in Appeal No.118 of 2006.

9. Mr. Salunkhe submitted that landlady Saraswatibai died on 15.11.1965 leaving behind four daughters namely, Shantabai, Lakshmibai, Rukminibai and Ganubai. He submitted that as per the proviso to clause (a) of sub-section (1) of Section 32-F, Saraswatibai was a member of joint family consisting of herself and four daughters. As the daughters are outside the categories specified in sub-section (1), and there is no material on record that Saraswatibai's share was separated by metes and bounds before 31.03.1958, the provisions of Section 32-F are not applicable. He, therefore, submitted that the Suit itself being wholly misconceived is liable to be rejected.

10. I have considered the submissions advanced by Mr. Salunkhe. I have also perused the material on record. In paragraph 4 of the

impugned order, the learned trial Judge has considered the contentions advanced on behalf of the plaintiffs based on Section 32-F of the Act. Plaintiffs have asserted that as the original tenant failed to issue statutory notice under Section 32-F of the At, he has lost right to purchase the suit property and therefore, the proceedings under the Act are null and void. Plaintiffs have sought declaration that the order dated 21.04.1980 and all further orders arising therefrom are void ab initio and nullity. Prayer clause (B) reads thus,

“B. It may please be declared that the impugned order dated 21.04.1980 in the proceeding no.56/80 **and all further orders arising therefrom are void - ab initio and nullity** and the plaintiffs right to have share of 1/4th in the suit property remains continuing and subsisting, the plaintiffs being owners of the same.

(emphasis supplied)”

11. Mr. Salunkhe submitted that in fact no order is passed on 21.04.1980 and order passed in Tenancy Case No.56 of 1980 is the order dated 02.04.1981. Even if I accept that submission of Mr. Salunkhe, having regard to prayer clause B extracted hereinabove, plaintiffs sought declaration not only in respect of order dated 21.04.1980 but even in respect of further orders arising therefrom. In view thereof, I do not find merit in this submission.

12. Section 31(1) lays down that notwithstanding anything contained in section 14 and 30 but subject to sections 31A to 31D (both inclusive), a landlord (not being a landlord within the meaning of Chapter III-AA) may, after giving notice and making an application for possession as provided in sub-section (2), terminate the tenancy of any land (except a permanent tenancy), if the landlord bona fide requires the land for (a) cultivating personally, or (b) any non-agricultural purpose. Sub-section (2) lays down that the notice required to be given under sub-section (1) shall be in writing, shall state the purpose for which the landlord

requires the land and shall be served on the tenant on or before the 31st day of December, 1956. A copy of such notice shall, at the same time, be sent to the Mamlatdar. An application for possession under section 29 shall be made to the Mamlatdar on or before the 31st day of March, 1957. Sub-section (3) reads thus,

“(3) Where a landlord is a minor, or a widow, or a person subject to mental or physical disability then such notice may be given and an application for possession under section 29 may be made,-

(i) by the minor within one year from the date on which he attains majority;

(ii) by the successor-in-title of a widow within one year from the date on which her interest in the land ceases to exist;

(iii) within one year from the date on which mental or physical disability ceases to exist; and

Provided that where a person of such category is a member of a joint family, the provisions of this sub-section shall not apply if at least one member of the joint family is outside the categories mentioned in this sub-section unless before the 31st day of March, 1958 the share of such person in the joint family has been separated by metes and bounds and the Mamlatdar on inquiry, is satisfied that the share of such person in the land is separated having regard to the area, assessment, classification and value of the land, in the same proportion as the share of that person in the entire joint family property, and not in a larger proportion.”

13. Section 32-F of the Act, insofar as it is relevant to the present controversy is concerned, reads thus:

“32F. Right of tenant to purchase where landlord is minor, etc.

(1) Notwithstanding anything contained in the preceding section,-

(a) where the landlord is minor, or a widow, or a person subject to any mental or physical disability, the tenant shall have the right to purchase such land under section 32 within one year from the expiry of the period during which such landlord is entitled to terminate the tenancy under section 31 and for enabling the tenant to exercise the right of purchase, the landlord shall send an intimation to the tenant of the fact that he has attained majority, before the expiry of the period during which such landlord is entitled to terminate the tenancy under section 31:

(b) ...

(1A) A tenant desirous of exercising the right conferred on him under sub-section (1) shall give an intimation in that behalf to the landlord and the Tribunal in the prescribed manner within the period specified in that sub-section;”

14. As noted earlier, Saraswatibai died on 15.11.1965 leaving behind four daughters namely, Shantabai, Lakshmibai, Rukminibai and Ganubai. Thus, her interest in the suit property ceased to exist after her death. It is not brought on record that in terms of Section 31(3), that any notice and an application for possession under Section 29 was made by the successor-in-title of Saraswatibai within one year from the date on which her interest in the suit property ceased to exist. Perusal of Section 32-F(1)(a) shows that notwithstanding anything contained in the preceding section where the landlord is a widow, the tenant shall have the right to purchase such land under Section 32 within one year from the expiry of period during which such landlord is entitled to terminate the tenancy under Section 31 and for enabling the tenant to exercise the right of purchase, the landlord shall send an intimation to the tenant of the fact that he has attained majority, before the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31. Section 32-F(1A) lays down that the tenant desirous of exercising the right conferred on him under sub-section (1) shall give an intimation in that behalf to the landlord and the Tribunal in the prescribed manner within the period specified in that sub-section. Mr. Salunkhe submitted that if in a given case, a landlord is minor, after attaining majority he has to send intimation as per sub-section (1)(a) of Section 32-F. Similar analogy applies to a landlord who is a widow. In view of the plain language of the Section, it is not possible to accept this submission.

15. In the case of *Maruti Vs. Ramchandra Bhau, 1999 (3) Mh.L.J. 530*, the learned Single Judge of this Court after considering Sections 31 and 32-F, observed in paragraph 20 thus,

“20. Sub-section (2) of section 32-F provides that the provisions of section 32 to 32-E (both inclusive) and section 32-G to 32-R (both inclusive) shall so far as may be applicable, apply to such purchase. As against this, section 32-F begins with the wording "Notwithstanding anything contained in the preceding sections.....". Both these sections, namely, section 32-F(1) and 32-F(2) if interpreted in proper prospective and harmoniously keeping in view the object of section 32-F then it becomes clear that it could be said that sub section (2) of section 32-F is an exception to sub-section (1) of section 32-F but at the same time it has to be borne in mind that exception carved out by sub section (2) is limited to the sections referred to in it, namely, section 32 to 32-E (both inclusive) and 32-G to 32-R (both inclusive). Since section 31 is not included in sub-section (2) of section 32-F and since section 32-F in sub section (1) provides "Notwithstanding anything contained in the preceding sections" then it has to be held that right given to the landlord under section 31 has nothing to do with the right given to the tenant under section 32-F for purchasing the land and consequently, it has to be held that a tenant in this case was under legal obligation or statutory duty to give notice of his intention to purchase the land as contemplated under section 32-F.”

16. Mr. Salunkhe relied upon the proviso to clause (a) of sub-section (1) of Section 32-F. Mr. Salunkhe has not brought any material on record to indicate that in terms of that proviso, Mamlatdar had held enquiry and recorded a finding that share of Saraswatibai in the suit property was separated. I, therefore, do not find any merit in this submission.

17. Prima facie, plaintiffs have come with the positive case that there is non-compliance of Section 32-F of the Act and therefore, the orders passed under Section 32-G are null, void and are nullity. Understood thus, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Application fails and the same is

dismissed. It is made clear that the observations made herein are only tentative and prima facie for deciding the correctness of the impugned order. Needless to observe that the learned trial Judge will decide the Suit on the basis of evidence on record and in accordance with law, uninfluenced by the observations made in this order.

18. At this stage, Mr. Salunkhe orally applies for continuation of the ad-interim order date 29.04.2013 for the period of 8 weeks from today.

19. Having regard to the fact that the C.R.A. is pending since 2013 and the applicants intend to challenge this order before the higher court, I find that the request made by Mr. Salunkhe is reasonable. Hence, notwithstanding dismissal of the C.R.A., ad-interim order dated 29.04.2013 shall remain in force for the period of 8 weeks from today subject to clear understanding that no further request for extension of time shall be entertained.

(R. G. KETKAR, J.)

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