

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3847 OF 1995

Gundappa D. Kole (since deceased)
Through his legal heirs
Shri Jaywant Gundappa Kole & Ors. ... Petitioners

V/s.

Ghanshyam Shankar Kulkarni (since deceased)
Through his legal heirs
Smt. Mangal Ghanshyam Kulkarni & Ors. ... Respondents

Mr. N. V. Bandiwadekar with Sagar Mane for the petitioners
Mr. R. S. Apte, Senior Advocate with Mandar Limaye for the
Respondents.

CORAM: K.K. TATED, J.
DATED : JULY 14, 2017

JUDGMENT :

1. Heard the learned counsel for the parties. By this petition under Article 227 of the Constitution of India the petitioner tenant challenges the orders dated 30.04.1993 passed by the Additional Collector, Kolhapur in TNC Application No.284/1992 filed by the respondent landlord u/s.43-1B(2) of the Maharashtra Tenancy and Agricultural Lands Act, 1948 (said Act) for possession of agricultural land being Gut No.199 admeasuring . 1H 8R at village Gourwad, Tq. Shirol, Dist. Kolhapur directing the tenant to handover/restore possession of the suit land to the respondent landlord.

2. The petitioner also challenges the judgment dated 29.03.1995 passed by the Additional Commissioner, Pune Division, Pune in Revision Application No.TNC/RA/KP/147/93 filed u/s.73A read with section 43-1B of the said Act, as the Revision Application also stood dismissed by the authority.

3. In the present proceedings, the dispute is between the landlord and tenant under the said Act in respect of the suit property. Originally, the land being Gut No.32 admeasuring 8A 39G owned by Hari Kulkarni. Same was in possession of Dattu Padappa Kole, father of the petitioner as a protected tenant. After death of landlord Hari Kulkarni, names of his three sons were recorded to the 7/12 extract to the extent of 1/3rd share each viz. (1) Shankar Hari Kulkarni (2) Ramchandra Hari Kulkarni and (3) Laxman Hari Kulkarni, prior to 1955-56. On tillers day i.e. 31.03.1957, name of three sons of the landlord were shown in 7/12 extract as tenant.

4. One of the sons of the landlord i.e. Shankar Hari Kulkarni died leaving behind, widow, four sons and two daughters. The respondent Ghanshyam Shankar Kulkarni was one of the sons. On the death of Shankar Kulkarni the name of his eldest son Digambar Kulkarni was mutated in 7/12 extract by M.E.No.219 as a Manager of HUF. The members of the HUF are as under:

1. Smt. Anutai Shankar Kulkarni- widow
2. Digambar Shankar Kulkarni – son
3. Balu Shankar Kulkarni – son
4. Vasudeo Shankar Kulkarni – son

5. Ghanshyam Shankar Kulkarni – son
6. Indutai Shankar Kulkarni – Daughter
7. Sakubai Shankar Kulkarni - Daughter
(after marriage Indumati Balkrishna Hatyal)

5. The respondent Ghanshayam Shankar Kulkarni, brother of Digambar Shankar Kulkarni had joined Military in the year 1963. After completion of 28 years service he retired on 31.12.1991. The respondent made a tenancy application No.284/1992 u/s.43-1B(2) of the said Act on 16.10.1992 for possession of the suit land from the petitioner. Said application was made by the respondent showing that he is the son of the landlord of the property. His contention was that on the basis of the application dated 20.06.1964 made to the Revenue Authority, his elder brother Digambar got transferred the suit property in his name. Same was recorded in the revenue record on 01.12.1964. Same was certified by the concerned officer on 21.07.1966.

6. In that tenancy application, the petitioner filed their written statement dated 27.04.1993 and raised objection to the said application itself. The petitioner, in their written statement submitted that Shankar Kulkarni died leaving behind widow, four sons and two daughters. Therefore, all the legal heirs of Shankar were entitled to their share in the suit property. Instead of effecting partition by metes and bounds, Digambar, on his own transferred the entire property in favour of the respondent, his brother. Hence, the said application was not maintainable as per section 43-1B(2) of the said Act.

7. Both the parties placed on record several documents and also entered into witness box. Considering the evidence on record the Additional Collector passed the impugned judgment dated 30.04.1993 in tenancy application No.284/1992 directing the petitioner tenant to handover possession of the suit property to the respondent. Same order was confirmed by the Additional Commissioner, Pune Division, Pune in Revision Application No.147/1993 by judgment dated 29.03.1995. Hence, the Writ Petition.

8. The learned counsel for the petitioner submits that the impugned orders passed by the Authorities below are against justice, equity and good conscience and same are liable to be quashed and set aside. He submits that bare reading of section 43-1B of the said Act shows that an Ex-serviceman can claim benefits of this section in respect of his share in joint family property and/or his own property. He submits that unless and until joint family property is divided by metes and bounds between the members, the Ex-serviceman has no right to make an application u/s.43-1B of the said Act. He submits that in the present proceedings the elder brother of respondent, Digambar who was acting as a Manager of HUF, transferred the entire property of HUF in the name of the respondent by application dated 20.06.1964. In the said application, nowhere stated that other members of HUF gave their consent or not and whether they relinquished their right in the HUF property in favour of the respondent. On the basis of the said application dated 20.06.1964, the suit property came to be transferred in favour of the respondent which is contrary to the provisions of Hindu Law as well as the said Act. He submits that though this issue was

raised by the petitioner in the written statement, same was not considered by both the Authorities below at the time of passing the impugned orders.

9. In support of this contention, the learned counsel for the petitioner relies on the judgment of the Apex Court in the matter of ***Chandrakant Madhavrav Dhaibar and Anr Vs. Patel Parshottamdas Shamalbhai and Anr. AIR 1971 SC 105***. He submits that in this authority, the Apex Court held that unless and until HUF property is divided by metes and bounds between the members, a member cannot make an application under Chapter III-AA of the said Act. He relies on para 3 and 6 of the said authority which read thus:

“3. The Mamlatdar came to the conclusion that the partition alleged did not come within the scope of Section 32F(1)(a) of the Act as it was only a partial partition in view of the fact that the members had not divided the house that they had at Baroda as well as their lands in Kadu in Poona District. The appellate authority opined that a partial partition also comes within the scope of Section 32F(1)(a) and hence it set aside the Order of the Mamlatdar and remanded the case back to him for determining whether the second appellant had been given a proper share in the family properties which question the Mamlatdar did not go into earlier in view of his conclusion that a partial partition does not come within the scope of Section 32F (1)(a) In the further appeal the tribunal agreeing with the Mamlatdar opined that in Order to have the benefit of Section 32F(1)(a), the entire family properties must have been partitioned. The same view commended itself to the High Court.

6. It is not necessary for us to go into these contentions in this appeal. The tribunal the final fact finding authority has come to the conclusion that on the admitted facts, the share given to the second

appellant, having regard to the area, assessment, classification and value of the lands is not in the same proportion as his share in the entire joint family property. It was admitted before the tribunal that at the time of the partition the 1st appellant's wife (second appellant's mother) was alive. It was further admitted that under law, she was entitled to a 1/6th share in the suit lands. Admittedly she was not given any share. The proper share to which the second appellant was entitled in the lands owned by the 1st appellant and his sons is 1/6th and not 1/5th. But in fact he was given 1/5th share in the same. That being so, the second appellant is not entitled to the benefit of Section 32F(1)(a). A somewhat half-hearted attempt was made in this Court to show that the wife of the 1st appellant had renounced her share. This contention is opposed to the admission made before the tribunal. Therefore it cannot be accepted."

10. The learned counsel for the petitioner submits that the Apex Court, in the matter of ***Balkrishna Somnath Vs. Sada Devram Koli & Anr.*** AIR 1977 SC 894 held that there should be partition of joint family property by metes and bounds and also to see that there is no unfair manoeuvre to defeat the scheme of the Act. He submits that in the case in hand, Digambar who was Manager of the HUF, transferred the entire HUF property in favour of the respondent defeating the rights of other members i.e. three sons, two daughters and widow. Paragraph 13 of the said judgment reads thus:

"13. The Proviso clearly states that the disabled person's share 'in the joint family' must have been 'separated by metes and bounds'. Separation from the joint family means separation from all the joint family assets. Otherwise the sharer remains partly joint and, to that extent, is not separated from the joint family. Notional division or division in status also may not be enough because the Act insists on separation 'by metes and bounds'. Ordinarily 'metes and bounds' are appropriate to real property, meaning, as the phrase does, 'the boundary lines of land, with their terminal points

and angles'. In the context, the thrust of the expression is that the division must be more than notional but actual, concrete, clearly demarcated. The ineptness and involved structure and some ambiguity notwithstanding, the sense of the sentence is clear.

The share of a person in the joint family, plainly understood, means his share in all the joint family properties and not merely in the real estate part. What is more, the section uses the expressions 'the share of such person in the joint family', 'the share of such person in the land', 'the share of that person in the entire joint family property'. Thus it is reasonable to hold that when the expression used is 'the share of such person in the joint family.', it is not confined to the share in the land only. It really means his share 'in the entire joint family property'. Moreover, the statutory exercise expected of the Mamlatdar by the Proviso involves an enquiry into the share of the disabled person in the land, and its value, the share of that person in the entire joint family property, the proportion that the allotment of the land bears to his share in the entire joint family property with a view to see that there is no unfair manouvre to defeat the scheme of the Act. The necessary postulate is that there is a division in the entire joint family property. Therefore, the imperative condition for the operation of the Proviso is that there should be a total separation and so far as a disabled member is concerned it must cover all the joint family properties.”

11. The learned counsel for the petitioner also relies on the judgment of this court in the matter of **Mannappa Rana Patil Vs. Narsingrao Ganpatrao Dalavi & Ors. 1992 MhLJ 1037**. He submits that in this authority, this court held that the application by landlord who was member of joint family u/s.43-1B to obtain possession of the land is only to the extent of his share in the joint family and if that is not determined by metes and bounds, then the application u/s.43-1B is not maintainable. Paragraph 14 to 16 of this authority reads thus:

“14. If we read the scheme of the provisions, it is amply clear that under section 43-1B, the landlord as defined under section 43-1A, is given right to terminate the tenancy of any land and obtain possession thereof, but if the landlord is a member of a joint family, only to the extent of his share in the land not exceeding the ceiling area held by the joint family, provided that the mamlatdar on inquiry is satisfied that such share has (regard being had to the area, assessment, classification and value of land) been separated by metes and bounds in the same proportion as his share in the entire joint family property and not in a larger proportion.

15. Section 43-1B, therefore, confers right on the landlord to terminate the tenancy of a tenant of tenants or to obtain possession. The right to obtain possession is restricted in case the landlord is a member of the joint family on the determination of his share in the property and also on getting his share separated by metes and bounds in the proportion of his share through the mamlatdar. The termination of tenancy precedes the obtaining of possession by the landlord which is also amply clear from the provisions of sub-section (2) of section 43-1B because the making of an application for possession is dependent on the giving notice in writing of termination of tenancy. The provisions of section 43-1D further support this aspect of the matter because section 43-1D confers the right on the tenant to purchase the land from the landlord. Clause (b) of sub-section (1) of section 43-1D deals with the purchase of the land after the termination of the tenancy under section 43-1B of that portion under which the landlord is not entitled for resumption.

16. Considering all these provisions together, the provisions leave no doubt that before making an application for possession of the land the tenancy of the tenant will have to be terminated. The landlord can, therefore, terminate the tenancy of the entire land by giving a notice in writing, but his right to obtain possession, if he is a member of a joint family, is only to the extent of his share in the joint family and not to any larger proportion.”

12. On the basis of these authorities and the submissions, the learned counsel for the petitioner submits that, in the present proceedings the

respondent has failed and neglected to place on record any documentary evidence to show that after the death of their father Shankar Hari Kulkarni, the entire property was distributed amongst the members of HUF by metes and bounds. In fact, in the present proceedings, Digambar, Manager of HUF and legal heir of Shankar, transferred the entire property in favour of the respondent by application dated 20.06.1964 with *mala fide* intention to take advantage of section 43-1B of the said Act and these facts were not considered by both the Authorities below.

13. The learned counsel for the petitioner submits that in fact the Additional Collector, Kolhapur in paragraph 6 of its impugned order dated 30.04.1993 held that the respondent was holding his share prior to 1955-56 and his share was separated by metes and bounds as far back as in 1963-64. He submits that this findings is *prima facie* incorrect. The respondent on their own placed on record the document to show that Digambar has made an application with the Revenue Authority on 20.06.1964 for transferring the entire property in favour of the respondent Ghansham. That application was recorded by the Gramsevak on 01.12.1964 and same was certified by the Revenue Authority on 21.07.1966. On this ground also the judgment passed by the Additional Collector, Kolhapur is required to be set aside.

14. The learned counsel for the petitioner submits that in fact, on the date of making the application by respondent u/s.43-1B of the said Act, the application itself was not maintainable for want of relationship between them as a landlord and tenant. He submits that admittedly,

the petitioner's father was in possession of the suit property as a protected tenant for last several years. After his death, names of three sons were recorded in 7/12 extract. On tillers day i.e. 01.04.1957, the names of three sons of original tenant were appearing and hence in view of section 32 of the said Act, they became owner of the suit property. He submits that it is not necessary for the petitioner to make any application for declaring him as owner of the suit property because on the tillers' day, his name was shown as tenant of the suit property. In support of this contention, he relies on the judgment of the Apex Court in the matter of *Amrit Bhikaji Kale & Ors. Vs. Kashinath Janardhan Trade & Anr. AIR 1983 SC 643*. He submits that in this authority, the Apex Court held that by operation of law, the tenant of the land become deemed purchaser thereof on the tillers' day. The landlord need not make any application to that effect. Therefore, the application made by the respondent under section 43-1B of the said Act on 16.10.1992 was not maintainable. He submits that this issue was not considered by the Additional Commissioner, Pune Division, Pune while passing the impugned order in revision No.147/1993. Though the judgment of this court in the matter of Manappa Patil (supra) was cited before the Commissioner, Pune Division, Pune, he failed to consider the same. On the basis of these submissions and the authorities, the learned counsel for the petitioner submits that both the orders passed by the Authorities below are required to be set aside holding that the application dated 16.10.1992 made by respondent u/s.43-1B of the said Act is not maintainable and same may be dismissed with costs.

15. On the other hand, the learned senior counsel for the respondent landlord vehemently opposed the Writ Petition . He submits that there are concurrent findings of facts recorded by both the authorities below therefore, this court should not interfere with it under Article 227 of the Constitution of India to set aside the concurrent findings of facts unless and until a question of law involves in the present proceedings. He submits that the mutation entry made on the basis of the application dated 20.06.1964 in respect of the suit property in the name of respondent was not challenged by anyone and therefore same was certified by the Authority on 21.07.1966. As said mutation entry was not challenged by anyone, the objections raised by the petitioner tenant in the present proceedings are not sustainable and same are required to be rejected.

16. The learned senior counsel for the respondent submits that on the date of making the application u/s.43-1B of the said Act, the respondent was exclusive owner of the suit property. He submits that the submission made by the learned counsel for the petitioner on the basis of section 32G is not to be considered in the present proceedings. He submits that those submissions were not made by the petitioner before the Authorities below at the time of arguments. He submits that in any case in view of section 43-1B of the said Act, the provisions of section 32G are not applicable for claiming to be purchaser of the suit property on the part of the petitioner. On the basis of these submissions, the learned senior counsel for the respondent submits that there is no substance in the Writ Petition and same is liable to be dismissed with costs.

17. Considering the submissions made by the learned counsel for both the counsel, the documents on record and the record & proceedings, in my view, the points involved in the present petition for determined are, as under:

- a. Whether the application made by the respondent u/s.43-1B of the Maharashtra Tenancy and Agricultural Lands Act, 1948 is maintainable?
- b. Whether the order passed by both the authorities below need interference under Article 227 of the Constitution of India ?

18. For the sake of convenience, section 32G and 43-1B of the said Act are reproduced below:

“32G Tribunal to issue notices and determine price of land to be paid by tenants

(1) As soon as may be after the tillers day the Tribunal shall publish or cause to be published a public notice in the prescribed form in each village within its jurisdiction calling upon:-

(a) all tenants who under section 32 are deemed to have purchased the lands,

(b) all landlords of such lands, and

(c) all other possession interested therein, to appear it on the date specified in the notice. The tribunal shall issue a notice individually to each such tenant, landlord and also, as far as practicable, other persons calling upon each other to appear before it on the date specified in the public notice.

(2) The Tribunal shall record in the prescribed manner the statement of the tenant whether he is or is not willing to purchase the land held by him as tenant

(3) Where any tenant fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase

the land and that the purchase is ineffective:

Provided that, if such order is passed in default of the appearance of any party, the Tribunal shall communicate such order to the parties and any party on whose default the order was passed may within 60 days from the date on which the order was communicated to him apply for the review of the same.

(4) If a tenant is willing to purchase, the Tribunal shall, after giving an opportunity to the tenant and the landlord and all other persons interested in such land to be heard and after holding an inquiry, determine the purchase price of such land in accordance with the provisions of section 32H and of sub-section (3) of section 63A:

Provided that, where the purchase price in accordance with the provisions of section 32H is mutually agreed upon by the landlord and the tenant, the Tribunal after satisfying itself in such manner as may be prescribed that the tenants consent to the agreement is voluntary may make an order determining the purchase price and providing for its payment in accordance with such agreement.

(5) In the case of a tenant who is deemed to have purchased the land on the postponed date the Tribunal shall, as soon as may be, after such date determine the price of the land.

(6) If any land which by or under the provisions of any Land Tenures Abolition acts referred to in Schedule III to this Act, is regranted to the holder thereof on condition that it was not transferable, such condition shall not be deemed to affect the right of any person holding such land on lease created before the regrant and such person shall as a tenant be deemed to have purchased the land under this section, as if the condition that it was not transferable was not the condition of regrant.”

43-1B *Right of landlord to terminate the tenancy :*

(1) Notwithstanding anything contained in the foregoing provisions of this Act, but subject to the provision of this section, it shall be lawful to a landlord at any time after the commencement of the Tenancy and Agricultural Lands Laws (Amendment) Act, 1964, (Mah.XXXIX of 1964) to terminate the tenancy of any land

and obtain possession thereof, but:-

(a) of so much of as will be sufficient to make up the total land in this actual possession equal to the ceiling area; and

(b) where the landlord is a member of a joint family, only to the extent of his share in the land (not exceeding the ceiling area) held by the joint family, provided that, the Mamlatdar on inquiry is satisfied that such share has (regard being had to the area, assessment, classification and value of land) been separated by metes and bounds in the same proportion as his share in the entire joint family property and not in a larger proportion.

(2) No tenancy of any land shall be terminated under sub-section (1), unless a notice in writing is given to the tenant, and an application for possession under sub-section (3-A) of section 29 is made to the Collector:

Provided that, in the case of a landlord who has ceased to be a serving member of the armed forces, such notice shall be given and application made within two years from the date of such cesser; and if he dies before the expiry of these two years from the date of his death.

(3) Nothing in this Chapter shall:-

(a) apply to a tenancy of land created (after obtaining possession thereof under the provisions of this Chapter) by a landlord who has ceased to be a serving member of the armed forces; but the provision of Section 32(O) shall apply to such tenancy as they apply in relation to a tenancy created after the tillers day;

(b) entitle a landlord who has ceased to be a serving member of the armed forces (as a result of his being duly dismissed or discharged after a Court martial or on account of bad character or as a result of desertion) or who has not been attested to terminate the tenancy of his land under this section.

(4) Nothing in the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, (Bom LXII of 1947) shall affect the termination of any tenancy under this Chapter.”

19. Bare reading of section 43-1B of the said Act shows that an ex-serviceman can make an application u/s.43-1B of the said Act to take

back possession of an agricultural land of his share from the tenant. It shows that u/s.43-1B of the said Act, an application is maintainable only in respect of ex-serviceman's share in the HUF property and/or in respect of the self acquired property, not only that, determination of the share to the satisfaction of the authority. In the case in hand, Shankar Kulkarni, father of respondents got 1/3rd share in his ancestral agricultural property being Gut No.32. Sankar Kulkarni died leaving behind widow, four sons and two daughters. This means, everyone is entitled to their share in his property. Same was transferred in the name of his elder son Digambar Kulkarni, on his death as per mutation entry No.219. The property which stands in the name of his elder son Digambar, was ancestral property and everyone has right in the said property. Thereafter Digambar made an application to the Revenue Authority dated 20.06.1964 for transferring the entire property of HUF in favour of respondent Ghansham, which was registered in the revenue record on 01.12.1964. On the basis of the said application, corrections were made in the revenue record on 21.07.1966. Bare reading of said document i.e. record of rights (Register No.6) which is at Exh.B to the petition shows that Digambar, on his own, made an application dated 20.06.1964 to the Revenue Authority for transferring the entire HUF property in the name of respondent Ghanshaym. It is not clear from the said entry whether other members of HUF gave their consent and/or relinquished their right, title and interest in favour of Ghansham. Indirectly, this shows that just to take benefit of Chapter III-AA of the said Act, Digambar has transferred the entire property in the name of respondent which is contrary to law. Because as per section 43-1B of the said Act, an Ex-serviceman can make an

application only in respect of his share in the HUF property. Moreover, he has to satisfy the Mamalatdar and/or Revenue Authority at the time of partition by metes and bounds whether share was distributed amongst other members of the HUF. This itself shows that just for taking benefit of section 43-1B of the said Act entire property was transferred by the Digambar in his respondent – brother's name. Hence, on this ground itself the respondent is not entitled to take benefit of section 43-1B of the said Act.

20. Apart from the abovementioned facts, on the tillers' day, i.e. 01.04.1957, the petitioner was admittedly tenant of the suit property. Bare reading of section 32G shows that it does not require the tenant to make any application for declaring him as owner. Even the Apex Court, in the matter of Amrit Kale (supra) held that by operation of law, who was tenant on the tillers' day, become deemed purchaser thereof. Therefore, when the respondent made an application u/s.43-1B on 16.10.1992, there was no relationship between the petitioner and the respondent as tenant and landlord. If there is no relationship of landlord and tenant, there is no question of entertaining the application u/s.43-1B of the said Act.

21. Considering these facts and the law declared by the Apex Court in the aforesaid matters i.e. Amrit Kale, Chandrakant Dhaibar, Balkrishna Somnath and this court in the matter of Manappa Patil, I am of the opinion that the impugned orders passed by both the Authorities below are contrary to the well established law and same are required to be set aside under Article 227 of the Constitution of India.

22. Hence, following order is passed:

- a. Impugned order dated 30.04.1993 passed by the Additional Collector, Kolhapur in Tenancy Application No.284/1992 u/s.43-1B(2) of the said Act and judgment dated 29.03.1995 passed by the Additional Commissioner, Pune Division, Pune in Revision Application No.147/1997 are set aside.
- b. Tenancy application being No.284/1992 dated 16.10.1992 made by the petitioner before the Additional Collector, Kolhapur stands rejected.
- c. Rule is made absolute.
- d. Considering the facts of the present case, no order as to costs.

(K.K. TATED, J.)