

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.161 OF 1995

Shri Bapu Sakharam Korgaonkar
since deceased through his L Rs
1A. Smt. Laxmibai Bapu Korgaonkar
And Others

... Appellants

Versus

Shri Sripad Purushottam Marathe

... Respondent

.....

Mr. Ashutosh M. Kulkarni a/w Mr. Akshay Kulkarni for the Appellants.

Mr. Vishwajeet Kapse a/w Mr. Akshay Sawant for the Respondent.

.....

CORAM : S.C. GUPTE, J.

DATE : 23 FEBRUARY 2017

(ORAL JUDGEMENT)

. This second appeal challenges a judgment and order passed by the District Court at Kolhapur. By the impugned judgment and order, the learned District Judge allowed the Respondent's appeal, set aside the judgment of the Trial Court, and decreed the Respondent's suit, directing the Appellant to hand over possession of the suit property to the Respondent by removing the structure erected thereon.

2 The suit property consists of a house together with appurtenant land described in paragraph-1 of the plaint. The suit property was originally owned by Ganesh Vasudev Joshi and taken on rent by the Appellant (original Defendant) from the former on an yearly rent of Rs.6/- for a

period of 30 years. Ganesh Vasudev Joshi died on 25 May 1956. He had executed a will bequeathing his property to his wife, Durgabai. Durgabai died on 25 May 1968. By a will executed in favour of the Plaintiff (her grand-son), the suit property was bequeathed by her to the Plaintiff. The Plaintiff, thus, claimed to have become the owner of the suit property after the demise of Durgabai. The Defendant rented the suit property, which then consisted of an open plot, for construction of a house. As per the registered document in this behalf, termed as Kabulayat, the Defendant was to remove the structure erected on the suit property and hand over vacant possession of the suit property after a period of 30 years to the original owner/landlord. The Defendant, however, did not hand over such possession at the expiry of 30 years. The Plaintiff, in the premises, filed Regular Civil Suit No.7 of 1983 for recovery of possession of the suit property. Whilst resisting the Plaintiff's claim, the Defendant admitted that the suit property was owned by Ganesh Vasudev Joshi. He, however, denied the purported bequest of the suit property by Ganesh Vasudev Joshi in favour of Durgabai. He, accordingly, disputed the authority of Durgabai to bequeath the property as also the authenticity of the purported will executed by Durgabai in favour of the Plaintiff.

3 It is an admitted position that the Defendant was also a tenant of Ganesh Vasudev Joshi in respect of Revision Survey No.130, which was an agricultural land in the same village and of which he became the owner in accordance with Section 32M of the Bombay Tenancy And Agricultural Lands Act, 1948 ("Act"). The Defendant was, as noted above, in simultaneous possession of the suit property as a tenant under the registered Kabulayat referred to above, paying rent therefor, and which he

had taken for construction of a house and where he had erected a house at his own cost. On these facts, the main ground of resistance of the Defendant, apart from questioning the ownership of the Plaintiff by way of testamentary succession, was that the suit property was “land” as defined under the Act, and that the Defendant cannot be evicted from it by a decree of a Civil Court. The Defendant also contended that in accordance with Section 16(1) of the Act, there was a bar for his eviction from the suit property which was a dwelling house (which included land immediately appurtenant thereto and necessary for its enjoyment), since the Defendant, as a tenant, was in occupation of it, having built the same at his own expenses on a site belonging to his landlord. Both these are substantial questions of law.

4 The Trial Court held that the Plaintiff had not proved his ownership of the suit property through the bequests purportedly made by deceased Ganesh Vasudev Joshi in favour of Durgabai and Durgabai in his favour. Though the Trial Court held that the Defendant had also failed to prove that he was a tenant of the suit plot, in accordance with its finding on the purported ownership of the Plaintiff, the Trial Court dismissed the suit. The matter was carried in appeal by the original Plaintiff. The First Appellate Court, in its impugned judgment and order, held that the Plaintiff had proved that he was the owner of the suit property and that he had validly terminated the tenancy of the Defendant. The Court held that the suit property was leased by the Plaintiff only for constructing a house for the residence of the Defendant and that there was no question, accordingly, of the provisions of the Act being attracted. The Court held that the suit property was not appurtenant to any agricultural land and thus, could not

be brought within the definition of “land” under Section 2(8) of the Act. The First Appellate Court, in the premises, allowed the appeal and decreed the suit, directing the Defendant to hand over possession of the suit property to the Plaintiff by removing the structure erected thereon.

5 Let us, at the outset, note the relevant provisions of the Act, which have a bearing on the controversy in the Second Appeal.

Sec. 2(8) “*land*” means, -

- (a) land which is used for agricultural purposes [or which is so used but is left fallow, and includes the sites of form buildings] appurtenant to such land; and
- (b) for the purposes of sections 11, 16, 17, 17A, 17B, 18, 19, 20, 26, 28, 29, 29A, 30, 41, 63, 64, 64A, 84A, 84B and 84C-
 - (i) the sites of dwelling houses occupied by agriculturalists, agricultural labourers and artisans and land appurtenant to such dwelling houses;
 - (ii) the sites of structures used agriculturists for allied pursuits.

Sec.16. Bar to eviction from dwelling house

- (1) If in any village, a tenant is in occupation of a dwelling house built at the expense of such tenant or his predecessor-in-title on a site belonging to his landlord, such tenant shall not be evicted from such dwelling house (with the materials and site thereof and the land immediately appurtenant thereto and necessary for its enjoyment) unless -
 - (a) the landlord proves that the dwelling house was not built at the expense of such tenant or his predecessor-in-title; and
 - (b) such tenant makes any [there defaults] in the payment of rent, if any, which he had been paying for the use and

occupation of such site.

- (2) The provisions of sub-section (1) shall not apply to a dwelling house which is situated on any land used for the purposes of agriculture from which he has been evicted under [section 31].

Sec.29 Procedure of taking possession

(1) A tenant or an agricultural labourer or artisan entitled to possession of any land or dwelling house under any of the provisions of this Act may apply in writing for such possession to the *Mamlatdar*. The application shall be made in such form as may be prescribed [and within a period of two years from the date on which the right to obtain possession of the land or dwelling house is deemed to have accrued to the tenant, agricultural labourer or artisan, as the case may be.]

(2) [Save as otherwise provided in sub-section (3A), no landlord] shall obtain possession of any land or dwelling house held by a tenant except under an order of the *Mamlatdar*. For obtaining such order he shall make an application in the prescribed form [and within a period of two years from the date on which the right to obtain possession of the land or dwelling house, as the case may be, is deemed to have accrued to him.]

(3) On receipt of application under sub-section (1) and (2) of the *Mamlatdar* shall, after holding an inquiry, pass such order thereon as he deem fit :

[Provided that where an application under sub-section (2) is made by a landlord in pursuance of the right conferred on him under section 31, the *Mamlatdar* shall first decide, as preliminary issues, whether the conditions specified in clauses (c) and (d) of section 31A and sub-sections (2) and (3) of section 31B satisfied. If the *Mamlatdar* finds that any of the said conditions is not satisfied, he shall reject the application forthwith.]

[(3A) Where a landlord proceeds for termination of the tenancy under sub-section (1) of section 43-1B, then, notwithstanding anything contained in the Act, the

application for possession of the land shall be made to the Collector, who shall, after holding an inquiry in the prescribed manner, pass such order thereon as he deems fit.]

(4) Any person taking possession of any land or dwelling house except in accordance with the provisions of [sub-sections (1), (2) or as the case may be, (3A)], shall be liable to forfeiture of crops, if any, grown in the land in addition to payment of costs as may be directed by the *Mamlatdar* or by the Collector and also to the penalty prescribed in section 6]

Sec.85 Bar of jurisdiction

- (1) No Civil Court shall have jurisdiction to settle, decide or deal with any question [(including a question whether a person is or was any time in the past a tenant or whether any such tenant is or should be deemed to have purchased from his landlord the land held by him)] which is by or under this Act required to be settled, decided or dealt with by the *Mamlatdar* or Tribunal, a Manager, the Collector or the [Maharashtra Revenue Tribunal] in appeal or revision or the [State] Government in exercise of their powers of control.
- (2) No order of the *Mamlatdar*, the Tribunal, the Collector or the [Maharashtra Revenue Tribunal] or the [State] Government made under this Act shall be questioned in any Civil or Criminal Court.

6 The main ground, with which we are concerned in the present second appeal and on the basis of which the appeal was admitted by this Court, is the applicability of Section 16 of the Act to the suit property. If in any village, a tenant is in occupation of a dwelling house built at the expense of such tenant or his predecessor-in-title on a site belonging to his landlord, he cannot be evicted from such dwelling house (which includes not only the dwelling house, but the site thereof including the land

immediately appurtenant thereto and necessary for its enjoyment), unless such tenant makes three defaults in payment of rent which he had been paying for the use and occupation of such site. It is for the landlord to prove that the dwelling house was not built at the expense of the tenant or his predecessor-in-title. That is the mandate of Section 16. Each of these ingredients is satisfied in the present case. There is no dispute that the Defendant was a tenant of Ganesh Vasudev Joshi in respect of Revision Survey No.130. The Defendant was also put in possession of a site belonging to his landlord, Ganesh Vasudev Joshi, under the registered Kabulayat, on which he had admittedly built a dwelling house at his own expense and there was no case of any default in payment of rent by him. In the premises, the bar of Section 16 clearly applied and he could not be evicted from the dwelling house. The 'dwelling house', as Section 16 provides, includes the site thereof including the land appurtenant thereto and necessary for its enjoyment, which covers the whole of the suit property.

7 The other aspect of the matter concerns the definition of “land” under Section 2(8) of the Act. “Land” for the purposes of the Act means land used for agricultural purposes including the site of a farm building appurtenant to such land and for the purpose *inter alia* of Sections 16 and 29 includes a site of a dwelling house occupied by an agriculturist, agricultural labourer or artisan and land appurtenant to such dwelling house. If any site is included in the definition of “land”, under Section 29 of the Act, no landlord could obtain possession thereof except by an order of mamlatdar. Simultaneously, under Section 85 of the Act, there is a bar of jurisdiction of Civil Court if the matter involves any question as to

whether a person is or was, at any time in the past, a tenant, which is to be dealt with by the mamlatdar or other authorities mentioned in Section 85.

8 The First Appellate Court essentially proceeded on the footing that the suit property is not appurtenant to any agricultural land and, therefore, cannot be termed as “land”. The definition of “land” under Section 2(8) of the Act covers not only land which is used for agricultural purposes, including site of any farm building appurtenant to such land, but for the purposes of Sections 16 and 29, also includes a site of a dwelling house occupied by an agriculturist and land appurtenant to such dwelling house. There is no dispute between the parties that the land is appurtenant to a dwelling house and that it is occupied by the Defendant who is an agriculturist. Once these conditions are satisfied, for the purpose of Sections 16 and 29, the site is included in the definition of “land” under Section 2(8). It is not necessary that this site should be appurtenant to any land which is used for agricultural purpose.

9 To sum up, if a site of a dwelling house is occupied by an agriculturist, who, as a tenant, is in occupation of the dwelling house built at the expense of himself or his predecessor-in-title at a site belonging to the landlord, he cannot be evicted from the dwelling house unless the conditions referred to in Section 16 are satisfied. So also, no landlord can recover possession of the land or dwelling house held by the tenant, except under an order of the mamlatdar. That means, firstly, that no Civil Court has jurisdiction to decide a suit such as the one herein, which involves a question of tenancy of the defendant before it, such question having to be settled, decided or dealt with by a mamlatdar under Section 29 of the Act

and, secondly, even for the mamlatdar's court, there is a bar for the eviction claimed, since the conditions mentioned under Section 16 of the Act of eviction of a tenant are admittedly not satisfied in the present case. These important aspects of the matter were lost sight of by the First Appellate Court.

10 Learned Counsel for the Respondent relied on a decision of our Court in case of **Keraba Govind Vhanalkar Vs. Rajaram Yashwant Deshpande**¹ and submitted that the suit land was not governed by the provisions of the Act. The case of **Karaba Govind Vhanalkar** involved a land of 28 acres, out of which 24 acres was a naturally grown grass land, while remaining 4 acres was put to agricultural use by the occupants/tenants for cultivation. The Court held that the land, which was brought under cultivation by carrying on agricultural activities, was the land liable to be treated as “land” for the purpose of the Act and that the naturally grown grass land would have to be excluded from the application of the provisions of the Act, since it was not the case of the tenant in that case that that land was used by them for grazing their cattle. These observations have no bearing on the facts of our case. Here we are not concerned with any natually grown grass land or any agricultural land *per se*. We are here concerned with a dwelling house site belonging to the landlord, the occupation of which was with the tenant and where a dwelling house was built at his expense. Such site, for the purpose of Sections 16 and 29 of the Act, was “land” within the meaning of Section 2(8) of the Act, to which Section 29 applied and from which the tenant could not be evicted unless the conditions referred to in Section 16 of the

1 2005 1 Bom C R 723

Act were satisfied. The suit is, thus, barred both under Section 85 and Section 16 of the Act.

11 There is one more ground urged by the Appellants in support of this second appeal. It is submitted that the Plaintiff claimed his title to the suit property through the will of Durgabai, who in turn is said to have owned the property through a will executed in her favour by her deceased husband, Ganesh Vasudev Joshi. It is submitted that the lower appellate court, in terms, found that Durgabai did not acquire any title to the suit property and yet proceeded to uphold the Plaintiff's ownership on the basis of intestate succession through Ganesh Vasudev Joshi and Durgabai. Learned Counsel submits that it was impermissible for the Court to base its decision on a ground outside the pleadings of the parties. Learned Counsel relies on a decision of the Supreme Court in the case of **Union of India Vs. Ibrahim Uddin**² in support of his contention. It is true that intestate succession was not the basis on which the Plaintiff claimed his title in the present suit. But then it is equally true that on the basis of the pleadings of the parties and the evidence before the Court, it is not in serious dispute that the Plaintiff was in fact a legal heir of the deceased Ganesh Vasudev Joshi, the admitted original owner of the property and landlord of the Defendant, and would have anyway succeeded to the property of the deceased. The only question, if all, would be of the share of the Plaintiff in the suit property – whether he would hold the whole of the suit property or only a share therein. That question has no significance from the standpoint of the present suit, since the suit is for recovery of property from a tenant and there is no legal impediment in one co-owner pursuing it, without

2 (2012) 8 Supreme Court Cases 148

joining others. I do not, accordingly, propose to base my order in the second appeal on this issue.

12 For the reasons discussed above, the impugned judgment and order of the First Appellate Court cannot be sustained. The impugned judgment and order is, accordingly, set aside. There shall be, in the facts of the case, no order as to costs.

(S.C. GUPTE, J.)