

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

...

WRIT PETITION NO. 4915 OF 1997

Smt. Lilabai w/o Dattatraya Labde-Patil,
age 56 years, Occ. Agri, R/o Jay Sahyadri
Housing Society, New Osmanpura, Shahanur Mia
Darga Road, Aurangabad.

..Petitioner...
(orig resp No.1)

VERSUS

1. Chotabai w/o Raising,
age major, Occ. Agril,
R/o Satara, Tq. & Dist.
Aurangabad. ...Respondent/orig
applicant before Asst
Collector.
2. Gendabai w/o Asaram Bainade (Died).
Through Legal heirs of original respondent
No.2 in Writ Petition No.4915/1997
- 2-a] Shri Ambersingh s/o Asaram Bainade,
age 42 yrs, Occ. Agriculture.
- 2-b] Sow Shobhabai w/o Chandansingh Dedawal,
age 38 yrs, Occ. Household.
- 2-c] Sow. Heerabai w/o Pratapsingh Dhanawat,
age 45 yrs, Occ. Household,

All R/o at Sunderwadi (Zalta),
Chikalthana, Tq. & Dist. Aurangabad.
3. Dhavlabai w/o Asaram,
age major, Occ. Household,
R/o Zalta, Tq & Dist. Aurangabad
4. The Assistant Collector,
Aurangabad, c/o Office of
The Assistant Collector, Aurangabad.

5. The Collector/Additional Collector,
Residential Deputy Collector, Aurangabad
c/o Office of the Collector Aurangabad.
6. The Divisional Commissioner/
Additional Commissioner,
C/o The Office of the Divisional
Commissioner, Aurangabad.
7. State of Maharashtra. ...Respondents...
...

WITH
CA/12258/2013 IN WP/4915/1997

...
Advocate for Petitioner : Shri. N K Kakade alongwith Mr.
D P Bakshi
AGP for Respondents 4-7 : Mr S P Tiwari
Advocate for Respondents : Shri S B Bhapkar for
Respondent No.1, Shri A A Mukhedkar for Respondent
nos. 3, Irale Eknath G. For R/2-a To 2-c

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CORAM : V.K. JADHAV, J.

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Reserved on : April 19, 2018
Pronounced on : April 24, 2018
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JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Additional Commissioner, Aurangabad dated 28.7.1997 in Case No.1993/Revision/R/176 confirming thereby the orders passed by the Assistant Collector, Aurangabad and the Additional Collector, Aurangabad, original defendant no.1 in the proceedings initiated before the Assistant Collector, Aurangabad preferred

this writ petition.

2. Brief facts, giving rise to the present writ petition, are as follows :-

a] Godubai Balkrushna and Anusayabai Vishnupant were the original owners in possession of the land survey no.39 gat no.61 admeasuring 11 acres 37 gunthas situated at village Satara Tq. & District Aurangabad. Said Godubai and Anusayabai on 6.8.1973 sold 6 acres 32 gunthas land out of survey no.39 to respondent No.1 Chhotabai under the registered sale deed no.13377 and on the same day also sold southern piece ad-measuring 5 acres 5 gunthas out of the land survey no.39 under the registered sale deed no.13378 in favour of respondent nos. 2 and 3 herein. So far as land sold to present respondent no.1 as stated above and land sold in favour of respondent nos. 2 and 3 herein, mutation entry no.486 came to be sanctioned. After purchase of the said southern piece admeasuring 5 acres 5 gunthas land of survey no.39, respondent nos. 2 and 3 herein, in their own capacity as absolute and exclusive owner thereof, in the year 1979 agreed to sell

the petitioner the said southern piece admeasuring 5 acres 5 gunthas. The petitioner, thereafter in the daily newspaper called 'Marathwada' published a notice through her Advocate informing the public that said southern piece agreed to be sold to the petitioner by respondent nos. 2 and 3 and agreement of sale to that effect also came to be executed in her favour and if anyone has any objection to the said sale transaction, the same should be raised within a stipulated period of the notice. However, no valid objection was received and respondent nos. 2 and 3 accordingly had executed a registered sale deed 1918 dated 9.4.1979 in favour of the petitioner in respect of said southern piece admeasuring 5 acres 5 gunthas. The petitioner, on the strength of said sale deed become the owner in possession of the said piece of the land out of the land survey no.39 gat no.61 of village Satara Tq. & District Aurangabad. Even, mutation entry no.658 came to be sanctioned in favour of the petitioner to that effect. Petitioner has been and is continuously in possession of the said land admeasuring 5 acres 5 gunthas out of the land survey no.39 gat no.61 as a full, absolute and exclusive owner

thereof.

3. Respondent no.1-Chhotabai thereafter filed an application before the Assistant Collector, Aurangabad under the provisions of the Maharashtra Prevention of Fragmentation and Consolidation of Holding Act, 1947 (for short hereinafter referred to as 'Act of 1947') contending therein that, southern portion admeasuring 6 acres 32 gunthas out of the land survey no.39 which converted into gat no.61 owned by respondent no.1 after implementation of the consolidation scheme being adjacent and adjoining to the southern piece of the said land 5 acres 5 gunthas of gat no.61, respondent nos. 2 and 3 herein ought to have sold the said piece of the land to respondent no.1 in terms of the provisions of the Act of 1947. Accordingly, respondent no.1 has prayed in the said application that permission may be granted to respondent no.1 to purchase said southern piece admeasuring 5 acres 5 gunthas of land out of land gat no.61 by cancelling the sale deed dated 7.8.1979 executed by respondent nos. 2 and 3 in favour of the petitioner and, it may declared that respondent no.1

(original petitioner in the proceedings before the Assistant Collector) is entitled to purchase the said southern piece admeasuring 5 acres 5 gunthas. Petitioner has strongly resisted the said application by filing her written statement. Petitioner has contended that the provisions of the Act of 1947 cannot be made applicable in any manner to the said transaction and, that the Assistant Collector has no right, authority, competency or jurisdiction to entertain such application of respondent no.1 or to grant her any of the reliefs claimed by her in the said application. It has been specifically contended that, the provisions of the Act of 1947 had or have no application at all to the matter or issues raised by respondent no.1 in the said application.

4. Learned Assistant Collector, Aurangabad by judgment and order dated 29.8.1986 in case No.1980/LAQ/CR/5/87/MLRC/5 partly allowed the petition and declared null and void the sale of the land gat no.61 admeasuring 5 acres 5 gunthas in favour of the present petitioner and cancelled the same alongwith mutation entry no.658. The learned Assistant Collector,

Aurangabad has further declared that respondent nos. 2 and 3 cannot sell this land to anyone else, but, respondent no.1 herein or any other adjacent land owner as per the provisions of Act of 1974.

5. Being aggrieved by the same, the petitioner has preferred an appeal before the Collector, Aurangabad and the Resident Deputy Collector, Aurangabad, by his judgment and order dated 30.10.1993 in file No.87/appeal/BPFCH/2 dismissed the appeal.

6. Being aggrieved by the same, the petitioner has preferred a revision before the Commissioner, Aurangabad and the Additional Commissioner, Aurangabad by judgment and order dated 28.7.1997 in Case No.1993/REV/R/176 dismissed the revision petition. Hence, this writ petition.

7. The learned counsel for the petitioner submits that, the provisions of Act of 1947 had/have no application at all to the matter or issues raised and claim made by respondent no.1 in the said application. Learned counsel submits that, in terms of the

provisions of section 4 of the Act of 1947, State Government may, after such inquiry as it deems fit and after consultation with the District Advisory Committee appointed by it, provisionally settle for any class of land in any local area the minimum area that can be cultivated profitably as a separate plot and invite objections to the minimum area provisionally settled by the State Government. In terms of the provisions of Section 5 of the Act of 1947, the State Government after considering the objections, if any, determine the standard area for each class of land in such a local area. The State Government is also empowered to revise the standard area determined under section (1) of section 5 and such revision is required to be made in the manner laid down in section 4 sub-section (1). Further, on notification of a standard area, in terms of the provisions of section 6 of the Act of 1947, all fragments in the local area shall be entered as such in the Record of Rights or where there is no Record of Rights in such village record as the State Government may prescribed. The learned counsel submits that, in terms of the notification of the year 1982, minimum area as settled

by the State Government in respect of the local area wherein suit land is situated is 1 to 2 acres to the extent of Jirayat and 10 to 20 gunthas in respect of the Bagayat Land. Learned counsel submits that, in terms of the provisions of section 7 of the Act of 1947, no person shall transfer any fragment in respect of which notice has been given under sub-section (2) of section 6 except to the owner of a contiguous survey number or recognized sub-division of a survey number. Learned counsel submits that, in the instant case, no such notice has been given under sub-section (2) of section 6 at any time to the vendor of the petitioner or the petitioner. Learned counsel submits that, even the Resident Deputy Collector in his impugned judgment and order has specifically observed that, in fact, no fragment is involved in the present matter and standard area determined by the State Government in Aurangabad Taluka is 2 and half acres. The learned Resident Deputy Collector, Aurangabad has further observed that notices under section 6 (1) have not been given nor suit land has been entered in the R.O.R. as fragment. The learned Resident Deputy Collector has

accepted the legal position that sale transaction in question does not attract the provisions of Act of 1947 in the technical sense, however, further observed that the purpose and provisions of the Act of 1947 would be served in a better way if the respondent nos. 2 and 3 herein sale the land to respondent no.1 as he is a co-sharer and adjacent land holder. Learned counsel submits that, Resident Deputy Collector further considered additional factor without jurisdiction that respondent no.1 was cultivating the suit land in the capacity as a tenant and as such, deserves preferential treatment. Learned counsel submits that, respondent no.1 herein has filed the application clearly under the provisions of the Act of 1947 and he has not claimed any relief under any tenancy provisions.

8. The learned counsel submits that, respondent no.1 herein has made futile attempt to approach the Tahasildar, Tenancy seeking declaration of the 38/G of the Hyderabad Tenancy and Agricultural Lands Act 1950 of bearing land survey no.39/gat no.61 admeasuring 5 acres 5 R situated at village Satara, Tq.

and District Aurangabad in respect of the same transaction and the case bearing no.2012/LR/Kavi/173/PK-7 came to be dismissed in default by order dated 26.2.2013 by the Tahsildar, Aurangabad.

9. Learned counsel for the petitioner, in order to substantiate his contentions, placed reliance on following judgments :-

1. Putalabai w/o Lakhu Pawar and others reported in [1980 Mh.L.J. 547].
2. Tukaram Motiram Shinde (dead through L.Rs.) Dattarao s/o Tukaram Shinde and others Vs. Vishwanath Bhimrao Khandele reported in [2003 (3) Mh.L.J. 182].

10. Learned counsel for respondent no.1 submits that in terms of section 7 of the Act of 1947, no person shall transfer any fragment of a contiguous survey number except to the owner thereof. In view of the same, respondent no.1 being a contiguous to the said fragment is entitled to purchase the land on preferential basis. Further, respondent no.1 was also cultivating the suit land as a tenant and, as such, entitled to purchase the said land if it was intended to sell to any third person.

Learned counsel submits that, the authorities below have recorded the concurrent findings and this court should not interfere in it while exercising writ jurisdiction.

11. Learned counsel for respondent no.3 submits that, by inviting the objections, if any, to the transaction by publishing a notice in the daily newspaper, respondent nos. 2 and 3 sold the suit land in favour of the present petitioner under the registered sale deed for a valuable consideration. Respondent nos. 2 and 3 had purchased the said land from the original owner Godubai and Anusayabai Vishnupant under the registered sale deed for valuable consideration on 6.8.1973 and, on the same day present respondent no.1 also purchased the land from the remaining land admeasuring 6 acres 32 gunthas. Respondent no.1 never raised any objection in response to paper publication and further in absence of any specific notification of the State Government about fragment, no bar is applicable to the transaction in respect of the suit land entered by the respondent nos. 2 and 3 with the present petitioner. Learned counsel

13. In order to better understand the case of the parties, sale transactions are reproduced herein below in a tabular form.

Original Owner
Godubai Balkrishna And Anusayabai Vishnupant
11 Acres 37 Gunthe (Fer No. 415)

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Dhavlabai Asaram
Gendabai Asaram
(Respondent nos. 2 & 3)

5 Acres 5 Gunthas
Separate Sale Deed
Registration No. 13378
Dated 06-08-1973
Fer No. 486

|

Lilabai Dattatraya Labde
(Petitioner)

5 Acres 5 Gunthas
Separate Sale Deed
Registration No.1918
Dated 09-04-1979
Fer No. 658

Chotabai Raising
(Respondent No.1)

6 Acres 32 Gunthas
Separate Sale Deed
Registgration No. 13377
Dated 06-08-1973
Fer No. 486

|

Prakash
Raising 2
Acres
Fer No. 450

|

Mohd.
Ibrahim
Mohd. Ismail
2 Acres
Fer No. 872

Chotabai
Raising
2 Acres 32
Gunthas
Fer No. 457

Padam
Raising
2 Acres
Fer No. 450

14. Respondent no.1 Chotabai had filed an application under the provisions of Act of 1947 with a specific pleading that in terms of the provisions of Act of 1947, respondent no.1 has a preferential right to purchase the southern piece of land admeasuring 5 acres 5 gunthas out of the land gat no.61 sold in favour of petitioner by respondent nos. 2 and 3 herein.

15. In view of the aforesaid contentions raised in the original application by respondent no.1, the relevant provisions of the Act of 1947 are reproduced herein below :-

Section 4. Settlement of standard areas -

(1) The State Government may, after such inquiry as it deems fit and after consultation with the District Advisory Committee or any other body, appointed by it, provisionally settle for any class of land in any local area the minimum area that can be cultivated profitably as a separate plot.

(2) The State Government shall by notification in the Official Gazette, and in such other manner as may be prescribed publish the minimum areas provisionally settled by it under sub-section (1) and invite objections thereto.

5. Determination and revision of standard areas.-

(1) The State Government shall, after considering the objections, if any, received within three months of the date of publication of the notification under sub-section (2) of section in the village concerned and making such further inquiry as it may deem fit, determine the standard area for each class of land in such bear area.

(2) The State Government may, at any time, if it deems fit expedient so to do revise a standard area determined under sub-section (1).

(3) The State Government shall, by notification in the Official Gazette, and in such other manner as may be prescribed, give public notice of any standard area determined under sub-section (1) or revised under sub-section (2).

6.Entry in the Record of Rights.-

(1) On notification of a standard area under sub-section (3) of section 5 for a local area all fragments in the local area shall be entered as such in the Record of Rights or where there is no Record of Rights in such village record as the State Government may prescribe.

(2) Notice of every made under sub-section (1) shall be given in the manner prescribed for the giving of notice in the Hyderabad area of the State, under the Hyderabad Record of Rights in Land Regulation, 1358 fasli and elsewhere, under the relevant Code, or an entry in the register of mutations.

7.Transfer and lease of fragments.-

(1) No person shall transfer any fragment in respect of which a notice has been given under sub-section (2) of section 6 except to the owner of a contiguous survey number or recognized sub-division of a survey number.

Provided that the holder of such fragment may mortgage or transfer it to the State Government or a land mortgage bank or any other co-operative society as security for any loan advanced to him by the State Government or such bank or society, as the case may be.

(2) Notwithstanding anything contained in any law for the time being in force or in any instrument or agreement no such fragment shall be leased to any person other than a person cultivating any land which is contiguous to the fragment.

31. Restrictions on alienation and sub-division of consolidated holdings :-

(1) Notwithstanding anything contained in any law for the time being in force, no holding allotted under this Act, nor any part thereof shall save as otherwise provided in this section –

(a) be transferred, whether by way of sale (including sale in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue) or by way of gift, exchange, lease, or otherwise; or

(b) be sub-divided, whether under a decree or order of a Civil Court or any other competent authority, or otherwise, so as to create a fragment, without the previous sanction of the Collector. Such sanction shall be given by the Collector in such circumstances and subject to such conditions as may be prescribed.

(2) Nothing in sub—section (1) shall apply to any land -

(a) which is situated in any area for which -

(i) a municipal corporation is constituted under the Bombay Municipal or the City of Nagpur Corporation Act, 1948; or

(ii) a municipal council is constituted under the Maharashtra Municipalities Act, 1965; or

(iii) a cantonment is constituted under the Cantonments Act, 1924; or

(b) which is situated in a notified area for which a Special Planning Authority is constituted or appointed under section 40 of the Maharashtra Regional and Town Planning Act, 1966; or

(c) Which is situated in an area designated as a site for a new town for which a Development Authority is constituted under section 113 of the Maharashtra Regional land Town Planning Act, 1966; or

(d) which is situated in any area specified by the State Government, by notification in the Official Gazette, as being reserved for non-agricultural or industrial development.

(3) Nothing in sub-section (I) shall also apply to any land which is to be transferred -

i. to the tenant of the holding or his heir; or

ii. to an owner of the adjoining holding who cultivates his land personally; or

iii. to an agriculturist or agricultural labourer, in its entirety; or

iv. to a person who is rendered landless by reason of acquisition of his land for a public purpose;

v. to a co-operative society; or

vi. by way of gift (whether by way of rust or otherwise) bona fide made by the owner in favour of a member of his family; or

vii. by way of exchange, where such land is cultivated personally by the holder, for any other land allotted under this Act, which is also likewise cultivated personally by its holder: -

Provided that, no such transfer shall be made so as to create a fragment.

16. In terms of the Government notification as contemplated under section 5 of the Act of 1947, even

the Resident Deputy Collector has also observed in its impugned judgment and order that the Assistant Collector has interpreted the sale contrary to the provisions of the Act of 1947 and, the sale transaction in question does not attract the provisions of Act of 1947 and all other circumstances are more suited to the present petitioner. In terms of the provisions of section 7 sub-section (1) no notice has been given under subsection (2) of Section 6. Bar under section 7 (1) is attracted only if the notice under section 6 (2) is given. Further, bar u/s 31 is attracted only if the holding is allotted under the Act and, as such, the sale of land if holding is not allotted, bar u/s 31 (1) (a) is not attracted. Even if section 31 applies sale to agriculturist of a land in its entirety is not barred under sub-section (3) of section 31.

17. This Court (Coram : D B Deshpande, J.) in a case of Putalabai w/o Lakhu Pawar and others (supra) relied upon by the learned counsel for the petitioner, in paragraph no.8, 9 and 10 has made following observations :-

8. It will, therefore, be seen that in order to attract the bar of the section, the holding must have been allotted under this Act. There is nothing in the instant case to show that the suit land was a holding allotted to the defendants under this Act. On the admitted facts the suit land cannot be a holding allotted under the Fragmentation Act to the defendants because Lakhu executed a sale deed of the suit land to the defendants privately. The provision of allotment is laid down in Rule 11 of the Rules framed under the Fragmentation Act. So all these provisions clearly go to show that the suit land is not a holding allotted under this Act and, therefore, the bar under Section 31 of the Fragmentation Act cannot be attracted. Both the Courts below have proceeded on the assumption that this section is applicable and both of them have not taken into consideration the wording used in the section and that is why both of them have fallen in error.

9. The only other section which prohibits transfer is Section 7(1) of the Fragmentation Act and it runs as follows:--

"7. (1) No person shall transfer any fragment in respect of which a notice has been given under Sub-section (2) of Section 6, except to the owner of a contiguous survey number or recognized subdivision of a survey number." This provision clearly goes to show that this bar is attracted only if a notice is given under Sub-section (2) of Section 6 of the Fragmentation Act. It is not the contention in this case that any such notice was given under Sub-section (2) of Section 6 of the Fragmentation Act. The mere fact that this land is entered as a fragment in 7-12- extract does not prohibit the transfer of the land under the Fragmentation Act. I have so far pointed out that there are only two provisions in the Act inhibiting transfers of the fragments and I have so far pointed out that none of these two provisions are applicable in the instant case and so there can be no bar under the Fragmentation Act for enforcing the agreement of re-conveyance.

10. Mr. Deshmukh appearing for the appellants invited my attention to Sub-section (3) of Section 31 of the Fragmentation Act. Therein it is clearly laid down that "nothing in Sub-section (1) shall also apply to any land which is to be transferred-

(i)-(ii) xx xx xx xx xx

(iii) to an agriculturist or agricultural labourer, in its entirety....."

It will therefore be seen that even if the land is a holding allotted under this Act, the provisions of Sub-section (3) (iii) of Section 31, make it clear that the bar will not apply if the transfer is to an agriculturist or agricultural labourer. The learned District Judge has proceeded to observe that the present appellants are not

agriculturists. Mr. Deshmukh urged that this finding is incorrect and I am in agreement with Mr. Deshmukh on this point. It is clear from the description given in the plaint that plaintiffs 1 to 4 have styled themselves as agriculturists and this averment in the plaint is not at all controverted in the written statement and, hence it must be taken to be an admitted fact that the plaintiffs 1 to 4 who are widow and sons of Lakhu are agriculturists and, therefore, by virtue of Sub-section (3) (iii) of Section 31, a transfer in their favour does not fall within the mischief of Fragmentation Act. Looking at the matter from any point of view I do not see any reason why a decree should not be passed in favour of the plaintiffs. Miss Samant urged that this cannot be done under the Fragmentation Act, but I have so far pointed out that the provisions of the Fragmentation Act are not applicable in the first place and even if applicable Sub-section (3) (iii) of Section 51 clearly enables such a transfer to an agriculturist and plaintiffs 1 to 4 are agriculturists.

18. In the instant case, though, learned Resident Deputy Collector and even the learned Additional Commissioner have come to the conclusion that provisions of the Act of 1947 are inapplicable to the suit sale transaction and respondent no.1 is not entitled to claim any preferential right as such technically in terms of the provisions of the Act of 1947, further allowed the application with the observations that the purpose of the provisions of Act of 1947 would be served in better way if respondent nos. 2 and 3 sell the land to respondent no.1 as a co-sharer and adjacent land holder. Thus, entire approach of the authorities below is incorrect, improper and illegal. Further, reference to tenancy issue is without any pleading and without

jurisdiction. The suit land never entered as a fragment in the 7/12 extract. There are only two provisions under the Act of 1947 i.e. Section 7 and Section 31 in transfer of the fragment. In the facts of the present case, none of these two provisions are applicable.

19. In view of the above, this writ petition deserves to be allowed. Hence, following order is passed.

O R D E R

- I. Writ Petition is hereby allowed.
- II. The Judgment and order passed by the Assistant Collector, Aurangabad dated 29.8.1986 in Case No.1980/LAQ/CR/5/87/MLRC/CR/5 (Chotabai Vs. Lilabai and others) and the judgment and order passed by the Additional Collector, Aurangabad dated 30.10.1993 in File No.87/appeal/BPFCH/2 and the judgment and order of the Additional Commissioner, Aurangabad dated 28.7.1997 in Case no.1993/REV/R/176 are quashed and set aside.
- III. Application No.1980/LAQ/CR/5 (Chotabai Vs. Lilabai and others) filed before the Assistant Collector, Aurangabad is hereby dismissed.

- IV. Rule is made absolute in above terms.
- V. Writ petition accordingly disposed off. In the circumstances, there shall be no order as to costs.
- VI. In view of disposal of writ petition, pending civil application also stands disposed of.

(V.K. JADHAV, J.)

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aaa/-