

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9735 OF 2017

Khandu Mahadu Nadekar Petitioner
Vs.
State of Maharashtra & Others Respondents

Mr. P.D. Dalvi with Mr. Girish R. Agrawal for the
Petitioner.

Mr. B.V. Samant, AGP, for the Respondent-State.

CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

DATE : FEBRUARY 24, 2018

P.C:

1. The petitioner before us is aggrieved and dissatisfied with the order of the State Government dated 23-6-2017 refusing permission to a transfer of the land and within the meaning of Section 36A of the Maharashtra Land Revenue Code, 1966 ("the Code" for short).

2. The Section 36A of the Code reads as under:-

“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 kilometres 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 motu 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 motu or on an application made by any person interested in such occupancy, [within thirty years from the 6th July, 2004]] 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.”

3. This Section would apply because the petitioner before us is a tribal. The land which is an agricultural land within the District of Nashik is owned by the petitioner on the footing that he is a tribal and the allotment is traceable to the provisions of the Code as also the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974. The petitioner on his own showing is from the Scheduled Tribe. He was in possession and according to him continues to be in possession of this agricultural land.

4. The petitioner says that he was in financial difficulties. Out of the total land, a portion of it - admeasuring 4 ares - was agreed to be sold by him to one Ishwarlal M. Chordiya.

5. It is at that stage the petitioner was advised and after Chordiya and he drew up an Agreement for Sale, to seek the sanction in terms of Section 36A.

6. The petitioner says that an Agreement for Sale dated

13-12-2012, but without handing advance possession of the property, was executed. That Agreement for Sale was registered. The total consideration agreed was Rs.30 Lakhs. The petitioner accepted a sum of Rs.10 Lakhs. The petitioner says that the remaining or balance sum and, as per the terms and conditions of this Agreement for Sale, was to be paid after obtaining the permission under the aforementioned legal provision.

7. The application seeking permission/sanction was made and since it is the transaction of a proposed sale, Clause (b) of sub-section (1) of Section 36A would apply. However, the Collector made the preliminary inquiries and forwarded the proposal to the State Government for the law requires the Collector to not grant sanction except with the previous approval of the State Government. The petitioner says that after the Collector forwarded this proposal, the Divisional Commissioner scrutinised it but no decision was taken at the end of the State Government. That compelled him to institute Writ Petition No.2195 of 2015 seeking a direction for expeditious disposal of that application by the State

Government. An order was passed on 1-4-2015 on this writ petition but that was not complied with. A Contempt Petition bearing No.176 of 2017 alleging civil contempt was filed on 23-9-2016 in this Court. An order was made thereon based on which the State Government has issued the impugned direction.

8. The order passed by the State Government and copy of which is at page 52 of the paper-book records all this but says that the petitioner has got an Agreement for Sale registered with the Registrar of Assurances without the previous approval of the State Government. This violates sub-section (1) of Section 36A. That is why the application cannot be processed further.

9. It is this order which is challenged by this writ petition.

10. An affidavit in reply has been filed and in which the salutary purpose in making and inserting Section 36A has been set out. It is stated that it is with an intent to protect the interest of tribals, who are weaker sections of the society and could be easily exploited that this provision is inserted. Once it is to

safeguard the interest of the tribals and to protect them, then, execution of an Agreement for Sale by the tribal occupant with a non-tribal purchaser, without prior approval of the State Government would attract the bar under sub-section (1) of Section 36A.

11. It is in these circumstances, the action is justified.

12. After hearing both sides and perusing with their assistance the petition, this affidavit in reply and the rejoinder, we are of the opinion that the State Government has misconstrued the whole transaction.

13. Firstly, the petitioner is a tribal. Secondly, he holds about 7 hectares of land approximately. He is not intending to divest himself of this entire 7 hectares of land. He says that he has financial difficulties and therefore intends to sell this land to a non-tribal but not in its entirety and has carved out a portion of about 4 ares / 4 hectares therefrom. He drew up an Agreement for Sale and then sought the sanction to the transfer by way of sale from the Competent Authority. Thus, this could

not have been understood as a sale of the property for even if the Agreement for Sale was registered, the petitioner has not parted with physical possession nor is the consideration determined received in full.

14. The petitioner made this application seeking the sanction before a Sale Deed was executed. From the records, no such Sale Deed was pointed out to us nor any further document which would evidence acceptance of the total consideration and divesting of the physical possession of the property. If a sale in terms of the Transfer of Property Act, 1882 of a property requires an instrument to be registered, then, the sale is not complete without execution of such a deed. The document registered is the contract or Agreement for Sale. That is how the petitioner understood it and equally the non-tribal. There was no reason, therefore, for the State Government to assume in the peculiar facts that sub-section (1) of Section 36A is violated because the petitioner disposed of and sold the property and has divested himself of the right, title and interest therein.

15. If on the own showing of the petitioner, who is the vendor and the purchaser Chordiya, a further stage of a Sale Deed was not reached and that would be only after the terms and conditions of this Agreement were complied with, then, all that we can do is to direct the Competent Authority to consider the request of the petitioner for sale of this property to Chordiya and which request shall be considered strictly in terms of the law and if the terms and conditions imposed by law are satisfied, then alone the transaction has to be approved and not otherwise.

16. Once the petitioner has stated before us, on oath, that he has not sold the property and which position is agreed to by Chordiya, then, the petitioner and Chordiya have approached the Government/Competent Authority before the transfer by way of sale was effected. The State Government should, therefore, consider the request as one seeking permission or sanction for such sale and which will take effect in future. That will take effect only when necessary permission/sanction has been granted by the Competent Authority with the previous

approval of the State Government. In the circumstances, the application be considered afresh and without being influenced by the contents of the impugned order. The writ petition is allowed in these terms. No order as to costs.

(SMT. BHARATI H. DANGRE, J.)

(S.C. DHARMADHIKARI, J.)