

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

WRIT PETITION No. 10200 of 2014
WITH
CIVIL APPLICATION No. 189 of 2020
IN
WRIT PETITION No. 10200 of 2014

1. Padmabai Narayan Chaudhary, age 60 years,
2. Bhika Narayan Chaudhary, age 40 years,
3. Rameshwar Narayan Chaudhary, age 30 years
4. Devrao Kaduba Chaudhary, age 40 years,
5. Sadu Kaduba Chaudhary, age 35 years

All agriculturists by occupation and
R/o Shelud Taluka and Dist. Aurangabad.

...Petitioners

VERSUS

1. The Deputy Director of Land Records,
Aurangabad Region, Aurangabad.
2. The Superintendent of Land Records,
Aurangabad Region, Aurangabad
3. Bhausahab S/o Bajirao Chaudhary,
age major occup. agriculture
R/o Shelud Taluka and District Aurangabad
4. Vitthalrao Bajirao Chaudhary,
age major occup. agriculture
R/o 18/5, Sector 'J', N-2, CIDCO,
Mukundwadi, Aurangabad.
5. Pandurang S/o Bajirao Chaudhary,
age major occup. & R/o as above

6. Mrs. Sushila Ankush Gore,
age major occup. agriculture
R/o Daigavhan Taluka Paithan Dist. Aurangabad
7. Mrs. Sagar Bappa Tobre,
age major occup. & R/o as above
8. Saraswatibai Bajirao Chaudhary,
age major occup. agriculture
R/o Shelud Tal. & Dist. Aurangabad
9. Jija S/o Sakharam Chaudhary,
age major occup. & R/o as above
10. Mahadu S/o Tukaram Chaudhary,
age major occup. & R/o as above
11. Nana S/o Tukaram Chaudhary,
age major occup. & R/o as above. ...Respondents

Mr. D.P. Palodkar, Advocate for petitioners

Mr. N.T. Bhagat, Asstt. Govt. Pleader for respondents No.1 & 2

Mr. R.K. Bhakde, Advocate for respondents No. 3 to 5 & 8

CORAM : ROHIT B. DEO, J.

Reserved on : 16th January 2020

Pronounced on: 13th February, 2020

J U D G M E N T :

1. Rule. Rule is made returnable forthwith. Heard finally with consent of the parties.

2. The petitioners are assailing the order dated 28th May 2012 rendered by the Deputy Director, Land Records, Aurangabad

Region, Aurangabad – respondent 1 herein, (Exhibit 'E'), and the order dated 15th July 2014, rendered by the respondent 1, (Exhibit 'H') in purported exercise of power under Section 32(3) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short "The Act").

3. The petitioners contend that the subject matter is original survey 40 situated at village Shelud Taluka and District Aurangabad. Survey 40 was divided into four parts, to wit, survey 40/1 admeasuring 6 acres 15 gunthas, survey 40/2 admeasuring 6 acres 15 gunthas, survey 40/3 admeasuring 6 acres 15 gunthas and survey 40/4 admeasuring 6 acres 14 gunthas.

4. The petitioners contend that in the year 1969, a consolidation scheme was implemented at village Shelud. The lands were consolidated taking into consideration the quality of soil, the convenience of the parties and other relevant factors. During the consolidation, the parties chose the holding. Some agriculturists were allotted fertile land which was less than their earlier holding and vice versa. A consolidation statement came to be prepared after completion of formalities. The petitioners contend that after the consolidation, the holdings were consolidated in Gats 69, 124, 125, 126 & 127.

5. The petitioners contend that 37 years after the implementation of the consolidation scheme, on 5th January 2006 Shri Bhausaheb Bajirao Chaudhary – respondent 3 herein, preferred an application before the respondent No.1 contending that the area recorded as regards the land allotted, was incorrect.

6. The petitioners contend that pursuant to the application preferred by respondent 3, the respondent 1 issued notices to the petitioners. The petitioners registered their vehement objection to the application preferred by respondent 3 on the premise that the authority did not have the jurisdiction to rectify the consolidation scheme after the lapse of more than 37 years. Certain other objections were also raised.

7. The petitioners contend that the objections submitted by the petitioners were allowed by the respondent 1. The proposal for modification of the consolidation scheme was rejected. However, in the same breath, the respondent 1 issued further directions for initiation of the proceedings U/S. 32(1) of the Act, vide order dated 28th May 2012.

8. The petitioners contend that pursuant to the directions issued by the respondent 1, notices were issued on 6th December 2013, which were received only by petitioners 4 & 5, who submitted

elaborate objections to the proposed modification and the consolidation scheme. The petitioners state that vide order dated 15th July 2014, the respondent 1 rejected the objections raised by petitioners 4 & 5 and directed the modification of the consolidation scheme in accordance with the provisions of Section 32(3) of the Act.

9. The petitioners contend that the respondent 1 could not have invoked power U/S. 32 of the Act 45 years after the implementation of the consolidation scheme. The respondent 1 ignored the well settled legal position, enunciated by atleast three Division Bench decisions of this Court and several decisions of learned Single Judge.

10. The petitioners contend that the orders impugned are contrary to the circular dated 17th March 2004 issued by the Settlement Commissioner & Director of Land Records, State of Maharashtra, Pune.

11. The petitioners contend that the order dated 15th July 2014 is inconsistent with the earlier order dated 28th May 2012.

12. The petitioners contend that none of the petitioners consented for 'ONE *KHATA*-ONE GAT', as is observed by the

respondent 1 in the order dated 28th May 2012.

13. The petitioners contend that the respondent 1 clearly misused the statutory powers inasmuch as while the objections preferred by the petitioners are allowed and the proposed modification to the consolidation scheme is rejected, in the same breath, by referring to 'ONE KHATA-ONE GAT', the respondent 1 issued certain directions vide order dated 28th May 2012, effect of which is to virtually allow the application seeking modification of the consolidation scheme.

14. The petitioners contend that while referring to 'ONE KHATA-ONE GAT', reference made to the circular dated 25th August 1993 issued by the Settlement Commissioner and Director of Land Records, Maharashtra State, Pune, is misconceived since the said circular is of no relevance in the context of the factual matrix.

15. The respondents 1 & 2 have filed their affidavit in response dated 22nd January 2015, which is affirmed by Shri Kishorkumar Pandurang Kore, Deputy Superintendent of Land Records, Aurangabad. Paragraph 5 of the affidavit reads thus:

" 5. With reference to para No.3 and 4 of the Writ Petition I say and submit that, the contents are related each other I say and submit that, the Scheme of Consolidation under the provisions of

the Maharashtra Prevention of Fragmentation of Holdings and Consolidation Act, 1947 was implemented in the village Shelud, Taluka and District Aurangabad and the suit land i.e. survey No. 40 was incorporated in the Consolidation Scheme. Prior to the Consolidation, the Survey no. 40 was sub divided in four hissass i.e. S.No. 40/1 area 6 Acres 15 Gunthas, S.no. 40/2 area 6 Acres 15 Gunthas, S.No. 40/3 area 6 Acres 15 Gunthas and S.No. 40/4 Area 6 Acres 14 Gunthas. The S.No. 40 was incorporated in the Scheme and Gut Nos. was formed as detailed below.

<i>Survey No.</i>	<i>Hissa No.</i>	<i>Area Acre Gunthe Hect. Aar.</i>	<i>Kabjedar</i>	<i>Gut No.</i>
40	1	<u>9A 08 Gun.</u> 3.72	Shripati Ganpati	124
40	2	<u>2 A 23 Gun.</u> 1.04	Bajirao Mhasu	125
40	3	<u>6 A 32 Gun.</u> 2.75	Kaduba Nana	126
40	4	<u>3 A 37 Gun.</u>	Tukaram Nana	127
40	5	<u>2A 38 Gun.</u> 1.20	Sakharam Tulshiram	69
<i>Total</i>		<u>25 A 19 Gun.</u> 10.30 "		

16. The respondents 1 & 2 assert in the affidavit that the application preferred by respondent 4 Vitthal Bajirao Chaudhary was entertained, survey 40 was measured on 29th December 2006 and

27th February 2010 and the measurement revealed that the area of *Hissas* of survey 40 i.e. the Gat numbers is not correct and is inconsistent with the area in possession of the parties. The respondents 1 & 2 do not dispute that the objections raised by the petitioners were allowed and that while allowing the said objections, direction to correct the consolidation scheme U/S. 32(1) was issued vide order dated 28th May 2012. Respondents 1 & 2 deny the averment in the petition that the petitioners 1 to 3 were not served with the notice. Respondents 1 & 2 state that the notices were sent on the addresses furnished by the said petitioners.

17. Notably, in the entire affidavit there is no rebuttal of the averment in the petition that the petitioners did not consent to correction of the consolidation scheme on the touchstone of 'ONE *KHATA*-ONE GAT'. The affidavit further makes no attempt to justify the exercise of power pursuant to an application preferred 37 years after the consolidation scheme was implemented.

18. The petition is opposed by respondents 3 to 8, who have filed an affidavit in response dated 17th July 2015. The contesting private respondents contend that the petitioners be relegated to the remedy of revision, which is available in view of the provision of Section 35 of the Act. The said respondents contend that the

application dated 5th January 2006 was preferred by Shri Bajirao Chaudhary since the land in his possession was 2.57 hectares and in the consolidation scheme the area was erroneously shown as 1.04 hectares. The said respondents contend that after the demise of Bajirao Chaudhary, his son preferred an application stating that he is in possession of land admeasuring 2. 57 hectares and erroneously the record refers to the area as 1.04 hectares. The private respondents contend that the respondent 1 directed the Superintendent of Land Records to submit report, which report substantiates the contention of the private respondents that the area in their possession is at variance with the area in the revenue record.

19. The private respondents contend that in the proceedings before the respondent 1 the parties agreed that the ownership of survey 40 prior to the consolidation scheme will be maintained and then the parties further requested that new 7/12 extracts be prepared on the basis of the 'ONE *KHATA*–ONE GAT'. It is further contended that the parties agreed that the dispute shall be settled before the Civil Court and that it was in view of the statements of the parties that while respondent 1 allowed the objections of the petitioners, vide order dated 26th May 2012, the respondent 1 directed to vary the consolidation scheme consistent with the 7/12

extracts prior to the consolidation. The respondents contend that since the order dated 26th May 2012 was a consent order, the petitioners are precluded from challenging the said order.

20. At this stage, it would be appropriate to note the stand of Shri Bajirao Chaudhary, as is reflected in the application dated 5th January 2006, the objections raised by the petitioners to the said application and the reasons recorded by the respondent 1 in the order dated 26th May 2012. The application dated 5th January 2006 is predicated on the assertion that the land in possession of Shri Bajirao Chaudhary is 2.57 hectares, which is significantly more than the area 1.04 hectares, which is reflected in the record of the consolidation scheme. The petitioners objected to the said application, primarily on the ground of inordinate delay of 37 years in preferring the application. While noting the said objection, respondent 1 has attributed to the petitioners the submission that the 7/12 extracts be corrected in accordance with the 7/12 extracts holding the field prior to the consolidation scheme. The submission, which is attributed to the contesting private respondents herein, is that 7/12 extracts be corrected on the basis of 'ONE *KHATA*–ONE GAT' and in tune with the 7/12 extracts recorded prior to consolidation scheme. The respondent 1 allowed the objections preferred by the petitioners and despite having done so, issued

direction to rectify the consolidation scheme U/s. 32(1) on the basis of 'ONE *KHATA*–ONE GAT'. This direction is issued on the premise that the parties consented to such a course of action.

21. I have noted *supra*, that the petitioners categorically assert that no such consent was accorded to correct the 7/12 extracts on the basis of 'ONE *KHATA*–ONE GAT' and to the contrary, the petitioners vehemently objected to the proposed rectification. This assertion is not denied in the affidavit in response filed on behalf of the respondents 1 & 2 nor is any material placed on record to support the observation in the order dated 26th May 2012 that the parties consented to such a course of action. It would, therefore, be safe to proceed on the premise that the petitioners did not consent to correction of the 7/12 extracts on the basis of 'ONE *KHATA*–ONE GAT'.

22. Pursuant to the order dated 26th May 2012, the respondents purported to publish the draft of the proposed modification U/S. 32(1) of the Act and to invite objections. Petitioners 4 & 5 preferred objections dated 23rd December 2013, the parties were heard and vide order dated 15th July 2014 the respondent 1 approved the modification in purported exercise of power U/S. 32(3) of the Act. The respondent 1 held that the

proposed modification is consistent with the ownership rights of the parties. Respondents 1 & 2 referred to the earlier order dated 28th May 2012 and the circular dated 25th August 1993 issued by the Settlement Commissioner. However, the respondent 1 did not record any finding on the objection that the consolidation scheme could not have been modified after the passage of 55 years inasmuch as the consolidation scheme implemented in the year 1969 was directed to be modified vide order dated 15th July 2014, albeit, pursuant to the application dated 5th January 2006, which application itself was preferred 37 years after the implementation of the consolidation scheme.

23. Section 32 of the Act reads thus:

" 32. Power to vary scheme on ground of error, irregularity, informality. - (1) If after a scheme has come into force it appears to the Settlement Commissioner that the scheme is defective on account of an error other than that referred to in section 31A), irregularity or informality the Settlement Commissioner shall publish a draft of such variation in the prescribed manner. The draft variation shall state every amendment proposed to be made in the scheme.

(2) Within one month of the date of publication of the draft variation any person affected thereby may communicate in writing any objection to

such variation to the Settlement Commissioner.

(3) After receiving the objections under sub-section (2) the Settlement Commissioner may, after making such enquiry as he may think fit, make the variation with or without modification or may not make any variation.

(3A) If the scheme is varied under sub-section (3), a notification stating that the scheme has been varied shall be published in the Official Gazette and the scheme so varied shall be published in the prescribed manner in the village or villages concerned.

(4) From the date of the notification stating that the scheme has been varied the variation shall take effect as if it were incorporated in the scheme."

24. Section 32 does not prescribe a time limit for exercise of power of rectification or modification of the consolidation scheme.

25. However, it is trite law, that even in the absence of a prescribed period of limitation, a statutory power must necessarily be exercised within a reasonable period. While reasonable period would be a question of fact, no cut and dried formula can be applied to determine whether exercise of the power is within a reasonable period. In the context of the exercise of the power U/s. 32 of the

Act, I am not without guidance and the issue is addressed by a catena of the decisions of this Court, to which I shall advert at a later stage in the judgment.

26. In *Mohamad Kavi Mohamad Amin Vs. Fatmabai Ibrahim (1997) 6 Supreme Court Cases 71*, the question, which fell for consideration before the Hon'ble Apex Court was, whether *suo motu* enquiry initiated by the Mamlatdar U/S. 84 (C) of the Bombay Tenancy and Agricultural Lands Act, 1976 nine months after the sale transaction was initiated within a reasonable time. The Hon'ble Apex Court held that the fact that no time limit is prescribed for exercise of a power under the statute would not mean that the power can be exercised at any time and that such power has to be exercised within a reasonable time. In the factual matrix, the Hon'ble Apex Court found that the exercise of *suo motu* power U/S. 84(C) of the said enactment was not within a reasonable time.

27. In *Dattu Appa Patil Vs. Ananda Dattu Patil and others Vs. State of Maharashtra and others , 2007(1) Mh.L.J. 393* , the Division Bench was considering the justifiability of exercise of power U/S. 32(1) of the Act 27 years after the implementation of the consolidation scheme. A submission was canvassed that in view of

the three Judges decision of the Hon'ble Apex Court in ***Uttam Namdeo Mahale Vs. Vithal Deo and others, (1997) 6 Supreme Court Cases 73***, which strikes a discordant note, the decision of the two Judges Bench in ***Mohamad Kavi*** (supra), does not hold the field. The Division Bench considers the submission thus :

" 19. We find no substance in the submission advanced by the learned Counsel for the respondent that since Section 32(1) prescribes no period of limitation, it cannot be read into it. Answer to this submission is found in the judgment of the Supreme Court in ***Mohamad Kavi's*** case (supra), where the Supreme Court has reiterated its view in the earlier decisions that where no time limit is prescribed for exercise of power under a statute, it does not mean that it can be exercised at any time. Such power has to be exercised within a reasonable time. It is true that in ***Uttam Mahale's*** case (supra) three learned judges of the Supreme Court have held that where there is a statutory rule operating in the field, the implied power of exercise of the right within reasonable limitation does not arise. It is also true that the judgment in ***Mohamad Kavi's*** case (supra) is delivered by two learned judges of the Supreme Court. In our opinion, that would, however, not make any difference. In ***Javed Ahmed's*** case (supra) the Supreme Court has stated that the Supreme Court sits in divisions of

two and three judges for the sake of convenience and it may be inappropriate for a Division Bench of three judges to purport to overrule the decision of a Division Bench of two judges and it may be otherwise where a Full Bench or Constitution Bench does so. Though the Supreme Court has clarified that it was not embarking upon this question, the above observations of the Supreme Court cannot be glossed over.

20. We must also note that in **Mohamad Kavi's** case (*supra*) the Supreme Court was dealing with suo moto powers of Mamlatdar under Section 84C of the Bombay Tenancy and Agricultural Lands Act, 1976. In the present case, the impugned order of the Additional Chief Secretary, Government of Maharashtra is passed under Section 35 of the said Act. Section 35 of the said Act refers to the power of the State Government or the Commissioner to call for and examine the record of any case for the purpose of satisfying itself or himself as to the legality or propriety of any order passed by any officer under the said Act. In **Uttam Mahale's** case (*supra*), however, the Supreme Court was dealing with execution proceedings initiated under Section 21 of the Mamlatdar's [Courts Act](#), 1906. [Section 21](#) makes statutory provision for execution of Mamlatdar's decision. In our opinion, in **Mohamad Kavi's** case (*supra*) the Supreme Court was dealing with a provision which is somewhat similar to the

*provision with which we are concerned and, therefore, we are of the opinion that the present case is covered by the ratio of that judgment. In the ultimate analysis, therefore, in view of the judgment of the Supreme Court in **Mohamad Kavi's** case (supra) and also the judgment of this Court in **Gulabrao's** case (supra), we feel that exercise of powers by the Consolidation Officer after about 27 years, is totally unjustified and on that ground alone the impugned orders need to be set aside."*

28. The Division Bench proceeded to hold that the delay of 27 years in initiating action U/S. 32(1) of the Act was unreasonable. The Division Bench in **Dattu Appa Patil** (supra) referred to and relied upon the Division Bench judgment in **Gulabrao Bhaurao Kakade Vs. Nivrutti Krishna Bhilare and others, 2001 (Supp.1) Bom. C.R. 688** and observed thus:

*" 17. In our opinion, the impugned orders are liable to be set aside on the ground of delay. In this connection, we may usefully refer to the judgment of this Court in **Gulabrao's** case (supra). In that case, 16 years after the Scheme was finalised, the original petitioner received a notice informing him that the Scheme earlier finalised had been varied under Section 32(1) of the said Act and possession as per the varied Scheme would be taken on 14/2/1989. Aggrieved by that*

order, the original petitioner filed a writ petition in this Court. This Court noted that there was no dispute that the Scheme was finalised following the procedure contemplated under the said Act way back in the year 1973 whereby the earlier Survey No. 95/4 was divided into different Gat numbers and the said Scheme was enforced and it remained in force without any demur or objection by any party for about 15 years. This Court then referred to Sections 32 and 31A of the said Act and observed that Section 32 gives power to Settlement Commissioner to vary the Scheme on the ground of error, irregularity or informality other than the errors referred to in Section 31A. It was observed that though there is no time limit prescribed under Section 32(1) for the Settlement Commissioner to vary the Scheme, which has come into force, but obviously even in the absence of any period prescribed under Section 32, the said power can only be exercised within a reasonable period in any case. It was further observed that what would be the reasonable period for exercise of power under Section 32(1) by the Settlement Commissioner may depend on facts and circumstances of each case. It was observed that ordinarily exercise of such power after three years of finalisation of the Scheme under Section 22 may not be justified. This Court analysed the facts before it and held that the exercise of power by the Settlement Commissioner for variation of the Scheme which

had come into force in the year 1973, by initiating proceedings in the year 1988 cannot be said to be within the reasonable time. It was further observed that the earlier Scheme was finalized in the year 1973 under the said Act to the knowledge of all the parties concerned. Nobody was aggrieved by the said Scheme finalised under the said Act and the Scheme came into force under Section 22. It was further observed that the said Scheme which had been finalised in accordance with law and which came into force and continued to be in force, could not have been unsettled by initiating proceedings for variation under Section 32 on Page 3134 the purported ground of error, irregularity or informality after a lapse of about 15 years and thus the exercise of power by the Settlement Commissioner under Section 32 for variation of the Scheme in the facts and circumstances of the case was grossly unjustified. "

29. In **Gulabrao Kakade** (supra), the Division Bench articulated that even in the absence of any period prescribed U/S. 32, the power can only be exercised within a reasonable period. While the Division Bench did observe that what would be the reasonable period may depend on facts and circumstances of each case, ordinarily exercise of such power after three years of finalisation of scheme U/S. 22 may not be justified. The relevant

observations of the Division Bench in **Gulabrao Kakade** (supra)

reads thus:

" 6. The power given to the Settlement Commissioner for variation of the scheme is on account of an error other than that referred to in section 31A, irregularity or informality after following the procedure prescribed. Though there is no time limit prescribed under Section 32(1) for the Settlement Commissioner to vary the scheme which has come into force, but obviously even in the absence of any period prescribed under section 32, the said power can only be exercised within reasonable period in any case. What would be the reasonable period for exercise of power under Section 32(1) by the Settlement Commissioner may depend on facts and circumstances of each case and we do not intend to lay down any specific period for exercise of that power by Settlement Commissioner but ordinarily exercise of such power after three years of finalisation of scheme under section 22 may not be Justified. In the facts and circumstances of the present case, the exercise of power by Settlement Commissioner for variation of scheme which has come into force in the year 1973, by initiating proceedings in the year 1988 cannot be said to be within reasonable time. The fact is and that is not disputed that the earlier scheme was finalised in the year 1973 under the Act of 1947

to the knowledge of all the parties concerned. Nobody was aggrieved by the said scheme finalised under the Act of 1947 and the scheme came into force under section 22. The said scheme which had been finalised in accordance with law and came into force and continued to be in force, could not have been unsettled by initiating the proceedings for variation under section 32 on the purported ground of error, irregularity or informality after a lapse of about 15 years. Thus, the exercise of power by Settlement Commissioner under section 32 for variation of the scheme in the facts and circumstances of the present case is grossly unjustified."

30. The enunciation of law by the Division Bench is followed in catena of decisions rendered by the learned Single Judges of this Court and suffice it to refer to the decision in ***Ganpati Dadu Mali Vs. State of Maharashtra and others, 2012 (3) Bom. C.R. 703.***

31. In the light of the settled legal position, I have no hesitation in holding that the exercise of power U/S. 32 of the Act was not within a reasonable period and, on that ground alone, the order impugned deserves to be quashed and set aside, which I accordingly do.

32. Needless to observe, that every action initiated pursuant

to the orders impugned, including mutation entries, are also quashed and set aside.

33. The contesting private respondents are at liberty to prove their title by approaching the Civil Court, if so advised, and if such proceedings are initiated, the Civil Court shall give due consideration to the provisions of Section 14 of the Limitation Act.

34. In view of disposal of the writ petition, pending civil application stands disposed of.

35. Rule is made absolute in the aforestated terms.

(ROHIT B. DEO)
JUDGE.

Madkar