

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

CRIMINAL WRIT PETITION NO.903 OF 2019

1. Deorao Tanbaji Bobde
Aged 65 years,
Occu: Not known.
2. Sou. Maya Deorao Bobde
Aged 56 years,
Occu: Household.

Both R/o Dhakate Layout,
Near Biyani Petrol, State Bank Colony,
Plot No.25, Durgapur Road,
Tukum Chandrapur,
Tah. & Dist. Chandrapur.

..... **PETITIONERS**

...VERSUS...

1. Pramod Deorao Bobade
Aged 36 years,
Occu: Service
R/o 400 KV, Lonikand Sub Station,
Power House Colony, Sambhaji Nagar,
Pune-Nagar Road, Tah. Haveli,
Dist. Pune-412216.
2. District Magistrate,
Chandrapur, Dist. Chandrapur.
3. Sub-Divisional Officer/Chairman
Maintenance Tribunal, Chandrapur,
Dist. Chandrapur.

..... **RESPONDENTS**

 Mr. Anil A. Dhawas, Advocate for Petitioners.
 Mrs. Shilpa Giratkar, Advocate for Respondent 1.
 Mr. I.J. Damle, APP for Respondents 2 & 3.

CORAM: ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 18.12.2020

DATE OF PRONOUNCING THE JUDGMENT : 04.01.2021

JUDGMENT:

Petitioners, who are the parents of respondent 1, are assailing the order dated 08.08.2019 rendered by the District Magistrate, Chandrapur in Appeal in Revenue Case 24/2019 whereby the order dated 04.12.2018 rendered by the Sub-Divisional Magistrate, Tribunal constituted under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 ('Act' for short) is confirmed and the petitioners are denied maintenance.

2. It would be necessary to note the factual backdrop.

3. Petitioners preferred Revenue Case/Miscellaneous Application 2/2016-17 impleading Pramod Deorao Bobde as the sole respondent, claiming collective maintenance of Rs.10,000/- from the date of the application and Rs.10,000/- as litigation expenses.

4. Pleadings in the application preferred by the

petitioners under section 5 (1) of the Act :-

The petitioners have four children, Sanjay and respondent 1 Pramod and Manisha and Swati who are married. Petitioner 1 Deorao was serving with the Chandrapur Thermal Power Station. Petitioner 1 incurred expenditure for the education of the children and construction of house, while in service. Petitioner 1 superannuated in 2014 and is receiving monthly monetary benefit (referred to as *bhatta* in the application) of Rs.1872/-. Petitioner 1 also spent for the marriage of the two daughters, by availing financial assistance from the society.

Petitioner 1 is obligated to meet the day-to-day expenses and medical expenses of his wife – petitioner 2. Respondent 1 is a government servant with monthly salary ranging between Rs.35,000/- to Rs.40,000/-. The attitude and approach of respondent 1 changed dramatically after marriage and he started neglecting the petitioners. Respondent 1 is deliberately neglecting the petitioners and rather is claiming interest in the agricultural field and house *inter alia* by issuing notice dated 24.06.2016.

5. Submissions in response on behalf of respondent 1 :-

In specific pleadings, respondent 1 averred that petitioner 1 Deorao received a substantial amount as retiral benefit, which is lying in his bank account. The grand-father of respondent 1 and the father of petitioner 1 Tanbaji Bobde owned ancestral agricultural land which was acquired for the purpose of the thermal power station and with the aid of the compensation received, Tanbaji Bobde and petitioner 1 purchased land admeasuring 1.38 HR bearing gat 373/1 which is recorded in the name of petitioner 1. The said agricultural land generates annual income of Rs.4,00,000/- to Rs.5,00,000/-. Petitioner 1 has also utilized the corpus generated from ancestral property to purchase agricultural land admeasuring 2.48 HR bearing gat 316 which is recorded in the name of petitioner 2 and which agricultural land also generates annual revenue of Rs.4,00,000/- to Rs.5,00,000/-. Petitioner 1 owns plot 25 admeasuring 165.00 square meters and the double storied building constructed thereon which is part or portion of survey 49/12 and the said building generates rental income of Rs.15,000/- per month. The other son Sanjay is aged 33 years and is employed with the Chandrapur Thermal Power Station and earns monthly salary of Rs.25,000/- to Rs.30,000/-.

Respondent 1 averred in the submissions in response

that notwithstanding the fact that the petitioners do not need any maintenance, they are welcome to reside with respondent 1 at Pune. Respondent 1 specifically pleaded that he requested the petitioners time and again that they should reside with his family at Pune. However, since the petitioners were not happy with the decision of the respondent 1 to marry out of caste, they nurtured a grudge against the petitioners and his wife.

6. In essence the stand of respondent 1 is that the application is preferred only to harass him. Before adverting to the order of the Tribunal, the attempts made by the conciliation panel, to resolve the dispute, may be noted.

7. The conciliation panel noted that the petitioners and respondent 1 attended the meetings dated 04.10.2017 and 02.11.2017 which were convened to explore the possibility of an amicable settlement. The conciliation panel noted the willingness of respondent 1 to look after and take care of the petitioners should they reside with him at Pune. The conciliation panel then noted that an amicable settlement is not possible and submitted a report in such terms, to the Tribunal.

8. The Tribunal's order :-

The order of the Tribunal notes that the petitioners filed on record affidavit dated 28.02.2018 reiterating the averments in the application and additionally disclosing that respondent 1 has instituted Civil Suit 111/2017 claiming partition and separate possession in ancestral property.

The Tribunal then noted that the respondent 1 filed affidavit dated 13.03.2018 reiterating the averments in the submissions in response and further pointing out that vide gift-deed without consideration dated 24.06.2016 petitioner 1 has transferred agricultural land bearing gat 373/1 to the other son Sanjay. Respondent 1 further stated on oath that the petitioners are residing with his brother Sanjay.

The Tribunal noted that petitioner 2 is the recorded owner of agricultural land bearing gat 316 admeasuring 1.46 HR, that petitioner 1 is the recorded owner of plot 25 and the double storied building standing thereon and the annual property tax is Rs.3493/-, that the monthly pension received by petitioner 1 is Rs.1872/- and that petitioner 1 transferred agricultural land bearing gat 373/1 admeasuring 1.38 HR in favour of his other son Sanjay by executing registered gift-deed dated 24.06.2016,

without receiving any consideration. The Tribunal further noted that respondent 1 is ready and willing to look after the petitioners should they reside with him at Pune.

The Tribunal concluded that the petitioners failed to make out a case for awarding maintenance.

9. **The Appellate Order :-**

The Appellate order notes the rival contentions and concurs with the view of the first authority. The appellate order notes and refers to the property of the petitioners and the pension received by the petitioner 1 herein.

10. The learned counsel for the petitioner Mr. Anil Dhawas would vehemently submit that the order of the Tribunal is liable to be declared illegal on the short ground that the evidence is not recorded as is the mandate, *inter alia* of section 6 (4) and 8 of the Act. Mr. Anil Dhawas draws support from the decision of a learned Single Judge in *Writ Petition 1954/2016 Dnyaneshwar Rambhau Shinde v. Rambhau Govind Shinde and another* and in particular from the observations in paragraphs 3 and 4 therein which read thus :-

3. *The impugned order nowhere shows that any evidence was recorded and that too in the presence of the petitioners or his relatives. Section 8 of the Act of 2007 contemplates the procedure for disposal of such cases. It does not do away with the need for recording of evidence in a summary manner. Sub-section 4 of Section 6 of the Act of 2007 clearly lays down that all evidence in such proceedings must be recorded in presence of children or relatives against whom an order for payment of maintenance is proposed to be made and shall be recorded in the manner prescribed for summons cases, provided that if the Tribunal is satisfied that the children or relative against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the Tribunal, the Tribunal may proceed to hear and determine the case ex-parte. In the present case though the impugned order has been passed by showing the petitioner as absent, no specific order for proceeding ex-parte against the petitioner was passed by the respondent No.2 Tribunal. The say of the petitioner was filed on 10/2/2015 and thereafter, it appears that, no opportunity was granted to the petitioner to defend his case properly.*

4. *The impugned order also shows that no specific findings have been given by the respondent No.2 regarding inability of the respondent No.1 to maintain himself and how much maintenance amount would be required by him in order to sustain himself as per the same standard of the life of his sons.*

Mr. Anil Dhawas then relies on the decision of a learned Single Judge in *Ajay s/o Harakchand Karnavat v. Harakchand s/o Subhagchand Karnavat* 2018 ALL MR (Cri) 1157

and in particular on paragraph 3 of which reads thus :-

3. The learned counsel for present petitioner drew the attention of this Court to the provision of section 6 of the Act, in which the procedure is laid down for the trial of such matters. The provisions of section 6 (3) and (4) show that the Tribunal has the power of Judicial Magistrate First Class as provided in Criminal Procedure Code, 1973 and the evidence needs to be recorded in presence of children and relatives against whom the order of payment of maintenance is proposed. The provision of section 8 of the Act shows that in holding inquiry, the Tribunal is expected to follow summary procedure as laid down by the State Government in that behalf. These provisions together show that the evidence needs to be recorded in the matter and the provision of section 6(4) shows that the evidence needs to be recorded in the manner prescribed for summons case. Admittedly, such procedure was not followed by the Tribunal. This point is not considered by the Appellate Tribunal. The learned counsel for petitioner submitted that as the procedure was not followed, there was no opportunity to the petitioner to contest the matter properly. For that, he wants remand of the matter.

11. Before I consider the submission referred to *supra*, it is relevant to note that no specific grievance was made in appeal touching the manner in which the evidence was recorded. Perusal of the memo of appeal would reveal that ground 1 is a general and extremely vague challenge that the order of the Tribunal is not in accordance with law. It is obvious from the memo of appeal

and the submissions recorded by the Appellate Authority that the petitioners did not raise the ground that the evidence is not recorded in accordance with the mandate of the Act much less that the petitioners were put to any prejudice. Such a ground is not even raised in the petition. Paragraph 5 of the petition reads thus :-

5. That the parties tendered their evidence and thereafter the learned Chairman of Maintenance Tribunal respondent no. 3 passed an order on 4/12/2018 and thereby rejected the application of the petitioners. A copy of order dt. 4/12/2018 is annexed herewith as ANNEXURE-4.

Ground (ii) contends that the Tribunal failed to decide the application in the manner provided under the Act. It is clear, that except a general and vague assertion that the application is not decided in accordance with the provisions of the Act, the petitioners herein have not approached this Court with a case of having been denied the right of effectively presenting their case or having suffered any prejudice due to the purported breach of the provisions of the Act.

12. It is already noted, that even according to the petitioners, the evidence was tendered. The contesting parties

chose to file on record their affidavits, and did not at any point of time contend that any other mode of adducing evidence or recording evidence be followed. Neither party expressed the desire to cross-examine the deponent. It is, more than apparent, that no prejudice is suffered whatsoever by the petitioners due to the purported failure of the Tribunal to record the evidence in the manner prescribed for summons cases.

13. Chapter XXIII of the Code of Criminal Procedure, 1973 provides for the mode of taking and recording evidence. Section 274 provide that in all summons cases tried before a Magistrate, as the examination proceeds, the Magistrate shall make a memorandum of the substance of the evidence in the language of the court.

14. The Maharashtra Maintenance and Welfare of Parents and Senior Citizens Rules, 2010 envisage that in the event of failure of conciliation, the Tribunal shall give the parties an opportunity of leading evidence in support of their respective claims, and shall, after holding a summary inquiry, as provided in sub-section (1) of section 8 pass a speaking order (see Rule 13).

15. Adverting to the decisions cited by Mr. Anil Dhawas,

Dnyaneshwar Rambhau Shinde v. Rambhau Govind Shinde turns on facts. The decision was rendered in the context of the fact that no evidence was recorded and that though the impugned order marked the petitioner absent, the Tribunal did not pass a specific order proceeding *ex-parte*. The learned Judge, therefore, concluded that effective opportunity of defence was not extended to the petitioner. *Ajay Karnavat* records that admittedly the procedure prescribed was not followed by the Tribunal, and that the said aspect was not considered by the Appellate Authority. The facts and pleadings are not culled out in the decision, and therefore, it is difficult to ascertain the ratio thereof.

16. In my considered view, it does not lie in the mouth of the petitioners, to contend that the evidence was not recorded in the manner prescribed. It is crystal clear that the contesting parties were more than satisfied by filing their respective affidavits in lieu of oral examination-in-chief. While in a summons case the Magistrate would have recorded only the substance of the evidence, the affidavits gave an opportunity to the petitioners to bring on record their case, completely and effectively, with the intended hues and colours. In exercise of writ jurisdiction, I am not inclined to permit the petitioners to make a capital of the

purported departure from the manner prescribed for recording evidence in summon cases. I more than satisfied that no prejudice is caused, and indeed none is pleaded much less demonstrated, either in Appeal or in the memo of petition.

While the Code of Criminal Procedure, 1973, may not apply in its entirety to the proceedings under the Act, significantly section 465 thereof provides that an order shall not be reversed in Appeal or Revision on account of any error, omission or irregularity in the proceedings unless the same has in fact occasioned a failure of justice and that one of the relevant considerations to determine whether a failure of justice has occasioned is whether the objection could have and should have been raised at an earlier stage in the proceedings. In exercise of writ jurisdiction, there is all the more reason not to interfere unless a failure of justice is demonstrable, and in the present case there is none.

17. Mr. Anil Dhawas would then argue that the order of the Tribunal militates against the letter and spirit of the Act. However, Mr. Anil Dhawas was unable to persuade me to hold that there is any error committed by the Tribunal in denying maintenance. The property and assets and the receipt of pension

are either admitted or uncontroverted or irrefutable. Petitioner 1 has not accepted the offer of respondent 1 to reside with the family of respondent 1 at Pune. Petitioner 1 is residing with the other son Sajay to whom he has transferred one of the agricultural fields by executing a registered gift-deed without consideration. In my considered view, there is more than ample uncontroverted material on record to suggest that the application preferred by the petitioners was actuated with the desire to settle scores with the estranged son who is demanding share in ancestral property rather than by a genuine need to claim maintenance. The Division Bench decision in *Jatin Ramaiya v. State of Goa through its Chief Secretary, Director of Social Welfare, Government of Goa 2019 (5) BCR 640* which is pressed in service by Mr. Anil Dhawas does not take the cause of the petitioners any further. Needless to state, I am respectfully bound, by the observations in paragraph 24 of the said decision, to which my attention is specifically invited. However, while there cannot be any quarrel with the proposition that the Tribunal is expected to apply mind and, where appropriate case is made out, to lean in favour of making order for interim maintenance, and to generally take a proactive role keeping in mind the sensitive nature of the jurisdiction conferred,

in the facts of the present case, the petitioners have not made out any case for grant of maintenance.

18. The petition is dismissed.

JUDGE

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