

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

WRIT PETITION NO.4822 OF 2016

Sau. Urmila Dattarao Sarkunde,
 aged about 40 years, Occ. Household,
 Through Power of Attorney Holder,
 Shri Dattarao Sakharam Sarkunde,
 aged about 50 years, Occ. Agriculturist,
 R/o Narayanwadi, Pusad,
 Tah. Pusad, Dist. Yavatmal. **PETITIONER**

...V E R S U S...

- 1) Narayan Kondba Sarkunde,
 aged about 52 years, Occ. Agriculturist,
 R/o Shelu (Bu.), Tah. Pusad,
 Dist. Yavatmal.
- 2) Shri Balaji Kondba Sarkunde,
 aged about 51 years, Occ. Agriculturist,
- 3) Shri Laxmibai Uttamrao Pande,
 aged about 48 years, Occ. Household,
- 4) Omkar Hanuman Sarkunde,
 aged about 11 years (Minor),
 through his mother Shantabai Sarkunde.
- 5) Gokarna Hanuman Sarkunde,
 aged about 42 years, Occ. Household.
- 6) Shantabai Hanuman Sarkunde,
 aged about 41 years, Occ. Household.
- 7) Smt. Dhrupatabai Kondba Sarkunde,
 aged about 73 years, Occ. Household.

Petition dismissed
 against R.nos. 3 to
 6 vide Regd. (J)
 order dtd. 13.6.18

Respondent No.2 to 7 R/o Shelu (Bu.),
 Tah. Pusad, Dist. Yavatmal.

8) Tahsildar, Pusad, Dist. Yavatmal.

9) Additional Commissioner,
Amravati Division, Amravati.

..... **RESPONDENTS**

Mr. P. S. Chawhan, Advocate for Petitioner.

Mr. G. M. Kubade, Advocate for Respondent 1.

Ms. T. H. Khan, AGP for Respondents 8 & 9/State.

CORAM: **ROHIT B. DEO, J.**

DATE: **13th APRIL, 2022.**

ORAL JUDGMENT:

The petitioner and respondents 1 to 7 belong to the
'Andh' community which is recognized as Scheduled Tribe.

2. According to the petitioner, vide sale-deed dated 17.09.2009, respondents 1 to 7 sold agricultural land admeasuring 1.23 HR assigned Survey 90 situated at Mouza Shelu, Pusad, District Yavatmal, to the petitioner.

3. Petitioner claims to be in possession of the said agricultural land.

4. Petitioner states that on 02.12.2013 respondent 1 preferred an application before the Tahsildar – respondent 8 herein for cancellation of the sale-deed and restoration of the

agricultural land. The petitioner resisted the application contending that since the vendors and the vendee belonged to the Scheduled Tribe, there is no requirement of obtaining prior sanction of the Collector for the transfer.

5. The Tahsildar passed order dated 30.06.2015 allowing the application for restoration on the ground that the previous sanction of the Collector was not obtained. Consequentially, the mutation entry 365 which was taken on the basis of the sale-deed was cancelled.

6. The petitioner preferred revision before the Maharashtra Revenue Tribunal (MRT) which was not entertained.

7. The petitioner then preferred appeal under Section 257 of the Maharashtra Land Revenue Code, 1966 (Code) which was dismissed by the Additional Commissioner, Amravati – respondent 9 herein by order dated 12.07.2016.

8. Dissatisfied with the concurrent view the petitioner is invoking supervisory jurisdiction under Article 227 of the Constitution of India.

9. The short submission of the learned counsel for the petitioner Mr. Prithviraj Chawhan is that prior sanction of the Collector is not necessary if the transfer is between tribal and tribal.

10. The learned counsel for the respondents 1 to 7 Mr. Kubade would support the orders impugned on the premise that the issue is not *res integra*. The learned AGP Ms. Khan also supports the concurrent view of the authorities.

11. I have recently considered an identical issue in Writ Petition 1556/2022. Following the decision in ***Tulsiram Adku Marape & Anr. v. State of Maharashtra & Ors. 2011(1) ALL MR 22***, I have held that in view of the provisions of Section 36(2) of the Code even a transfer between tribal and tribal would be illegal in the absence of previous sanction of the Collector.

12. I see no reason to reconsider the view which I have taken while deciding Writ Petition 1556/2022 (Vijay s/o Anandrao Moghe and others v. The Additional Collector/ Sub Divisional Officer, Pusad, Dist. Yavatmal and others).

13. Section 36 of the Code reads thus :

“36. Occupancy to be transferable and heritable subject to certain restrictions.

(1) An occupancy shall, subject to the provisions contained in section 72 and to any conditions lawfully annexed to the tenure, and save as otherwise provided by law, be deemed an heritable and transferable property.

(2) Notwithstanding anything contained in the foregoing sub-section occupancies of persons belonging to the Scheduled Tribes (hereinafter referred to as the ‘Tribals’) (being occupancies wherever situated in the State), shall not be transferred except with the previous sanction of the Collector :

***Provided that,** nothing in this sub-section shall apply to transfer of occupancies made in favour of persons other than the Tribals (hereinafter referred to as the ‘non-Tribals’) on or after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974].*

(3) Where an occupant belonging to a Scheduled Tribe in contravention of sub-section (2) transfers possession of his occupancy, the transferor or any person who if he survives the occupant without nearer heirs would inherit the holdings, may, [within thirty years from the 6th July, 2004), apply to the Collector to be placed in possession subject so far as the Collector may, in accordance with the rules made by the State Government in this behalf, determine to his acceptance of the liabilities for arrears of land revenue or any other due which form a charge on the holding, [and, notwithstanding anything contained in any law for the time being in force, the Collector shall] dispose of such application in accordance with the procedure which may be prescribed:

Provided that, where a Tribal in contravention of sub-section (2) or any law for the time being in force has, at any time before the commencement of the Maharashtra land Revenue Code and Tenancy Laws (Amendment) Act, 1974 transferred possession of his occupancy to a non-Tribal and such occupancy is in the possession of such non-Tribal or his successor-in-interest, and has not been put to any non-agricultural use before such commencement, then, the Collector shall, notwithstanding anything contained in any law for the time being in force, either suo motu at any time or on application by the Tribal (or his successor-in-interest) made at any time [within thirty years from the 6th July, 2004), after making such inquiry as he thinks fit, declare the transfer of the occupancy to be invalid, and direct that the occupancy shall be taken from the possession of such non-Tribal or his successor-in-interest and restored to the Tribal or his successor-in-interest.

(* * * * *)

Provided further that where transfer of occupancy of a Tribal has taken place before the commencement of the said Act, in favour of a non-Tribal, who was rendered landless by reason of acquisition of his land for a public purpose, only half the land involved in the transfer shall be restored to the Tribal.

(3A) Where any Tribal (or his successor-in-interest) to whom the possession of the occupancy is directed to be restored under the first proviso to sub-section (3) expresses his unwillingness to accept the same, the Collector shall, after holding such inquiry as he thinks fit, by order in writing, declare that the occupancy together with the standing crops therein, if any, shall with effect from the date of the order, without further assurance, be deemed to have been acquired and vest in the State Government.

(3B) On the vesting of the occupancy under sub-section (3A), the non-Tribal shall, subject to the provisions of sub-section (3C), be entitled to receive from the State Government an amount equal to 48 times the assessment of the land plus the value of improvements, if any, made by the non-Tribal therein to be determined by the Collector in the prescribed manner.

Explanation.- In determining the value of any improvements under this sub-section, the Collector shall have regard to-

(i) the labour and capital provided or spent on improvements;

(ii) the present condition of the improvement;

(iii) the extent to which the improvements are likely to benefit the land during the period of ten years next following the year in which such determination is made;

(iv) such other factors as may be prescribed.

(3C) Where there are persons claiming encumbrances on the land, the Collector shall apportion the amount determined under sub-section (3B) amongst the non-Tribal and the person claiming such encumbrances, in the following manner, that is to say-

(i) if the total value of encumbrances on the land is less than the amount determined under sub-section (3B), the value of encumbrances shall be paid to the holder thereof in full;

(ii) if the total value of encumbrances on the land exceeds the amount determined under sub-section (3B), the amount shall be distributed amongst the holders of encumbrances in the order of priority:

Provided that, nothing in this sub-section shall affect the right of holder of any encumbrances to proceed to enforce against the non-Tribal his right in any other manner or under any other law for the time being in force.

(3D) The land vested in the State Government under sub-section (3A) shall, subject to any general or special orders of the State Government in that behalf, be granted by the Collector to any other Tribal residing in the village in which the lands is situate or within five kilometers thereof and who is willing to accept the occupancy in accordance with the provisions of this Code and the rules and orders made thereunder and to undertake to cultivate the land personally, so, however, that the total land held by such Tribal, whether as owner or tenant, does not exceed an economic holding within the meaning of sub-section (6) of section 36A.]

(4) Notwithstanding anything contained in sub-section (1) or in any other provisions of this Code, or in any law for the time being in force it shall be lawful for an Occupant Class-II to mortgage his property in favour of the State Government in consideration of a loan advanced to him by the State Government under the Land Improvement Loan Act, 1883, the Agriculturists Loans Act, 1884, or the Bombay Non-Agriculturists Loans Act, 1928, or in favour of a co-operative society [or the State Bank of India constituted under section 3 of the State Bank of India Act, 1955, or a corresponding new bank within the meaning of clause (d) of section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, or the Maharashtra State Financial Corporation established under the relevant law] in consideration of a loan advanced to him by such co-operative society, (State Bank of India, corresponding new bank, or as the case be, Maharashtra State Financial Corporation], and without prejudice to any other remedy open to

the State Government, [the co-operative society, the State Bank of India, the corresponding new bank, or as the case may be, the Maharashtra State Financial Corporation] in the event of such occupant making default in payment of such loan in accordance with terms on which such loan is granted, it shall be lawful for the State Government, [the co-operative society, the State Bank of India, the corresponding new bank, or as the case may be, the Maharashtra State Financial Corporation] to cause the occupancy to be attached and sold and the proceeds to be applied towards the payment of such loan.

The Collector may, [on the application of the co-operative society, the State Bank of India, the corresponding new Bank or the Maharashtra State Financial Corporation], and payment of the premium prescribed by the State Government in this behalf, by order in writing reclassify the occupant as Occupant—Class I; and on such reclassification, the occupant shall hold the occupancy of the land without any restriction on transfer under this Code.

Explanation.—For the purposes of this Section, “Scheduled Tribes” means such tribes or tribal communities or parts of, or groups within, such tribes or tribal communities as are deemed to be Schedule Tribes in relation to the State of Maharashtra under Article 342 of the Constitution of India [and persons, who belong to the tribes or tribal communities, or parts of, or groups within tribes or tribal communities, specified in part VIIA of the Schedule to the Order [made under] the said Article 342, but who are not resident in the localities specified in that Order who nevertheless need the protection of this Section and Section 36A (and it is hereby declared that they do need such protection) shall, for the purposes of those sections be treated in the same manner as members of the Scheduled Tribes]”

14. Section 36A of the Code, which is inserted by Maharashtra Act 35 of 1974 is a special provision which restricts the transfer of the occupancy of a tribal in favour of non-tribal and reads thus :

“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 kilometers thereof is prepared to take the occupancy from the owner on lease, mortgage or by sale or otherwise.

Provided further, that in villages in Scheduled Areas of the State of Maharashtra, no such sanction allowing transfer of occupancy from tribal person to non-tribal person shall be accorded by the Collector unless the previous

sanction of the Gram Sabha under the jurisdiction of which the tribal transferor resides has been obtained.]

Provided also that, in villages in Scheduled Areas of the State of Maharashtra, no sanction for purchase of land by mutual agreement, shall be necessary, if, -

(i) such land is required in respect of implementation of the vital Government Projects; and

(ii) the amount of compensation to be paid for such purchase is arrived at in a fair and transparent manner.

Explanation – For the purposes of the second proviso, the expression “vital Government project” means project undertaken by the Central or State Government relating to National or State highways, Railways or other multi-modal transport projects, electricity transmission lines, Roads, Gas or Water Supply pipelines canals or of similar nature, in respect of which the State Government has, by Notification in the Official Gazette, declared its intention or the intention of the Central Government, to undertake such project either on its own behalf or through any statutory authority, an agency owned and controlled by the Central Government or State Government, or a Government Company incorporated under the provisions of the Companies Act 2013 or any other law relating to companies for the time being in force.]

(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, [or on a resolution of the Gram Sabha in Scheduled Areas] within thirty years from 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.”

15. While deciding Writ Petition 1556/2022 Vijay Anandrao Moghe and others v. The Additional Collector/Sub-Divisional Officer, Pusad, District Yavatmal, I have observed thus :

“[i] The provisions of Sections 36 and 36-A of the Code serve the salutary purpose of protecting the interest of tribals, who are legislatively perceived to be potentially vulnerable. While Section 36(2) of the Code prohibits transfer of occupancies of persons belonging to the Scheduled Tribe except with the previous sanction of the Collector, and the prohibition would come into play even if the transfer is in favour of a tribal, Section 36A of the Code specifically governs the transfers of occupancies by tribals in favour of non-tribal. Section 36A of the Code mandates that such transfer will require the previous sanction of the Collector if the transfer is by way of lease, or mortgage for a period not exceeding five years and in all other cases, the previous sanction of the Collector with the previous approval of the State Government. The proviso obligates the Collector not to accord sanction unless he is satisfied that no tribal residing in the village in which the occupancy is situate or within 5 kilometers thereof is prepared to take the occupancy from the owner on lease, mortgage or by sale or otherwise.

[ii] While the previous approval of the State Government is not contemplated if the transfer is between tribal and tribal or if the transfer is between tribal and non-tribal and is by lease, or mortgage for period not exceeding five years, the previous

sanction of the Collector is a must.

In the teeth of the provisions of Section 36(2) of the Code, which do not make any distinction based on the status of the purchaser or transferee, it is not possible to accept the submission that if the transfer is between tribal and tribal, the previous sanction of the Collector shall not be necessary. Such submission militates against the plain language of the statutory provisions and if accepted will be destructive of the legislative intent which is to protect the tribals from exploitation.

The fact that the transferee is also a tribal does not necessarily eliminate the possibility that the transferer tribal may be exploited or may be at the receiving end of the bargain. The Legislature has in its wisdom not exempted tribal to tribal transfer from the requirement of previous sanction from the Collector. Presumably, the Legislature was conscious of the fact that a tribal is vulnerable and could possibly be exploited or induced to part with the agricultural land even by a fellow tribal who is in a more dominating position in life. It is precisely to prevent such exploitation that the previous sanction of the Collector is statutorily mandated.”

16. In the light of the view which I have taken, I am not inclined to interfere with the orders impugned in exercise of supervisory jurisdiction. The petition is dismissed.

JUDGE

NSN