Vijayabai and Others

Vs

Shriram Tukaram and Others

Civil Appeal No. 2814 of 1989

(Sujata V. Manohar, A. P. Mishra JJ)

20.11.1998

JUDGMENT

MISRA, J. -

1. The short question raised in this appeal is whether on the facts and circumstances of this case, when in a proceeding under Section 8 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, Respondent 1 in terms of the compromise declared himself not to be the tenant of the disputed land and in pursuance thereof his name being deleted by the order of the Tahsildar under Section 8(3), could the Tahsildar in exercise of his suo motu power under Section 49-B after a lapse of about 11 years, declare Respondent 1 to be a tenant under the said Act.

2. In the present appeal, Respondent 1 claims to be a tenant of the suit land of which the appellants and Respondent 2 claim to be the landlord/owner. To appreciate the controversy it is necessary to give certain facts. On 20-3-1959, the appellants' predecessors filed an application before the Tenancy Tahsildar for deleting the name of Respondent 1 from the list of tenants to correct the records prepared under Section 8(1) of the 1958 Act. According to the said application, the suit land is owned and possessed by the applicants and they have been cultivating it personally by engaging Saldars and labourers. The non-applicant's father (Respondent 1) was engaged as a Saldar and worked as a Saldar in the field of the applicants for nearly 20 years. Respondent 1 was also engaged as such along with his father. The applicants also entrusted their bullocks and implements to the custody of their Saldars since the beginning. It was specifically averred in the said application that the Patwari of Village Dongarkhadala and Kherdi in collusion with the non-applicant had entered the name of Respondent 1 in the list of tenants prepared and published under Section 8. Hence a prayer was made for deleting the said name which was wrongly recorded therein. During the pendency of the said proceeding, it is not in dispute that a compromise was arrived at between the appellants and Respondent 1 on 21-12-1960. In para (g) of the said compromise, Respondent 1 admitted that he was never the tenant of the appellants over the disputed land. The said compromise also spelt out other conditions. It seems that Respondent 1 even prior to this compromise on 3-12-1960, made an application in the said proceeding that his name be deleted from the list of tenants. This was done as earlier the parties seem to have arrived at a compromise which ultimately was only signed later. In pursuance of this on 30-12-1960 the Tahsildar ordered the deletion of the name of Respondent 1 in exercise of his power under Section 8(3) read with Section 100(2) of the said Act. This fact was also recorded by the Tahsildar in his order. It is significant to record here that none of the parties filed appeal against this order and this became final.

3. In fact, after this order in pursuance of the compromise as aforesaid, 10 acres 38 gunthas of land situated at Mouza Kherdi was purchased by Respondent 1 from the appellants for a consideration of

Rs. 7000. Hence not only the name of Respondent 1 was deleted but the compromise was acted upon by Respondent 1 by taking the aforesaid land from the appellants under the said compromise. After a lapse of about 11 years, in 1971 the Tahsildar initiated a proceeding suo motu under Section 49-B of the said Act. In pursuance of this notice, the appellants (landlord) filed the written statement and stated that the land in suit belongs to their family since 1940 and it was cultivated personally by the family by engaging Saldars. It was never leased out to anybody at any time. It was further stated that Respondent 1 was also one of the Saldars (servants) who had been cultivating the land as such. Respondent 1 filed reply by stating that he and his father cultivated the suit land as tenant. Respondent 1, however, admitted to have purchased the suit land of an area of 10 acres 38 gunthas from the appellants on 11-3-1961. The Tahsildar by means of order dated 2-2-1971 with due consideration of the earlier order of the Tahsildar passed under Section 8(3) read with Section 100(2) of the aforesaid Act also with due reference to the aforesaid compromise, held that Respondent 1 had not cultivated the suit land as tenant during the year 1958-59 and hence he is not entitled to restoration of the suit land. Hence he dropped the proceeding under Section 49-B. Aggrieved by this, Respondent 1 preferred an appeal before the Special Deputy Collector (Land Reforms) who allowed the appeal by holding that the compromise was brought upon under pressure and allurement, hence could not be acted upon thus in view of the evidence on record held Respondent 1 to be the tenant of the suit land primarily on the basis of the sole entry recorded under Section 8 of the said Act published on 1-4-1959. The appellants challenged this order before the Maharashtra Revenue Tribunal in revision which was dismissed. Thereafter a writ petition was filed in the High Court which was dismissed and finally the letters patent appeal in the High Court was also dismissed.

4. The learned Senior Counsel for the appellants, Shri Mohta, submits that once in the proceeding under Section 8 of the aforesaid Act between the appellants and the respondent, the question was determined by holding the respondent not to be the tenant of the appellants and that order having become final since no appeal was preferred, he is stopped from raising a contradictory plea in the subsequent proceeding initiated by the Tahsildar under Section 49-B, in respect of the same land. He submits that the only foundation for the claim of the respondent to be the tenant is the said entry only for one year, i.e., 1958-59 and that entry having been deleted, there was no foundation even for the Tahsildar to initiate suo motu proceeding. Further, the respondent and his father were Saldars (servants) of the appellants and the said entry was obtained by them in collusion with the Patwari of the village concerned and for that he would have no sustainable claim for adjudication. Thus the findings recorded by the authority/Court as aforesaid contrary to this are liable to be set aside.

5. On the other hand, Shri Deshpande, learned counsel for the respondent, supported the decision that the respondent is a tenant of the disputed land and proceeding under Section 49-B was rightly initiated by the Tahsildar suo motu. Further, there being no termination of his tenancy under Section 19 of the aforesaid Act and in any case, unless an order is passed by the Tahsildar under Section 36(2), the landlord cannot obtain possession of the suit land. The submission is that as he was a tenant on the appointed day, namely, 28-8-1958 as also recorded and hence by virtue of Sections 46 and 49-A is entitled to become the statutory owner.

6. Before we proceed to decide the controversy, it is necessary to record certain admitted facts. On 20-3-1959, the appellants filed application before the Tenancy Tahsildar under Section 8(3) for deletion of the name of Respondent 1 from the list of tenants pertaining to the suit land as prepared under Section 8(1). That entry in favour of Respondent 1 as tenant was recorded for only one year, namely, in the records of 1958-59 which was actually prepared under Section 8(1) as aforesaid. Thus in this proceeding, the question which arose was, whether Respondent 1 is a tenant of the suit

land of the appellants or not. A compromise was arrived at which led Respondent 1 to file an application dated 3-12-1960 before the Tabsildar in the said proceeding for deleting his name from the list of tenants and withdrawing allegation, if any, to the contrary in his written statement. This was followed by a written compromise dated 21-12-1960. Under that, Respondent 1 admitted that he was never the tenant of the appellants of the land in suit. The said compromise contemplated that the appellants would sell to Respondent 1 10 acres 38 gunthas of land out of the suit land for a consideration of Rs. 7000 and the said consideration was actually paid on the date of this compromise, in pursuance whereof Respondent 1 purchased the said land for the said consideration. For 11 years thereafter no proceeding or action was initiated by Respondent 1 over the suit land and the parties continued to enjoy the suit land in terms of the said compromise and as a consequence of the order passed under Section 8(3) recording in favour of the appellants by deleting the name of the respondent. It is only on 2-2-1971, i.e., after 11 years, suo motu proceeding was initiated by the Tahsildar under Section 49-B. It is on these admitted facts and the aforesaid facts, the controversy is to be adjudicated.

7. In the second round of proceeding under Section 49-B, the Tahsildar upheld the contention of the appellants on the basis of the compromise as aforesaid but in appeal, the Collector negatived the contention holding in favour of the respondent. Similarly, the revision was also dismissed by the Tribunal. Both the appeal and the revision were dismissed primarily by holding that the compromise was arrived at under pressure and allurement and that he was recorded as tenant in the year 1958-59. The writ petition and letters patent appeal filed by the appellants were also dismissed. The High Court upheld the orders of the courts below and further recorded that without an order of the Tahsildar under Section 36(2), which is not in the present case, the appellants cannot obtain possession of the suit land. Thus the Court held Respondent 1 to be the tenant primarily based on the said one entry of 1958-59 and on the oral evidence.

8. Normally this Court would not interfere with any such finding of fact recorded but where the conclusions are arrived at by misconstruing the provisions of an Act and without appreciating the principle of estoppel, including adjudication of such right in early proceeding under the same Act between the same party, this Court would not hesitate to reconsider such adjudication of facts. The facts are very clear in the present case. The question whether Respondent 1 was a tenant of the appellants of the suit land came up for consideration under this very Act and the Tahsildar in a proceeding initiated under Section 8(3) passed an order deleting the name of the respondent as tenant. The question whether Respondent 1 was a tenant of the appellants or not was directly in issue in this proceeding which was finally adjudicated upon by the competent authority, holding against the respondent. Section 49-B refers to transfer of possession and ownership of lands to a certain dispossessed tenant. This section is applicable only where a tenant referred to in Section 46 or 49-A was in possession of the land on the appointed day but was dispossessed before the relevant date. Thus before a power could be exercised under it there has to be a tenant of the suit land, who is dispossessed on the relevant date. But this fact was no more res integra between the appellants and Respondent 1 on the date suo motu notice was issued by the Tahsildar. As aforesaid, dispute, if any, regarding tenancy between Respondent 1 and the appellants of the suit land stood concluded in the proceeding under Section 8. The said order passed under Section 8 is appealable but no appeal was preferred. Thus, so far the appellants and the respondent are concerned, inter se, between them as they were parties therein, this issue became final. In other words, on the date when the Tahsildar exercised his suo motu power of initiating proceeding under Section 49-B, there was no material on the record of the Tahsildar to proceed under it, the only record of an entry of 1958-59 stood erased when the name of Respondent 1 was deleted by the competent authority under this very Act.

9. The Tabsildar while exercising his suo motu power under Section 49-B has to initiate on the basis of the materials before him not arbitrarily. Every exercise of suo motu power explicitly or implicitly reveals to correct an error crept in under a statute, what ought to have been done was not done or which escaped the attention of any statutory authority, or error or deliberate omission or commission by the subject concerned requires correction, of course, within the limitation of any such statute. This has to be based on some relevant material on record, it is not an omnipower to be exercised on the likes and dislikes of such an authority. Though such a power is a wide power but it has to be exercised with circumspection within the limitations of such statute. Wider the power, the greater circumspection has to be exercised.

10. Returning to the present case, it has to be seen what was on the records of the Tahsildar when he initiated proceeding under Section 49-B. Admittedly, the only documentary evidence on the records was the sole entry of 1958-59 which stood deleted by an order of the competent authority, viz., the Tabsildar himself in accordance with law under this very same statute. The question is, has the Tahsildar any power under Section 49-B to set aside an order passed under Section 8? Section 49-B does not contain the words, "Notwithstanding anything in this statute". The orders passed by the Tahsildar both under Section 8 and Section 49-B are subject to appeal or revision, but Section 8 order is not subject to Section 49-B. This apart, what is primarily required for exercise of such power is that there has to be a tenant and he is dispossessed on the relevant date. So there has to be a tenant first, a tenant referred under Sections 46 and 49-A. To appreciate the controversy, Sections 8 and 49-B are quoted hereunder :

> "8. Record of rights of ordinary tenants. - (1) As soon as may be after this Act comes into force the Tahsildar shall cause a list of persons, other than occupancy tenants and protected lessees, who are deemed to be tenants under sub-section (1) of Section 6 to be prepared for entry in the Record of Rights in accordance with the provisions of Chapter IX of the Code.
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> (2) After such list is prepared it shall be published in the prescribed manner and if no application is made by the landlord or the tenant or any other person interested within a period of six months of the date of such publication disputing the correctness or omission of any entry, such list shall be final.
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> (3) If an application is made to the Tahsildar by the landlord or the tenant or any other person interested in the prescribed manner within the aforesaid period, disputing the correctness or omission of such entry, the Tahsildar shall decide the dispute in accordance with the provisions of sub-section (2) of Section 100 of this Act and such decision subject to appeal or revision under this Act shall, notwithstanding Section 106 of the Code, be final.
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> (4) In deciding the question referred to in sub-section (3), the Tahsildar shall, notwithstanding anything contained in Section 92 of the Indian Evidence Act, 1872, or in Section 49 of the Indian Registration Act, 1908, or in any other law for the time being in force, have power to inquire into and determine the real nature of the transaction and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or a statement or unregistered document with a view to such determination.
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49-B. Transfer of possession and ownership of lands to certain dispossessed tenants. - Where a tenant referred to in Section 46 or Section 49-A was in possession on the appointed day but is not in possession of the land held by him on the relevant date on account of his being dispossessed before that date, otherwise than in the manner and by an order of the Tahsildar as provided in Section 36, and the land is in the possession of the landlord or his successor-in-interest on the 31st day of July, 1969 and is not put to a non-agricultural use on or before the last-mentioned date, then, the Tahsildar shall, notwithstanding anything contained in Section 36, either suo motu or on the application of the tenant, hold an inquiry, and direct that such land shall be taken from the possession of the landlord, or as the case may be, his successor-in-interest and shall be restored to the tenant, and the provisions of Sections 46 to 49-A shall, insofar as they may be applicable apply thereto, as if the tenant had held the land on the relevant date subject to the modification that the ownership of land shall stand transferred to, and vest in, the tenant, and such tenant shall be deemed to be the full owner of the land, on the date on which the land is restored to him :

Provided that, the tenant shall be entitled to restoration of the land under this section only if he undertakes to cultivate the land personally, and of so much thereof as together with the other land held by him as owner or tenant, shall not exceed three family holdings."

11. Section 49-B stipulates enquiry where a tenant under Section 46 or Section 49-A was in possession on the appointed date but was dispossessed on the relevant date to transfer back such land to such tenant and confer ownership on him. So for initiating proceeding there has to be something on record to show that one is a tenant of the suit land. It is significant that both Section 46 and Section 49-A open with the words "Notwithstanding anything in this chapter ....". Thus notwithstanding confines to the sections of the Chapter in which these Sections 46 and 49-A are placed, viz., Chapter III. We find Section 8 is in Chapter II. So orders passed under Section 8 would have its full effect. Section 46 and Section 49-A confer right of ownership of the land on a tenant from the specified date. Thus Sections 49-B, 49-A and 46 refer to a tenant. Tenant is defined under Section 2(32) to mean :

"2. (32) 'tenant' means a person who holds land on lease and includes -

(a) a person who is deemed to be tenant under Section 6, 7 or 8

(b) a person who is a protected lessee or occupancy tenant, and the word 'landlord' shall be construed accordingly;"

12. It means a person holding land on lease and further he is deemed to be a tenant under Sections 6, 7 and 8. A person lawfully cultivating any land of another person who is not cultivating such land personally or through another member of his family or servant, then such a person would be deemed to be a tenant under Section 6. This question was up for consideration in a proceeding under Section 8. Then Section 7 also refers to a person holding alienated land, trust etc. on a condition specified therein to be a deemed tenant. However, we are not concerned with it. Finally adjudication is made under Section 8 as to who is a tenant, in case any objection is raised either by the tenant, landlord or any other person. When objection is raised under sub-section (2) of Section 8 disputing correctness of any entry which is raised in this case regarding the 1958-59 entry, the Tahsildar decides the dispute in accordance with sub-section (2) of Section 100 of this Act, which is final, subject to

appeal or revision. For deciding this, the Tahsildar is empowered to enquire to determine the real nature of the transaction between the parties, by taking such evidence as he deems fit by virtue of sub-section (4) of Section 8.

13. We find in the present case the Tahsildar reopened the very question which finally stood concluded, viz., whether Respondent 1 was or was not the tenant of the suit land. He further erroneously entered into a new premise of reopening the question of validity of the compromise which could have been in issue if at all in appeal or revision by holding that compromise was arrived at under pressure and allurement. How can this question be up for determination when this became final under this very same statute ? This is also not a case that Respondent 1 made any application even under Section 46(1-A)(a) for getting back the possession from the appellants or any application under Section 49-B. So on the relevant date, there did not exist any record for the Tahsildar to initiate proceeding suo motu except the record of the 1958-59 entry which stood deleted. This apart, finding of pressure and allurement recorded was not even pleaded. No pleading has been placed before us which shows such a pleading though it was brought in by oral evidence. On the other hand, we find the compromise was acted upon as Respondent 1 purchased part of the same suit land of an area of 10 acres 38 gunthas for the consideration of Rs. 7000. In other words, the compromise was acted upon under which the respondent gained part of the same property. On the facts of this case and further when the respondent did not raise any such issue for 11 years, we find exercise of power by the Tabsildar suo motu under Section 49-B to be without jurisdiction and unsustainable in law.

14. It would be impermissible to permit any party to raise an issue, inter se, where such an issue under the very Act has been decided in an early proceeding. Even if res judicata in its strict sense may not apply but its principle would be applicable. Parties who are disputing now, if they were parties in an early proceeding under this very Act raising the same issue, would be stopped from raising such an issue both on the principle of estoppel and constructive res judicata. The finding recorded even by the High Court that possession by the landlord could only be by an order under Section 36(2) is also not sustainable as that only conceived of the case where the tenant is dispossessed and the landlord is seeking to get back possession of the suit land from such tenant. In the present case, there was no such question. For this, Respondent 1 has to be at least a tenant and whether he is a tenant stood concluded, as aforesaid earlier, hence initiation of proceeding under Section 49-B cannot be sustained in law.

15. Learned counsel for the respondent faintly referred to Section 6 of the Act to contend that Respondent 1 would be a deemed tenant. As aforesaid, Section 6 refers to a person lawfully cultivating any land belonging to another person to be held to be a deemed tenant in case such land is not cultivated personally by the owner. In the earlier proceeding, when application is made by the appellants under Section 8(3) of the Act, it was specifically stated that the appellants were cultivating the suit land personally and through the respondent's father and later Respondent 1 as their Saldar (servant) and this question having been specifically pleaded, order was passed under Section 8(3) holding Respondent 1 not to be the tenant. In other words, Respondent 1 could not be said to be lawfully cultivating the land of another person, as the appellants (owner) were personally cultivating the land themselves or through their Saldars, hence Section 6 would not confer any benefit on the respondent. Section 6 excludes a person to be a deemed tenant in case the owner is cultivating the land personally.

16. In view of the aforesaid findings, we hold that the decision by the appellate and the revisional authorities in the proceedings under Section 49-B and the High Court in the writ petition and finally

under letters patent appeal contrary to what we have recorded above cannot be sustained. The authorities and the Court misdirected themselves to conclude in favour of the respondent by not properly construing the provisions of the Act and the power of the Tahsildar to exercise under Section 49-B of the Act. The said decision to the contrary is hereby set aside.

17. Accordingly, the appeal is allowed and the findings recorded against the appellants in the proceedings under Section 49-B of the Act are hereby quashed. Cost on the parties.