

Murlidhar Dayandeo Kesekar vs Vishwanath Pandu Barde & Anr on 22 February, 1995

Equivalent citations: 1995 SCC, SUPL. (2) 549 JT 1995 (3) 563, AIR ONLINE 1995 SC 6, 1995 AIR SCW 2224, (1995) 2 SCJ 553, (1995) 2 MAD LJ 21, 1995 SCC (SUPP) 549, (1995) 2 LAND LR 160, (1995) 2 CIV LJ 575, (1995) 2 CUR CC 142, (1995) 2 SCR 260, (1995) 2 ANDH LT 34, (1995) 3 JT 563, 1995 SCFBRC 293, 1995 BOMCJ 2 465, 1995 ALL CJ 2 784, (1995) 2 SCR 260 (SC), (1995) 3 JT 563 (SC)

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Bench: K. Ramaswamy, B.L Hansaria

PETITIONER:

MURLIDHAR DAYANDEO KESEKAR

Vs.

RESPONDENT:

VISHWANATH PANDU BARDE & ANR.

DATE OF JUDGMENT 22/02/1995

BENCH:

RAMASWAMY, K.

BENCH:

RAMASWAMY, K.

HANSARIA B.L. (J)

HANSARIA B.L. (J)

CITATION:

1995 SCC Supl. (2) 549 JT 1995 (3) 563

1995 SCALE (2) 672

ACT:

HEADNOTE:

JUDGMENT:

ORDER

1. Admittedly, the land bearing Survey No.265 to the extent of II acres 4 gunthas in Sangamner Badurk Village, Ahmednagar District which belonged to the State Government was allotted to first respondent, a tribal, in June, 1960. The appellant had entered into an agreement with the tribal-allottee on June 27, 1968 initially to purchase 5 acres of lands and later for the entire extent and sought permission for alienation from the Collector. Both the Collector and the Commissioner had refused to grant him the permission. The appellant approached the High Court by way of a writ petition. The High Court rejected the writ petition summarily. Thus this appeal by special leave.

2. Shri Ganpule, learned senior counsel for the appellant, contended that the first respondent being a tribal was unable to cultivate the lands and so lawfully entered into the agreement to sell the lands for valuable consideration, subject to permission of the Collector. The District Collector was in error in refusing permission for alienation as the Bombay Revenue Code gives such a power. The appellant was inducted into possession of the land pursuant to the agreement and he remained in possession and is entitled to retain the same under s. 53-A of the Transfer of Property Act. The authorities were not justified in refusing permission for alienation, The appellant had improved the lands and, therefore, is entitled to compensation for the improvements he had effected.

3. The question involved bears wider constitutional dimensions Mahatma Gandhiji, the Father of the Nation, in his 'Socialism of My Conception', at page 82-83 stated that:

"Every human being has a right to live and, therefore, to find the wherewithal to feed himself and, where necessary, to clothe and house himself In a well ordered society the securing of one's livelihood should be, and is found to be, the easiest thing in the world. , the test of orderliness in a country is not the number of millionaires it owns, but the absence of starvation among its masses."....."Working for economic equality means abolishing the eternal conflict between capital and labour. It means the levelling down of the few rich in whose hands is concentrated the bulk of the nation's wealth on the one hand, and the levelling up of the semi-starved, naked millions on the other A violent and bloody revolution is a certainty one day, unless there is a voluntary abdication of riches and the power that riches give and sharing them for the common good."

Rabindranath Tagore poetically portrayed the plight of a poor farmer thus:

"Bowed by the weight of centuries he leans, Upon his hoe and gazes on the ground,
The emptiness of ages on his face, And on his back the burden of the world."

4. As quoted by B.K. Roy in his "Socio-

Political Views of Vivekananda", at 52, Swami Vivekananda, speaking on social and spiritual justice, has said "I do not believe in a God who cannot give me bread here, giving me eternal bliss in heaven. Pooh; India is to be raised, the poor are to be fed, education is to be spread, and the evil of priestcraft is to be removed ... more bread, more opportunity for every body It is well to remember what Vivekananda said about poor:

"Feel, my children, feel, feet for the poor, the ignorant, the downtrodden, feel till the heart stops, the brain reels and you think you will go mad....."

5. The lament of a Scheduled Caste parent is pithily brought home to his son of their plight thus :-

"Hush, my child; don't cry, my treasure, Weeping is in vain, For the enemy will never Understand your pain. For the ocean has its limits Prisons have their walls around, But our suffering and torment Have no limit and no bound."

6. Pope Pious has, therefore, said that property arrangements ought to be "an element of the social order, a necessary presupposition for men's initiatives, a stimulus to work for the securing of both the temporal and the transcendent ends of life, for securing, therefore, the dignity and liberty of man". The right to property is a basic civil right which has long been recognised.

7. The India National Congress declared in 1931 in its resolution that "in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions' and that the Organisation of economic life must conform to the principles of justice". The founding father of the Constitution, therefore, while making the Constitution on behalf of the people, declared through "We the people of India" in the Preamble, which is part of the Constitution, to secure to every citizen justice, social, economic and political, equality of status and of opportunity with stated liberties to promote among them fraternity and dignity of the individual in a united and integrated Bharat. Chapter III of Fundamental Rights and Chapter IV of the Directive Principles have been evolved to accord socio-economic justice while securing political justice and laid the foundation in these Chapters to achieve egalitarian social order in Sovereign Democratic Republic which later was amended by Constitution 42nd (Amendment) Act as Sovereign Socialist Secular Democratic Republic.

8. Robson in his 'Welfare State and Welfare Society' has stated at p. 11:

"The ideas underlying the welfare state are derived from many different sources. From the French Revolution came notions of liberty, equality and fraternity. From the utilitarian philosophy of Bentham and his disciples came the idea of the greatest number. From Bismarck and Beveridge came the concepts of social insurance and social security. From the Fabian Socialists came the principles of the public ownership of basic industries and essential services. From Tawney came a renewed emphasis on equality and rejection of avarice as the mainspring of social activity. From the Webbs came proposals for abolishing the causes of poverty and cleaning up the base of society."

Robson stated at p. 192 "The basic aims of the welfare state are the attainment of a substantial degree of social, economic and political equalities and to achieve self-expression in his work as a citizen, leisure and social justice".

According to George Watson, quoted by Robson, welfare state implies a redistribu-

tion of incomes for the achievement of basic standard of living for all. M.P. Hall in his 'The Social Services of Modern England', has stated at p.303 of 1952 Edn. that "The distinguishing characteristic of the welfare state is that the assumption by the community, acting through the State, of the responsibility for providing the means whereby all its members can reach minimum standard of health, economic security and civilised living and can share according to their capacity in its social and cultural heritage". S.G. Sturmev in his 'Income and Economic Welfare' has stated at p. 142 that "The welfare State. should take positive measures to assist the community at large to alive to a collective responsibility towards its weaker members and should take positive measures to assist them.

9. In Encyclopedia Britannica, Vol.23, p.389, social welfare has been defined as "System of laws and institutions through which a government attempts to protect and promote the economic and social welfare of its citizens are usually based on various forms of social insurance against unemployment, accident, illness and old age. " The welfare state is not alien to Indian soil. In Kautilya's, Arthashastra, it was specifically provided that "In the happiness of the people lies the happiness of the king. What is good to the people is good (for the king). What is pleasant to the king is not good for him. What is good for the people alone is good for him." In Vedas and Epics, the duties of the king have diversely been mentioned that the king acts more than paternal and paternalistic in attitude. King Ashoka, Maurya, Akbar Srikrishna Devaraya and Kakatiyas etc. worked for the welfare of the people. Robert McNamara, President of the World Bank, quoted by Peter Singer in his "Practical Ethics, 1979, said that society has the moral obligation to raise above the absolute poverty level those who are in absolute poverty."

10. Universal Declaration of Human Rights, 1948, assures in Article 1 that "All human beings are born free and equal in dignity and rights." Article 3 assures that "Everyone has the right to life, liberty and security of person". Article 17 declares that "Everyone has the right to own property alone as well as in association with others." Article 22 envisages that "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort..... and resources of each State..... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Article 25 assures that "Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Similarly are the social, civil, economic and cultural rights given in European Convention.

11. The Declaration on the Right to Development to which India is a signatory recognising that development is a com- prehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. Article 1 assures that "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social cultural and political development, in which all human rights and fun- damental freedoms can be fully realized." Article 2 assures right to active

participation and benefit-of his right to development. Article 3 enjoins the state as its duty to formulate proper national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom. Article 3(1) states that it is a primary responsibility of the State to create conditions favourable to the realisation of the right to development. In particular, Article 4(1) directs the State as its duty to take steps individually and collectively for providing facilities for full realisation of right to development. Article 8(1) enjoins that the State should undertake necessary measures for the realisation of the right to development. Article 10 says that steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures for legislative and executive measures."

12. Article 38 of the Constitution of India provides that "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. In particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but amongst groups of people residing in different areas or engaged in different vocations." Article 39(b) directs the State "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good". All human rights derive from dignity and worth in man. Democracy blossoms the person's full freedom to achieve excellence. The socioeconomic content in directive principles is all pervasive to make the right to life meaningful to all Indian citizens.

13. Granville Austin in his "The Indian Constitution's Seamless Web", Lecture in Rajiv Gandhi Institute for Contemporary Studies, stated that the founding fathers of the Constitution raised three grand goals for India in the Constitution : (i) Achieving a more equitable society through a transformation they called a social revolution;

(ii) Preserving and enhancing national unity and integrity; and (iii) Establishing the spirit as well as the institutions of democracy. India could not be truly democratic unless the social revolution has established the just society. Without national unity, little progress could be made towards a social and economic reform or democracy. Equally, without democracy and reform, India was unlikely either to preserve or to enhance its unity. Judicial system has particular important role to play. In a welfare state, liberty, equality and fraternity as the trinity and social welfare are close companions. They are complimentary and supplementary means to each other to create conditions for self expression and balanced growth so that every citizen becomes responsible and re-

sponsive for successful working of democracy.

14. Illiot Dodds in his "Liberty and Welfare", 1957 Ed. at p. 17 stated that "welfare is actually a form of liberty in as much as it liberates men from social conditions which narrow their choices and brighten their self development. Article 46 of the Constitution mandates the State "to promote with special care the educational and economic interests of the weaker sections of the people, and, in

particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation." Dr. B.R. Ambedkar, while winding up the debates on the Draft Constitution, stated on the floor of the Constituent Assembly that the real reason and Justification for inclusion of the Directive Principles in the Constitution is that the party in power disregard of its political ideologies, will not sway away by its ideological influence but "should have due regard to the ideal of economic democracy which is the foundation and the aspiration of the Constitution." "Whoever may capture the governmental power will not be free to do what he likes to do in the exercise of the power. He cannot ignore them. He may not have to answer for the breach in a court of law, but he will certainly have to answer for them before the electorate when the next election comes." Dr. Ambedkar further stated that:

"We must make our political democracy a social democracy as well. Political democracy,, cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy..... In politics we will be recognising the principles of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one vote one value..... If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up".

15. Article 21 of the Constitution assures right to life. To make right to life meaningful and effective, this Court put up expensive interpretation and brought within its ambit right to education, health, speedy trial, equal wages for equal work as fundamental rights. Articles 14, 15 and 16 prohibit discrimination and accord equality. The Preamble of the Constitution as a socialist republic visualises to remove economic inequalities and to provide facilities and opportunities for decent standard of living and to protect the economic interest of the weaker segments of the society, in particular, Scheduled Castes i. e. Dalits and the Schedules "Tribes i.e. Tribes and to protect them from "all forms of exploitations". Many a day have come and gone after January 26, 1950 but no leaf is turned in their lives of the poor and the gap between the rich and the poor is gradually widening on the brink of being unbridgeable.

16. Robert L. Simon in his 'Troubled Waters : Global Justice and Ocean Re-

sources' (1984) has stated that "in a world of vastly unequal opportunities, where some are born into relative affluence and others into a subsistence economy or worse, to view... resources as the libertarian does as the exclusive property of those who exploit them or otherwise legitimately acquire them perpetuates or extends the initial inequalities." At page 198, he mentions that the right to life to illustrate is of a positive right. He states that "right to life is considered as a positive right if it requires not only that we refrain from killing the rights barely but also that we provide him with

basic necessities where he is unable to do so himself'. Dias, in his Jurisprudence, 5th Ed. at p.85 has stated that "Democracy is workable as long as there is a substantial area of shared values and aspirations among the people and where they have the maturity to rise above differences."

17. Providing adequate means of livelihood for all the citizens and distribution of the material resources of the community for common welfare, enable the poor, the Dalits and tribes, to fulfill the basic needs to bring about a fundamental change in the structure of the Indian society which was divided by erecting impregnable walls of separation between the people on grounds of cast, sub-caste, creed, religion, race, language and sex. Equality of opportunity and status thereby would become the bed-rocks for social integration. Economic empowerment thereby is the foundation to make equality of status, dignity of person and equal opportunity a truism. The core of the commitment of the Constitution to the social revolution through rule of law lies in effectuation of the fundamental rights and directive principles as supplementary and complimentary to each other. The Preamble, fundamental rights and directive principles - the trinity are the conscience of the Constitution. Political democracy has to be stable. Socio-economic democracy must take strong roots and should become a way of life. The State, therefore, is enjoined to provide adequate means of livelihood to the poor, weaker sections of the society the Dalits and tribes and to distribute material resources of the community to them for common welfare etc.

18. Dr. Justice Gajendra Gadkar, the former Chief Justice of this Court in his 'The Constitution of India, its philosophy and postulates' stated at p. 18 of 1969 Edn. that "the ultimate object of Directive Principles is to liberate the Indian masses in a positive sense to free them from the passivity endangered by centuries of coercion, by society and by nature and by ignorance and from the abject conditions that had prevented them from fulfilling their best selves". Therefore, civil, political, social, economic and cultural rights are necessary to the individual to protect and preserve human dignity, social and economic rights are sine quo non concomitant to assimilate the poor, the depressed and deprived i.e. the Dalits and Tribes in the national main stream for ultimate equitable society and democratic way of life to create unity, fraternity among people in an integrated Bharat.

19. Least Fundamental Rights in Chapter III would remain teasing illusions to the poor, disadvantaged and deprived sections of the society, the disadvantaged cannot effectively exercise their fundamental rights. Society, therefore, must help them to enjoy freedom accorded in Chapter III of Fundamental Rights.

20. Justice K.K. Mathew, a former Judge of this Court, in his 'Democracy, Equality and Freedom' has stated at p.37 that "Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a circle around the activities of each private individual or Organisation. Within that circle, the owner has a greater degree of freedom than without." At page 38, the learned Judge stated that "In a society with a mixed economy, who can be sure that freedom in relation to property might not be regarded as an aspect of individual freedom? People without property have a tendency to become slaves. They become the property of others as they have no property themselves. They will come to say : "make us slaves, but feed us". Liberty, independence, self-respect, have their roots in property. To denigrate the institution of property is to

shut one's eyes to the stark reality evidenced by the innate instinct and the steady object of pursuit of the vast majority of people. Protection of property interest may quite fairly be deemed in appropriate circumstances an aspect of freedom." At page 39, he further stated that "There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. This is why the Constitution-makers wanted that the ownership of the material resources of the community should be so distributed as to subserve the common good. People become a society based upon relationship and status." At page 56, he stated that "the economic rights provide man with freedom from fear and freedom from want, and that they are as important if not more, in the scale of values,"

21. Professor Hocking has judiciously put : "To contemporary consciousness it has become an axiom that there can be no freedom without provision; for a large part of mankind the main task of freedom is at the economic level. But it remains true that provision, work and leisure are not enough the most abundant provision is not human freedom unless a man remains the unhampered director of his powers of thought and action." Agricultural land is the foundation for sense of security and freedom from want and fear. Assured possession is a lasting root for prosperity, dignity of person and means for pursuit of excellence. Justice is an attribute of human conduct and rule of law is indispensable foundation to establish socio-economic justice. Doctrine of political economy must include an interpretation of the public good which is based on justice that would guide the people when questions of economic and social policy are under consideration.

22. Rawls in his "Theory of Justice" at p.259 stated that :

"From the beginning I have stressed that justice as fairness applies to the basic structure of society. It is a conception for ranking social forms viewed as closed systems. Some decision concerning these background arrangements is fundamental and cannot be avoided. In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be. These matters are, of course, perfectly obvious and have always been recognised. They were stressed by economists as different as Marshall and Marx. Since economic arrangements have these effects, and indeed must do so, the choice of these institutions involves some view of human good and of the design of institution to realize it. This choice must, therefore, be made on moral and political as well as on economic grounds."

23. In *Devati Balasubrahmanyam v. District Collector, Nellore*, 1986 (2) ALT 1, the Andhra Pradesh High Court considering the question whether constitutionality of the Government Order allotting 20% of the fair price shops in a District to the Dalits and tribes, violates Articles 14 and 19(1)(g) of the Constitution, held that equality of opportunity is not simply a legal equality, its existence

depends not merely on the absence of possibilities but on the presence of abilities. Those who have been disadvantaged by the existing social conditions, should be given more benefits by altering the ways of distribution. The distributive justice accomplishes the proportional equality. The proportional rewards to the groups of the people would enable the groups of people to level up their income and economic status in proportion to their membership in the country's population. Economic empowerment to the Dalits and tribes is one of the principles of economic Justice envisaged under Article 46 of the Constitution. Equality of opportunity by providing 20% reservation in the distribution of the fair price shops in the district to the Dalits and tribes, was held to be valid and does not violate Articles 14 and 19 of the Constitution.

24. Economic empowerment to the poor, Dalits and Tribes, is an integral constitutional scheme of socio-economic democracy and a way of life of political democracy. Economic empowerment is, therefore, a basic human right and a fundamental right as part of right to live, equality and of status and dignity to the poor, weaker sections, Dalits and Tribes. The State has evolved, by its legislative and executive action, the policy to allot lands to the Dalits and tribes and other weaker sections for their economic empowerment. The government evolved two pronged economic policies to render economic justice to the poor. The Planning Commission evolved policies like DRDL for economic empowerment of the weaker sections of the society; the Dalits and tribes in particular. There should be short term policy for immediate sustenance and long term policy for stable and permanent economic empowerment. All the State governments also evolved assignment of its lands or the lands acquired under the ceiling laws to them. Appropriate legislative enactments are brought on statute books to prevent alienation of the assigned lands or the property had under the planned schemes, and imposed prohibition thereunder of alienation, declaring any conveyance in contravention thereof as void or illegal and inoperative not to bind the State or the assignee. In case the assignee was disqualified or not available, on resumption of such land, the authorities are enjoined to resume the property and assign to heir or other eligible among the Dalits and tribes or weaker sections in terms of the policy. The prohibition is to effectuate the constitutional policy of economic empowerment under Articles 14, 21, 38, 39 and 46 read with the Preamble of the Constitution. Even in respect of pri-

vate sales of the lands belonging to tribes, statutes prohibit alienation without prior sanction of the competent authority.

25. It is seen that prior permission for alienation of the land was a condition precedent. Before permission is given, the competent authority is enjoined, by operation of Article 46 of the Constitution, to enquire whether such alienation is void under law or violates provisions of the Constitution and whether permission could be legitimately given. In that behalf, the competent authority is enjoined to look to the nature of the property, subject-matter of the proposed conveyance and pre-existing rights flowing thereunder and whether such alienations or encumbrances violate provisions of the Constitution or the law. If the answer is in the positive, then without any further enquiry the permission straightaway would be rejected. Even in case the permission is granted, it would be decided on the anvil of the relevant provisions of the Constitution and the law. In this case, the authorities, though had not adverted to the aspect of the matter, broadly refused permission on the ground that the assigned land cannot be permitted to be sold or

converted to non-agricultural use. The action refusing permission, therefore, is in consonance with the Constitutional scheme in Part IV of the Directive Principles. The agreement is, therefore, void under s.23 of the Contract Act as opposed to public policy vide judgment in DTC v. DTC Mazdoor Congress, 1990 (suppl.) 1 SCR, 192, by one of us Ramaswamy, J. with whom Sawant and Ray, JJ. agreed by separate but concurring judgment and the permission was rightly refused to be given for alienation. The possession is unlawful. Section 53-A of Transfer of Property Act is not attracted. The appellant's possession continues to be unlawful and he is not entitled to any improvement made on the lands. The Collector is directed to resume the lands immediately and assign the same to the legal representatives of first respondent, if found eligible or to any other eligible tribal.

26. Accordingly, the appeal is dismissed but in the circumstances without costs.