Chandrakant Baban Motkari . vs Gotiram Laxman Motkari(D) By Lrs. on 27 August, 2019

Equivalent citations: AIRONLINE 2019 SC 930, (2019) 11 SCALE 451, (2019) 3 CURCC 452, (2019) 5 ALLMR 968

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Bench: K.M. Joseph, Sanjay Kishan Kaul

Re

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2390 OF 2011

CHANDRAKANT BABAN MOTKARI & ORS. ….Appellant(s)

VERSUS

GOTIRAM LAXMAN MOTKARI (D)

BY LRS. & ORS. ….Respondent(s)

JUDGMENT

SANJAY KISHAN KAUL, J.

1. The legal heirs of two deceased brothers Laxman and Nivrutti are the contesting parties in the present proceedings, the subject matter being an open land measuring eight acres now falling within the Municipal Council of Nasik (since 1987). The family traces itself from the common ancestor, Bhimaji, who had three sons – Govind, Sadashiv and Yashwant. It appears that Yashwant passed away early some time, in the year 1936. Yashwant is survived by Nivrutti and Laxman.

2. The land located at Survey Nos.789, 791 and 786 was owned by one Raghunath Hari Phadake. The land was taken on lease for cultivation by Govind, Sadashiv and Nivrutti (the younger son of Yashwant) by execution of a Kabuliyatnama, on 16.5.1944. It appears that Laxman (the elder son of

Yashwant) was an attesting witness to this Kabuliyatnama. It is of some relevance to also note that Laxman had obtained a Government job in the Office of the Sub Registrar as a peon; prior to the execution of the Kabuliyatnama.

3. Post independence, various laws were enacted to protect the tenancy rights of the tenants in agricultural lands and the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the 'said Act') was one such legislation. In terms of Section 32 of the said Act, from 1.4.1957, tenants who were tilling the land were deemed to have purchased the land from the owners as per the procedure prescribed under the said Section (the Section was brought in by the Amendment Act 15 of 1957).

4. An Agreement to Sell was executed by Shri Phadake on 7.5.1956, i.e., prior to the cut-off date, when Section 32 of the said Act came into force, in terms whereof; three parcels of land were agreed to be sold to seven purchasers. 1/3rd share of this land was agreed to be sold to Laxman and Nivrutti. This Agreement to Sell was duly registered but never culminated in a sale deed. In terms of the Agreement to Sell Laxman and Nivrutti along with five other parties are stated to have paid a sum of Rs.6,000/- out of the total consideration of Rs.22,000/-. The remaining amount had to be paid in installments.

5. The case sought to be set up subsequently by the legal heirs of Laxman is that rights were derived in pursuance of this document, and payments were made by Nivrutti out of the joint family funds.

6. The next development was the proceedings which commenced for the rights of the tillers in pursuance of Section 32 of the said Act. The Deputy Collector initiated proceedings under Section 32G of the said Act to determine the price of the land to be paid by the tenants, which resulted in the order dated 9.8.1961. The benefit of this order, from the array of parties was to the tenants – Govind, Sadashiv and Nivrutti. The payments were made, and a certificate was issued under Section 32M of the said Act in 1967 in favour of the said three parties.

7. The three owners sought partition amongst themselves of the said land, which resulted in a Mutation entry No.23330, in terms whereof Nivrutti was recognized as the individual owner of Survey Nos.789/3 and 791/3. However, some part of the land which fell in Survey Nos.789/4 and 791/4 was still held by the owners jointly.

8. It appears that the wife of Laxman and his children sought to assail the mutation solely in the name of Nivrutti, on the ground that the payments for the land were made out of joint family funds and, thus, they were also liable to be included in the certificate issued under Section 32M of the said Act. These proceedings, however, were not successful and the revision application filed against the same also met the same fate vide order dated 18.11.1991, noticing that since the certificate under Section 32M of the said Act has been issued in favour of Nivrutti and the other co-owners, vide entry No.12378, on partition, the land was mutated in the name of Nivrutti Mutation No.23330. The matter was not carried further.

9. There appears to have been a silence on the part of the legal heirs of Laxman till the institution of a plaint, as Special Civil Suit No.148/2003 before the Civil Judge, Senior Division, Nashik. The alleged cause of action for the same is stated to be the notices issued by the legal heirs of Nivrutti. The public notices brought to light the endeavours of the legal heirs of Nivrutti to transact the land in question. The case set up in the plaint is that the parties constituted a Joint Hindu Family, and the properties belonged to the same. Thus, the grandsons of Laxman claimed rights in the property. These grandsons sued as plaintiffs, arraying the two sons of Laxman as the first two defendants while the legal heirs of Nivrutti were arrayed as the remaining defendants. This appears to have been so done because defendant Nos.1 & 2, being the sons of Laxman, along with their mother, had already instituted proceedings against the mutation of the land in favour of Nivrutti alone, but those proceedings ended in the year 1991. The first two defendants were really in the nature of supporting parties.

10. The suit was contested by the legal heirs of Nivrutti (Nivrutti having passed away in the year 1999). The plea of the land being ancestral was contested on the ground that the name of Laxman was never entered as a tenant of the property as he was not a signatory to the Kabuliyatnama, but, in fact, a witness to the Kabuliyatnama. Thus, no rights could have been created in his favour by Section 32 of the said Act coming into force, apart from the fact that being a Government Servant he could not have been the tiller cultivating the land. Payments for the issuance of certificate were stated to have been made by Nivrutti in his personal capacity, and thus, the plea raised was that apparently, a colour was sought to be given to the holding of the land as being purchased on behalf of the Joint Hindu Family. It may be noticed that interestingly, though Nivrutti was the younger of the two brothers, it was sought to be pleaded on behalf of the legal heirs of Laxman that he, i.e., Nivrutti, was holding the property as a Manager/Karta on behalf of the family.

11. The suit was tried and was dismissed, vide judgment dated 4.2.2009. The first appeal, filed before the High Court was also dismissed vide impugned order dated 8.6.2009.

12. It may be noticed that in order to establish their case, the appellants sought to bring in various documents to substantiate their plea, the main one being the Agreement to Sell dated 7.5.1956. However, since no sale deed had been executed in pursuance thereto, the courts below refused to rely on the same.

13. The main contention of the appellants, which was raised for the first time before the appellate court, and was also sought to be canvassed before us, was that it was not within the jurisdiction of the Civil Court to have opined on the matter in issue, and the proper course of action for the civil court was to stay its hand, and refer the matter to the Mamlatdar for determination of the tenancy rights. In this behalf, learned counsel had relied upon Section 85 of the said Act, which reads as under:

> “Section 85 Bar of jurisdiction (1) No Civil Court shall have jurisdiction to settle, decide or deal with any question [(including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him) which is by or under this Act

> required to be settled, decide or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the [Maharashtra Revenue Tribunal] in appeal or revision or the [State] Government in exercise of their powers of control.
>
> (2) No order of the Mamlatdar, the Tribunal, the Collector or the [Maharashtra Revenue Tribunal] or the [State] Government made under this Act shall be questioned in any Civil or Criminal Court.

Explanation. – For the purposes of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdars' Courts Act, 1906."

14. The duties of the Mamlatdar are specified in Section 70 and clause

(b) of the said Section specifies one of the duties as to the determination of the question as to whether a tenant is a protected tenant or not. It is also relevant to note that in terms of Section 85A of the said Act such determination would become final. The said Section reads as under:

> "Section 85A Suits involving issues required to be decided under this Act (1) If any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as the "competent authority") the Civil Court shall stay the suit and refer such issues to such competent authority for determination.
>
> (2) On receipt of such reference from the Civil Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

Explanation. – For the purposes of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdars' Courts Act, 1906."

15. To buttress his arguments, learned counsel for the appellants relied upon the judgment in Bhimaji Shankar Kulkarni v. D.V. Udapudi & Anr.1 and Gundaji Satwaji Shinde v. R.B. Joshi2. The two judgments considered the scheme of the said Act, to opine that where there were uncertainties on the issue as to whether a tenant is or is not a protected tenant, the civil court must stay its hand and refer the issue to the Mamlatdar and once such determination takes place (which is final as per Section 85A of the said Act) then the suit can proceed further.

16. On the other hand, learned counsel for respondent Nos.3 to 18 representing the family of Nivrutti sought to rebut the aforesaid pleas. Our attention was sought to be invited to the Kabuliyatnama to contend that if Laxman was a tenant, he would not have been a witness to the document. The Kabuliyatnama was signed by only three persons. It was 1 AIR 1966 SC 166 2 (1979) 2 SCC 495 pleaded that there was no material to show that Nivrutti, the younger brother was

holding the land on behalf of the family and acting as the Manager/Karta. Insofar as the Agreement to Sell was concerned, it was stated that it never culminated in a sale deed and thus, could not have been relied upon as rightly held by the courts below. Our attention was also invited to a Sale Deed dated 29.8.1948, in respect of Survey No.877, in which Nivrutti had 50 per cent undivided share and he released the same by a subsequent deed dated 12.10.1949, to contend that the release deed of 1949 defines the property as having been acquired by Laxman, for Nivrutti, "as head of the joint family." This would, thus, go contrary to the plea of the plaintiffs in the suit that Nivrutti was acting as the Manager/Karta. The Agreement to Sell is said not to have been signed by Nivrutti or other vendees, and it shows that Laxman was serving as a peon in the same office of the Sub Registrar, the imputation is of some kind of a motivated/collusive action.

17. It was the submission of the learned counsel for the respondents that the certificate under Section 32M of the said Act is a conclusive proof of the purchase, and can only be set aside in appeal against the certificate. In fact, an endeavour was made by the wife and sons of Laxman to challenge the same in appeal and revision petition thereafter unsuccessfully, and the matter was given up by them. The suit proceedings in question, were thus, an oblique nature of proceedings; to raise this issue again, without assailing the certificate directly under Section 32M of the said Act knowing fully well that they would not be able to do so, as they trace their ancestry through the very appellants/revisionists, being their grandmother and their fathers. Such endeavour was labeled as impermissible, as an endeavour to assail a certificate through "side wind". This is an expression borrowed from the judgment in Jagu Tukaram Waghamale v. Dynandeo Bala Waghamale 3. In the judgment of the Privy Council in Randhi Appalaswami v. Randhi Suryanarayanmurti & Ors.4 it was elaborated that the proof of the existence of a joint family does not lead to the presumption that the property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact.

18. Insofar as the main plea is concerned, i.e., the ouster of jurisdiction 3 2003 (2) Mh.L.J. 475 4 AIR (34) 1947 PC 189 of the civil court and the requirement pleaded for reference to the Mamlatdar, it is pleaded that such a situation would arise when there was an ambiguity or a determination required as to whether a tenant is a protected tenant or not. Once a certification has been issued under Section 32M of the said Act, there can be no doubt, and there was no need to refer the matter to the Mamlatdar merely because the plaint alleges that it was a joint family property.

19. Learned counsel for the respondents seeks to rely upon the judicial pronouncements in Adam Mohmad Darwajkar & Ors. v. Appa Daud Darwajkar5 and Yeshwant Hari Patil v. Shripati Hari Patil & Ors. 6, both of the Bombay High Court. The judgments enunciated the principle that in a suit for partition of tenanted land, it is not necessary to refer the issue in question before the civil court to a Mamlatdar if the material on record is sufficient to show that the particular party or parties are tenants or deemed purchasers. In fact, it was submitted, that the same view was taken even by the Kerala High Court in Ambu v. Vellachi & Ors.7 5 2007(2) Mh.L.J. 340 6 2018 SCC OnLine Bom 2775 7 (1994) 1 KLJ 627

20. Learned counsel for the respondents also stated that there were properties, which were inherited by Laxman and the legal heirs and were sold for their benefit.

21. We have examined the aforesaid submissions in the contours of facts, which, though may appear a little complicated, but are not so.

22. We must note at the inception that there are concurrent findings of the trial court and the first appellate court, the latter being the final court as a court of fact. Even if we examine the reasoning of these two courts, we have no doubt that the findings arrived at are the correct findings since the Kabuliyatnama itself, from which the rights of the tenants were claimed, was never in the name of Laxman, the elder brother. That is the reason that the certificate under Section 32M of the said Act was granted in favour of Govind, Sadashiv and Nivrutti. Similarly, on partition of the land, again a mutation was made in favour of Nivrutti alone. In fact, the wife and sons of Laxman did contest the partition, albeit unsuccessfully. The appeal and the revision petition were dismissed. They chose to remain silent after that.

23. We have no doubt that the present proceedings in question are what has been labeled as "side wind", to re-open the chapter which could not have been directly challenged, i.e., by challenging the certificate issued under Section 32M of the said Act. Thus, the ruse of filing a suit was used by the grandsons of Laxman, impleading the father as a supporting party as Laxman's wife had since passed away. It is this endeavour, which is not proved to be successful.

24. We do not consider it necessary to once again, go into the documentary aspects and as to how they should be read at this third stage of scrutiny. Suffice to say that the Agreement to Sell never matured into a sale deed and the Kabuliyatnama did not record the name of Laxman. The result was that the certificate issued under Section 32M of the said Act also did not include the name of Laxman, and the subsequent proceedings to challenge the same resulted in abject failure.

25. Now turning to the only issue which is really debated before us at some length and on which a lot of emphasis was laid, that the civil court fell into an error in not staying the suit proceedings and remitting the matter to the Mamlatdar on the issue of tenancy rights. This plea was not even raised in the suit proceedings, even though the suit was filed by the appellants. It was sought to be raised at the appellate stage on the plea that, being a jurisdictional issue, it can be raised at that stage.

26. Firstly, this is not purely a jurisdictional issue, but a mixed question of fact and law, which would arise. Secondly, even assuming if this is considered as raised before the appellate court and as canvassed before us, we are in complete agreement with the findings of the appellate court that this was not a case where a suit was required to be stayed and the question of tenancy remitted to the Mamlatdar.

27. The judgments relied upon by the appellants in Mudakappa v. Rudrappa & Ors.8 does not lay down a proposition as sought to be canvassed by the learned counsel for the appellants, but seeks to deal with a factual situation where there is no certainty about whether a particular tenant is a protected tenant or not or who is a protected tenant. In that case, in view of the bar of jurisdiction of the civil court under 8 (1994) 2 SCC 57 Section 85 of the said Act, the recourse to Section 85A of the said Act was required to be made. There is no uncertainty on this issue before the trial court as the certificate under Section 32M of the said Act is final and exists. The provision of Section 85 of the

said Act itself states that such a certificate, once issued, is final and can only be assailed in appeal. Thus, there was no occasion for the trial court to stay its hand to remit this issue to the Mamlatdar.

28. We are, thus, unequivocally of the view that these long drawn out proceedings initiated by the grandsons of Laxman were proceedings by "side wind", which have dragged on since the year 2003, for the last 16 years.

29. The appeal is completely without merit and is, thus, dismissed.

.....J. [Sanjay Kishan Kaul] .....J. [K.M. Joseph] New Delhi.

August 27, 2019.