

(2012) 02 BOM CK 0180

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 3426 of 2011

Smt. Sudhabai Manohar
Meshram and Others

APPELLANT

Vs

Wasudeo Chattumal Jhamnani
and Others

RESPONDENT

Date of Decision: Feb. 21, 2012

Acts Referred:

- Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 - Section 8AA
- Civil Procedure Code, 1908 (CPC) - Section 54
- Constitution of India, 1950 - Article 226
- Maharashtra Co-operative Societies Act, 1960 - Section 149(9), 150, 154, 23(3)
- Maharashtra Land Revenue Code, 1966 - Section 247, 257, 257(1), 257(2)

Citation: (2012) 3 ALLMR 348 : (2012) 4 BomCR 382 : (2012) 4 MhLJ 173

Hon'ble Judges: Deshpande, J

Bench: Single Bench

Advocate: M.G. Bhangde, assisted by Mr. V.V. Bhangde, for the Appellant; A.M. Gordey, assisted by Smt. R.D. Raskar, counsel for Respondent No. 1, Shri A.D. Patil, Counsel for Respondent No. 2, Smt. K.R. Deshpande, Additional Government Pleader for Respondent Nos. 3, 4 and 5, Smt. M.P. Munshi, Advocate for interveners and None, for the Respondent

Judgement

R.K. Deshpande, J.

Rule made returnable forthwith.

Heard Shri Bhangde, the learned Senior Counsel assisted by Shri V.V. Bhangde, for the petitioners, Shri Gordey, the learned Senior Counsel assisted by Smt. Raskar, for respondent No. 1, Shri Patil, learned counsel for respondent No. 2, Smt. Deshpande, the learned Assistant Govt. Pleader for Respondent Nos. 3, 4 & 5. Though respondent No. 6 is served, none appears for her. Hence, it is not necessary to issue

fresh notice to respondent No. 6 .

2. The Tahsildar, Hingna, has passed an order u/s 54 of C.P.C. effecting partition of the suit property on 14.09.2010. The partition was done pursuant to the judgment and decree passed in Special Civil Suit No. 925/1998, dated 21st November, 2006. Accordingly, the parties are put in possession of the property on 18.05.2011. The entries in 7/12 extract in respect of the property in question have also been taken in the name of the respective parties.

3. The respondent No. 1, who claims to be the purchaser of the suit property, pending the decision of the suit, preferred an appeal u/s 247 of the Maharashtra Land Revenue Code (in short MLR Code). The Sub Divisional Officer, Nagpur, has decided the said appeal on 14th June, 2011, setting aside the order dated 14.09.2010, passed by the Tahsildar, Hingna and directing remand of the matter to the Tahsildar for fresh enquiry and for passing order as per the provisions of law.

4. Aggrieved by the order passed by the Sub Divisional Officer on 14th June, 2011, the petitioners herein who are the plaintiffs and the defendants in the Special Civil Suit No. 925/1998 have preferred the Revenue Appeal No. 109/SRV-43/2010-11 u/s 247 of MLR Code. The same is pending before the Additional Collector, Nagpur. In that appeal, an application for grant of stay to the order of remand dated 14.06.2011 passed by the S.D.O., Nagpur, was moved. The said application has been rejected by the Additional Collector by order dated 4th July, 2011, holding that the S.D.O. has already remanded the matter back to the Tahsildar for fresh enquiry and passing the order as per the provisions of law and hence it will not be proper to grant stay to the order under challenge in the interest of justice. This is the order which is the subject matter of challenge in this petition.

5. On 21st July, 2011, this Court issued notices to the respondents and granted ad-interim relief in terms of prayer clause (ii) of the petition. The interim relief is to the stay to the order dated 14.06.2011 passed by the S.D.O. and the order restraining the respondents from disturbing the possession of the plaintiffs over the suit property, pending the decision of the petition.

6. Shri Gordey, the learned Senior Counsel appearing for respondent No. 1 has raised the preliminary objection as to the existence of an alternate efficacious remedy by way of revision u/s 257 of MLR Code. He submits that power u/s 257 is as wide as the power of the Appellate Court and the petitioners can move the Commissioner u/s 257 of MLR Code, challenging the legality and propriety of the decision refusing to grant stay. He has relied upon the decision of the Apex Court reported in Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta, to urge that it is not the object of Article 226 of the Constitution of India to convert the High Court in Original or Appellate jurisdiction to determine the questions. He has also relied upon the decision of the Apex Court reported in Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, to urge that the writ of

certiorari is discretionary and it is not issued merely because it is lawful to do so.

7. Replying to the preliminary objection, Shri Bhangde, the learned Senior Counsel for the petitioners has urged that the remedy u/s 257 of the MLR Code is not as a matter of right and the Commissioner may at his discretion call for and examine the record of any enquiry or proceeding. He has relied upon the decision of the Apex Court reported in [Everest Apartments Co-operative Housing Society Ltd. Vs. State of Maharashtra and Others,](#) wherein the provision of Section 154 of the Maharashtra Cooperative Societies Act as it then existed regarding revisional jurisdiction of the State Government has been construed. He submits that what the Court is required to see is whether the party has right to move the authority u/s 257 so as to make it an alternate efficacious remedy. He has further relied upon the Full Bench decision of this Court reported in [Smt. Shireen Sami Gadiali and Another Vs. Spenta Co.op. Hsg. Soc. Ltd. and Others,](#) wherein the amended provision of Section 154 of the Maharashtra Cooperative Societies Act has been considered and it has been held to be the remedy as a matter of right.

8. In the decision of the Apex Court in Everest Apartments Co-operative Housing Society Ltd.'s case, the provisions of Section 154 of the Maharashtra Cooperative Societies Act fell for consideration. The question was whether it provided an efficacious alternate statutory remedy to the person aggrieved. The provisions of Section 154 as it then existed is reproduced in para 2 of the said judgment. The same is, therefore, reproduced here also, as under;

154. Power of State Government and Registrar to call for proceedings of subordinate officer and to pass orders thereon.-The State Government and the Registrar may call for and examine the record of any inquiry or the proceedings of any other matter of any officer subordinate to them, except those referred to in sub-section (9) of Section 149 for the purpose of satisfying themselves as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer. If in any case, it appears to the State Government, or the Registrar, that any decision or order or proceedings so called for should be modified, annulled or reversed, the State Government or the Registrar, as the case may be, may after giving persons affected thereby an opportunity of being heard pass such order thereon as to it or him may seem just.

Paras 5 and 6 of the said judgment are relevant and hence, the same are reproduced below.

5. There is no doubt that Section 154 is potential but not compulsive. Power is reposed in Government to intervene to do justice when occasion demands it and of the occasion for its exercise, Government is made the sole judge. This power can be exercised in all cases except in a case in which a similar power has already been exercised by the Tribunal u/s 149(9) of the Act. The exception was considered necessary because the legality or the propriety of an order having been considered

once, it would be an act of supererogation to consider the matter twice. It follows, therefore, that Government can exercise its powers u/s 154 in all cases with one exception only and that the finality of the order u/s 23(3) does not restrict the exercise of the power. The word "final" in this context means that the order is not subject to an ordinary appeal or revision but it does not touch the special power legislatively conferred on Government. The Government was in error in considering that it had no jurisdiction in this case for it obviously had.

6. There remains the question whether a party has a right to move Government. The Tribune Trust case is distinguishable and cannot help the submission that Government cannot be moved at all. The words of the two enactments are not materially equal. The Income Tax Act used the words "suo motu" which do not figure here. It is, of course, true that the words "on an application of a party" which occur in Section 150 of the Act and in similar enactments in other Acts, are also not to be found. But that does not mean that a party is prohibited from moving Government. As Government is not compelled to take action, unless it thinks fit, the party who moves Government cannot claim that he has a right of appeal or revision. On the other hand, Government should welcome such applications because they draw the attention of Government to cases in some of which, Government may be interested to intervene. In many statutes, as for example the two major procedural Codes, such language has not only not inhibited the making of applications to the High Court, but has been considered to give a right to obtain intervention, although the mere making of the application has not clothed a party with any rights beyond bringing a matter to the notice of the Court. After this is done, it is for the court to consider whether to act or not. The extreme position does not obtain here because there is no right to interference in the same way as in a judicial proceeding. Government may act or may not act; the choice is of Government. There is no right of relief as in an appeal or revision under the two Codes. But to say that Government has no jurisdiction at all in the matter is to err, and that is what Government did in this case.

It is thus apparent that Section 154 of the Maharashtra Cooperative Societies Act was held to be potential but not compulsive. It has been held that neither the word "suo motu" nor the word "on an application of the party" have been used u/s 154. It has been held that mere making of an application does not clothe a party nor any right beyond bringing the matter to the notice of the court and if after the application is made, it is for the court to consider whether to act or not. It has been held that there is no right to interference and there is no right to relief as in an appeal or revision.

9. Section 257 of the MLR Code being relevant, is reproduced below.

257. Power of State Government and of certain revenue and survey officers to call for and examine records and proceedings of subordinate officers.- (1) The State Government and any revenue or survey officer, not inferior in rank to an Assistant

or Deputy Collector or a Superintendent of Land Records, in their respective departments, may call for and examine the record of any inquiry or the proceedings of any subordinate revenue or survey officer, or the purpose of satisfying itself or himself, as the case may be, as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer.

(2) A Tahsildar, a Naib-Tahsildar, and a District Inspector of Land Records may in the same manner call for and examine the proceedings of any officer subordinate to them in any matter in which neither a formal nor a summary inquiry has been held.

(3) If in any case, it shall appear to the State Government, or to any officer referred to in sub-section (1) or subsection (2) that any decision or order or proceedings so called for should be modified, annulled, or reversed, it or he may pass such order thereon as it or he deems fit:

Provided that, the State Government or such officer shall not vary or reverse any order affecting any question of right between private persons without having to the parties interested notice to appear and to be heard in support of such order:

Provided further that, an Assistant or Deputy Collector shall not himself pass such order in any matter in which a formal inquiry has been held, but shall submit the record with his opinion to the Collector, who shall pass such order thereon as he may deem fit.

Perusal of the said section shows that words "suo motu" or "on an application of the party" are not used. A comparative study of Section 154 of the Maharashtra Cooperative Societies Act considered by the Apex Court and the provision of Section 257 of MLR Code reproduced above shows similarity in the language employed in both the provisions. It is in respect of-(i) calling for examining record of inquiry, (ii) satisfying about legality/propriety and regularity of proceedings and there is power to modify, annul or reverse the decision after giving affected party an opportunity of being heard. It is the discretion of the authority u/s 257 to call for and examine the record. If it decides not to call and examine the record, then there would not be any occasion for the applicant to ask for the decision as a matter of right. There is no right to relief as is available in appeal to the party aggrieved. In view of this, it cannot be said that Section 257 of the MLR Code provides statutory remedy of revision as an alternate and efficacious remedy to challenge the order passed in appeal u/s 247 of the MLR Code. The two decisions cited by Shri Gordey lay down general propositions of law which are not disputed.

10. Coming to the merits of the matter, the order impugned in this petition nowhere records the reason for refusing to grant stay which was asked for. It prima facie appears from the order of the Tahsildar dated 14.09.2010 and the document of delivery of possession dated 18.05.2011 along with 7/12 extract, in which entries were taken after 18.05.2011, that the property was partitioned and the parties were put in possession of the same. Prima facie, two questions were raised in appeal u/s

247 before the S.D.O., i.e. (i) that no notice was issued to the respondent No. 1 and (ii) that the partition was hit by the provisions of Section 8AA of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. These are the questions which are required to be gone into the appeal preferred by the present petitioners. In view of this, the Additional Collector, Nagpur, ought to have stayed the order of the S.D.O. passed on 14.06.2011.

11. Shri Gordey, the learned Senior counsel appearing for Respondent No. 1 has invited my attention to the communication dated 18.06.2011 and the pursis dated 29.06.2011 to urge that the order of the S.D.O. passed on 14.06.2011 has already been implemented. This court has already passed an order of injunction restraining the respondents from disturbing the possession of the petitioners, pending the decision of this petition. The perusal of the pursis and the communication dated 18.06.2011 nowhere indicates that the petitioners have been displaced from the suit property. The contention cannot be accepted.

12. In view of above, writ petition is allowed. The interim order granted by this Court on 21.07.2011 is made absolute and the same shall continue till the decision of the Appeal No. 109/SRV-43/2010-11, pending before the Additional Collector, Nagpur. No orders as to costs.

13. There are some applications for intervention filed in this writ petition. It is not necessary for this Court to consider those applications for intervention in this writ petition. Shri Bhangde, the learned Senior Counsel, however, submits that the petitioners shall not have any objection for permitting these interveners to intervene in the appeal, which is pending before the Additional Collector, Nagpur. In view of this, the interveners are at liberty to file application for intervention before the Collector. The applications for intervention stand disposed of accordingly.