(1964) 04 BOM CK 0015

Bombay High Court (Nagpur Bench)

Case No: Special Civil Application No''s. 435 of 1962 and 35 and 43 of 1963

Azam Shah		APPELLANT
	Vs	
M.R. Tribunal and Others		RESPONDENT

Date of Decision: April 18, 1964

Acts Referred:

- Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958 - Section 38, 38(3), 39
- Bombay Tenancy and Agricultural Lands (Vidarbha Region) (Amendment) Act, 1963 - Section 6
- Constitution of India, 1950 - Article 226, 227

Citation: AIR 1965 Bom 76 : (1964) 66 BOMLR 605 : (1964) ILR (Bom) 843

Hon'ble Judges: R.M. Kantawala, J; N.L. Abhyankar, J

Bench: Division Bench

Advocate: R.N. Deshpande and C.S. Dharmadhikari, in Spl. Civ. appln. Nos. 35 and 43 of 1963, for the Appellant; M.W. Palekar, J.N. Chandurkar and C.S. Dharmadikari, in Spl. Civ. Appln. No. 435 of 1962, for the Respondent

Judgement

Abhyankar, J.

(1) This order will also dispose of Special Civil Applications Nos. 35 and 43 of 1963 arising out of the same order. The latter two petitions are, however, not pressed and are dismissed with costs.

(2) Special Civil Application No. 435 of 1962 is filed by one Azimsha. Azimsha was a tenant of field survey No. 35, having a total area of 28 acres and 29 gunthas. One Pandurang was a tenant of field survey No. 231/1. Azimsha was inducted on land as tenant in the year 1954-55, whereas Pandurang became a tenant in 1951-52. Both these fields along with some property was part of a joint family property, of which one Vasantrao and his mother Manoramabai (respondent No.4 in this petition) were members. There were other persons who had interest in this property. One

Indirabai commenced a suit for partition and separate possession of her share in the joint family property (Civil suit NO. 10-A of 1944) in the Civil Court. To this suit Shripatrao (husband of respondent No.4 Manoramabai and father of Vasantrao) was a party. Ultimately a final decree for partition was passed in that suit as a result of division of property made by the collector on foot of a preliminary decree. The fields which were the subject-matter of the proceedings before the Revenue authorities in these cases seemed to have been allotted to the share of the branch of the deceased Shripatrao in that partition. Thereafter a partition took place between Vasantrao and his brother as well as Manoramabai and her co-widow, on foot of a registered partition deed dated 27th March 1959. This document describes a partition having been effected among the four members in respect of their joint ancestral property. At this partition of 1959 14 acres and 14 1/2 gunthas of land from eastern side of survey No. 35 were allotted to respondent No.4 Manoramabai. Five acres of land in survey No. 231/1 were also allotted to respondent No.4. Manoramabai gave a notice purporting to act u/s 38 of the new Tenancy Act to both Azimsha and Pandurang, terminating the tenancy of the lands in their possession to the extent of the share allotted to Manoramabai. On the basis of these notices separate applications seem to have been filed by Manoramabai before the Tahsildar u/s 36 of the new Tenancy Act. The Revenue case against Azimsha was registered as Revenue case No. 449/59(6)/1959-60 of mouza Galvi, taluq and district Yeotmal. By an order dated 26th October 1960, the Tahsildar held that Manoramabai would be entitled to acquire only 7 acres and 7 1/2 gunthas of land from survey No. 35 cultivated by the petitioner Azimsha. Similarly, the Tahsildar granted 2 1/2 acres of land out of survey No. 231/1. cultivated by Pandurang.

(3) Against these orders both the tenants as well as respondent No. 4 Manoramabai filed appeals before the Sub-Divisional Officer. All the appeals were heard together and the Sub-Divisional officer came to the conclusion that Manoramabai was entitled to possession of whole of the area in possession of each tenant. He therefore dismissed the appeals filed by Azimsha and Pandurang and allowed the appeals of Manoramabai.

(4) Thereafter the two tenants filed separate revision applications before the Maharashtra Revenue Tribunal. Both the applications were heard together and have been disposed of by a common order dated 20th July 1962. Before the Tribunal, among other questions, one of the issues raised was whether Manoramabai having acquired right to the property as a result of the partition on 27-3-1959, was precluded from terminating the tenancies u/s 38(7) of the new Tenancy Act inasmuch as she had acquired the property as a result of transfer. This contention was repelled by the Tribunal. The Tribunal also took the view that Azimsha, the petitioner before us, having been introduced on land after Pandurang, the Court had to determine how much of Azimsha''s land was liable to be given to the land-holder as a result of termination of the lease. The Tribunal took the view that the total land held by the land-holder was in excess of one-third of a family holding,

but less than one family holding, and therefore she was entitled to land equal to one-third of a family holding namely, an area of 10 acres and 26 gunthas. The Tribunal further held that Azimsha being a tenant who had come on land after Pandurang was liable to be evicted to the extent of 10 acres and 26 gunthas of land under sub-sec (4) of Section 38 read with proviso (a). In this view of the matter, the Tribunal fully allowed the revision filed by pandurang, holding that Pandurang was not liable to be evicted from any area in his possession, but so far as Azimsha was concerned, Manoramabai would be entitled to claim from him not 14 acres and 14 1/2 gunthas as decided by the Sub-Divisional Officer in appeal but only 10 acres and 26 gunthas.

(5) The petitioner Azimsha challenges the order of the Revenue Tribunal and has raised three points :-

(1) That the petitioner had no opportunity to contest the position that Pandurang was introduced on land earlier than the petitioner and the finding to that effect being recorded in his absence he is not bound by it.

(2) That the provisions of Section 38(3) (e) do not apply to a case where tenancies of different of different tenants are being terminated and that it would apply only to the case of a tenant who has more than one tenancies under the same landlord.

(3) That the amendment effected in Sec 37(7) of the new Tenancy Act by Maharashtra Act 44 of 1963 is retrospective in operation, and inasmuch as this petition is pending in this Court the petitioner should get benefit of that amendment.

We will consider each of these points in the same order.

(6) In our opinion, the petitioner is not entitled to contend for the first time in this Court that the tenancy of the other tenant Pandurang was prior to his. The two revision applications before the Tribunal were heard together and the Tribunal has observed in paragraph 4 of its order that the tenancy of the applicant Pandurang being earlier than that of Azimsha, the landlord would be competent to terminate the tenancy of Azimsha which is admittedly of shortest duration. Thus, before the Tribunal it does not seem to have been contested that the tenancy of Azimsha was shortest in point of duration. That was a question of fact. If the petitioner had any grievance as to that question, he could have very well stated before the Tribunal that he had no opportunity to contest this fact and the Tribunal would have given him the appropriate relief. That fact not having been disputed before the Tribunal, we do not think the petitioner is now entitled to canvass the correctness of that finding on the ground that he had no opportunity to contest the position whether or not his own tenancy was of shortest duration.

(7) As regards the second question, the matter is decided by a Division Bench of this Court in Special Civil Application No. 1051 of 1961, decided on 1-3-1962, to which

one of us (Kantawala J.) was a party. Though that case arose under the Bombay Tenancy and Agricultural Lands Act, 1948, the provision which was under examination was section 37 A (a) and (e) of that Act which is pari materia with the provisions of section 38(3)(e) of the new Tenancy Act in this region. The Division Bench observed as follows :- (Vide Ram Shivaraya v. Mukteshwar, 1962 Nag LJ (Notes 57).

"Cases may arise where the same man may hold different lands under different tenancies created at different times. Cases may arise where the same man holds various lands but under one tenancy. Cases may arise where each land is held by a different tenant. The Court will have to see in each case with creation of relationship of landlord and tenant is of the shortest duration ..... The expression ''more tenancies than one are held under the same landlord'' is wide enough to include both the cases, i.e. where on tenant holds more lands than one under different tenancies as well as different tenants holding different pieces of lands under different tenancies."

In view of this decision we do not think that the contention raised before us is well founded and must be rejected.

(8) The third contention of the petitioner is that a substantial change has been made by an amendment effected in sub-section (7) of section 38 of the new Tenancy Act. By this amendment the word ''transfer'' expressly includes partition. The petitioner''s case is that the respondent Manoramabai specifically traced her source of title to a partition effected in 1959 between herself and her sons, and the petitioner is entitled to get benefit of the amendment and Manoramabai cannot terminate his tenancy.

(9) Maharashtra Act 44 of 1963, which has amended section 38 of the New Tenancy Act, was made applicable in this region from 28th December 1963 under Notification No. TNC/5763/50042-M-(Spl), dated 24th December 1963, published in the Maharashtra Government Gazette of 26th December 1963, at page 1734 in Part IVB. Section 6 of this amending Act 44 of 1963 provides as follows :

"6. Certain amendments to apply to pending proceedings - Ss. 38 and 39 of the principal Act as amended by this Act shall also apply as respects all suits, appeals and proceedings which are pending before any authority, tribunal or court on the date of the commencement of this Act."

The contention of the learned counsel for the petitioner is that this petition under Article 227 of the Constitution is pending in this Court and therefore the amendment to sections 38 and 39 effected by the Maharashtra Act 44 of 1963 should apply and thus if that amendment is made applicable to the facts of this case, i.e. should get relief on the basis of applicability of such amendment to these proceedings.

(10) On the other hand, the contention of the respondent is that the amendment is made applicable only to proceedings which are pending under the Act, namely under the new Tenancy Act before authorities created by that Act, and the mere fact that a final order of the Revenue Tribunal is challenged by the petitioner involving the extraordinary jurisdiction of this Court under Article 227 of the Constitution does not attract the provisions of section 6 of the Maharashtra Act 44 of 1963.

(11) In our opinion, it is not possible to accept the construction contended for by the learned counsel for the petitioner as to the effect of section 6 of the amending Act. i.e. Maharashtra Act 44 of 1963. An examination of the provisions of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958, shows the different types of proceedings which can be taken under that Act. u/s 101 of the Act all enquiries and other proceeds which can be taken before the Tahsildar or the Tribunal commence by an application in writing. Section 102 provides that in all enquiries and proceedings commenced by presentation of an application u/s 101, the Tahsildar or the Tribunal shall exercise the same powers as the Mamlatdar''s Court under the Mamlatdar''s Courts Act, 1906, and shall, save as provided in section 36 : follow the provisions of the said Act as if the Tahsildar or the Tribunal were the Mamlatdar''s Courts under the said Act and the application presented was a plaint presented under S, 7 of the said Act. S. 7 of the Mamlatdar''s Courts Act provides that all suits under this Act shall be commenced by a plaint which shall be presented to the Mamlatdar in open Court by the plaintiff and which shall contain the prescribed particulars. Thus, it will be seen that the word "suits" which has been used in section 6 of the Maharashtra Act No. 44 of 1963 must necessarily refer to the proceedings commenced by presentation of a plaint before the Tahsildar or the Tribunal which shall be governed by the procedure of the Mamlatdar''s Courts Act. Reference was also invited to the provisions of sections 124 and 125 of the new Tenancy Act, Explanation to each of which sections says that for the purposes of that section a Civil Court shall include a Mamlatdar''s court constituted under the Mamaltdar''s Courts Act, 1906. There are provisions for appeals against orders of the Tahsildars u/s 107 of the new Tenancy Act. Express right of appeal has been given against several kinds of orders of the Tahsildar or the tribunal to the Collector. "Tribunal" has been defined u/s 2(33) of the Act as meaning Agricultural Lands Tribunal constituted u/s 97 for determination of value of a site of a dwelling house or land. The Tribunal has also several other ancillary powers. So far as application u/s 36 of the new Tenancy Act is concerned, such an application would constitute a ''proceeding'' under the Act as it is so described u/s 102. u/s 103 of the new Tenancy Act the Collector is empowered after due notice to parties to transfer any proceeding under this Act pending before a tahsildar to some other Tahsildar within the district. It is thus clear that reference to "suits, appeals and proceedings" in section 6 of the Maharashtra Act 44 of 1963 must necessarily be construed as a reference to proceedings which answer the description of ''suits, appeals or proceedings'' under that Act. It cannot possibly refer to matters pending before the

High Court when its extraordinary jurisdiction is invoked under the Constitution. The mandate u/s 6 of the Maharashtra Act 44 of 1963 requires the authority, tribunal or the Court to apply the amended provisions of section 38 or 39 to suits appeals or proceedings pending before such authority, tribunal or Court. We are not able to accept the contention of the learned counsel for the petitioner that use of the word "court" in this section should include a High Court. This is not because the High Court may not be a Court but because in the context in which the words designating the authority before which one or other kind of proceedings, i.e., suit, appeal or proceeding may be pending, those words cannot possibly include a proceeding under the Constitution when the jurisdiction of the High Court is invoked under Article 226 or 227 of the Constitution.

(12) A proceeding cannot be said to be pending if the matter is finally decided by the highest authority created under the Special Act. Once the Revenue Tribunal passes a final order, the proceedings are at an end so far as the litigant working out his rights under the Special Act is concerned. The jurisdiction that the High Court exercises or is called upon to exercise when its jurisdiction under Art. 226 or 227 is invoked, is not an appellate jurisdiction. It is an extraordinary jurisdiction and if powers under Article 227 are invoked, it has also the superintending jurisdictioin, it may be possible to contend that the original lis continues, but the jurisdiction of the High Court which is invoked under Article 226 or 227, not being an appellate jurisdiction but an original jurisdiction, it cannot be said that the matter which is finally decided under the Tenancy Act is reopened in the sense that it is continued. We must therefore hold that by filling an application under Article 227 of the Constitution by which a final order of the Tribunal is challenged by the petitioner, the petitioner cannot contend that the proceedings under the Tenancy Act are pending before the High Court. We have already indicated that section 6 will apply only to suits, appeals or proceedings which may be pending on the date of the coming into force of the Maharashtra Act 44 of 1963 before any of the authorities created under the new Tenancy Act, but not to proceedings pending before the High Court whose jurisdiction is invoked not under any of the provisions of the Tenancy Act but under the Constitution.

(13) The jurisdiction which the High Court exercised when it entertains a petition under Article 227 of the Constitution is of a special character. In a sense it is a limited jurisdiction and that jurisdiction is exercised to see to it that the inferior tribunals, whose orders are challenged before the High Court, keep within the bounds of their authority. Decided cases show that the jurisdiction may be invoked it the Tribunal has acted without evidence, or in flagrant violation of law, or the order of the tribunal results in grave injustice or grave miscarriage of justice, or there is substantial failure of justice which are all aspects of failure of justice, or if the tribunal neglects mandatory provisions, or passes a patently unjust or illegal order by arbitrary procedure, or the order is without jurisdiction or any principles of natural justice are violated. An order is not liable to be set aside merely because

there is an error of law.

(14) The only writ which the petitioner could with propriety claim in this case would be a writ of certiorari because this kind of writ would enable use to correct error in judicial exercise of the powers by the tribunal.. The circumstances in which such a writ may issue are indicated in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, . There the Court observed as follows :-

"Now, if a writ of prohibition could be issued only if there are proceedings pending in a Court, it must follow that is incapable of being granted when the court has ceased to exist, because there could be then no proceeding on which it could operate. But it is otherwise with a writ of certiorari to quash because it is directed against a decision which has been rendered by a Court or tribunal., and the continued existence of that court or tribunal is not a condition of its decision being annulled.. In this context, the following passage from Juris Corpus Secundum, Volume 14, page 126 may be usefully quoted :

''Although similar to prohibition in that it will lie for want or excess of jurisdiction ''certiorari'' is to be distinguished from prohibition by the fact that it..... is directed to the cause or proceeding in the lower court and not to the court itself, while prohibition is a preventive remedy issuing to restrain future action and is directed ''to the court'' itself.''

The decision is Clifford and O''Sullivan, In re 1921 (2) AC 570, which was concerned with a writ of prohibition, is therefore inapplicable to a writ of ''certiorari'' to quash.. It has also be noted that in that case as the military Court had pronounced its sentence before the application was filed, a writ of prohibition was bound to fail irrespective of the question whether the Tribunal was ''functus officio'' or not, and that is the ground on which Viscount Cave based his decision. He observed :

''A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military Court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail. (See In re, Poe (1833) 5 B & Ad 681; and Chabot v. Lord Morpeth (1848) 15 QB 446.'' "

(15) In Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, where the above principles have been reiterated, it is observed in paragraph 18 at page 142 as follows :-

"The scope of that section (the reference is to section 107 of the Government of India Act, 1915) has been discussed in many decisions of Indian High Courts. However wide it may be than the provisions of S. 115 of the code of Civil Procedure, it is well established that the High Court cannot in exercise of its power under that section assume appellate powers to correct every mistake of law. Here there is no question of assumption of excessive jurisdiction or refusal to exercise jurisdiction or

any breach of any rule of natural justice. If anything, it may merely be an erroneous decision which, the error not being apparent on the face of the record, cannot be corrected by the High Court in revision under S. 115 of the CPC or under Art. 227."

In Waryam Singh and Another Vs. Amarnath and Another, the rule is laid down in these words:-

"This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee, , to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."

Confirming this view of the Court their Lordships observed in Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, :-

"It is thus clear that the power of judicial interference under Art. 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the powers under Art. 226 of the Constitution. Under Art. 226, the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Art. 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority."

(16) If we apply these tests, it could hardly be said that any of the revenue authorities including the Tribunal, either, acted beyond the bound of their authority or that there was any error in the application of the law itself is changed cannot possibly be a ground justifying interference with the final orders of the authority which were not challengeable on any valid grounds according to law then prevailing. It is not as if by filling a writ petition the lis between the parties is reopened. The limited scope of challenge which is permissible for quashing the final orders of the authorities is indicated in the above decision in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, . It could not be said, therefore, that there was any error of law or procedure, or any violation of the principle of natural justice, which could be said to vitiate the orders of the Tribunal or other authorities in these cases. If the law was that partition was not to be included in transfers up to a particular date, then we fail to see how the orders passed on the basis of the then state of law could be successfully challenged as erroneous or without jurisdiction because of subsequent change in law. It is true that if the matter is not finally decided, section 6 of the Maharashtra Act 44 of 1963 permits a party to the proceedings before any of the authorities under the Act to take advantage of the change. Advantage can also be taken I proceedings which may come to be filed after the amendment became effective. But so far as the rights which have been finally decided in due compliance with the provisions of the law as it then stood are contended by the Legislature that there should be reopening of those proceedings by the mere fact that any of the

parties approached the High Court and invoked its jurisdiction under Article 227 of the Constitution. No provision of a State law can have the effect of enlarging or limiting the jurisdiction of the High Court under Article 226 or 227 of the Constitution. The limits have been put by the High Court itself and by the superior Courts, and that limit is to confine the exercise of jurisdiction of the High Court to cases where the order of the inferior tribunal is shown to suffer from any of the known vices i.e. acting in excess of jurisdiction, or refusing to exercise jurisdiction or acting with such illegality or irregularity in procedure which vitiate the orders, or acting beyond the scope of authority, or in violation of the principles of natural justice. If the final order cannot be challenged on any of these grounds, we do not think that the subsequent change in law will justify interference with the order impugned in these cases which had become final and in a due compliance with the law as it then was. We must therefore decline to exercise our jurisdiction invoked by the petitioner. As the proceedings are not re-opened, unless the petitioner can successfully ask as to remand the case on this ground, the proceeding will not become a pending proceeding under the Act. We do not think that section 6 of the Maharashtra Act 44 of 1963 applies to proceedings before the High Court because it is not a proceeding under the Act, and merely because there was a change in law the petitioner is not entitled to ask us to quash the order of the Tribunal in this case. The third contention also must fail.

(17) The result is that Special Civil Application No. 435 of 1962 is also dismissed but in the circumstances there will be no order as to costs. As stated above in the beginning, the Special Civil Applications Nos. 35 and 43 of 1963 are not pressed and are dismissed with costs.

(18) Special Civil Applications dismissed.