

Ishverlal Thakorelal Almaula

Vs

Motibhai Nagjibhai

Civil Appeal No. 210 of 1963

(K. N. Wanchoo, J. C. Shah, J. R. Mudholkar JJ)

10.08.1965

JUDGEMENT

SHAH, J.

On June 18, 1939, Ishverlal Almaula - hereinafter called 'the appellant' - granted for agricultural purposes tenancy rights in land bearing Survey Nos. 52 & 158 at Kanbivaga in the town of Broach to Nagjibhai, father of the respondent, and since that date the land continued to remain in the possession of Nagjibhai and after his death of his son Motibhai. By letter dated November 2, 1955 the appellant terminated the tenancy and called upon the respondent to deliver vacant possession of the land on March 31, 1956, and filed on April 4, 1956 Suit No. 180 of 1956 in the Court of the Civil Judge, Senior Division, at Broach for a decree in ejectment against the respondent and for mesne profits. The Civil Judge decreed the appellant's claim. In appeal the District Judge, Broach reversed the decree of the Trial Court and dismissed the suit. He held that in view of the proviso to s. 43C incorporated in the Bombay Tenancy and Agricultural Lands Act 67 of 1948 by Bombay Act 13 of 1956, the respondent continued

Counsel for the appellant raised two contentions in support of the appeal :

- (1) That the rights of the respondent in the land conferred or recognised by virtue of Bombay Act 67 of 1948 were extinguished on the enactment of Bombay Act 33 of 1952, and by the amendments made by Act 13 of 1956 (which was brought into force during the pendency of the suit) those rights were not restored to the respondent so as to prejudice the appellant's claim to evict him; and
- (2) that the Civil Court was competent in the suit filed by the appellant to grant a decree for possession of the land held by the respondent.

Facts which have a bearing on the question raised in this appeal and the relevant statutory provisions may be briefly set out. The land in dispute is situate within the limits of the Broach Borough Municipality. Nagjibhai - father of the respondent and after his death the respondent were tenants of the land since June 1939, the tenancy being continued year after year under fresh agreements. Notice calling upon the respondent to vacate and deliver possession of the land on March 31, 1956 was given in terms of s. 84 of the Bombay Land Revenue Code, 1879. The Bombay Tenancy Act 29 of 1939 was applied on April 11, 1946 to the area in which the land is situate, and the name of Nagjibhai was entered in the Record of Rights as a protected tenant under the Bombay Tenancy Act 29 of 1939 as amended by Bombay Act 26 of 1946. By the Bombay Tenancy and Agricultural Lands Act 67 of 1948, which was brought into force on December 28, 1948, the Bombay Tenancy

Act 29 of 1939 stood repealed, subject to the reservation that ss.

A tenant was defined in Act 67 of 1948 as meaning an agriculturist who holds land on lease and includes a person who is deemed to be a tenant under the provisions of the Act [s. 2(18)]. "Land" was defined by s. 2(8) as "land which is used for agricultural purposes, and includes" amongst others sites of farm buildings and sites of dwelling houses occupied by agriculturists. Section 5 of the Act provided that no tenancy of any land shall be for a period of less than ten years, and that no tenancy shall be terminated before the expiry of the period of ten years except on the grounds mentioned in s. 14. Section 14 provided that :

"(1) Notwithstanding any agreement, usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be terminated unless such tenant"

has done acts or committed defaults specified in cls. (a) to (e). It may be sufficient to state that under s. 14 a notice calling upon the tenant to vacate and deliver possession of the land demised on the expiry of the contractual period of the annual annual tenancy does not operate to determine the tenancy. By sub-s. (2) of s. 29 it was enacted that a landlord shall not obtain possession of land held by a tenant except under an order of the Mamlatdar. Chapter III dealt with the special rights and privileges of protected tenants. By s. 32 it was provided that notwithstanding anything (to the contrary in any law, usage or contract, a protected tenant shall at any time be entitled to purchase from the landlord the land held by him as a protected tenant. Section 34 prescribed certain other restrictions upon the landlord's right to determine a protected tenancy. The first sub-section gave liberty to a landlord to determine a protected tenancy notwithstanding anything contained in s. 14, by giving one y

"For the purposes of this Act, the following shall be the duties and functions to be performed by the Mamlatdar -

#(a) * * * *##

(b) to decide whether a person is a tenant or a protected tenant;"

Section 85 provided by its first sub-section :

"No Civil Court shall have jurisdiction to settle, decide, or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Bombay Revenue Tribunal in appeal or revision or the Provincial Government in exercise of their powers of control,"

and for the purpose of this section, a civil court includes a Mamlatdar's Court constituted under the Mamlatdars' Courts Act, 1906. Therefore, by Act 67 of 1948 the rights of protected tenants acquired under the Bombay Tenancy Act, 1939, were, notwithstanding the repeal of that Act, preserved, a tenancy agreement was to be for a period of not less than ten years, and the tenancy could not be determined before the expiry of the period otherwise than for reasons set out in s. 14, and possession of land demised to a tenant could not be obtained otherwise than by an order of the Revenue Court under s. 29(2). A landlord could determine a protected tenancy on the grounds mentioned in s. 34, but a protected tenant had a right to purchase the land occupied by him. The jurisdiction of the Civil Court "to deal with or decide any question which is by or under the Act required to be dealt with, settled or decided by" the Revenue Court was excluded and the Revenue Courts were invested with

exclusive jurisdiction for the

When Bombay Act 67 of 1948 was brought into force in the town of Broach, the respondent acquired rights which a tenant could claim under that Act and his rights flowing from the status of a protected tenant remained expressly preserved. But the Legislature thereafter enacted Bombay Act 33 of 1952 with effect from January 12, 1953 and by the amendment to s. 88 (which excluded lands in certain areas and of specified descriptions from the operation of ss. 1 to 87 of the Bombay Act 67 of 1948) lands situate within all municipal boroughs constituted under Act 18 of 1925 ceased to be governed by Act 67 of 1948. Taking advantage of the amendment by Bombay Act 33 of 1952 the appellant purported to terminate as from March 31, 1956 the tenancy by a notice in accordance with s. 84 of the Bombay Land Revenue Code, 1879, and commenced an action in the Civil Court for a decree for possession. During the pendency of the action, s. 88 was again amended by Act 13 of 1956. The Legislature by that Act repealed cl. (c) of s. 88

The Legislature also enacted by Act 13 of 1956 s. 43C which by the proviso sought to restore with retrospective effect the rights which had been previously acquired under the Bombay Tenancy and Agricultural Lands Act 67 of 1948 on or after December 28, 1948, notwithstanding that the Bombay Act 33 of 1952 had been made applicable to the area in which the land is situate. Section 43C provided :

"Nothing in sections 32 to 32R (both inclusive) and 43 shall apply to lands in the areas within the limits of -

(a) Greater Bombay,

(b) a municipal corporation constituted under the Bombay Provincial Municipal Corporation Act, 1949,

(c) a municipal borough constituted under the Bombay Municipal Boroughs Act, 1925,

(d) a municipal district constituted under the Bombay District Municipal Act, 1901,

(e) a cantonment, or

(f) any area included in a Town Planning Schedule under the Bombay Town Planning Act, 1954 :

Provided that if any person has acquired any right as a tenant under this Act on or after the 28th December, 1948, the said right shall not be deemed to have been affected by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952, or (save as expressly provided in section 43D), by the Amending Act, 1955, notwithstanding the fact that either of the said Act has been made applicable to the area in which such land is situate,"

The decision in this appeal must primarily depend upon the meaning and effect of proviso to s. 43C. The enactment of the proviso, it may be observed, illustrates how clumsy drafting obscures the meaning of a statute. The proviso appears to be entirely out of place in the scheme of the substantive part of s. 43C, which excludes from the operation of ss. 32 to 32R and 43, lands in the areas specified in cls. (a) to (f), and cl. (c) specifies one of such areas as "a municipal borough constituted

under the Bombay Municipal Boroughs Act, 1925". Sections 32 to 32R as inserted by Act 13 of 1956 deal with the purchase of lands held by tenants on April 1, 1957, and to related matters and s. 43 imposes restrictions on the transfer of lands purchased by virtue of the right reserved under ss. 32, 32F or 32-O or sold under ss. 32-P or 64 of the Act.

The proper function of a proviso is to except or qualify some thing enacted in the substantive clause, which but for the proviso should be within that clause. It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the section would have included the subject-matter of the proviso. But the question is one of interpretation of the proviso and there is no rule that the proviso must always be restricted to the ambit of the main enactment. Occasionally in a statute a proviso is unrelated to the subject-matter of the preceding section, or contains matters extraneous to that section, and it may have then to be interpreted as a substantive provision, dealing independently with the matter specified therein, and not as qualifying the main or the preceding section.

By the substantive clause of s. 43C the tenants do not acquire in respect of lands described therein rights conferred by ss. 32 to 32R : that part of s. 43C is therefore in the nature of a qualification or an exception, and functions as a proviso to ss. 32 to 32R. The proviso to s. 43C goes on, not to carve out an exception or to impose a qualification to the exclusion prescribed by the main enactment, but deals with a matter which is unrelated thereto. In terms it seeks to protect rights acquired or arising not under ss. 32 to 32R (which were added by Act 13 of 1956) but under the principal Act 67 of 1948 on or after December 28, 1948, and those rights are protected not from the operation of the substantive part of s. 43C, but from the operation of Act 33 of 1952, or of "the Amending Act of 1955". It may be recalled that by Act 33 of 1952, the Act ceased to apply to land within the municipal boroughs, but the intention disclosed by the proviso to s. 43C was to declare that all rights acquired by persons as

Counsel for the appellant, however, urged that even if the proviso to s. 43C be read as dealing substantively with matters specified therein, it does not come to the aid of the respondent, because at the date when Act 13 of 1956 was enacted, the tenancy of the respondent stood determined according to law, as it then applied to the land, and the respondent had ceased to be a tenant. In the absence of express enactment to the contrary, said counsel, the rights of the appellant to obtain possession of the land according to the law prevailing, from a person who was at the date of the suit not a tenant, could not be deemed to be restricted by the enactment of Act 13 of 1956. In support of this contention, counsel strongly relied upon s. 89(2) (b) of Act 67 of 1948 which provided :

"But nothing in this Act or any repeal effected thereby -

#(a) * * * *##

(b) shall save as expressly provided in this Act, affect or be deemed to affect,

(i) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(ii) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act,

and any such proceedings shall be continued and disposed of, as if this Act was not

passed."

In our view sub-s. (2) of s. 89 which incorporates, with some variations, the provisions found in s. 7 of the Bombay General Clauses Act 1 of 1904, relating to the operation of provisions which repeal statutes, has no relevance in considering the effect of the amendments made by Act 13 of 1956. Sub-section (2) of s. 89 in terms protects (save as expressly provided in the Act) right, title, interest, obligation or liability acquired, accrued or incurred "before the commencement of this Act" i.e. Act 67 of 1948, and it also protects legal proceedings or remedies in respect of any such right, title, interest, obligation or liability or anything done or suffered "before the commencement of this Act". The appellant does not seek to enforce a right acquired before the Act 67 of 1948 was enacted, and a suit instituted for a decree for possession of lands pursuant to a determination of tenancy by a notice in 1956 is not a suit in respect of a right or title acquired or accrued "before the commencement of this Act" w

The alternative contention of counsel for the appellant that by virtue of s. 7 of the Bombay General Clauses Act 1 of 1904 also legal proceedings to enforce rights acquired before Act 13 of 1956 was passed were saved, has no force. By s. 7 of the General Clauses Act the repeal of an enactment shall not inter alia affect any right, privilege, or liability acquired, accrued or incurred under any enactment so repealed or affect any investigation, legal proceeding or remedy in respect of any such etc. and any such investigation, legal proceeding or remedy may be instituted or continued or enforced as if the repealing Act had not been passed. Act 13 of 1956 may in so far as it seeks to substitute the new sections 88 and 88A to 88D for the old section 88 be regarded as a repealing enactment. Section 7 of the Bombay General Clauses Act, however, applies only if a different intention does not appear, and a different intention clearly appears from the terms of the proviso to s. 43C which state that the rights acquire

The respondent became on the enactment of Act 67 of 1948 entitled as a tenant to the diverse rights conferred by that Act. The right to claim that every contractual tenancy is statutorily extended for a period of ten years, the right to claim that the tenancy may not be determined otherwise than in circumstances mentioned in s. 14, and in case of protected tenants subject to restrictions imposed by s. 34, the right not to be deprived of possession otherwise than by an order under s. 29(2), were some of those rights vested in the respondent before Act 33 of 1952 was enacted. These and other rights were restored to the tenants retrospectively from the date on which Act 33 of 1952 was enacted by virtue of the express provision contained in the proviso to s. 43C. The Legislature having restored the rights originally granted under Act 67 of 1948 with retrospective operation from the date on which act 33 of 1952 was enacted, a person sued, before Act 13 of 1956 was brought into force, could in a pending suit set u

In Patel Maganbhai Jethabhai's case the Bombay High Court held that the proviso to s. 43C affords protection to the tenant if the tenant had the protection of the Act of 1948 as originally enacted, notwithstanding that the protection was taken away by the Bombay Tenancy and Agricultural Lands (Amendments) Act, 1952. The Bombay High Court also held that the protection of the proviso to s. 43C much be given to the tenant even in cases where it is claimed in a suit filed before the amendment was enacted, if the suit is not finally disposed of. We agree with the Bombay High Court on both the questions decided in Patel Maganbhai Jethabhai's case.

But the order passed by the District Judge dismissing the suit cannot be sustained. The learned District Judge passed the order passed in Patel Maganbhai Jethabhai's case. It was assumed in Patel Maganbhai case that the Mamlatdar in Patel Maganbhai Jethabhai's case. It was assumed in Patel

Maganbhai Jethabhai's that the Mamlatdar in whose Court the suit was instituted was competent to decide the various issues relating to the rights claimed by the tenant. It is not clear from the judgment in Patel Maganbhai Jethabhai's case whether the suit was instituted in the Court of the Mamlatdar exercising his power under s. 5 of the Mamlatdar's Courts Act 2 of 1906. By s. 85 of Act 67 of 1948 a Mamlatdar's Court constituted under Act 2 of 1906 is a Civil Court, whereas a Mamlatdar exercising powers under s. 29(2) is a Revenue Court. In the present case, the suit was properly entertained by the Civil Court, but since the enactment of Act 13 of 1956 the Civil Court could not try issues arising therein, because those issues

It may be pertinent in this connection to refer to s. 85A which was added by Act 13 of 1956. The section, insofar as it is material, provided :

"(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 purpose of this section a Civil Court shall include any Mamlatdars' Court constituted under the Mamlatdars' Courts Act, 1906."

Whatever may have been the position before Act 13 of 1956, the Legislature has clearly expressed its intention that even in a suit properly instituted in the Civil Court, if any issue arises which is required to be decided by the Revenue Court, the issue shall be referred for trial to that Court, and the suit shall be disposed of in the light of that decision. The Legislature has therefore clearly expressed itself that issues required under Act 67 of 1948 to be decided by a Revenue Court, even if arising in a civil suit must be decided by the Revenue Court and not by the Civil Court. The view expressed by the Bombay High Court in Pandurang Hari v. Shanker Maruti and by the Gujarat High Court in Kalicharan Bhajanlal Bhayya v. Bai Mahalaxmi widow of Trikamlal & Another, that a suit properly instituted in the Civil Court before Act 13 of 1956 is not liable to be dismissed merely because the rights acquired by tenants under Act 67 of 1948 are retrospectively restored is correct, but we are unable to agree with it

The finding recorded by the District Judge that the Civil Court had no jurisdiction to hear the suit and the ultimate order passed by him dismissing the plaintiff's suit are therefore not strictly accurate. If the appellant desired that the questions relating to the tenancy and its determination which arose in the suit be tried by the Mamlatdar as a Revenue Court, which that authority alone was competent to decide, the District Judge should have referred to the Revenue Court those questions for determination and should not have proceeded to dispose of the suit. We accordingly set aside the decree passed by the High Court and the District Court and direct that the District Court do restore the appeal to its original number and do proceed according to law.

It appears that before the District Court the appellant had conceded that the suit may in view of the judgment of the Bombay High Court in Patel Maganbhai Jethabhai's case be dismissed, and he

requested the District Court not to pass an order for costs against him. In the circumstances of the case, we direct the appellant's legal representatives to pay the costs of this appeal to the respondent. The costs in the District Court will abide the event.

Mudholkar, J. The facts as well as the two points raised in the argument before us appear in the judgment prepared by my brother Shah and need not be repeated. I agree with him that the District Court was in error in allowing the appeal and dismissing the present appellant's suit for possession of the land in suit. In that suit the appellant's case was that he had terminated the respondent's tenancy by giving him an appropriate notice to quit. The substantial plea of the respondent was that his tenancy was governed by the Bombay Tenancy and Agricultural Lands Act, 1948 as it stood on the date of suit and that the combined effect of ss. 70 and 85 of that Act was to deprive the civil court of its jurisdiction to entertain the suit.

In the arguments before us reliance was placed on his behalf in particular on the proviso to s. 43S which was added by amendment Act 13 of 1956. The learned counsel on the other side had claimed the benefit of the provisions of s. 89(2) (h) of the Act which seeks to preserve certain rights, titles etc., and exempts them from the operation of the Act.

The benefit of the proviso to s. 43C of the Act would be available only to a person who is or claims to be a tenant or protected tenant under the Act. That in turn would depend upon the effect of the various amendments to the Act made after its enactment in 1948 till the date of suit, including the effect of s. 89(2) (h) of the Act. Section 70 of the Act, however, provides that one of the duties to be performed by the Mamlatdar (who acts as a revenue court) is to decide whether a person is a tenant or a protected tenant. Obviously this must mean a claim to be a tenant or a protected tenant under the Act. Section 85(1) provides :

"No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided 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."

It would be seen from the two aforesaid provisions that no sooner such a claim is made before a Civil Court it must stay its hands and refer that question to the Mamlatdar, acting as a revenue court for his decision [see Paika Dasaru Bhongle v. Rajeshwar Balaji Awari]. In order to answer it, the Mamlatdar will have to adjudicate on the facts in issue between the parties as well as to determine the effect the effect of the various provisions of law bearing on the point. He gets exclusive jurisdictions to do so by the combined operation of the two provisions aforesaid in view of the fact that a person claims to be a tenant or protected tenant. If the Mamlatdar finds that he is a tenant or a protected tenant he has to send his finding to the Civil Court which has to decide the suit in the light of that finding. If, on the other, his finding is to the contrary, the civil court will have to decide the suit on the basis that the does not possess the status claimed by him. Initially, therefore, the matter has to be

The question required by the Act to be decided by the Mamlatdar may be one of fact only or as is the case in the appeal before us, a mixed question of fact and law. The civil court before which the suit was brought raised the following issues bearing upon it :

"....."

(2) Whether the provisions of Bombay Tenancy and Agricultural Lands Act would be applicable to the suit Survey Numbers?

(3) Whether this Court has no jurisdiction to entertain suit in view of section 85 of the Bombay Tenancy and Agricultural Lands Act ?

.....

(5) Whether defendant proves that he is a permanent tenant of the suit land ?"

The first and third of these had to be decided by the Mamlatdar on the other two issues. The limitations placed on the jurisdiction of the Civil Court would necessarily extended to the entire hierarchy of courts, including this Court before which the decision of the Civil Court can be challenged in appeal. It is in the light of this legal position that I hold that the District Court however, do is only to set aside the judgment of the District Court and remanded the suit to the Civil Court with the direction that issues Nos. 2 and 5 be remitted to the Mamlatdar for his findings. It is not open to this Court to examine for itself the various enactment, construe the provisions and state its conclusions as to their applicability to the case before us. The jurisdiction to do any of these things in an appeal of the kind before us is, in my view, barred by the combined operation of ss. 70(b) and 85(1) of the Act.

I would, therefore, allow the appeal, set aside the judgment of all the courts below and remit the suit to the court of first instance with the direction that it should remit issues 2 and 5 to the Mamlatdar for decision and upon receiving his findings, decide the suit on the basis of his findings. I would further direct that costs so far incurred shall be costs in the suit and shall abide the final decision of the lis.

ORDER

In accordance with the opinion of the majority the decree passed by the High Court and the District Court is set aside and the appeal remanded to the District Court with the direction that it do restore the appeal to its original number and do proceed according to law. Appellant's legal representatives will pay the costs of this appeal to the respondent. Costs in the District Court will abide the event.

</html