

Manekji Edulji Mistry and etc.

Vs

Maneksha Ardeshir Irani and Another

Civil Appeal No. 2435 of 1966

(C.A. Vaidialingam, A.N. Ray, D.G. Palekar JJ)

20.08.1971

JUDGMENT

RAY, J. -

1. This appeal is by certificate against the judgment, dated November 6 and December 6, 1962, of the Bombay High Court dismissing the appellants' suit filed on September 14, 1959, against the respondents, inter alia, for possession of suit property.
2. By an indenture of lease, dated March 16, 1944, the respondents became lessees of the appellants for a period of five years from March 1, 1943, in respect of the agricultural lands belonging to Jivanji Jamasji Mistry's Adarian Charities. The appellants terminated the tenancy of the respondents by notice to quit, dated October 25, 1955. The notice to quite was effective on the expiry of March 31, 1957. The appellants without prejudice to the October, 1955 notice gave another notice to quit, dated June 10, 1958, to deliver possession within seven days.
3. The respondents contended that they were protected tenants under the Bombay Tenancy Acts, 1939 and 1948 and, therefore, the appellants would not be entitled to possession.
4. The Trial Court held that after March 31, 1957, the respondents continued in possession and the appellants allowed the respondents to continue in possession by extending the term of the lease at least for one year up to March 31, 1958. The Trial Court held that the notice, dated October 25, 1955, terminating the tenancy with effect from March 31, 1957, could not therefore be relied on by the appellants. As to the notice, dated June 10, 1958, the Trial Court held that it was not a valid notice and a proper three months' notice expiring with the year on March 31, should have been given by the appellants.
5. On appeal the High Court held that it was not necessary to consider whether the respondents had acquired the status of protected tenants. The High Court held that the lease which was operative from March 1, 1943, for a period of five years was under Section 23(1)(b) of the Bombay Tenancy Act, 1939 as amended in 1946 deemed to be for a period of not less than ten years. The lease was therefore effective up to February 28, 1953. Meanwhile the Bombay Tenancy and Agricultural Lands Act, 1948 came into force on December 28, 1948. The High Court held that Section 5 of the Bombay Act, 1948 as it originally stood was in terms similar to Section 23 of the 1939 Act but as a result of amendment of Section 5 of the 1948 Act by the Bombay Act XXXIII of 1952 the period of the lease was renewed up to February 28, 1963, and therefore the appellants could not obtain a decree for possession.

6. Though Section 5 of the 1948 Act as amended by the Bombay Act of 1952 was repealed by Bombay Act XIII of 1956 the High Court held that the tenants had acquired the vested right of protection against termination of tenancy merely on the ground of expiry of the duration fixed by agreement. The High Court said that it was not necessary to decide whether the respondents had acquired the status of protected tenants. The High Court held that by reason of the provisions of Section 5 of the 1948 Act as amended in 1952 in respondents acquired renewed tenancy up to February 28, 1963, and unless the plaintiff-landlords could show that rights so acquired had ended they could not claim possession.

7. When the appeal came up for hearing before this Court on February 13, 1970, this Court sent the matter back to the High Court for submitting a report on two questions. First, whether on March 1, 1953, the respondents were protected tenants. Second, if the respondents were protected tenants on March 1, 1953, whether on that account the respondents had the right to claim the benefit of Section 5 and other relevant sections of the Bombay Tenancy and Agricultural Lands Act, 67 of 1948.

8. The High Court recorded the findings on January 27, 1971. The High Court recorded the answers that the respondents were protected tenants on March 1, 1953, and, secondly, the respondents did not have the right to claim the benefit of Section 5 or other relevant sections of the Bombay Tenancy and Agricultural Lands Act, 1948. The respondents challenged the second finding of the Court.

9. The Bombay Tenancy Act, 1939 came into effect on April 2, 1940. Section 3 of the 1939 Act spoke of a tenant who would be deemed to be a protected tenant if he held land continuously for a period of not less than six years immediately preceding January 1, 1938 and cultivated such land personally during the said period. The Bombay Tenancy Amendment Act, 1946 introduced changes into the 1939 Act. These were Sections 3-A and 23. Under Section 3-A of the 1946 Amendment Act every tenant on the expiry of one year from the date of the coming into force of the 1946 Amendment Act would be deemed to be a protected tenant for the purpose of the Act and his rights as protected tenant would be recorded in the Record of Rights, unless his landlord has within the said period made an application to the relevant authority for a declaration that he was not a protected tenant. Under Section 23 of the 1946 Amendment Act no lease of any land after the period of less than ten years and secondly every lease subsisting on the said date, merely, coming into force of the Act or made after the said date in respect of any land in such area shall be deemed to be for a period of not less than ten years. The leases subsisting on the date when the 1946 Amendment Act came into force could not be terminated before the expiry of the period of ten years only on the ground that the period of lease had expired but such a lease could be terminated by a tenant by surrendering the lease.

10. The Bombay Tenancy Amendment Act, 1946 was brought into force from November 8, 1946 throughout the Province of Bombay. The effect of the 1946 Amendment Act in the present case was that the lease which was subsisting on that date, viz., November 8, 1946, was deemed to be for a period of not less than ten years from March 1, 1943, when the lease came into effect. The other important change as a result of the 1946 Amendment Act was that under Section 3-A of the Act the tenant was deemed to be a protected tenant for the purpose of this Act and his rights were to be recorded in the Record of Rights. The facts found by the High Court in the present case are that the tenant respondents' rights were recorded and the appellants did not make an application after the coming into force of the 1946 Amendment Act that the respondents were not protected tenants. Therefore, the respondents were protected tenants and the lease was effective for ten years from the date of the lease. This extension of the lease for five years beyond the period of five years

mentioned in the lease was by virtue of the provisions in the statute.

11. The Bombay Tenancy Act, 1939 was repealed by the Bombay Tenancy and Agricultural Lands Act, 1948 referred to as the 1948 Act. It may be stated here that the 1948 Act repealed the whole of the Bombay Tenancy Act, 1939 except Sections 3, 3-A and 4 which were also modified in the manner mentioned in Schedule I to the 1948 Act. In the present case, the High Court has recorded the finding that the respondents were protected tenants on March 1, 1953. That finding is not challenged by either side in the present appeal.

12. The respondents have challenged the other findings of the High Court that the respondents did not have the right to claim the benefit of Section 5 or other relevant sections of the 1948 Act.

13. The rival contentions in the present appeal are on the effect of Section 5 of the 1948 Act which was introduced as an amendment by Bombay Act 33 of 1952 in substitution of Section 5 as it originally stood in the 1948 Act. On behalf of the respondents it is said that they were protected tenants under the 1948 Act and the lease of the respondents which had come into existence on March 1, 1943, was extended up to February 28, 1953 and as a result of an amendment of Section 5 by the 1952 Amending Act the period of the lease was extended up to February 28, 1963, and, therefore, the appellants could not claim eviction. The appellants on the other hand contended that the respondents who had a subsisting lease, dated March 1, 1943, for five years received the benefit of statutory extension of the period by another five years up to February 28, 1953, and on March 1, 1953, the respondents were protected tenants who had an unlimited period of tenancy which could be terminated in accordance with the provisions of Section 34 of the 1948 Act. It was also said on behalf of the appellants that Section 5 which was introduced into the 1948 Act by the Amending Act of 1952 which came into effect on January 12, 1953, did not at all apply to protected tenants but only to ordinary tenants. Even if it were assumed that Section 5 of the 1948 Act as amended by the 1952 Act applied, it was said on behalf of the appellants that as a result of the Bombay Amending Act 13 of 1956 which came into effect on August 1, 1956, Section 88-B introduced by the Amending Act of 1956 removed Section 5 from the statute and the appellants were not entitled to invoke any protection under that section of the statute.

14. In order to appreciate these contentions it is necessary to refer to Section 5 which was introduced into the 1948 Act by the Amending Act of 1952 which is as follows :

"5(1) No tenancy of any land shall be for a period of less than ten years :

Provided that at the end of the said period and thereafter at the end of each period of ten years in succession, the tenancy shall, subject to the provisions of sub-sections (2) and (3) be deemed to be renewed for a further period of ten years on the same terms and conditions notwithstanding any agreement to the contrary.

(2) The landlord may, by giving the tenant one year's notice in writing before the end of each of the period referred to in sub-section (1), terminate the tenancy with effect from the thirty-first day of March in the last year of each of the said period, if he bona fide requires the land for any of the purposes specified in sub-section (1) of Section 34, but subject to the provisions of sub-sections (2) and (2-A) of the said section, as if such tenant was a protected tenant.

(3) Notwithstanding anything contained in sub-section (1) -

(a) every tenancy shall, subject to the provisions of Sections 24 and 25, be liable to be terminated at any time on any of the grounds mentioned in Section 14; and

(b) a tenant may terminate the tenancy at any time by surrendering his interest as a tenant in favour of the landlord :

Provided that such surrender shall be in writing and shall be verified before the Mamlatdar in the prescribed manner."

15. The question in the forefront is whether Section 5 introduced by the Amending Act of 1952 applied to protected tenants. Counsel on behalf of the respondents contended not only that the said Section 5 applied to protected tenants but also that if the said Section 5 were held to be applicable only to ordinary tenants the respondents who were protected tenants could claim the benefit of ordinary tenants by virtue of their position of contractual tenants.

16. The 1948 Act recognised a tenant to be a protected tenant if such person had deemed to be a protected tenant under Sections 3, 3-A and 4 of the Bombay Tenancy Act, 1939. Section 34 of the 1948 Act provided that notwithstanding anything contained in Section 14 a landlord might terminate the tenancy of a protected tenant on the grounds and in the manner as provided in that Section. It therefore follows that a protected tenant had been given security under the 1948 Act for an unlimited duration and he could be ejected either on grounds mentioned in Section 14 or for grounds mentioned in Section 34 of the 1948 Act. A protected tenancy therefore did not come to an end on the expiration of any particular period. A protected tenancy could be brought to termination only on the grounds and in the manner mentioned in Sections 14 and 34 of the 1948 Act. It is also noticeable that no new protected tenancy could come into existence under the 1948 Act.

17. Section 5 of the 1948 Act as it originally stood provided that no tenancy could be for a period of less than ten years and no tenancy was to be terminated before the expiry of the period of ten years except on the grounds mentioned in Section 14. Therefore, under Section 5 of the 1948 Act as it originally stood, tenants other than protected tenants were given a security to the extent of ten years only. Persons other than protected tenants could under Sections 14(2) and 15 of the 1948 Act be allowed to hold over and in such case of holding over the tenancy "of such a tenant shall be deemed to have been renewed for a further period of ten years from the date of the expiry on the same terms and conditions".

18. Therefore, under the 1948 Act prior to the amendment in 1952, there was on the one hand a protected tenant with a security for an unlimited period whose tenancy could be terminated for grounds and in the hand manner mentioned in Sections 14 and 34 of the 1948 Act and on the other hand a person other than protected tenant who had a security for a period of 10 years with the possibility of a landlord allowing such a tenancy to hold over in which case he would have a further period of 10 years, unless the tenancy was terminated in accordance with the provisions of the Act.

19. It is in this context that Section 5 was introduced into the Act by the Amending Act of 1952. The effect of the amended Section 5 came up for consideration by this Court in *Trimbak Damodhar Raipurkar v. Assaram Hiranman Patil and Others.* (1962 Supp 1 SCR 700 : AIR 1966 SC 1758) The facts in that case were these. A tenancy came into existence on February 5, 1943 for 5 years. Under the provisions of Section 23(1)(b) of the 1939 Act as amended in 1946 the subsisting lease was deemed to be for a period of not less than ten years. During the subsistence of a tenancy the 1948 Act came into existence. A notice was given to the tenants calling upon them to deliver possession

after expiration of the period of tenancy on March 31, 1953. Meanwhile, the 1952 Amending Act had come into effect on January 12, 1952. That case was of an ordinary tenant and not of a protected tenant. This Court held that the Amending Act, 1952, repealed Section 14(2) of the 1948 Act, amended Section 5 of the 1948 Act and the effect of the amendment in that case was stated as follows :

"Shortly stated the effect of this amendment was that the tenancy of the respondents, who were till then ordinary tenants as distinct from protected tenants, could not be terminated on the expiry of their tenancy except by giving one year's notice and that too on the ground that the lands were required by the landlord for bona fide personal cultivation and that the income of the said lands would be the main source of income of the landlord."

20. Prior to the Amending Act of 1952 the tenancy of an ordinary tenant could be terminated on the grounds mentioned in Section 14 before the expiry of the period of ten years. An ordinary tenant however could hold over under Section 14(2) of the 1948 Act. After the amendment of Section 5 and the repeal of Section 14(2) of the 1948 Act a tenancy contemplated in Section 5 of the Act would at the end of each period of ten years subject to the provisions of sub-sections (2) and (3) be deemed to be renewed for a further period of ten years. This was a new protection afforded to tenancies mentioned in Section 5 of the Act. The second sub-section of Section 5 as amended in 1952 provided that the landlord by giving one year's notice in writing before the end of each period of ten years referred to in Section 5(1) of the Act could terminate the tenancy with effect from the thirty-first day of March in the last year of each of the said period, if the landlord bona fide required the land for any of the purposes specified in Section 34(1) but subject to the provisions of sub-sections (2) and (2-A) as if such tenant was a protected tenant. On the one hand a tenant under Section 5 as amended in 1952 could have a renewal of a further period of ten years and on the other the landlord could terminate the tenancy at the end of the period of ten years by giving a notice as mentioned in Section 5(2) of the Act as amended in 1952.

21. The decision of this Court in Trimbak Damodhar Raipurkar's case (supra), noticed the distinction between ordinary tenants and protected tenants and applied Section 5 as amended in 1952, to the case of an ordinary tenant as distinct from a protected tenant. This decision also held that there was a statutory extension of the duration of the lease by virtue of the provisions of the Act. It could not be said that when a lease for five years was extended as a result of the provision of the statute that extension was in terms of the contract. In Trimbak Damodhar Raipurkar's case (supra), this Court held that before the lease could expire on March 31, 1953, in that case the period of the lease had been extended for ten years as a result of the amendment of Section 5 by the Amending Act of 1952, which came into effect on January 12, 1953, and it could not be terminated save and except as specified by a valid notice or a surrender. The notice given in the month of March, 1952, in that case which called upon the tenant to deliver possession on the expiry of the statutory period of ten years on March 31, 1953, proved abortive by reason of the operation of the amendment of Section 5 renewing the term of the tenancy for the period of ten years.

22. The principal reason as to why Section 5 as amended in 1952 does not apply to a protected tenant is that the tenancy of a protected tenant under the 1948 Act was of unlimited time and the tenant other than a protected tenant had a security only for ten years and it is only under Section 5 as amended in 1952 that such a tenant other than a protected tenant became entitled to renewal of the tenancy for a further period of 10 years in succession as mentioned in the said section. Secondly, Section 5 and, in particular, sub-section (2) thereof as amended in 1952, spoke in termination of

tenancy by the landlord by giving the tenant one year's notice in writing if the landlord bona fide required the land for any of the purposes specified in sub-section (1) of Section 34 but subject to the provisions of sub-sections (2) and (3) of the said section as if such a tenant was a protected tenant. The words 'as if such a tenant was a protected tenant' indicate that the Legislature treated Section 5 as applying to tenancies other than protected tenancies. If the word 'tenancy occurring in Section 5 of the Act as amended in 1952 related to protected tenancy the words 'as if such a tenant was a protected tenant' in Section 5(2) would not have been necessary. In the third place, Section 5 of the 1948 Act as amended in 1952 was in Chapter II of the Act. Chapter II related to general provisions regarding tenancies. Sections 31 and 34 of the 1948 Act which related to protected tenants occurred in Chapter III of the 1948 Act. The heading of Chapter III of the 1948 Act before the amendment thereof in 1956 was 'protected tenants their special rights and privileges'. The recognition of protected tenant was only under Section 31 of the 1948 Act. The termination of a tenancy of a protected tenant was specifically provided for only in Section 34 of the Act. Section 34 itself provided that notwithstanding anything contained in Section 14 the tenancy of a protected tenant could be terminated as mentioned in Section 34 of the Act. It is true that Section 14 of the Act occurred in Chapter II but that section was attracted only for termination of tenancy of a protected tenant because of the grounds mentioned in Section 14. These were specific provisions for protected tenants. Fourthly, the termination of tenancy of a person other than a protected tenant after the amendment of Section 5 in 1952 on the grounds mentioned in Section 34 of the Act was by applying the grounds as if such tenant was protected tenant. It is, therefore, manifest that if Section 5 as amended in 1952 applied to protected tenants the manner of termination of tenancy mentioned in Section 5, namely, by giving one year's notice in writing before the end of each period of ten years would have been totally inconsistent with the manner of termination of tenancy of a protected tenant. A protected tenant had unlimited security of tenure with the exception of termination by one year's notice on the grounds mentioned in Section 34 whereas the tenancy of one other than a protected tenant could be terminated on the grounds mentioned in Section 34(1) only at the end of each period of ten years. Fifthly, under the 1948 Act no new protected tenancy could come into existence whereas a tenancy period of 10 years in succession unless the tenancy was terminated at the end of one such period of 10 years. Finally, if a protected tenancy of unlimited time was brought within the ambit of Section 5 as amended in 1952 the protected tenancy would be contemplated to be renewed for periods of 10 years in succession. Any such renewal for periods of 10 years would be destructive of the protected tenant's unlimited security as to duration of tenancy.

23. In view of our conclusion that Section 5 of the 1948 Act as amended in 1952 does not apply to protected tenancy for the reasons indicated above, it is not necessary to consider another contention advanced on behalf of the respondents that apart from protected tenancy Section 5 of the 1948 Act as amended could be invoked as a part of contractual tenancy. The reason is obvious. The protection afforded by Section 30 of the 1948 Act to contractual terms of tenancy is that the rights or privileges vested in the tenancy under any contract cannot be abridged or limited. The provisions contained in Section 5 of the 1948 Act as amended are provisions of the statute not applicable to protected tenants and a protected tenant cannot therefore claim the protection of such a statutory provision far less on the ground that it is a right or privilege arising out of any contract. It has to be borne in mind that Section 5 as amended in 1952 speaks of the fictional renewal of a tenancy for periods of 10 years. A protected tenant on the other hand acquired the statutory "Status of irremovability" when the 1948 Act recognised a protected tenant and nothing more was required to be done to renew or extend the duration of statutory tenure. To apply the renewal of tenancy for periods of 10 years under the amended Section 5 would be to rob the protected tenancy of its unlimited security and truncate it into tenancy for periods of 10 years renewable as mentioned therein.

24. In the present case the tenancy under the lease which was for a period of 5 years commencing March 1, 1943 was operative in duration up to February 29, 1948. The respondents by virtue of Section 23(1)(b) of the Tenancy Act of 1939, as amended in 1946 became entitled to an extension of 5 years under the statutory provisions. This Court in Trimbak Damodhar Raipurkar's case (supra), noticed that the extension of the duration of the lease was by virtue of a statute. This is described as a "Statutory security of tenure". "Various statutes give security of tenure to tenants. The so-called statutory tenancy created under the Rent Acts..... upon the determination of a contractual tenancy is not, properly speaking, a species of tenancy, it is a personal right in the tenant not to have an order for possession made against him unless certain specified conditions are fulfilled; it is a "status of irremovability" (See Woodfall Landlord and Tenant, 27th Edition, Vol. 1, Paragraph 703, pp. 295 to 296). An ordinary tenant could invoke in aid the provisions of Section 5 of the 1948 Act as amended in 1952 and even in that case the extended term would be under the statute and not as a part of the contractual term. A protected tenant, as is the case here, is disentitled to be within the scope of the amended Section 5.

25. The 1948 Act was amended by the Bombay Amending Act 13 of 1956, which came into effect on August 1, 1956. As a result of the 1956 amendment Section 5 which had been introduced into the Act by the Amended Act of 1952 ceased to be on the statute and a new Section 5 was substituted. But the new Section 5 substituted in 1956 has no relevance to the present appeal. The contention on behalf of the respondents was that Section 5 as amended in 1952 had conferred a vested right on the respondents and therefore the deletion of the amended Section 5 by the 1956 amendment could not take away the vested right of the respondents.

26. The contention on behalf of the appellants as to the effect of substitution of the amended Section 5 by a totally different Section 5 of the 1956 was first that Section 5 did not apply and even if it applied it did not create a vested right and secondly if the statute conferred any protection or privilege the statute could take away such a protection or privilege.

27. This Court in Sidram Narsappa Kamble v. Sholapur Borough Municipality and Another ([1966] 1 SCR 618 : AIR 1966 SC 538), considered the effect of the 1956 Amendment Act in relation to protected tenants. In the present appeal, in view of our conclusion that Section 5 of the 1948 Act as amended in 1952 did not apply to protected tenants, it is not necessary to consider the contention advanced on behalf of the respondents whether they had any vested right in the amended Section 5.

28. For these reasons the findings of the High Court, dated January 27, 1971, are upheld and the judgment, dated November 6/ December 6, 1962 is set aside.

29. Counsel for both the parties submitted that the matter would have to be remanded to the High Court for consideration as to whether there was a valid termination of tenancy. The matter is remanded to the High Court for decision of the appeal as to whether there was a valid termination of tenancy. In view of the fact that this is an old litigation we hope that the matter will be heard as soon as is convenient to the High Court.

30. The order of costs passed by the High Court is set aside. Costs of this appeal will abide the result of the decision of the High Court. The successful party would be entitled to costs.

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