

Vithal Dattatraya Kulkarni and Others

Vs

Smt. Shamrao Tukaram Power and Others

Civil Appeal No. 1296 of 1969

(R. S. Sarkaria, P. S. Kailasam, O. Chinnappa Reddy JJ)

21.03.1979

JUDGMENT

CHINNAPPA REDDY, J. -

1. In respect of an extent of ten acres and 23 guntas of land in Survey No. 215 of Village Nathare, Haranax, one Tukaram Patla Power was a protected tenant under the provisions of the Bombay Tenancy Act, 1939, as amended by Act 26 of 1946. The landlords, Vithal Kulkarni, Vasudeo Kulkarni and Krishnaji Kulkarni gave a notice to Tukaram on March 8, 1948 under Section 7(1) of the Bombay Tenancy Act, 1939, alleging that they required the land for their personal cultivation. In December, 1948, the Bombay Tenancy Act, 1939 was repealed and replaced by the Bombay Tenancy and Agricultural Lands Act (57 of 1948). Thereafter, on April 25, 1949, the Kulkarni brothers filed tenancy case 102 of 1949, before the Aval Karkun, to recover possession of the land from Tukaram. The application was dismissed by the Aval Karkun on August 29, 1949, but in tenancy appeal 20 of 1950 filed by the landlords, the Collector of South Satara, Sangli, by his order dated May 9, 1950, directed that possession of the land should be given to the Kulkarni brothers. The landlords accordingly recovered possession of the land on June 18, 1950. Tukaram died on August 31, 1951. On April 18, 1961, Vasudeo Kulkarni executed a deed of conditional sale in favour of Sopan Power in respect of a joint 1/9th share in the land. It was recited in the deed that possession was delivered to Sopan but that was disputed. However, on June 27, 1962, Sopan executed a deed of reconveyance in favour of Vasudeo Kulkarni. On April 16, 1962, Vithal Kulkarni executed a deed of sate in respect of his one-third share in the land in favour of Bapu Bhau More and Vilas Ganapati More. On July 7, 1962, Tukaram's heirs filed tenancy case 87 of 1962 against the Kulkarni brothers and their alienees, under Section 37 and Section 39 of the Bombay Tenancy and Agricultural Lands Act alleging that the landlords had ceased to cultivate the lands personally within twelve years from the date of dispossession of the tenant (Tukaram) and, therefore, they were entitled to recover possession of the land. The Aval Karkun made an order in favour of Tukaram's heirs on November 26, 1963. The order was confirmed by the Special Deputy Collector on March 31, 1964. The landlords and their alienees referred a revision application before the Maharashtra Revenue Tribunal. The Revenue Tribunal allowed the revision application on October 27, 1964, and dismissed the application of Tukaram's heirs filed under Sections 37 and 39 of the Bombay Tenancy and Agricultural Lands Act. Tukaram's heirs invoked the jurisdiction of the High Court under Article 226 of the Constitution. The High Court of Bombay by its judgment dated November 11, 1968 allowed the writ petition, quashed the order of the Tribunal and restored the order of the Aval Karkun as affirmed by the Special Deputy Collector. The three Kulkarni brothers, Bapu Bhau More and Vilas Ganapati More, have preferred this appeal by special leave.

2. Shri M. C. Bhandare, learned Counsel for the appellants argued that the right of a protected

tenant whose tenancy had been determined and who had been dispossessed of the land under Section 39 of the Bombay Tenancy and Agricultural Lands Act was a right which was personal to the tenant himself and, which could not for that reason be exercised by the tenant's heirs. He argued that whatever may be the right of the heirs of a protected tenant dying subsequent to the Amending Act of 1956, the heirs of a protected tenant who died before the commencement of the 1956 Amending Act had no right to recover possession from the landlords. He urged that there was a substantial difference between Section 40 of the Bombay Tenancy and Agricultural Lands Act as it stood before and after the 1956 amendment. He submitted that the decision of the Full Bench of the High Court of Bombay in *Vasant Hariba Londhe v. Jagannath Ramchandra Kulkarni* (71 Bom LR 12), applied to case where the tenant died after the Amending Act of 1956 and not before. Some other contentions were also raised to which it is unnecessary to refer.

3. Shri A. N. Karkhanis, learned Counsel for the respondents, who presented the case of the respondents extremely well, drew out attention to the provisions of the Bombay Tenancy Act and the Bombay Tenancy and Agricultural Lands Act before and after it was amended in 1956. He submitted that a comprehensive view of the provisions of the Act showed that the right given to the protected tenant was heritable and, therefore, the heirs of Tukaram were entitled to exercise the right given to the tenant under Section 37 of the Act. He submitted that the position was not different even under Section 40 of the Bombay Tenancy and Agricultural Lands Act as it stood before the 1956 amendment. He also advanced some other minor contentions which we do not consider necessary to mention here. The Bombay Tenancy Act, 1939 preceded the Bombay Tenancy & Agricultural Lands Act, 1948. Chapter II of the Bombay Tenancy Act, 1939 (Section 13A to Section 26) dealt with tenants generally, while Chapter II (Sections 3 to 13) of the Act dealt with a special class of tenants described in the Act as protected tenants. Section 3 classified a tenant as a protected tenant in respect of any land if he had held such land continuously for a period of six years immediately preceding January 1, 1938 to January 1, 1945 and had cultivated such land personally during the aforesaid period. Section 3A was introduced by way of amendment in 1946 and it provided that every tenant shall be deemed to be a protected tenant for the purpose of the Act, on the expiry of one year from the date of coming into force of the Amending Act. Section 5 enumerated the rights and liabilities of a protected tenant and it was expressly provided that the tenancy of land held by a protected tenant shall not be terminate unless the tenant failed to pay the arrears of rent for a specified period or before the specified date or had done any act which was destructive or partly injurious to the land or had sub-divided or sub-let the land or failed to cultivate personally or had used the land for a purpose other than agricultural. Section 7(1) invested the landlord with a special right to determine protected tenancy by giving the protected tenant on year's notice in writing on the ground that he bona fide required the land for the purpose of cultivating the land personally or for a non-agricultural purpose. Section 7(2) provided that if after taking possession of the land after the termination of the tenancy the landlord failed to use it for the purpose for which he had obtained possession within one year from the date on which he took possession or ceased to use it for that purpose at any time within twelve years from the date on which he took possession, the landlord shall restore possession of the land to the tenant whose tenancy was terminated by him unless the tenant had refused in writing to accept the tenancy on the same terms and conditions as before to that the tenant, on an offer being made to him in writing, had failed to accept the offer within three months of the receipt thereof. Explanation II to Section 7 provided : "For the purposes of this Section a tenant shall include his heir as specified in sub-section (3) of Section 9". Section 9(3) specified that the lineal male descendants of a protected tenant or his adopted son, or, in absence of any lineal male descendant or an adopted son, his widow shall be deemed to be his heir for the purposes of this section. Section 9(1) provided that if a protected

tenant died, the landlord should continue the tenancy on the same terms and conditions on which the protected tenant was holding it at the time of his death to such one of his heirs who, within four months of the death of such tenant, gave notice in writing to the landlord that he is willing to hold the land on such terms and conditions.

4. The Bombay Tenancy Act, 1939, was repealed and replaced by the Bombay Tenancy and Agricultural Lands Act, 1948. Chapter II of the Act (Section 3 to Section 30) contained 'General provisions regarding Tenancies' while Chapter III (Section 31 to Section 43) dealt with 'Protected tenants, their special rights and privileges'. 'Tenant' was defined to mean an agriculturist who held the land on lease and to include a person who was deemed to be a tenant under the provisions of the Act. 'Protected tenant' was defined to mean a protected tenant under Section 31 of the Act. Section 5 prescribed to mean a protected tenant under Section 31 of the Act. Section 5 prescribed that tenancy of any land shall be for a period of less than ten years and further provided that at the end of the said period and thereafter at the end 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. Section 5(3) provided that a tenancy was liable to be terminated on any of the grounds mentioned in Section 14. Section 5(2) further empowered the landlord to terminate the tenancy by giving the tenant one year's notice in writing if he bona fide required the land for any of the purposes specified in Section 34(1). Section 14 enumerated certain general grounds which entitled a landlord to terminate the tenancy, such as non-payment of rent within the prescribed period, doing of an act which was destructive or permanently injurious to the land, division of the land in contravention of Section 27, sub-letting, failure to cultivate personally and use of land for a purpose other than agriculture. Section 31 declared as protected tenants persons who were deemed to be protected tenants under Section 3, 3A or 4 of the Bombay Tenancy Act, 1939. Section 32 clothed the protected tenant with the right to purchase from the landlord the land held by him as a protected tenant. Section 34(1) gave to the landlord a special right to terminate the tenancy of a protected tenant by giving him one year's notice in writing that he required the land for cultivating personally or for any non-agricultural use for his own purpose. Section 34(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, corresponded to Section 7(1) of the Bombay Tenancy Act, 1939. Section 37 of the 1948 Act provided that if after taking possession of the land after terminating the tenancy under Section 34(1), the landlord failed to use it for the purpose for which he had obtained possession within one year from the date on which he took possession or ceased to use it for that purpose at any time within twelve years from the date on which he took possession the landlord shall restore possession to the tenant whose tenancy was terminated by him unless he obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or the tenant had failed to accept the offer made by him in writing to give possession of the land on the same terms and conditions. Section 37(I) of the 1948 Act corresponded to Section 7(2) of the 1939 Act. One noticeable feature in the 1948 Act was that there was no provision corresponding to Explanation II to Section 7 of the 1939 Act which declared that for the purposes of Section 7 a tenant shall include his heir as specified in Section 9(3) of that Act. This was a significant omission. Section 39 of the 1948 Act enabled the tenant to make an application where the landlord failed to comply with the provisions of Section 37. Section 40 provided that if a protected tenant died the landlord shall offer to continue the tenancy on the same terms on which such tenant was holding it at the time of his death to the heir or heirs of the deceased tenant. The Explanation to Section 40 declared that for the purposes of the section, an heir meant the lineal male descendants of a tenant or his adopted son, and, failing both, his widow. Section 40 of the 1948 Act replaced Section 9 of the 1939 Act though not in the same terms.

5. The 1948 Act underwent some substantial amendments in 1956. 'Tenant' under the Amended Act was defined to include a protected tenant and the provisions relating to the special rights and privileges of the protected tenants contained in Chapter III of the Act were extended to all tenants. Instead of providing as Section 5 of the unamended Act did, that no tenancy shall be for a period of less than ten years, and for renewal of the tenancy for ten-year periods thereafter, Section 4B of the amended Act provided that no tenancy of any land shall be terminated merely on the ground that the period fixed by the agreement or usage had expired. Section 31 of the 1948 Act as it stood originally was repealed and replaced by a new Section 31 which substantially enacted the provisions of Section 34 of the Act as it stood before the amendment. What was Section 37 of the Act before amendment continued to be Section 37 after the amendment. Section 40 was amended and it was declared that on the death of a tenant, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death to such heir or heirs of the deceased tenant as may be willing to continue the tenancy. In this appeal we are concerned with Section 40 as it stood before it was amended in 1956. In order to understand the real controversy between the parties it is necessary to extract here Section 40 both as it stood before and after the 1956 amendment. Before the 1956 amendment Section 49 was as follows :

If a protected tenant dies, the landlord shall offer to continue the tenancy on the same terms and conditions on which such tenant was holding it at time of his death to the heir or heirs of the deceased tenant :

Provided that the offer required to be made by the landlord under this section shall be made in writing :

Provided further that if any heirs of the deceased tenant do not agree to continue the tenancy on the same terms and conditions on which the deceased protected tenant was holding the land, the Collector may select an heir or heirs who is or are willing to continue the tenancy on the same terms and conditions. The decision of the Collector shall be final.

Explanation : For the purposes of this section, an heir means the lineal male descendants of a tenant or his adopted son and failing both his widow who has not remarried.

Section 40 as it stood after the 1956 amendment is as follows :

(1) Where a tenant (other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy.

(2) Where the tenancy is inherited by heirs other than the widow of the deceased tenant, such widow shall have a charge for maintenance on the profits of such land.

6. The question for consideration is whether the heirs of a tenant whose tenancy was terminated by the landlord on the ground that he required the land for his personal cultivation were entitled to exercise the right which the tenant would have, if alive to obtain possession of the land if the landlord ceased to cultivate the land at any time within twelve years alters obtained possession; in other words, whether the right of the tenant to have the possession of the land restored on the failure

of the landlord to cultivate the land personally at any time during the twelve years subsequent to his obtaining possession was a heritable right. The position was clear under the Bombay Tenancy Act, 1939. Explanation II to Section 7 of that Act expressly provided that for the purposes of the section a tenant included his heirs, as specified in Section 9(3). The position under the Bombay Tenancy and Agricultural Lands Act, 1948, after it was amended in 1948, after it was amended in 1956 is also quite clear. Section 4B and Section 40 show that the tenancy under the Act is heritable. As already mentioned, while Section 4B provides for the continuation of the tenancy even after the expiry of the period fixed by the agreement or usage, Section 40 expressly provides for the continuation of the tenancy on the death of the tenant, the heirs of the tenant stepping into the position of the tenant. Once it is found that the tenancy is heritable it follows that the right given to the tenant under Section 37(1) may be exercised by the heirs of the tenant also. A Full Bench of the High Court of Bombay in *Vasant Hariba Londhe v. Jagannath Ramchandra Kulkarni* (supra) came to the same conclusion. Kotwal, C.J., observed :

Section 40(1) provides that where a tenant other than a permanent tenant dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy. It will be noticed that prior to the amendment of the Tenancy Act by the Bombay Act XIII of 1956 this section was worded thus "if a protected tenant dies, the landlord shall offer to continue the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death to the heir or heirs of the deceased tenant. ...." The expression used in the old Section 40 was "offer to continue the tenancy" and there was no indication whatever as to what was to happen if the offer was not made but by the amendment made by the Amending Act XIII of 1956, sub-section (1) was wholly re-cast and now there is no question of the landlord merely making an offer to the tenant to continue the tenancy on the same terms and conditions, but on the other hand, the section provides that "the landlord shall be deemed to have continued the tenancy on the same terms and conditions". The amendment, therefore, meets precisely the argument that is here advanced that the heir succeeding to the erstwhile tenant does not continue as a tenant on the same terms and conditions. Besides, the new section introduced a fiction by the use of the words "deemed to have continued the tenancy" and therefore, whatever may have been the position prior to the amendment, Section 40 as it now stands after the Amending Act XIII of 1956 automatically confers on the heir a tenancy on the same terms and conditions as were applicable to the deceased tenant.

The learned Chief Justice then referred to the decisions in *Bai Jamna v. Bai Dhani* (61 Bom LR 19) and *Thakorelal v. Gujarat Revenue Tribunal* (AIR 1964 Guj 183 : ILR 1963 Guj 914 : (1963) 4 Guj LR 841), and distinguished the two cases on the ground that on the date on which the death of the tenant force, whereas, in the case before the Full Bench the tenant had died after Section 40 was amended in 1956. In the case now before the Bombay Tenancy and Agricultural Lands Act was amended in 1956. The contrast is apparent. While under the amended Section 40 the heirs of the tenant were automatically deemed to succeed to the tenancy there was no such "deeming" before the 1956 amendment. The landlord was merely required to make an offer and it was not stipulated what would happen if he did not make the offer. Where the landlord had obtained possession of the land under Section 34 for cultivating the land personally, there could be no question of making an offer to continue the tenancy since such an offer would be an exercise in futility. There was also the significant circumstance that the 1948 Act (before it was amended in 1956) contained no provision

corresponding to Explanation II to Section 7 of the 1939 Act. The only reasonable conclusion, therefore, is that under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, as it stood before it was amended in 1956, the right of a tenant to recover possession of land from a landlord who had obtained possession of such land on the ground that he required it to cultivate it personally was not a heritable right.

7. Shri Karkhanis, learned Counsel for the respondents relied on the decision of this Court in *Damadilal v. Parashram* ((1976) 4 SCC 855, 864 : AIR 1976 SC 2229, 2234) and argued that a statutory tenancy was heritable like a contractual tenancy. This Court did not lay down the wide proposition that every statutory tenancy was heritable but the Court did quite definitely lay down that it would be wrong to import the notions of English law relating to "statutory tenancy" and on that basis to hold that it was not transferable or heritable. It was observed by A. C. Gupta, J., as follows :

We find it difficult to appreciate how in this country we can proceed on the basis that a tenant whose contractual tenancy has determined but who is protected against eviction by the statute, has no right of property but only a personal right to remain in occupation, without ascertaining what his rights are under the statute. The concept of a statutory tenant having no estate or property in the premises which he occupies is derived from the provisions of the English Rent Acts. But it is not clear how it can be assumed that the position is the same in this country without any reference to the provisions of the relevant statute. Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject-matter of the tenancy, and heritability is an incident of the tenancy. It cannot be assumed, however, that with the determination of the tenancy the estate must necessarily disappear and the statute can only preserve his status of irremovability and not the estate he had in the premises in his occupation. It is not possible to claim that the "sanctity" of contract cannot be touched by legislation. It is therefore necessary to examine the provisions of the Madhya Pradesh Accommodation Control Act, 1961 to find out whether the respondents' predecessors-in-interest retained a heritable interest in the disputed premises even after the termination of their tenancy.

The learned Judge thereafter referred to the definition of tenant in the Madhya Pradesh Act and held that the definition made a person continuing in possession after the determination of his tenancy a tenant, unless a decree or order for eviction had been made against him, thus putting him at par with a person whose contractual tenancy still subsisted. It was observed that the incidents of such tenancy and the contractual tenancy had to be the same in the absence of a contrary intention conveyed by any provision of the Act. It was further observed that the so-called statutory tenant had, under Section 14 of the Madhya Pradesh Act, the right to sub-let in common with the contractual tenant and, therefore, he must be said to have an interest in the premises occupied by him.

8. Thus the question whether a tenancy other than a contractual tenancy has any or all the incidents of a contractual tenancy has to be decided with reference to the provisions of the particular statute. Though Section 5 of the Bombay Tenancy and Agricultural Lands Act as it stood before it was amended in 1956, did indicate by providing that notwithstanding any agreement to the contrary the minimum period of a tenancy shall be ten years renewable thereafter for successive periods of ten years, that the tenancy was heritable, the indication was definitely to the contrary when it came to the right of a protected tenant to have the land restored to him on the failure of the landlord to

cultivate the land personally. Our conclusion regarding the non-heritability of this right rests solely on our understanding of Section 40 of the Bombay Tenancy and Agricultural Lands Act as it stood before it was amended in 1956, in relation to the right under Section 37. Nothing that we have said should be understood as indicating that any other right of a tenant or this very right after the 1956 amendment is not heritable.

9. Shri Karkhanis argued that having regard to the position that obtained both under the Bombay Tenancy Act and under the Bombay Tenancy and Agricultural Lands Act after the 1956 amendment, we should so interpret Section 40 as to make the right under Section 37 heritable. We are unable to do so in view of the language of Section 40 before it was amended in 1956. In the result we allow the appeal set aside the judgment of the High Court and restore the decision of the Maharashtra Revenue Tribunal. In the circumstances of the case there will be no order regarding costs.

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