Motiram Ghelabhai (Dead) Through Lr Maniram Motiram

Vs

Jagan Nagar (Dead) Through Lrs and Others

Civil Appeal No. 239 of 1985

(V. D. Tulzapukar, V. Khalid JJ)

28.02.1985

JUDGMENT

V. D. TULZAPURKAR, J. -

1. The short question raised in this appeal is whether a pending appeal would be governed by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short the Act) upon the Part II of the Act being made applicable to the area in which the suit premises were situate during its pendency ?

2. The material facts giving rise to the question are these : By a registered lease dated June 3, 1957 (Ex. 75) the respondents-plaintiffs gave a lease of an open plot admeasuring about 7500 sq. ft. forming part of a non-agricultural land bearing Survey No. 70/4/1 situated in village Kalwada in Valsad District, Gujrat State to the appellant-defended for a period of 10 years for the purpose of running a flour mill after making necessary construction thereon at an yearly rent of Rs. 101. There was a clause for the renewal of the term but if it was not renewed the lessors were given the right to recover vacant possession on removal of construction at the expiry of the initial term. Admittedly, there was no renewal of the term and therefore on the expiry of 10 years the lessors became entitled to recover vacant possession on June 3, 1967 but the appellant-defendant was permitted to hold over. By a notice under Section 106 of the Transfer of Property Act issued on December 2, 1970 the respondents-plaintiffs called upon the appellant-defendant to vacate and hand over vacant possession of the suit plot after midnight of June 2, 1971 that is to say on June 3, 1971 but as the notice was not complied with a suit in ejectment was filed against the appellant-defendant on July 12, 1972. Since the suit premises were not governed by any rent legislation eviction on the ground of determination of tenancy under Transfer of Property Act was available to the respondents-plaintiffs. The trial court negatived all the defences that were raised by the defendant-appellant and decreed the suit for ejectment in favour of the respondents-plaintiffs on February 28, 1977. On June 20, 1977 the appellant-defendant challenged the decree by filing an appeal to the District Court, Navsari being Civil Appeal No. 60 of 1977.

3. While aforesaid appeal was pending in the District Court the State of Gujarat by its Notification dated March 26, 1980 applied Part II of the Act to village Kalwada where the suit premises were situated. Thereupon the defendant-appellant with the permission of the court raised the contention that he was entitled to the protection of Part II of the Act and since none of the grounds on which eviction could be had by the landlord under Part II had been made out by the respondents-plaintiffs they were not entitled to recover possession of the suit plot by virtue of the decree passed by the trial court. That contention was refuted on behalf of the respondents-plaintiffs on the ground that in view of the proviso to Section 50 of the Act and particularly the latter part thereof Part II of the Act

had no retrospective operation so far as pending appeals were concerned and such appeals had to be disposed of as if Part II of the Act was not applicable. The learned Assistant Judge who heard the appeal took the view that the proviso to Section 50 read with the latter part thereof expressly enacted that pending appeals arising out of decrees or orders passed before the coming into operation of the Act had to be disposed of as if the Act had not been passed and therefore the appellant-defendant was not entitled to any protection as claimed by him and the respondents-plaintiffs were entitled to the decree for possession; he therefore dismissed the appeal. The High Court confirmed the view taken by the learned Assistant Judge by dismissing the appellant-defendant's second appeal summarily. The appellant-defendant has challenged before us the aforesaid view taken by the courts below in this appeal.

4. In support of the plea that his client's appeal pending in the District Court was governed by Part II of the Act no sooner that Part was made applicable to village Kalwada, counsel for the defendant-appellant raised two contentions. In the first place he urged that a section could be prospective in one part and retrospective in another and that it has been so held in regard to Section 12 occurring in Part II of the Act by this Court; he pointed out that in Chandrasingh Manibhai v. Surjit Lal Ladhamal Chhabda (1951 SCR 221 : AIR 1951 SC 199 : 1951 SCJ 265) this Court has taken the view that sub-sections (2) and (3) of Section 12 are, having regard to the language employed therein prospective in operation and therefore would apply to suits filed after the Act has come into force while in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha ((1962) 2 SCR 159 : AIR 1961 SC 1596 : (1962) 1 SCJ 377) it has been held that sub-section (1) of Section 12, by reason of the words used therein, is retrospective in operation and covered even suits pending on the date when the Act is brought into force or is made applicable to an area and all such pending suits would have to be decided as if the protection afforded by sub-section (1) is available to the tenants who are parties to such suits; he urged that such protection against eviction under Section 12(1) of the Act would be available to the tenant independently of Section 50 of the Act. Further according to the learned counsel since an appeal is a continuation of a suit the protection of sub-section (1) would be available to the tenant in the pending appeal. He therefore, urged that since Civil Appeal No. 60 of 1977 was nothing but a continuation of the suit which was pending at the time when Section 12 was made applicable to village Kalwada the defendant-appellant was entitled to the protection of Section 12(1) of the Act and the trial court's decree for eviction obtained by the respondents plaintiffs was of no avail to them. Secondly, he contended that Section 50 and the proviso thereto did not apply to the present case at all; according to him the proviso is not an independent provision but is linked with the substantive enactment contained in Section 50 which deals with the repeal of two earlier enactments, namely, Bombay Rent Restriction Act, 1939 and the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944 an since the present suit was one under the Transfer of Property Act and was not under either of the two repealed Acts there would be no question of applying the proviso to such a suit or to any appeal arising out of a decree in such suit. According to him such suits and appeals arising from decrees in such suits would be governed by Section 12(1) of the Act which has retrospective operation, and since protection was available to his client in the pending appeal the decree for ejectment ought to have been set aside by the lower courts.

5. The question thus raised requires proper construction being placed on the two relevant and connection provisions of the Act, namely Section 12(1) and Section 50. These provisions run thus :

> 12. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and permitted increases. - (1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenants pays, or is ready and

willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, insofar as they are consistent with the provisions of this Act.

50. Repeal. - The Bombay Rent Restriction Act, 1939, and the Bombay Rents, Hotel Rates and Lodging Houses Rates (Control) Act, 1944, are hereby repealed :

Provided that all suits and proceedings between a landlord and a tenant relating to the recovery or fixing of rent or possession of any premises to which the provisions of Part II apply and all suits proceedings by a manager of a hotel or an owner of a lodging house against a lodger for the recovery of charges for, or possession of, the accommodation provided in a hotel or lodging house situate in an area to which Part III applies, which are pending in any court, shall be transferred to any continued before the courts which would have jurisdiction to try such suits or proceeding under this Act or shall be continued in such courts, as the case may be, and all the provisions of this Act and the Rules made thereunder shall apply to all such suits and proceedings.

Nothing in this proviso shall apply to execution proceedings and appeals arising out of decrees or orders, passed before the coming into operation of this Act; and such execution proceeding and appeals shall be decided and disposed of as if this Act had not been passed.

6. So far as Section 12 of the Act is concerned, having regard to the two decisions mentioned earlier it is clear that this Court has ruled that sub-section (2) and (3) of Section 12 are prospective but sub-section (1) thereof is retrospective in operation and in that behalf the Court in Shah Bhojraj case ((1962) 2 SCR 159 : AIR 1961 SC 1596 : (1962) 1 SCJ 377) has relied upon the difference in the language employed in sub-section (2) and (3) on the one hand and sub-section (1) on the other. Since sub-section (2) commences with the words, "no suit for recovery of possession shall be instituted ..." and since sub-section (3) as it then stood commenced with the words "no decree for eviction shall be passed in any such suit ..." the Court took that such language plainly indicated that these provisions were intended to operate prospectively, that is to say would apply to suits instituted after the coming into force of the Act; but so far as sub-section (1) is concerned the Court pointed out that the point of time when sub-section (1) operates is when the decree for recovery possession has to be passed and that the language of that sub-section, which provides that the landlord is not entitled to recover possession if the tenant pays or shows his willingness to pay the standard rent and to observe the other conditions of the tenancy, is such that it applies equally to suits pending when Part II comes into force and those to be filed subsequently and is not limited only to suits filed after the Act comes into force in a particular area and in fact the Court in that case granted the benefit of the protection of sub-section (1) of Section 12 to the tenant who was a party to a suit which was already pending when Part II of the Act was made applicable to the area in which the suit premises were situated. The decision in Shah Bhojraj case ((1962) 2 SCR 159 : AIR 1961 SC 1596 : (1962) 1 SCJ 377) therefore is a clear authority for the proposition that Section 12(1) of the Act has retrospective operation and would apply to a suit which is pending when Part II comes into force or is made applicable to a particular area where the suit premises are situated but it must be observed that the question whether the protection of section 12(1) of the Act would be available in regard to a pending appeal, when Part II is made applicable to the particular area did not arise for consideration nor was decided in that case. Counsel for the appellant-defendant has however, urged that on the well accepted principle that an appeal is nothing but a continuation of the suit the retrospective operation of Section 12(1) must be extended to such pending appeal especially as the language thereof must receive the same interpretation in regard to a pending appeal. We have no doubt that by itself the provision would apply to pending appeals but the provision has to be considered in the

light of the other provision to be found in Section 50 and the proviso thereto read with the latter part thereof which expressly deals differently with the aspect of applicability of the Act especially Part II thereof to pending suits and original proceedings on the one hand and pending execution proceedings and appeals on the other. That is why counsel for the appellant-defendant raised the second contention that Section 50 and the proviso thereto read with the latter part thereof did not apply to the present case at all and in that behalf urged that the proviso together with the latter part thereof is not an independent provision but is linked with the substantive enactment contained in Section 50 that is to say the proviso has been inserted merely with a view to qualify or create an exception to what is stated in the main provision. The manner in which the two contentions were put forward by counsel for the appellant-defendant clearly showed that he realised that unless the present case was taken out of the purview of Section 50 and the proviso thereto read with the latter part thereof his client would not be able to claim the benefit of the protection of Section 12(1) of the Act. Therefore, the two contentions being interdependent it will be desirable to deal with the second contentions first. Of course, we shall also deal with his contention that the defendant-appellant would be entitled to the protection of Section 12(1) independently of and irrespective of whether his client's case is covered by Section 50 and the proviso thereto read with the latter part thereof or not.

7. Turning then to the second contention of counsel for the appellant-defendant it is obvious that the question whether the present case falls within or outside the purview of the proviso to Section 50 depends upon what is true nature and scope of the proviso introduced at the end of Section 50 ? Is it introduced merely with a view to qualify or create exceptions to what is contained in the main provision of Section 50 or does it go beyond that purpose and enact a substantive law of its own by way of providing for special savings following upon the repeal of the two earlier enactments, the 1939 Act and the 1944 Act ? That a proviso could be of either type was not disputed before us by counsel for the appellant-defendant. In fact in Shah Bhojraj case ((1962) 2 SCR 159 : AIR 1961 SC 1596 : (1962) 1 SCJ 377) this Court after referring to two English decisions and a passage in Craies on Statute Law (Fifth Edition) at page 166 of the Report has observed thus :

The law with regard to proviso is well-settled and well-understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. But provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be construed as controlled by the section.

The question is in which category the instant proviso together with latter part thereof falls. It may be stated that this very question was hotly debated before the Court in that case but was not decided and kept open because of the view taken by the Court on the contention pertaining to proper interpretation of Section 12(1) of the Act and since the Court held that Section 12(1) is retrospective in operation and covers suits pending on the date when Part II was applied to the particular area it granted relief to the tenant-appellant against eviction. We might observe, however, that the same result would have obtained even if the case were considered under the proviso to Section 50 because under it suits and proceedings pending at the date when Part II is made applicable are required to be decided by applying the 1947 Act to them. Since the question raised before us relates to the applicability of the 1947 Act to a pending appeal we shall have to decide the question pertaining to the true nature and scope of the proviso to Section 50 in this case.

8. Before we deal with that question we might indicate that the said proviso to Section 50 as it originally stood has undergone certain amendments effected by Bombay Act 3 of 1949. The proviso as it originally stood ran thus (omitting unnecessary parts) :

Provided that all suits and proceedings (other that execution proceedings and appeals) between a landlord and a tenant relating to the recovery or fixing of rent or possession of any premises to which the provisions of Part II apply ... which are pending in any court, shall be transferred to and continued before the courts which would have jurisdiction to try such suits or proceedings under this Act; and thereupon all the provisions of this Act and the Rules made thereunder shall apply to all such suits and proceedings.

By the Bombay Act 3 of 1949 three changes were made by the Legislature, (i) it deleted the words "other than execution proceedings and appeals" appearing in brackets from the proviso and inserted a new paragraph at the end of that proviso dealing separately with execution proceedings and appeals, (ii) it inserted the words "or shall be continued in such courts as the case may be" in the proviso and (iii) it deleted the word 'thereupon' from the proviso. The object of amendments made at (ii) and (iii) was to remove the judicial confusion caused by courts taking conflicting views on the question whether the Act (1947 Act) applied only to transferred cases and not others. Previously the proviso stated that all suits and proceedings of a certain category mentioned therein "shall be transferred to and continued" before the courts which would have jurisdiction to try them under the Act and 'thereupon' the provision of the Act shall apply to them and therefore some courts took the view that the provision of the Act (1947 Act) will apply only to suits and proceedings which were so transferred and continued and others held to the contrary. This conflict was set at rest by these amendments By the amendment made at (i) what was there in the body of the proviso was relegated to a new separate paragraph and no change was effected except that the effect of the wide expression "all suits and proceedings" was re-emphasised and further clarified by using the words "execution proceedings and appeals arising out of decrees and orders, passed before the coming into operation of this Act" in the new paragraph.

9. Bearing in mind the aforesaid legislative amendments we shall proceed to consider the question as to what is the true nature and scope of the proviso. For that purpose it will be necessary to read as a whole the entire provision, namely, the substantive part of Section 50, the proviso thereto and the new paragraph added at the end of the proviso. So read, two aspects stand out very clearly. In the first place, it is clear that under the substantive part of Section 50 on the coming into force of the Act (the 1947 Act) the two earlier enactments (the 1939 Act and the 1944 Act) stand repealed. If nothing more was said then Section 7 of the Bombay General Clauses Act, 1904 would have come into play and would have had the effect of saving the legal proceedings or remedies in respect of any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactments. In other words, all suits and proceedings including execution proceeding and appeals arising therefrom which were pending on the relevant date and which were governed by the provisions of these respective repealed Acts would have been saved and the rights and obligations of the parties thereto would have been worked out under the relevant provisions of the repealed Acts. But here a clear intention to deviate from the normal rule which applies to the repeal of enactments is clearly evinced by the Legislature by the manner in which the proviso was enacted initially or as it now stands after the amendments. Either under the proviso as it originally stood or under the new separate paragraph enacted by way of an amendment the legislative intent was and is quite clear that only suits and original proceedings between a landlord and a tenant (of the description or categories specified therein) which were pending on the relevant date are required to be decided and disposed of by applying the provisions of the 1947 Act while execution proceedings and appeals arising out of decrees or orders passed before the coming into operation of the Act are denied the benefits of the provisions of the Act and have been directed to be decided and disposed of as if this Act had not been passed, that is to say such execution proceedings and appeals would be continued to be governed by and shall be disposed of in accordance with the law that was then applicable to them.

In other words, it is clear that the proviso was and has been enacted to provide for special savings which suggests that it has not been introduced merely with a view to qualify or create exception to what is contained in the substantive part of Section 50. Secondly, it does appear that the Legislature while framing the Act (the 1947 Act) was enacting certain provisions for the benefit of tenants which conferred larger benefits on them than were in fact conferred by the earlier enactments which were repealed, [and this would be clear if regard be had to the wider definition of the expression 'tenant' adopted in Section 5(11) of the Act] and therefore, the Legislature thought it advisable that in regard to pending suits and original proceedings also (of course of the description or categories specified therein) in which the decrees and orders were not passed the provisions of the Act should be made applicable. It is with this intention that the proviso to Section 50 has been enacted in the manner it has been done. What is more, while so extending the larger benefits of the Act (the 1947 Act) to tenants the Legislature has used a very wide expression, namely, "all suits and proceeding between a landlord and a tenant" so as to include within that category suits and proceedings filed under the repealed Acts as also under the general law or Transfer of Property Act. Deliberate use of such wide expression clearly shows that the benefit of the Act was intended to be given to all tenants who were parties to all suits and proceedings filed either under the repealed Acts or under the general law or Transfer of Property Act and were pending at the relevant date. It is therefore, clear that the proviso read with the separate paragraph added thereto will have to be regarded as an independent provision enacting a substantive law of its own by way of providing for special savings and counsel's contention that the same has been added merely with a view to qualify or to create an exception to what is contained in the main provision of Section 50 has to be rejected. We might refer to a Bombay High Court decision in Shankarlal Ramratan Shet v. Pandharinath Vishnu Phatak ((1951) 53 Bom LR 319 : AIR 1951 Bom 385 : ILR 1951 Bom 670) where a similar view of the proviso to Section 50 of the Act has been taken and we approve the same.

10. Having regard to the aforesaid conclusion which we have reached on the true nature and scope of the proviso to Section 50 of the Act it would be clear that the present case, in which an appeal (arising out of a decree passed in a suit filed under the Transfer of Property Act) was pending when Part II of the Act was made applicable to village Kalwada, would be directly covered by the proviso read with the separate paragraph added thereto and the appeal was liable to be decided and disposed of as if the 1947 Act had not been passed, that is to say, had to be disposed of in accordance with the law that was then applicable to it. In this view of the matter, we are of the opinion that the learned Assistant Judge as well as the High Court were right in coming to the conclusion that the appellant-plaintiff was not entitled to any protection of the 1947 Act as claimed by him.

11. Counsel for the appellant-defendant however, faintly urged before us that his client would be entitled to the protection of Section 12(1) of the Act, (which has been held to be retrospective in operation) independently of and irrespective of whether his case was covered by the proviso to Section 50 read with the latter part thereof or not. It is impossible to accept this contention for the simple reason that section 12(1) of the Act would unquestionably be a general provision whereas the proviso to Section 50 read with the new paragraph added thereto, which has now been held to be an independent provision enacting substantive law in itself and which expressly deals with pending matters (suits and other proceedings in contradistinction with execution proceedings and appeals) would be a special provision contained in the Act and obviously under the normal rule of interpretation the special provision must prevail over the general and therefore if a case is covered by the special provision the general provision will not be attracted to it. The contention has therefore to be rejected.

12. Before parting with the case we would like to point out that Chandrasingh Manibhai case (1951

SCR 221 : AIR 1951 SC 199 : 1951 SCJ 265) was also a case dealing with an appeal (arising out of a decree passed on a date prior to the coming into force of the 1947 Act in a suit filed under the Transfer of Property Act) which was pending at the relevant date and the question was whether on the principle that the appeal was in the nature of a rehearing of the suit the same should be decided in accordance with the provisions of the 1947 Act which had come into force during its pendency and this Court took the view that having regard to the proviso to Section 50 as it originally stood the Act was given retrospective operation only to a limited extent and execution proceedings and appeals were excluded from this effect and were to be governed by the law in force at the time when the decrees were passed and therefore, the tenant was not entitled to the protection of the 1947 Act and was liable to be evicted.

13. Really speaking this decision laid concluded the point raised before us in the present appeal. But since in Shah Bhojraj case ((1962) 2 SCR 159 : AIR 1961 SC 1596 : (1962) 1 SCJ 377) a distinction was made between sub-section (1) of Section on the one hand and sub-sections (2) and (3) on the others an it was held that the former provision was retrospective in operation and the latter prospective counsel for the appellant-defendant made valiant attempt to bring his client's case within the purview of Section 12(1) by putting forward the plausible contention that his case was not covered by the proviso to Section 50 read with the separate paragraph added thereto at all on the ground that the said proviso together with the new separate paragraph added thereto was not an independent provision enacting any substantive law therein but was linked with the main provision contained in Section 50 and had been introduced merely with a view to qualify or create an exception to what is contained in the main provision but that attempt has failed in view of our conclusion on the true nature and scope of the said proviso read with the new separate paragraph added to it.

14. In the result, the appeal fails and is dismissed but in the circumstances there will be no order as to costs.

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