

## **GUJARAT HIGH COURT**

Kalicharan Bhajanlal Bhayya

Vs.

Bai Mahalaxmi

Second Appeal No. 61 of 1960

(J.M. Shelat and M.R. Mody, JJ.)

04.04.1962

### **JUDGMENT**

**J.M. Shelat, J.**

1. This is an appeal against the decision of the learned Assistant Judge, Baroda, who confirmed the decree of the trial Court passed against the appellant and dismissed his appeal with costs. On the 26th March 1954, the plaintiff filed suit No. 366 of 1953 in the Court of the learned Joint Civil Judge (Junior Division), Baroda, for possession of S. No. 825/1 situate within the Borough Municipal limits of Baroda and for mesne profits. According to the plaintiff, the land in suit was leased to the 1st defendant under a rent note dated June 12 1952 at an annual rent of Rs. 40/-. Under that rent note the 1st defendant was bound to hand over possession of the land on May 16 1953 The 1st defendant however failed to deliver up possession of the land to the plaintiff and also failed to pay the rent. According to the plaintiff there was no privity of contract between her and 2nd defendant who according to her was a mere trespasser and was joined as a party to the suit only to prevent any future obstruction by him. The 1st defendant did not appear at the trial and therefore an ex parte decree was passed against him. By his written statement Ex. 8 the 2nd defendant raised a number of pleas viz. that the rent note dated June 12 1952 was collusive and was not binding upon him; that he was in possession of the land not as a tenant of the plaintiff but as a tenant from the original owner one Bai Amathi with whom he had an arrangement that he should cultivate the land during his life time and that he was therefore a permanent tenant of the land. The 2nd defendant also claimed protection under the Bombay Tenancy and Agricultural Lands Act 1948 hereinafter referred to as the Act and challenged the jurisdiction of the Court to try the suit. The learned trial Judge held that the land in question was not governed by the Act and that therefore no question as to the 2nd defendant being a protected tenant nor the question that a Civil Court had no jurisdiction to try the suit arose. He rejected the 2nd defendants plea that the rent note was either collusive or unenforceable or that 2nd defendant was a permanent tenant. In view of these findings he decreed the suit of the plaintiff and directed that possession

of the land in suit should be handed over to her. The 2nd defendant thereupon filed Civil Appeal No. 132 of 1955 in the Court of the learned Assistant Judge at Baroda. The learned Assistant Judge held that the Civil Court had jurisdiction to try the suit; that the 2nd defendant was not a tenant or a permanent tenant of the original owner Bai Amathi or of the plaintiff; that the 2nd defendant was in possession of the land as a trespasser and the plaintiff therefore was entitled to possession and mesne profits as ordered by the trial Court. The learned Assistant Judge dismissed the 2nd defendant's appeal and directed payment of the costs to the plaintiff. It is against this judgment and decree that the present appeal has been filed. Before we proceed to deal with the question, raised by Mr. Barot before us it would be convenient to set out a few pertinent dates. The suit was filed on March 26 1954 and was decreed against both the defendants on June 29 1955. An appeal against the judgment and decree passed by the trial Court was filed before the learned Assistant Judge Baroda on August 6 1955 and that appeal was dismissed confirming the decree passed by the trial Court on September 29 1956.

2. It is an admitted fact that S. No. 825/1 in respect of which the present litigation was launched is situated within the limits of the Borough Municipality of Baroda. On July 30 1949 the Act of 1948 was made applicable to the territories of the former Baroda State. Section 85 of that Act provides that 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 etc. Therefore under that section there was a bar of jurisdiction of Civil Courts in matters arising under the Act in respect of lands to which the Act applied. But under Section 88 of the Act certain lands and areas were exempted from the operation of the Act and these lands and areas were described in Clauses (a) to (d) of Sub-section (1) of that section. Under Clause (c) of Sub-section (1) it was provided that the Act was not to apply to any area within the limits of Greater Bombay and the Municipal Boroughs of Poona City and suburban Ahmadabad Sholapur Surat and Hubli and within a distance of two miles of the limits of these boroughs. Since the Municipal Borough of Baroda was not included in Clause (c) it follows that lands situated within the limits of the Baroda Municipal Borough were governed by the Act and therefore Section 88 applied and no Civil Court had jurisdiction to decide any question which was by or under the Act required to be decided or settled by the several authorities set out therein.

3. Under the power reserved under Clause (d) of Section 88(1) of the Act a notification No. 9361/49 was published in the Bombay Government Gazette dated May 3 1951 whereby the Government of Bombay specified the areas within the limits of the Municipal Borough of Baroda city and within a distance of two miles therefrom as being reserved for urban non-agricultural or industrial development. The effect of this notification was that the Act ceased to apply to the lands situated within the municipal limits of Baroda and also to lands situated within a radius of two miles from those limits. It is an admitted position that S. No. 825/1 is situated within the municipal limits of Baroda. The effect therefore of this notification was as if the Act did not apply to S. No. 825/1 and other lands situated within the aforesaid limits. That being the position

Civil Courts had from the date of that notification jurisdiction to try and decide matters relating to these lands as these lands were not affected by the Act and the tenants of these lands could not claim protection of the Act. Subsequently another notification dated January 12 1953 bearing the same number was published on January 15 1953 in the Government Gazette thereby cancelling the previous notification. But on that very same day i.e. January 12 1953 Act XXXII of 1952 came into force and Section 16 of that amending Act amended Section 88(1)(c) of the Act amongst other provisions. Briefly stated the effect of this amendment was that Section 1 to 87 were declared not to apply to lands situate within the limits of all the municipal boroughs constituted under the Municipal Boroughs Act 1925 The position therefore was that the lands situate within the municipal limits of Baroda such as the present S. No. 825/1 were exempted from the operation of the Act and therefore Civil Courts had jurisdiction and not the revenue authorities under the Act to deal with and decide matters arising in respect of such lands as these lands were exempted from the operation of the Act. When the present suit was filed on March 26 1954 the Civil Court therefore had jurisdiction both at the time when it was instituted as also when it was disposed of by the trial Court on June 29 1955 As aforesaid the appeal against the decree passed by the trial Court was filed on August 6 1955 but before that appeal could be disposed of Amendment Act XIII of 1956 was enacted and was brought in force on August 1 1956 The appeal filed on August 6 1956 was still pending at the date when Act XIII of 1955 was brought into force. This Act introduced a new chapter being Chapter III-B which contained two new Sections 43C and the proviso thereto and Section 43D. We are not concerned for the present with Section 43D. The new Act also enacted Sections 32 to 32R dealing with compulsory purchase of lands by tenants. Under Section 43C however lands in the areas in Greater Bombay a municipal corporation constituted under the Bombay Provincial Municipal Corporations Act 1949 a municipal borough constituted under the Bombay District Municipal Act 1901 a cantonment or any area included in a Town Planning Scheme were exempted from the operations of Sections 32 to 32R and Section 43. The proviso to Section 43(c) provided that –

if any person has acquired any right as a tenant under this Act on or after the 28 December 1948 the 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 in fact that either of the said Act has been made applicable to the area in which such land is situate.

Section 88 was also reconstituted evidently to bring it in line with Section 32 to 32R and Section 43 and the effect of the section as reconstituted was that amongst other things Clause (c) of Sub-section (1) of Section 88 as it stood in Act XXXII of 1952 was deleted. Therefore except for Section 32 to 32 and Section 43 the Tenancy Act would seem to have been made applicable to lands situate within the limits of the Borough Municipality of Baroda. The effect of the proviso was that it took away the non-applicability of the Act enacted by Act of 1952 and restored the protection of the Act to tenants of the lands in the areas situate within the limits of the municipal borough such as the Baroda Municipal Borough. Section 43C and in particular the proviso

thereto came to be considered by a Pull Bench of the High Court of Bombay in *Patel Maganbhai Jethabhai v. Somabhai Sursang*<sup>1</sup> where it was held that the proviso afforded protection to the tenant if the tenant had the protection under the Act notwithstanding the fact that that protection was taken away by Act XXXII of 1952. That protection became available to the tenant even though it was claimed after a suit for ejectment was filed against him and that protection was afforded by the proviso though it was enacted after the suit was instituted. The Pull Bench further held that the proviso introduced a legal fiction and that was that any right that the tenant had under the Act on or after December 28 1948 was not to be affected by the Amending Act of 1952 or by the Amending Act of 1955. Therefore the proviso first postulates a right that a person has as a tenant under the Act of 1948 That right must have

<sup>1</sup>60 Bom. L.R. 1383

been acquired on or after December 28 1948 that is the date when the Act of 1948 came into force. Then it took into consideration the fact that the Amending Act of 1952 took away the rights of those tenants who were living within the areas to which Section 88(1)(c) was applicable like the tenants living within the municipal area of Baroda and it was here that the Legislature introduced the legal fiction that although in fact and in law their rights were affected and their rights were taken away the Courts shall assume that those rights were not taken away and those rights always existed. Therefore once there was a right in a person as a tenant under the Act of 1948 that right by a legal fiction is continued and is not permitted to be affected by the Amending Act of 1952. The Full Bench further held that by reason of the language used in the proviso and the legal fiction that it created the tenant must be deemed to have been protected under the provisions of the Act of 1918 and therefore the intention of the Legislature was not the limited intention to control only that litigation which would be filed after the amendment was passed. The proviso to Section 43C was retrospective and it required the Courts to afford protection to the tenant if he had it under the Act of 1948 notwithstanding the fact that that protection was taken away by Act XXXIII of 1952. That protection must be given to the tenant even though the protection is claimed after the suit was filed and the protection is afforded by a piece of legislation which was put on the statute book after the suit for ejectment has been instituted A twofold result would thus follow from this decision.

- (1) that though Act XXXIII of 1952 took away these lands from the ambit of the Tenancy Act the rights of a tenant if he had acquired them on or after December 28 1949 are notwithstanding that fact protected by the proviso as if the Amending Act XXXIII of 1952 never applied and
- (2) the proviso being retrospective and creating the legal fiction it applied to suits for possession filed even before it came into force so long as the suit was not concluded by a final judgment.

It is clear therefore that the proviso to Section 43C would apply to the present suit as it came into force while the appeal was still pending and the suit was not finally concluded.

4. But the question still remains whether by reason of Act XIII of 1956 and the provision to

Section 43C as construed in *Maganbhai Jethabhai* case the jurisdiction of a Civil Court to decide suits touching the rights of persons claiming to be tenants in respect of such lands is divested In *Dhondi Tukaram Mali v. Dadoo Piraji Adgale*<sup>2</sup> Gajendragadkar and Vyas JJ. held that by virtue of Section 70 of the Act of 1948 the Mamlatdar was the exclusive tribunal even where a landlord has filed a suit against a person alleging such A person to be a trespasser if such a person were to raise a plea that he was a tenant. It is not therefore as if the Mamlatdar is the exclusive tribunal in cases only where the relationship of landlord and tenant is admitted or not in dispute. Similarly in *Harshadrai Raghunathji Desai v. Babubhai Maganlal Batliwala*<sup>3</sup> it was held that if in order to decide the question whether an occupant is a tenant within the meaning of the Act it is necessary to decide the question whether the lands in his possession are used for an agricultural purpose or for a purpose mentioned in Section 88 of the Act it is a question which the Mamlatdar has power to decide and the Civil Court is debarred from deciding the question. Therefore the question is whether by reason of the proviso to Section 43C and the construction placed upon it in *Maganbhai's* case the jurisdiction of a Civil Court in a suit which it was

<sup>2</sup>55 Bom. L.R. 663

<sup>3</sup>59 Bom. L.R. 1036

competent to entertain and try at the date of its institution is taken away? In other words can it be said as was urged by Mr. Barot that by reason of the retrospective restoration of the rights of a tenant under the proviso to Section 43C the tenant can claim that as the suit was still not finally concluded by reason of the pendency of the appeal at the date when the proviso came into force the Civil Court ceased to have jurisdiction and therefore the appellate Court ought not to have tried that appeal and ought to have sent it on to the Mamlatdar or any of the revenue authorities specified in Section 70 of the Act. Such a contention in our view if accepted would result in an anomaly which could not have been contemplated by the Legislature. Could it be said that the Legislature intended that a Court which had jurisdiction to try a suit both at the time of its institution and at its disposal must be deemed not to have that jurisdiction? Could it again be said that an appellate Court which had jurisdiction at the date of the institution of the appeal is deprived of its jurisdiction to try that appeal and that such an appellate Court must send that appeal to a revenue forum? Assuming that it has to send it to such a forum the next question would be to which authority under the Act the appellate Court would send whether to the Mamlatdar although the appellate Court is trying an appeal where the trial Court has disposed of the suit and passed a decree? Apart from these difficulties there is no provision made in the Act even when Act XIII of 1956 was enacted enabling a Civil Court to send a suit to any of the authorities under the Act. The second difficulty if Mr. Barot's contention were to be accepted would be that it would be impossible to reconcile Section 89(2)(b) with the proviso to Section 43 Section 89(2)(b) inter alia provides that;

"Nothing in this Act or any repeal effected thereby

... ..

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

... ..

(iii) 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."

Clause (b) of Section 89(2) thus expressly saves from the operation of the Act any legal proceeding instituted before the commencement of Act XIII of 1956. Prima facie therefore a suit instituted before Act XIII of 1916 came into force as the present suit was is saved and a Civil Court has jurisdiction to entertain and try such a suit which would be governed by reason of the express provisions of Section 89(2)(b)(ii) by the law as it stood when it was filed subject of course to the proviso to Section 43 But it was urged that the tenant whose rights were restored by Section 43C proviso in respect of lands situate in the limits of the borough municipalities is entitled to urge that Section 29 of the Tenancy Act gives him a right to have a suit against him by a landlord for possession tried by the revenue authority. That argument in our view, does not take into account the well settled principle that a litigant has no vested right to have his litigation tried by a particular forum. Besides the proviso to Section 43C on which this argument is founded does not appear to support it. What is saved by that proviso is the right of a person as a tenant in relation to the agricultural land of which he is a tenant and it is that said right which is not to be deemed to have been affected by Act XXXIII of 1952. Rights as a tenant pertain to the land held by such a person under the Act and do not have any reference to a particular tribunal or forum. In this view the contention urged by Mr. Barot must fail. It was however urged by Mr. Barot that by reason of the proviso to Section 43C it was the Mamlatdar who alone had the jurisdiction to try the suit and as the 2nd defendant had raised a plea in his written statement that the Civil Court had no jurisdiction to try that suit the appellate Court ought to have accepted that contention and held that the trial Court had no jurisdiction to entertain and try the suit. Mr. Barot however forgets that at the time when the suit was instituted by reason of the provisions of Act XXXIII of 1952 it was only the Civil Court which could have entertained that suit. The Tenancy Act not being applicable to the land in the suit at that stage the 2nd defendant could not possibly be said to be a tenant entitled to the protection of the Act until the proviso to Section 43C was enacted. That being the position it was the Civil Court only which could have tried that suit and not the Mamlatdar. Mr. Barot however relied upon the case of *Harshadrai v. Babubhai*<sup>4</sup> and in particular to the observations made by Tendolkar J. at page 1042. The observations relied upon by Mr. Barot are:

But we have chosen to deal with the matter not merely as a matter under Section 88(1)(b) but as a matter which may cover any other case of exclusion enumerated in Section 88(1). As the exclusion merely helps to determine what lands attract the provisions of the Act and therefore in respect of what lands the Mamlatdar has jurisdiction the determination of

any of these matters is in my opinion a purely jurisdictional fact which it is competent for the Tribunal whose jurisdiction is invoked under the provisions of the Bombay Tenancy and Agricultural Act to determine and to the extent to which the Tribunals set up under the Bombay Tenancy and Agricultural Lands Act 1948 have jurisdiction to determine the matter the jurisdiction of the Civil Court is necessarily excluded.

5. It is difficult to understand as to how this decision can help Mr. Barot's contention. The question raised before the learned Judges in that case was whether the Mamlatdar had jurisdiction to decide the question viz. whether the land in question fell within the ambit of Section 88(1)(b)? That decision did not have to deal with the point raised before us by Mr. Barot with reference to the proviso to Section 43C and Section 89 of the Act. In other words the question raised before us viz. whether the restoration of tenancy rights of a tenant included also the right to have such matter determined under Section 70 by the Mamlatdar did not arise in Harshadrai Desai's case. In that case the land was situate in a village to which admittedly the Act applied and the only question that arose was whether the land was leased to an industrial undertaking and therefore fell under the exception of Section 88(1)(b). It was on these facts that it was held that since the Act applied to the lands there it would be the Mamlatdar who would have the jurisdiction to decide the jurisdictional fact viz. whether the land fell within the exclusion of Section 88(1)(b) and therefore the Mamlatdar did not have the jurisdiction to try a case pertaining to such land. In our view the decision in Harshadrais case cannot be called in aid by Mr. Barot in support of his contention. Questions similar to the ones raised before us arose in

<sup>4</sup>59 Bom. L.R. 1036

<sup>5</sup>62 Bom. L.R. 873

*Pandurang Hari Jadhav v. Shankar Maruti Todkar*<sup>5</sup> where a view, similar to the one which we have taken as to the effect of the proviso to Section 43C was taken. Naik J. who decided that case also held that the general words used in the proviso to Section 43C that the right of the tenant would not be affected were not sufficient to divest the Court of jurisdiction in respect of a suit which was already instituted before it before the proviso came into force. He was also of the view that if the words 6 said right used in the proviso to Section 43C were interpreted to cover the right to institute a proceeding then obviously there would arise a conflict between that proviso and the provisions of Section 89(2)(b)(ii) of the Act of 1948.

6. For the reasons aforesaid we are of the view that the learned Assistant Judge was right in the conclusion he came to and in his finding that the proviso to Section 43 did not divest the Court of its jurisdiction and therefore the trial Court had jurisdiction both to entertain and try the suit. This being the only contention raised before us in this appeal the appeal fails and is dismissed with costs.

Appeal dismissed.