GUJARAT HIGH COURT

Thakorelal Amratlal Vaidya

Vs.

Gujarat Revenue Tribunal

Special Civil Appln. No. 174 of 1961

(M. Shelat and P.N. Bhagwati, JJ.)

18.02.1963

JUDGMENT

P.N. Bhagwati, J.

1. The short question which, arises in this petition is whether the heirs of a person who is a deemed tenant under Section 4 of the Bombay Tenancy and Agricultural Lands Act, 1948, thereinafter referred to as the Tenancy Act are entitled to inherit the tenancy on the death of such person under the provisions of the Tenancy Act as it stood prior to its amendment by Bombay Act 13 of 1956 or whether the tenancy comes to an end on the death of such person ? Various ingenious arguments have been advanced by Mr. B.G. Thakore, learned advocate appearing on behalf of the respondents, in support of the contention that the tenancy is heritable but they are all ill-founded and we cannot assent to any of them. On a true construction of the provisions of the Tenancy Act the tenancy is clearly net heritable and we shall briefly indicate our reasons for fading this view but before we do so, we may conveniently set out the facts giving rise to the petition.

2. The petitioner is the occupant of land bearing Survey No. 1363 situate in village Rajpipla, Taluka Nandod, District Broach. One Chunilal was at one time a tenant of the petitioner; but he surrendered his tenancy in favor of the petitioner and the surrender being duly verified by the Mamlatdar in accordance with the provisions of the Tenancy Act possession of the land was handed over to the petitioner under an order of the Mamlatdar dated 1st October 1952. The petitioner thereafter employed one Laskaria, the father of respondents Nos. 2 and 3, under a service agreement to work on the land. Laskaria filed Tenancy Application No. 5 of 1953 in the Court of the Mamlatdar, Nandod, for a declaration that he was a tenant of the land and for an injunction to restrain the petitioner from disturbing his possession of the land. Laskaria contended that he was a contractual tenant of the petitioner but this contention was negatived by the Mamlatdar. The Mamlatdar accepted the case of the petitioner that Laskaria was cultivating

the land under a service agreement entered into between him and the petitioner but held that since there was no personal supervision by the petitioner, Laskaria was a deemed tenant under Section 4 of the Tenancy Act. Being aggrieved by the order of the Mamlatdar the petitioner preferred an appeal being Tenancy Appeal No. 28 of 1953 in the Court of the Prant Officer, Rajpipla. The Prant Officer also came to the same conclusion, namely, that Laskaria was not a contractual tenant but was a deemed tenant under Section 4 of the Tenancy Act and he accordingly upheld the order of the Mamlatdar and dismissed the appeal. The petitioner thereupon carried the matter in revision before the Revenue Tribunal. During the pendency of the Revision Application, Laskaria died on 7th March 1955. The petitioner thereupon applied to bring respondents Nos. 2 and 3 on record as heirs of Laskaria and they were accordingly brought on record as siren heirs on 25th August 1955. The Revision Application was thereafter heard by the Revenue Tribunal and the Revenue Tribunal by an order dated 14th September 1955 dismissed the Revision Application. The result was that the order of the Prant Officer declaring Laskaria to be a deemed tenant of the petitioner under Section 4 of the Tenancy Act was confirmed.

3. After the Revision Application was rejected by the Revenue Tribunal as mentioned above, the petitioners filed an application in the Court of the District Deputy Collector, Rajpipla, under Section 84 of the Tenancy Act seeking an order for eviction against respondents Nos. 2 and 3 on the ground that they were in unauthorised or wrongful occupation of the land. Respondents Nos. 2 and 5 contested the application and ultimately obtained an order staying the hearing of the application as a result of proceedings taken right upto the Revenue Tribunal. Respondents Nos. 2 and 3 thereafter filed Tenancy Application No. 199 of 1956 on 7th July 1956 in, the Court of the Mamlatdar, Nandod, for a declaration that they were tenants of the land. There were three grounds on which the claim to be tenants of the land was put forward by respondents Nos. 2 and 3. The first ground was that the tenancy of Laskaria prior to his death was joint family tenancy and that respondents Nos. 2 and 3 were, therefore, tenants as members of the joint family of Laskaria. The second ground was that after the death of Laskaria, respondents Nos. 2 and 3 were accepted as tenants by the petitioner. and the third ground was that the tenancy of Laskaria was heritable property and that on the, deaths of Laskaria respondents Nos. 2 and 3 became tenants of the land as heirs of Laskaria. The Mamlatdar who hear the application came to the conclusion that all the three grounds on which respondents Nos. 2 and 3 claimed to be tenants of the land were well-founded and he accordingly by an order dated 12th July 1957 declared that respondents Nos. 2 and 3 were tenants of the land. The petitioner thereupon carried the matter in appeal and the appeal was heard by the Prant Officer, Rajpipla. The Prant Officer took the view that the tenancy of Laskaria was not heritable property but was merely a personal right which came to an end on the death of Laskaria and that respondents Nos. 2 and 3 were, therefore, not tenants of the land as heirs inheriting the tenancy of Laskaria. The Prant Officer also found that respondents Nos. 2 and 3 were not accepted as tenants by the petitioner after the death of Laskaria and this ground also, therefore, did not avail them. The contention that the tenancy of Laskaria was joint family tenancy was also rejected by the Prant Officer. The Prant Officer accordingly allowed the appeal and set aside the order of the Mamlatdar. Respondents. Nos. 2

and 3 thereupon preferred a Revision Application before the Revenue Tribunal. Before the Revenue Tribunal it was contended that even though Laskaria was a deemed tenant under Section 4 of the Tenancy Act, respondents Nos. 2 and 3 as heirs of Laskaria were entitled to inherit the tenancy on the death of Laskaria and that they were therefore tenants of the land. This contention founds favor with the Revenue Tribunal and, accepting this contention, the Revenue Tribunal came to the conclusion that respondents Nos. 2 and 3 were tenants of the land, The Revenue Tribunal accordingly set aside the order of the Prant Officer and restored that of the Mamlatdar. It is this decision of the; Revenue Tribunal which is challenged before us in the present petition.

4. Mr. G.P. Vyas, learned advocate appearing on behalf of the petitioner, contended before us that Laskaria being a deemed tenant under Section 4, the tenancy of Laskaria was a statutory tenancy and that there was no provision of law under which such tenancy was heritable on the death of Laskaria. The right of Laskaria as a deemed tenant under Section 4 was, argued Mr. G.P. Vyas, a personal right which came to an end on his death end unless there was some provision of law which provided for passing on of such right to the heirs, such right could not be inherited by the heirs. Mr. G.P. Vyas conceded that there was such provision of law in Section 40 as amended by Bombay Act 13 of 1956 but contended that it had no application since it was not in force at the flats of death of Laskaria. Section 40 which was in force at the date of death of Laskaria was the unamended Section prior to its amendment by Bombay Act 13 of 1956 and provide for the devolution of the right of a deemed tenant under Section 4 on his death and since there was in other provision in the Tenancy Act which provided for such devolution, contended Mr. G.P. Vyas, respondents Nos. 2 and 3 were not entitled to claim any right as tenants as heirs of Laskaria, Mr. B.G. Thakore on the other hand supported the decision of the Revenue Tribunal and the grounds which he urged were not only the grounds which found favor with the Revenue Tribunal but also other grounds which we shall proceed to examine.

5. Mr. B.G. Thakore in the first instance contended that Section 4 created a legal fiction and provided that a person lawfully cultivating any land belonging to another person shall be deemed to be a tenant under certain circumstances. According to Mr. B.G. Thakore, a deemed tenant under Section 4 was not a statutory tenant but was, by reason of the legal action enacted in that Section, a tenant in the full sense of the term with all the rights and liabilities of a contractual tenant and since a contractual tenancy is heritable on the death of the contractual tenant, equally a deemed tenancy under Section 4 was heritable on the death of the deemed tenant. Mr. B.G. Thakore urged that there was no distinction at all between a contractual tenant and a deemed tenant and to make a distinction between the two would be to refuse to give full effect to the legal fiction contained in Section 4. This argument was sought to be reinforced by Mr. B.G. Thakore by relying on Section 3 which provides that the provisions of Chapter V of the Transfer of Property Act shall, in so far as they are not inconsistent with the provisions of the Tenancy Act, apply to tenancies and leases of land to which the Tenancy Act applies. The contention built upon the foundation of Section 3 was that, by reason of that Section, the provisions of Chapter V

of the Transfer of Property Act, which deal with leases, applied to all tenancies and leases of and to which the Tenancy Act applied including deemed tenancy under Section 4 and that Section 111 of the Transfer of Property Act which occurs in Chapter V of that Act also therefore applied to deemed tenancy under Section 4. Mr. B.G. Thakore contended that Section 111 of the Transfer of Property Act provided various modes of determination of a tenancy but death of the tenant was not one of them and it was, therefore, this Section, which by omitting to provide that a tenancy shall be determinate on the death of the tenant, made the tenancy heritable and since this Section applied to deemed tenancy under Section 4, deemed tenancy under Section 4 was also heritable. This was the rather ingenious line of reasoning by which Mr. B.G. Thakore attempted to persuade us to take the view that deemed tenancy under Section 4 was heritable and that on the death of the deemed tenant, the heirs became entitled to the deemed tenancy. This line of reasoning, apart from being involved and tortuous, is, as we stall presently point out, illogical and suffers from various infirmities.

6. It is no doubt true that Section 4 creates a legal fiction and makes a person a tenant who would not other wise be a tenant but for the provisions of that Section. But it must be remembered that legal fictions are created judicial only for some definite purpose. The judicial decisions referred to in the dissenting judgment of S.R. Das, J., as he then was, in *State of Travencore-Cochin v. Shanmugha was Cashew-Nut Factory*[1], and the case of *East End Dwellings Co. Ltd. v. Fins-bury Borough Council*[2], clearly indicate that a legal fiction is to be limited to the purpose for which it is created and should not be extended beyond that legitimate field. The fiction in the present case is obviously created for the purpose of the Tenancy Act and it would not be right to extend the fiction beyond the provisions of the Tenancy Act into the field occupied by the Transfer of Property Act. A deemed tenant under Section 4 would certainly be a tenant for all purposes under the Tenancy Act and every provision of the Tenancy Act which refers to a tenant would apply equally to a deemed tenant under Section 4, but such a deemed tenant would not be a tenant for the purposes of the Transfer of Property Act. The Transfer of Property Act defines a tenant - and such a tenant is clearly a contractual tenant - and unless a person falls within this definition, he cannot be said to be a tenant within the meaning of that expression as used in the Transfer of Property Act. A deemed tenant under Section 4 would not fall within the definition of a tenant under the Transfer of Property Act and would not, therefore, be a tenant contemplated by the Transfer of Property Act. It will, therefore, be seen that a deemed tenant under Section 4 is not a tenant for all purposes. He is not equated with a tenant under the Transfer of Property Act, namely, a contractual tenant in all respects. The equivalence between a contractual tenant under the Transfer of Property Act and a deemed tenant under Section 4 is limited to the provisions of the Tenancy Act and cannot be carried beyond those provisions and merely be cause a contractual tenant under the Transfer of Property Act has an estate or interest in the land, it does not follow that a deeded tenant under Section 4 must also have an estate or interest in the land. A deemed tenant under Section 4 is a creature of statute unlike a contractual tenant under the Transfer of Property Act who is a creature of contract and the legal character of a deemed tenancy is different from that of a contractual tenancy. We may venture to state that even if the

fiction created by Section 4 were not limited to the provisions of the Tenancy Act and were applied wherever the relationship of landlord and tenant fell to be considered, it would not be possible to take the view that the legal character of a contractual tenancy under the Transfer of Property Act, namely, that it represents an estate or interest in the land can affect deemed tenancy under Section 4 and a deemed tenant under Section 4 can be said to have an estate or interest in the land. The legal fiction in such a case might attract the legal incidents provided for a contractual tenancy by the Transfer of Property Act but it would be difficult to hold that deemed tenancy under Section 4 is invested with the same legal character as contractual tenancy in the sense that a deemed tenant under Section 4 has estate or interest in the land like a contractual tenant. That question, however, does not arise since the legal fiction enacted in Section 4 is clearly and indubitably limited to the provisions of the Tenancy Act and the only effect of that legal fiction is that every provision of the Tenancy Act applies as much to a contractual tenant as to a deemed tenant. Mr. B.G. Thakore is, herefore, not

[1] 1954 SCR 53

[2] 1952 AC 109

right in his contention that since a contractual tenant has an estate or interest in the land, a deemed tenant under Section 4 must also equally have an estate or interest in the land.

7. This conclusion which we are inclined to reach is fortified when we turn to the definition of "tenant" in Section 2(18). That Section defines a tenant to mean a person who holds land on lease, meaning thereby a contractual tenant and includes amongst other persons, a person who is deemed to be a tenant under Section 4. This definition of tenant clearly indicates that wherever the expression tenant is used in the Tenancy Act, it means not only a contractual tenant but also a deemed tenant under Section 4 and that it is only for the purpose of extending the scope and ambit of the expression "tenant" as used in the Tenancy Act that the concept of a deemed tenant has been created by the Legislature by enacting Section 4. The Legislature introduced the Tenancy Act on the statute book with a view to conferring certain benefits and protections on tenants against landlords. Now ordinarily the expression "tenant" would mean a contractual tenant, but the Legislature desired that the benefits and protections conferred by the Tenancy Act should not be limited only to contractual tenants but should also extend to persons lawfully in cultivation of land belonging to another and the Legislature, therefore, created by Section 4 an artificial class of persons and deemed them to be tenants so that they would also have the advantage of the beneficent provisions of the Tenancy Act. It was for the purpose of extending the benefits and advantages of the Tenancy Act to this class of persons that the Legislature created the fiction of a deemed tenant under Section 4. The object and purpose of the fiction was not to alter the legal content of the expression "tenant" as understood in the ordinary law of landlord and tenant so as to include within the coverage of that expression for all purposes a deemed tenant under Section 4. We cannot, therefore, agree with Mr. B.G. Thakore that a deemed tenant under Section 4 must be treated for all purposes and in all respects as a contractual tenant to such an extent that just as a contractual tenant has an estate or interest in the

land, so also a deemed tenant under Section 4 must be regarded as having an estate or interest in the land.

8. Mr. B.G. Thakore, appealed to us that we must march with the times and interpret the law in the spirit of agrarian reform which imbues the provisions of the Tenancy Act. Mr. B.G. Thakore contended that the Legislature has revolutionised the concept of a tenant and that it is this new and revolutionary concept which must be absorbed by us and given full force and effect and that it would be wrong on our part to allow our minds to be boggled by the old concepts of a contractual tenant. Of course what we have said above provides a complete answer to this contention of Mr. B.G. Thakore. But we think it necessary to make a few observations in regard to this approach which Mr. B.G. Thakore strongly urged us to adopt while dealing with the provisions of an enactment like the Tenancy Act. It is no doubt true that the felt necessities of the time must in the last analysis affect every judicial determination for the law embodies the story of a nation's development through the centuries and it cannot be dealt with as if it contains only axioms and corollaries of a book of mathematics. A Judge cannot stand aloof on chill and distant heights. The great tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judge by. But at the same time the Judge must remember that his primary function is to interpret the law and to record what the law is. He cannot allow his zeal for social or agrarian reform to overrun his true function. He does not run a race with the Legislature for social or agrarian reform. His task is a more limited task; his ambition a more limited ambition. Of course in this process of interpretation he enjoys a large measure of latitude inherent in the very nature of judicial process. In the skeleton provided by the Legislature, he pours life and blood and creates an organism which is best suited to meet the needs of the society and in this sense he makes and moulds the law in a creative effort. But he is tied by the basic structure provided by the Legislature which he cannot alter and to appeal to the spirit of the times or to the spirit of social or agrarian reform or for the matter of that any other reform for the purpose of twisting the language of the Legislature is certainly a function which he must refuse to perform.

9. Mr. B.G. Thakore next contended that in any event a deemed tenant under Section 4 has an estate or interest in the land and that such estate or interest must, therefore, devolve on his heirs on his death. Now there is nothing in the Act to show that a deemed tenant under Section 4 has any estate or interest in the land. On the contrary the language of Section 4 clearly shows that it is a personal right or status which attaches to an individual since he lawfully cultivates land belonging to another person wider the circumstances specified in the Section. It is difficult to see how this personal right or status can devolve on another by inheritance or testamentary disposition unless of course there is some statutory provision to that effect. Mr. B.G. Thakore was, therefore, constrained to argue that there was a provision in the Tenancy Act which made the right of a deemed tenant under Section 4 heritable on his death and that provision, according to Mr. B.G. Thakore, was to be found in Sections 3 and 30 of the Tenancy Act.

10. We have already set out the contention, of Mr. B.G. Thakore based on the provisions of

Section 3. The contention briefly was that by reason of Section 3, Section 111 of the Transfer of Property Act applied to a deemed tenancy .under Section 4 and a deemed tenancy under Section 4 was, therefore, heritable by virtue of the application of Section 111 of the Transfer of Property Act. The contention was based on the rather curious premise that Section 111 of the Transfer of Property Act by omitting to provide that a tenancy shall be determined on the death of a tenant made the tenancy heritable and that a deemed tenancy under Section 4 to which Section 111 of the Transfer of Property Act applied was also, therefore, heritable. The premise is, in our opinion, clearly wrong. A contractual tenancy under the Transfer of Property Act, is heritable not because of Section 111 of the Transfer of Property Act but because it constitutes an estate or interest in the land which passes on to the heirs by the operation of the Law of Succession. Section 111 of the Transfer of Property Act merely provides various modes for determination of a contractual tenancy but so long as a contractual tenancy is not determined by any of the modes provided by that Section and continues to subsist, it can always devolve by succession, testate or intestate. Of course if Section 111 of the Transfer of Property Act had provided that the tenancy of a tenant shall be determined on his death, the tenancy would not have been heritable by the heirs nor would it have been capable of passing, by testamentary disposition but that would have been so, because the tenancy having come to an end on the death of the tenant, there would have been no property which could be inherited by the heirs or which could pass by testamentary disposition. Such an express provision in Section 111 of the Transfer of Property Act would have prevented the operation of the Law of Succession by destroying the property belonging to the tenant. But when there is no such express provision in Section 111 of the Transfer of Property Act, the law of succession operates on the property of the tenant, namely, his estate or interest in, the land and the tenancy devolves on the heirs if there is intestacy and on the legatees if there is testamentary opposition. Such legal result follows on account of the law of succession and not on account of Section 111 of the Transfer of Property Act. It is, therefore, not right on the part of Mr. B.G. Thakore to contend that because Section 111 of the Transfer of Property Act applies to a deemed tenancy under Section 4, a deemed tenancy under Section 4 is heritable. If Section 111 of the Transfer of Property Act does not make a contractual tenancy heritable, equally it cannot make a deemed tenancy under Section 4 heritable. Besides it is not a correct proposition to state that Section 111 of the Transfer of Property Act applies to a deemed tenancy under Section 4. The provisions of Chapter V of the Transfer of Property Act are not applicable to agricultural leases by reason of Section 117 of the Transfer of Property Act. Section 3, therefore, makes these provisions applicable to agricultural leases in so far as they are not inconsistent with the Tenancy Act. What Section 3 intends to achieve is to put agricultural leases on the same footing as other leases in so far as the applicability of the previsions of Chapter V of the Transfer of Property Act is concerned except to the extent to which they are inconsistent with the provisions of the Tenancy Act. The provisions of Chapter V of the Transfer of Property Act are not extended by Section 3 to the artificial category of tenants created by the Tenancy Act, for by their very nature they are applicable only to contractual tenancies. But apart altogether from this consideration it is apparent that Section 111 of the Transfer of Property Act cannot in any event apply to a deemed tenancy under Section 4 since it is inconsistent with Section 14 and the contention of Mr. B.G.

Thakore based upon the applicability of Section 111 of the Transfer of Property Act by virtue of Section 3 must, therefore, fail.

11. Mr. B.G. Thakore also relied on Section 30, but we do not see how that Section can at all help him. All that Section 30 as it stood at the material time provided was that no provision contained in the Tenancy Act, save and except Sub-Section (3) of Section 6 and Sub-Section (1) of Section 27, shall be construed to limit or abridge the rights or privileges of any tenant under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a court or otherwise howsoever. If, therefore, a tenant had any rights or privileges apart from the provisions of the Tenancy Act such rights or privileges were not to be abridged or limited by the provisions of the Tenancy Act, the object of the Tenancy Act being to augment the rights and privileges of the tenant and not to reduce them. A deemed tenant under Section 4 being an artificial tenant created for the first time by the Tenancy Act, he could not possibly have any rights or privileges apart from the provisions of the Tenancy Act and it is, therefore, difficult to see how Section 30 can be pressed into service by Mr. B.G. Thakore.

12. Reliance was then placed by Mr. B.G. Thakore on the provisions of Section 27 as it stood prior to the amendment effected by Bombay Act 13 of 1956 and also as it stood subsequent to the amendment. Mr. B.G Thakore contended that the provisions enacted in Section 27 applied to a tenant and by reason of the definition of tenant contained in Section 2(18), a tenant within the scope and ambit of Section 27 included a deemed tenant under Section 4 and if that was the position, it was clear from the provisions enacted in Section 27 that the tenancy of a deemed tenant under Section 4 was heritable by his heirs. Section 27 clearly contemplated partition and subdivision, of land between sons and grandsons of a tenant on his death and this provision could not have been made by the legislature argued Mr. B.G. Thakore, unless the Legislature was of the view that the tenancy of the tenant who would include a deemed tenant under Section 4 was heritable. Now this contention though at first blush quits formidable is in fact entirely devoid of any force if the words of the Section are carefully scrutinized. The Section applies only in relation to land leased to the tenant and it is, therefore, clear that the Section can have no application unless the tenant who dies and on whose death the question of partition and sub-division arises if a tenant holding the land on lease i.e., a contractual tenant. The Section does not, therefore, lend itself to any such inference as suggested by Mr. B.G. Thakore and the argument founded upon it must be rejected'.

13. The last Section on which Mr. B.G. Thakore relied was Section 40. Of course Section 40 as it stood prior to its amendment by Bombay Act 13 of 1956 could not help respondents Nos. 2 and 3 since that Section applied only to a situation arising on the death of a contractual tenant Laskaria was admittedly not a contractual tenant and no help could, therefore, be derived from Section 40 prior to its amendment for making out case of continuance of tenancy in respondents Nos. 2 and 3 after the death of Laskaria. Mr. B.G. Thakore, therefore, relied on Section 40 subsequent to its amendment by Bombay Act 13 of 1956. That Section, was in the following

terms :

> "40.(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 oft 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."

Mr. B.G. Thakore contended that this Section applied even though at the date of death of Laskaria which took place on 7th March 1955 this Section in its present form was not in force. We may mention here that Bombay Act 13 of 1956 effected amendment in Section 40 with effect from 1st August 1956 and Section 40 in its present form, therefore, came into being from that date. The contention of Mr. B.G. Thakore thus in effect amounted to this, namely, that the amendment effected in Section 40 was retrospective in operation and that Section 40 as amended applied even though Laskaria died on 7th March 1955 at a time when the amended Section was not in existence. Now it is well-settled by decisions not only of the Privy Council but also of the Supreme Court that while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Section 40 does not embody a provision dealing with a mere matter of procedure but it is an enactment affecting substantive rights. Prior to the amendment, if a deemed tenant under Section 4 died, the, heirs of the deemed tenant were not entitled to inherit the tenancy and they became trespassers liable to vacate the land and if they did not vacate the land, the landlord was entitled to evict them from the land. After the amendment, however, Section 40 operated to protect the heirs of a deemed tenant under Section 4 and provided that on his death the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which he was holding at the time of his death, to such heir or heirs as may be willing to continue the tenancy. This provision clearly affected substantive rights of the landlord and the heirs of the deceased tenant and consistently with the principle of construction set out above, retrospective effect could not be attributed to it unless of course the language of the provision clearly indicated a contrary conclusion either by express enactment or necessary intendment. Mr. B.G. Thakore was, therefore, constrained to argue that Section 40 as amended had a retrospective operation by express language or in any event by necessary intendment. This contention was, however, futile for it was not possible for Mr. B.G. Thakore to point out any express provision in the amended Section 40 from which it could be said that retrospective operation was intended to be given to it by the Legislature nor could he point out anything to indicate the necessary intendment of the Legislature to that effect. Far from there being anything in the Section to indicate that retrospective operation was intended to be given to it by the Legislature, the language of the Section clearly shows that it is prospective in operation. It is clear on the language of the Section

that the point, of time at which the Section operates is the death of the tenant and the Section cannot, therefore, apply in a case where the tenant has died before the, coming into force of the Section. Section 40 as amended could not, therefore, apply in the present case since Laskaria died before the amendment and the amended Section was not in force at the date of his death.

14. As a matter of fact we find that the same view which we are inclined to take in regard to the prospective character of Section 40 as amended by Bombay Act 13 of 1956 has also been taken by a Division Bench of the High Court of Bombay in *Bai Jamna v. Bai Dhani*[3], In that case the question arose out of the death of a tenant before the period of ten years for which his tenancy had been extended under the provisions of the Tenancy Act expired, Section 5(1) of the Tenancy Act as it stood prior to its amendment by Bombay Act 13 of 1956 prohibited a tenancy of a period less than ten years and created a statutory tenancy whose1 period could not be less than ten years. One Hari Lala came into possession of the lands in dispute in that case as a tenant on one year's lease. By virtue of the operation of Section 5(1), his tenancy after the expiration of the period of one year became a statutory tenancy for a further period of nine years so as to make up the total number of ten years for which alone a tenancy could be created under Section 5(1). Before however, the period of ten years expired, Hari Lala died and the question arose whether Bai Dhani, the daughter of Hari Lala, was entitled to the tenancy rights of Hari Lala as his heir. It was held by a Division Bench of the High Court of Bombay consisting of Vyas and Tambe, JJ. that the tenancy rights of a statutory tenant under Section 5(1) were not heritable rights. In that case also a contention was advanced on behalf of Bai Dhani that though Section 40 as amended by Bombay Act 13 of 1956 was not in force at the date of death of Hari Lala, it had a retrospective operation and it, therefore, governed the devolution of the tenancy rights of Hari Lala. This contention was, however, negatived by the Division Bench which took the view that the amended Section 40 was not retrospective in operation and that Hari Lala having died prior to the amendment, Bai Dhani was not entitled to inherit the tenancy rights of Hari Lala. Other contentions similar to the ones advanced before us were also urged on behalf of Bai Dhani in support of her contention that she had inherited the tenancy rights of Hari Lala and was, therefore, entitled to be regarded as a tenant of the landlord but they were also negatived by the Division Bench. Now this decision clearly concludes the answer to the present question

[3] 61 Bom LR 419

against Mr. B.G. Thakore. But Mr. B.G. Thakore tried to distinguish this decision by contending that this decision related to a casa where a statutory tenant under Section 5(1) had died before the expiration of the period of his statutory tenancy and could not apply to a case like the present one where a deemed tenant under Section 4 had died. A distinction was sought to be made by Mr. B.G. Thakore between a deemed tenant and a statutory tenant. Mr. B.G. Thakore urged that a statutory tenancy could not come into existence unless it was preceded by a contractual tenancy and that a deemed tenancy under Section 4 was, therefore, not a statutory tenancy. It is indeed difficult to appreciate this distinction. A tenancy is either a contractual tenancy or a statutory tenancy. It is difficult to conceive of a third category which is neither a contractual tenancy nor a statutory tenancy. Ordinarily there cannot be a tenancy except as a result of a contract between

the parties and such a tenancy is a contractual tenancy. But when the law declares that notwithstanding the absence of a contract between the parties there shall be a tenancy, such a tenancy would clearly to a statutory tenancy irrespective of the fact whether it traces its origin in a contract which has come to an end or it is born independently of a contract. A statutory tenancy is a tenancy which is the creation of a statute and we do not see why a deemed tenancy under Section 4 cannot be said to be a statutory tenancy. A deemed tenancy under Section 4 does not stand on any different footing from a tenancy under Section 5 (1). Both are statutory tenancies meaning thereby tenancies created by statute and not by contract. If, therefore, under the law as it stood prior to the amendment effected by Bombay Act 13 of 1956 the heirs of a statutory tenant under Section 5 (1) were not entitled to inherit the tenancy on the death of the tenant, it must logically follow that on the death of a deemed tenant under Section 4, his heirs also equally could not inherit the tenancy. This decision, therefore, must lead to the inevitable conclusion that the heirs of a deemed tenant under Section 4 ware not entitled to inherit the tenancy under the law as it stood prior to the amendment made by Bombay Act 13 of 1956. Apart from the fact that there is no real distinction between the position, of a deemed tenant under Section 4 and the position of a statutory tenant under Section 5(1), the reasons which induced the Division Bench to take the view that the amended Section 40 was not retrospective in operation must equally apply in the present case. The amended Section 40 cannot be retrospective in operation in case of death of a deemed tenant under Section 4 and be not retrospective in operation in case of death of a statutory tenant under Section 5(1). We are, therefore, of the opinion that this decision, of the Division Bench which is binding upon us must govern the decision of the present case and consistently with this decision, we must take the view that the heirs of a deemed tenant under Section 4 were not entitled to inherit the tenancy, if the death of the deemed tenant occurred prior to the amendment effected by Bombay Act 13 of 1956.

15. That leaves the last argument of Mr. B.G. Thakore based on the theory enunciated in decision of the Revenue Tribunal, namely, that an amending statute must be regarded as having been written in the statute book with the same pen and ink and the statute must, therefore, be regarded as incorporating the amendment from the date on which it was passed. This theory found favor with the Revenue Tribunal and was also canvassed before as by B.G. Thakore. This theory was based upon certain observations of the Supreme Court in *Shamrao V. Paruleker v. District Magistrate, Thana, Bombay*[4], which were as follows :

[4](1952) SCR 683 (AIR 1952 SC 324)

> "The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself into the earlier, then, the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier fact with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all."

These observations were, however, considered by the Supreme Court in a subsequent decision in

Shri Ram Narain v. Simla Banking and Industrial Co. Ltd[5]., where explaining these observations, Jagannadhadas, J., delivering the judgment of the Supreme Court observed as follows :-

> "Now there is no question about the correctness of this dictum. But it appears to us that it has no application to this case. It is perfectly true as stated therein that whenever and amended Act has to be applied subsequent to the date of the amendment the various unamended provisions of the Act have to be read along with the amended provisions as though they are part of it. This is for the purpose of determining what the meaning of any particular provision, of the Act as amended is, whether it is in the unamended part or in the amended part. But this is not the same thing as saying that the amendment itself must be taken to have been in existence as from the date of the earlier Act. That would be imputing to the amendment retrospective operation which could only be done if such retrospective operation is given by the amending Act either expressly or by necessary implication ....."

These latter observations of the Supreme Court clearly expose the invalidity of the theory enunciated by the Revenue Tribunal and advocated by Mr. B.G. Thakore before us for giving a retrospective operation to the provisions of Section 40 as amended by Bombay Act 13 of 1956. The amendment of Section 40 not being retrospective, Section 40 as amended could not be given retrospective operation by rallying on any such theory and respondents Nos. 2 and 3 were, therefore, not entitled to invoke the provisions of the amended Section 40 in support of their contention that on the death of Laskaria who was a deemed tenant under Section 4, they inherited the tenancy of Laskaria and were, therefore, entitled to be regarded as tenants of the land.

16. Before we part with this case we may point out that a contention was also advanced before us by Mr. B.G. Thakore on behalf of respondents Nos. 2 and 3 that since respondents Nos. 2 and 3 were brought on record as heirs of Laskaria in the Revision Application, preferred by the petitioner against the order of the Prant Officer declaring Laskaria to be a deemed tenant under Section 4, it was not open to the petitioner to contend-in the present proceedings that respondents Nos. 2 and 3 were not entitled to inherit the tenancy of Laskaria as his heirs. This was obviously a contention of despair. It is no doubt true that respondents Nos. 2 and 3 were brought on record as heirs of Laskaria in the Revision1 Application preferred by the petitioner, but that cannot affect the legal position as it actually obtained, if on the death of Laskaria, his tenancy was not inherited by his heirs as was the correct legal position, the Revisional Application became infructuous on the death of Laskaria and it was not necessary to bring respondents Nos. 2

[5](1956) SCR 503 : AIR 1956 SC 614

and 3 on record as heirs of Laskaria. But merely because respondents Nos. 2 and 3 were brought on record as heirs of Laskaria, it does not follow that a tenancy which was not heritable on the death of Laskaria became heritable by respondents Nos. 2 and 3. As a matter of fact the only question in the Revision Application was whether Laskaria was a deemed tenant under Section 4 and whets respondents Nos. 2 and 3 were brought on record as heirs of Laskaria, they were

brought on record only for the purpose of adjudication of the question, whether Laskaria was a deemed tenant under Section 4 and the present question, namely, whether respondents Nos. 2 and 3 had become tenants of the land as heirs of Lasharia was not at ail in issue between the parties. The fact that respondents Nos. 2 and 3 were brought on record could not, therefore, have any consequence as contended for ay Mr. B.G. Thakore.

17. Mr. B.G. Thakore also tried to urge before us that the deemed tenancy of Laskaria was joint family tenancy and that respondents Nos. 2 and 3 were, therefore, entitled to the tenancy rights as members of the joint-family. This contention, however, cannot succeed. In the first place it was negatived by the Prant Officer and the finding of the Prant Officer is binding upon the parties. Secondly it was not urged before the Revenue Tribunal though it may be contended on behalf of respondents Nos. 2 and 3 that since the Revenue Tribunal decided in their favor on the point that the tenancy of Laskaria was inherited by them, it was not necessary for them to urge this contention. But the fact remains that the Revenue Tribunal was invited to decide the case on the basis that the tenancy was held by Laskaria and that it was inherited by respondents Nos. 2 and 3 as his heirs which position was clearly contrary to the contention that the tenancy held by Laskaria was joint family tenancy. Lastly, in view of the service agreement between the petitioner and Laskaria, it is difficult to see how it can be contended that the tenancy of Lasksria was joint family tenancy.

18. This being the position it is apparent that en the death of Laskaria who was a deemed tenant under Section 4, respondents Nos. 2 and 3 did not inherit the tenancy and that respondents Nos. 2 and 3 were not tenants of the land. The petition will, therefore, be allowed and the rule will be made absolute. The order passed by the Revenue Tribunal will be set aside and the order of the Prant Officer will be restored. Respondents Nos. 2 and 3 will pay the costs of the partition to the petitioner.
Petition allowed.