GUJARAT HIGH COURT

Patel Ambalal Manilal

Vs.

Desai Jagdishchandra Naginlal

Second Appeal No. 186 of 1971 with Civil Application No. 1229 of 1971

(C.V. Rame, J.)

11/ 14.07.1975

JUDGMENT

C.V. Rame, J.

1. [His Lordship after stating the facts of the case, further observed:-]

5. At this stage, it may be pointed out that the appellants have made an application for permission to amend the written statement in order to enable them to raise a contention that they being mortgagees in possession had become tenants under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1939 (for short the 1939 Act) and that the above position had remained unaffected even under the Bombay Tenancy and Agricultural Lands Act, 1948 (For short the 1948 Act) and hence, the civil court had no jurisdiction to decide the suit. No such contention was raised in either of the courts below. This shows that the appellants have given the above application for amendment at a very late stage. It is argued by the learned Advocate for the appellants that even if it is held that the appellants were in possession of the suit land as mortgagees, they should be deemed to be tenants and hence, the civil court has no jurisdiction to hear the suit. In support of the above arguments, he has relied on the decision of this coot t in the case of *Salam Raje v. Madhvsang Banesang and others*[1], The relevant observations of this court in the above case are-

> "It follows from the views categorically expressed by the full bench in this decision that if a tenant of a mortgagee became a deemed tenant under section 2A of the 1939 Act on the ground only that he came on the land lawfully, though not because of, the permission of or privity with the owner, a mortgagee under an usufructuary mortgage must necessarily be in the identical position and must be said to be a deemed tenant on the same reasoning under section 2A of the 1939 Act.

Sec. 2A of the Tenancy Act, 1939, defines a tenant as a person lawfully cultivating land belonging to another person if such land is not cultivated personally by the owner and secondly if such person is not-

[1]4 G.L.R. 817

(a) a member of the owner's family, or
(b) a servant on wages or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family.

The above section further provides than "such a person becomes a deemed tenant provided that the owner has not made an application to the Mamlatdar within whose jurisdiction the land is situate for a declaration that the person is not a tenant within one year from the date of the coming into force of Bombay Act XXVI of 1916 that is to say, within one year" from the relevant date. It has been pointed out in the above case that-

"It is also clear from the language used in section 2A that there were only two classes of persons whom the Legislature excluded from the benefit of section 2A, viz.-
(1) the members of the owner's family, and
(2) his servants and hired labourers."

Obviously, a mortgagee in possession was not included in these two categories and was, therefore, not excluded from the benefit of section 2A though the Legislature must have been aware of the fact that there would be mortgagees cultivating lands belonging to mortgagors."

6. The Tenancy Act of 1939 was replaced by the Tenancy Act of 1948. According to section 4(c) of the Tenancy Act, 1948, however, a mortgagee in possession was specifically excluded from the category of a tenant. This court held in the above case that section 4 was not retrospective and the rights acquired by the tenant under the old Act were expressly saved by section 89(2)(b)(i) of the Tenancy Act, 1948. Section 89(2)(b)(i) of the above Act provides-

"(2) But nothing in this Act or any repeal effected thereby
(b) shall, save as expressly provided in this Act, affect or be deemed to affect-
(i) any right, title, interest, obligation or liability already acquired accrued or incurred before the commencement of this Act, or".

It does. not appear from the judgment in the case of Salam Raje (supra) that the fact that the words "affect or be deemed to affect" in clause (b) were qualified I y the clause (save as expressly provided in this Act" was considered while taking the view that section 4 was not retrospective and the rights acquired by the tenant under the old Act were expressly saved by section 89(2)(b) of the Act.
7. The above clause has been subsequently considered by the Supreme Court in the case of *S.N.*

Kamble v. The Sholapur Borough Municipality and another[2], In the above case-

> The appellant took on lease two survey numbers from the respondent, Sholapur Borough Municipality on April 1, 1946 for a period of three years. The land is situate within the municipal limits. About November 8, 1946, the Bombay Tenancy Act No. 29 of 1939 (hereinafter referred to as the 1939-Act) was applied to this area and section 3-A of that Act provided that every tenant shall on the expiry of one year from the date of the coming into force of the Bombay Tenancy

[2] A.I.R. 1966 SC 538

> (Amendment) Act, (No. XXVI of 1946) be deemed to be a protected tenant unless his landlord has within the said period made an application to the Mamlatdar for a declaration that the tenant was not a protected one 1 he respondent did not file a suit within one year and therefore the appellant claimed to have become a protected tenant under the 1939 Act. The 193?-Act was repealed in 1948 by the Bombay Tenancy and Agricultural Lands Act, No. LXV11 of 1948 (hereinafter referred to as the 1948 -Act). Section 31 of the 1948 Act provided that for the purposes of this Act, a person shall be recognized to be a protected tenant if such person had been deemed to be a protected tenant under sees. 3, 3A or 4 of the 1939-Act. Ordinarily, therefore, the appellant would have become a protected tenant under this section of the 1948- Act, if he had become a protected tenant under the 1939-Act. But section 88 of the 1948 - Act inter alia provided that nothing in the foregoing provisions of the 1948-Act shall apply to lands hold on lease from a local authority. Therefore, if section 88 prevailed over section 31, the appellant would not be entitled to the benefit of section 31 and could not claim to be a protected tenant under this section. The appellant however relied on section 89(2) of the 1948-Act which provided for the repeal of the 1939- Act except for sees. 3, 3A and 4 which continued as modified in schedule I of the J948-Act. That sub-section provided that nothing in the 1948-Act or any repeal effected thereby shall save as expressly provided in this Act affect or be deemed to affect any right title, interest, obligation or liability already acquired, accrued or incurred before the commencement of the 1948-Act."

8. Section 31 of 1948-Act provided as follows

> "For the purposes of this Act, a person shall be recognized to be a protected tenant if such person had been deemed to be a protected tenant under section 3, 3A or 4 of the 1939-Act."

9. It has been pointed out in the above judgment that, section 89 which repealed the 1939-Act did not repeal secs. 3, 3A and 4 of that Act, but those sections were continued as modified in Schedule I of 1948-Act, for the purpose of section 31 of the 1948-Act. Section 88 of the 1948-Act inter alia provided that nothing in the foregoing provisions of the 1948-Act shall apply to lands held on lease from a local authority or a co-operative society. While negativing the

contention of the appellant that, according to the provisions of secs. 31 and 89(2) of the Tenancy Act, 1948, he should be deemed to be a protected tenant, it has been observed :

> "Sec. 88 lays down that nothing in the foregoing provisions of the 1948 Act shall apply inter alto to lands held on lease from a local authority, like a municipality. As section 31 is one of the foregoing sections it will not apply to lands held on lease from a local authority. In other words, so far as lands held on lease from a local authority are concerned, there will be no provision in the 1948 Act for-recognizing a protected tenant even if a person was a protected tenant under the 1939 Act. It is only section 31 which gave recognition to the status of a protected tenant under the 1948-Act and if that provision is in effect omitted so far as lands held on lease from a local authority are concerned, no such lessee can claim to be protected tenant. In effect therefore the legislature which had conferred by the 1939 Act the status of a protected tenant on certain persons was taking way that status by enacting section 88 in the 1948-Act so far as inter alia lessees from a local authority were concerned."
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> "The narrow question then is whether there is anything express in the 1948- Act which takes away the interest of a protected tenant acquired before its commencement. If there is any such express provision, then section 89(2)(b) would be of no help to the appellant. The contention of the respondent is that section 88 is an express provision and in the face of this express provision the interest acquired as a protected tenant under the 1939-Act cannot prevail. On the other hand, it is urged on behalf of the appellant that section 88 does not in express terms lay down that the interest acquired by a protected tenant under the 1939-Act is being taken away and therefore it should not be treated as an express provision. Now there is no doubt that section 88 when it lays down inter alia that nothing in the foregoing provisions of the 1939-Act shall apply to lands held on lease from a local authority, it is an express provision which takes out such leases from the purview of secs. 1 to 87 of the 1948-Act. One of the provisions therefore which must be treated as non-existent where lands are given on lease by a local authority is in section 31. The only provision in the 1948-Act which recognised protected tenants is section 31 and if that section to be treated as non-existent so far as lands held on lease from a local authority are concerned, it follows that there can be no protected tenants of lands held on lease from a local authority tinder the 1948-Act.
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> It is true that section 88 does not in so many words say that the interest of a protected tenant acquired under the 1939 Act is being taken away so far as lands held on lease from a local authority are concerned; but the effect of the express provision contained in section 88(1)(a) clearly is that section 31 must be treated as non-existent so far as lands held on lease from a local authority are concerned and in effect therefore section 88(1)(a) must be held to say that there will be no protection under the 1948-Act for protected tenants under the 1939 Act so far as lands held on lease from a local authority are concerned. It was not necessary that the express provision should in so many words say that there will be no protected tenants after the 1949-Act came into force with respect to lands held on lease

from a local authority. The intention from the express words section 88(1) is clearly the same and therefore, there is no difficulty in holding that there is an express provision in the 1948-Act which lays down that there will be no protected tenant of lands held on lease from a local authority. In view of this express provision contained in section 88(l)(a), the appellant cannot claim the benefit of section 31, nor can it be said that his interest as protected tenant is saved by section 89(2)(b). This is in our opinion is the plain effect of the provisions contained in section 31, section 88 and section 89(2)(b) of the 1948-Act."

10. As observed above, section 4(c) of the 1948 Act specifically excludes mortgagee in possession from the category of a deemed tenant. The full bench of the High Court of Bombay, has, in the case of *Jasvantrai Tricumtlal Vyas v. Bai Jiwi*[3], observed that :

"the legislature in the Act of 1948 in clause (c) of section 4 has taken mortgagee in possession out of the category of statutory tenants. Therefore, whatever lacuna there was in the old Act has now been made good." As regards the reasons why

[3]59 B.L.R. 168

mortgagees in possession is excluded from the category of a deemed tenant, the Supreme Court has observed in the case of *Dahya Lala v. Rasul Mahomed Abdul Rahim*[4],

"A mortgagee in possession is excluded from the class of deemed tenants on grounds of public policy : to confer that status upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character."

11. The object of section 4(c) of the 1948 Act becomes abundantly clear from the above observations of the Supreme Court. Looking to the above object, it appears that, section 4(c) falls within the clause "save as expressly provided in this Act" occurring in section 89(2)(b) of the 1948 Act and in that case, it would be difficult to say that, the status of a deemed tenant alleged to have been acquired by the appellants under the Act of 1939 is saved by section 89(2)(b)(i) of the 1948 Act. In other words, in the face of the express provision of section 4(c) of the 1948 Act which specifically excludes mortgagee in possession from the category of a deemed tenant, there is no scope for saying that, the appellants' status as deemed tenants is saved by the provisions of section 89(2)(b)(i) of the 1948 Act. An express provision to the contrary would hit any such right acquired before the commencement of the Act. The above view is based on the decision of the Supreme Court in the case of S.N. Kamble (supra) in which it has been further observed-

But the clause 'nothing in this Act shall affect or be deemed to affect' is qualified by the words 'save as expressly provided in this Act'. Therefore, if there is an express provision in the 1948 Act, that will prevail over any right, title or interest etc. acquired before its commencement. Further the words 'save as expressly provided in this Act' also qualify the words 'any repeal effected thereby' and even in the case of repeal of the provisions of the 1939 Act if there is an express provision which affects any title, right or interest acquired before the commencement of the 1948 Act that will also not be saved."

It appears, with great respect to the learned Judges who decided the case of Salam Raje (supra) that, in that case, full effect has not been given to the words "save as expressly provided in this Act" appearing in section 89 (2)(b) of the 1948 Act and in view of the decision of the Supreme Court in the case of S.N. Kamble (supra), the decision of this court in the case of Salam Raje cannot be considered to be a good law. It should further be remembered that, mortgagee in possession was specifically excluded from the category of deemed tenant by section 4(c) of the 1948 Act in order to remove the anomolies created by section 2A of the 1939 Act so far as mortgagee in possession is concerned and hence, it is not likely that, the legislature would have intended to protect any right of a mortgagee in possession to be included in the category of a deemed tenant under section 2A of the 1939 Act, after section 4(c) of the 1948 Act containing the provision to the contrary was, enacted. In view of what is stated above, it becomes evident that, it is not open to the appellants to contend that they are tenants on the ground that they were in possession of the suit land as mortgagees. Under these circumstances, no useful purpose will be served by permitting the appellants to amend the written statement.

Appeal dismissed.

[4]65 B.L.R.328