BOMBAY HIGH COURT

Dhondi Tukaram

Vs.

Dadoo Piraji

Second Appeal No. 1381 of 1949, in Appeal No. 243 of 1948

(Gajendragadkar and Vyas, JJ.)

08.12.1952

JUDGMENT

Shah,J.

1. (After setting out the facts his Lordship proceeded :) It is true that an inference as to permanent tenancy is a mixed question of law and fact and could be raised in second appeal. But the facts found from which the inference in favor of a party claiming to be a permanent tenant is sought to be raised must be regarded as binding in second appeal, though the question as to what inference should be raised from those facts must be regarded as a question of law. In the present case on the facts found it is impossible to raise a presumption under Section 83 of the Land Revenue Code in favor of defendants 1 and 2. Admittedly there is no Miras Patra in favor of defendants 1 and 2, and the question that defendants 1 and 2 were mirasdars was not argued before the learned appellate Judge. Even though, the question as to the jurisdiction of the civil Courts to entertain and decide a suit relating to tenancy and protected tenancy was not argued in the lower appellate Court, Mr. Shukhtankar on behalf of defendants 1 and 2 has contended before me that once defendants 1 and 2 raised a contention that they were tenants and not liable to be evicted, the civil Court had no jurisdiction to decide the suit. The learned trial Judge held on the evidence that defendants 1 and 2 were trespassers in the year 1944, and not tenants as contended by them. He also held that defendants 1 and 2 not being tenants cannot be held to be protected tenants as defined under the Act, and the question of notice to them did not arise, and the Court's jurisdiction was not barred. As I stated earlier, the learned appellate Judge was not invited to consider the question as to the jurisdiction of the civil Courts to entertain and decide the case once defendants 1 and 2 raised a question as to tenancy or protected tenancy.

2. But the question being one as to the jurisdiction of the Court to proceed to a hearing of a suit, even though not canvassed in the lower appellate Court must be decided by this Court. Mr. Shukhtankar relies upon Section 70, Bombay Tenancy and Agricultural Lands Act, 1948, which,

provides 'inter alia'; "For the purposes of this Act, the following shall be the duties and functions to be performed by the Mamlatdar-

(a) to decide whether a person is an agriculturist;
(b) to decide whether a person is a tenant or a protected tenant;....."

Section 85 of the Act is also relied upon by Mr. Shukhtankar; and that section provides in Sub-Section (1) :

> "No 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 in appeal or revision or the State Government in exercise of their powers of control."

Relying upon Sections 70 and 85, Sub-Section (1) of the Act, it is submitted that the combined effect of these two sections of the Act is to bar the jurisdiction of the civil Courts in respect of any question which the Mamlatdar is entitled to settle, decide or deal with. Now, Section 85, Sub-Section (1), is a provision which excludes the jurisdiction of the civil Courts and must be strictly construed. Under Section 70 of the Act the duties and functions of the Mamlatdar set out are expressly stated to be "for the purpose of this Act." It is true that the jurisdiction of the civil Courts to decide, settle or deal with questions required to be decided by the Mamlatdar under the Act is excluded; and when Section 29, Sub-Section (2), provides that a landlord shall not obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar, the jurisdiction of the civil Courts to pass orders in ejectment against tenants defined by the Act must be deemed to have been taken away. Undoubtedly by Section 70 of the Act the Mamlatdar is authorized to decide the question whether a person is a tenant or a protected tenant, provided it is a decision to be given for the purposes of the Act'. If in proceedings under Sub-Section (2) of Section 29 a contention is sought to be raised that the relation of landlord and tenant does or does not subsist between the parties, it would be for the Mamlatdar to decide the question whether a person alleged or claiming to be a tenant or a protected tenant is or is not such a tenant. Section 70 of the Act does not, however, profess to confer exclusive jurisdiction upon the Mamlatdar to decide questions set out in Clauses (a) to (o) of that section, whatever the nature of the proceeding; it merely imposes duties and sets out the functions of the Mamlatdar to be performed for the purposes of the Act. It would, therefore, appear that if in a matter filed in a civil Court a question did arise which if it had arisen in proceedings instituted under the provisions of the Bombay Tenancy and Agricultural Lauds Act, 1948, it would be the duty and the function of the Mamlatdar to decide, the jurisdiction of the civil Courts to decide or deal with that question cannot be regarded as barred. There does not appear any provision in the Bombay Tenancy and Agricultural Lands Act, 1948, which lays down that a civil Court is not entitled to try a civil proceeding which involves the determination of any question falling within Section 70, Clauses (a) to (o), which if it had arisen in a proceeding under the Act would have been settled, decided or dealt with by the Mamlatdar. Normally the jurisdiction of a civil Court depends upon

its competence to decide a claim made by the claimant, and not upon the defense raised by the opponent; and the Court does not lose its jurisdiction merely by reason of a defense raised. In any case the cesser of jurisdiction can be effective only on proof of facts which deprive jurisdiction, and not merely by raising a plea of those facts.

3. I have an impression that numerous cases have come before this Court, some of which have been decided by Division. Bench of this Court, in which contentions have been raised by the defendants that they were tenants or protected tenants, and the Court decided that the defendants were mere trespassers and therefore not entitled to the status of protected tenants, and therefore the Court was entitled to pass decrees in ejectment on the footing that they were trespassers : see the judgment of Weston and Dixit, JJ. in - *'Ramchandra Atmaram v. Ramchandra Laxman[1]'* and judgments in - *'Laxmibai Govind Ambekar v. Maina[2],* and - *'Ibrahim Vajirsaheb v. Noormahomed[3]',* and - *'Jethalal Babar Bhatt v. Chhota Ranchhodas Baria[4]',* If the contention advanced by Mr. Sukhtankar is correct, all those cases must be deemed not to be correctly decided. It is true that the contention was not raised in those cases in the form in which Mr. Sukhtankar is seeking to raise a contention before me in this case. Mr. Sukhtankar has after this judgment was commenced to be delivered sought to rely upon a decision of my Lord the Chief Justice in - ***'Trimbak Sopana v. Gangaram', AIR 1953 Bombay 241***, in which an identical contention was sought to be raised, and it is claimed that it was decided that once a contention is raised by the defendant, in a civil suit filed against him on the footing that he is a trespasser, that lie is a tenant as defined by the Bombay Tenancy and Agricultural Lands Act, the civil Courts lost jurisdiction to try the suit.

4. In view of the importance of the question, I think that this is a fit case which should be referred to a Division Bench for deciding whether on a contention raised by the defendant in a suit filed against him on the footing that he is a trespasser that he is a tenant or a protected tenant, whether the civil Court loses jurisdiction to try the suit by reason of the combined operation of Sections 70 and 85. Bombay Tenancy and Agricultural Lands Act, 1948 ?

JUDGMENT OP DIVISION BENCH :

Gajendragadkar, J. :

5. This appeal has been referred to a Division Bench by Shah, J. because he felt that the question of jurisdiction which had been raised before him by Mr. Sukhtankar on behalf of the appellant was of some importance. The appeal itself arises from a suit in which the plaintiff claimed to recover possession of certain agricultural lands from three defendants. According to the plaint, defendants 1 and 2 were trespassers and defendant 3 was a tenant, whose tenancy had been duly determined. The plaintiff's claim was resisted principally by defendants 1 and 2 who claimed to be mirasdars or permanent tenants. This plea has been rejected by the Courts below and the plaintiff's suit has been decreed. Against this decree defendants 1 and 2 have preferred the

present appeal. At the hearing of this appeal Mr. Sukhtankar contended before Shah, J. that the plea of tenancy which had been raised by his clients in the present suit can be tried by the Mamlatdar alone under Section 70, Bombay Tenancy and Agricultural Lands Act, 67 of 1948, and that the civil Courts have no jurisdiction to entertain such a plea. This particular contention was not urged in the Courts below; but Shah, J. allowed it to be raised because it is a pure point of jurisdiction which arises on the pleadings themselves, it would appear that while Shah, J. had commenced to deliver his referring judgment, Mr. Sukhtankar cited before him the decision of the learned Chief Justice in - 'AIR 1953 Bombay 241' which was in his favor. But Shah, J. was disposed to take the view that the question raised may with

[1]S.A. No. 335 of 194S, D/-14-10-1949 (Bom) [3] S.A. Nos. 374 and 875 of 1950, D/d. 25-10-1950 (Bom) [2] S.A. No. 1201 of 1950, D/-15-7-1952 (Bom) [4] S.A. No. 664 of 1952, D/-13-11-1952 (Bom)

advantage be considered by a Division Bench and so he has also referred this point to us.

6. The scheme of the Bombay Tenancy and Agricultural Lands Act, 1948, seems to be fairly clear. This Act was passed to confer some special benefits on the tenants of agricultural lands. Amongst these, the most important benefit has been conferred by Section 29 of the Act. Section 29 provides for the procedure for taking possession of agricultural lands. The effect of this section is that a landlord cannot obtain possession of agricultural lands which are let out to a tenant unless an order to that effect is passed by the Mamlatdar. An application can be made by the landlord to obtain this relief. An application can also be made by the tenant who has been dispossessed but who claims that he is entitled to possession of any agricultural land. When an application is made to the Mamlatdar in the prescribed form, the Mamlatdar has to make an inquiry into the respective rights of the parties and then pass an order on the application, as he may deem fit. The section provides for a limitation of two years for making such an application, the starting point of the limitation being the date on which the right to obtain possession of the land is deemed to have accrued to the applicant. Sub-Section (4) of Section 29 is very important. It lays down that if any person takes possession of the land except in accordance with the provisions of Sub-Ss. (1) and (2) of Section 29, he shall be liable to forfeiture of crops, if any, grown in the land in addition to payment of costs as may be directed by the Mamlatdar or by the Collector and also to the penalty prescribed in Section 81. The penalty prescribed by Section 81 for contravention of the provisions of Section 29, Sub-Ss. (1) and (2), is the liability to pay a fine up to Rs. 1,000. It would thus be seen that under Section 29 the only procedure available to a landlord to recover possession of the property let out by him to his tenant is to move the Mamlatdar by an application and obtain his order for possession. If the landlord obtains a decree for possession from a civil Court and manages to get into possession in execution of this decree or otherwise, he would prima facie incur all the liabilities prescribed by Sub-Section (4) of Section 29. Consistently with the spirit underlying the provisions of Section 29, Section 70 of the Act provides for the duties of the Mamlatdar. Sub-Sections (a) to (e) of Section 70 mention different kinds of questions which it is the duty of the Mamlatdar to decide under, this Act. Section 70(b) makes it the duty of the Mamlatdar to decide whether a person is a tenant or a protected tenant. Thus, it would follow that when an application is made before the Mamlatdar

either by the tenant or by the landlord and a question arises as to whether the person in cultivation of the land is a tenant or a protected tenant, it is the duty of the Mamlatdar to decide that question. Section 85 shows that the questions which are left for determination of the Mamlatdar under Section 70 cannot, be tried by a civil Court. Section 85(1) clearly 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 by the other tribunals or authorities mentioned in this Act. There is, therefore, no doubt that Section 70 makes the Mamlatdar the forum of exclusive jurisdiction for the determination, of the questions mentioned in that section. Therefore, whenever parties are at issue on the question as to whether a person is a tenant or a protected tenant, the only tribunal that can decide this question is the Mamlatdar and no other. In other words, the Mamlatdar's jurisdiction to deal with the questions mentioned in Section 70 is absolutely exclusive.

7. Shah, J. apparently felt that the opening words of Section 70, "For the purposes of this Act," impose a limitation upon the jurisdiction of the Mamlatdar. The Mamlatdar may have to decide the questions mentioned in Section 70; but that is only for the purposes of this Act. In other words, if a point as to whether a person is a tenant or a protected tenant arises in a proceeding not falling within the Bombay Tenancy and Agricultural Lands Act, the decision of the said point cannot be said to be for the purposes of this Act. That seems to be the effect of the argument. With respect, we do not see how these words can be said to affect the bar created by Section 85 against civil Courts entertaining any plea which falls to be decided by the Mamlatdar under Section 70. The purpose of the Act in the context is deciding the claim, of the parties as to possession of an agricultural land. It may be, the landlord claims to recover possession of the agricultural land from his tenant or the tenant who is dispossessed claims to be restored to possession of the agricultural land. Whenever any such dispute arises between the parties, the object of the party seeking relief is to take possession of the agricultural land; and that undoubtedly is one of the purposes of the Tenancy Act. Indeed Section 29 makes it clear that possession of the agricultural land can be awarded only in execution of an order passed by the Mamlatdar and not otherwise. Therefore, in our opinion, even if a plea, is raised by a defendant in a suit like the present that he is a tenant or a protected tenant, that plea is ultimately referable to the provisions of the Tenancy Act and the purpose of raising the plea is to claim the protection of the Act. If that be so, the decision of this plea must be held to be for the purposes of this Act.

8. In considering the provisions of Section 70 is must be borne in mind that the jurisdiction conferred on the Mamlatdar is not confined to cases where the relationship of landlord and tenant is admitted. In fact, it is only where the said relationship is alleged by one party and denied by the other that the question falls to be considered and the decision of the question is left exclusively to be determined by the Mamlatdar under the provisions of Sections 70 and 85 of the Act. It is likely that u trespasser would thereby be able to prolong litigation between him and the owner of the property by frivolously raising a plea that he is a tenant or a protected tenant; but, on the other hand, a landlord may also frivolously allege that a tenant is a trespasser. We must,

therefore, hold that the only forum that can deal with this plea is the Mamlatdar. If he rejects the plea, the dispute between the owner and the trespasser would be triable by the ordinary civil Court; but otherwise, the Mamlatdar alone will decide the dispute in so far as it falls within the purview of the Act.

9. We may incidentally point out that the un-reported decisions of this Court which Shah, J. has mentioned in his referring judgment were all concerned with the earlier Tenancy Act of 1939. In the said Act exclusive jurisdiction had not been conferred upon the Mamlatdar to decide certain questions; and so there was no question of excluding the jurisdiction of civil Courts in respect of any class or category of questions between landlords and tenants. In fact, the material provisions of Sections 29, 70 and 85 were enacted for the first time in the present Act. Therefore with respect, these decisions are not of any assistance in dealing with the question raised in the present appeal.

10. Therefore, we hold that in a suit filed against the defendant on the footing that he is a trespasser, if he raises the plea that he is a tenant or a protected tenant, the civil Court would have no jurisdiction to deal with that plea. That is the view which has been expressed by the learned Chief Justice in - 'AIR 1953 Bombay 241', and with respect we agree with that view. We would, however, like to add that in all such cases where the civil Court cannot entertain the plea and accepts the objection that it has no jurisdiction to try it. It should not proceed to dismiss the suit straightway. We think that the proper procedure to adopt in such cases would be to direct the party who raises such a plea to obtain a decision from the Mamlatdar within a reasonable time. If the decision of the Mamlatdar is in favor of the party raising the plea, the suit for possession would have to be dismissed, because it would not be open to the civil Court to give any relief to the landlord by way of possession of the agricultural land. If, on the other hand, the Mamlatdar rejects the plea raised under the Tenancy Act, the civil Court would be entitled to deal with the dispute on the footing that the defendant is a trespasser. It would have been much better if Legislature had provided for the transfer of such cases as they have done in the Bombay Agricultural Debtors Relief Act. We would, therefore, like to invite their attention to this aspect of the matter in the hope that some suitable provision would be made in the Tenancy Act.

11. There is another point which we must consider before we part with this case. It appears that when the appeal was argued before Shah, J., it was assumed that the provisions of the Tenancy Act of 1948 applied to the present suit. But this assumption is challenged before us and we have come to the conclusion that the Tenancy Act of 1948 does not apply to the present proceedings. The material section for deciding this point is Section 89. This section provides for the repeal of the enactment specified in the schedule and then it goes on to add in Sub-Section (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
(ii) 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."

It is clear that rights which had vested in the landlord prior to this Act are intended to be saved. It is also clear that legal proceedings in respect of such rights and remedies in respect of them are also intended to be saved with the important proviso that these proceedings should have been commenced before the Act came into force. It is perfectly competent for the Legislature to affect vested rights retrospectively. It is also competent to them to save pending proceedings from the operation of the new Act. Mr. Sukhtankar says that no party has a vested right in procedure and his argument is that this Act has merely substituted the forum of the Mamlatdar for the decision of certain questions instead of the ordinary civil Courts. In support of this argument Mr. Sukhtankar has referred us to a decision of this Court in - *'Shiv Bhagwan v. Onkarmal*[5]*',* This contention is undoubtedly sound. But, on the other hand, if the Legislature has expressly provided that pending proceedings in respect of a right which had accrued to the landlord to evict a trespasser or a tenant whose tenancy has been duly determined should be continued and disposed of as if this Act has not been passed, we must give effect to that provision. Section 89(2)(b)(ii) unambiguously lays down that any legal proceeding in respect of rights mentioned in Section 89(2)(b)(i) shall be continued and disposed of as if this Act

[5] AIR 1952 Bom 365

was not passed. It would be noticed that what are saved are only pending proceedings. In other words, if a proceeding is instituted subsequent to the commencement of the Act, it would be governed by this Act notwithstanding the fact that the right itself had accrued to the party prior to the Act. In this connection it would be pertinent to point out that the last clause of Section 89(2) differs in one material particular from Section 7, Bombay General Clauses Act. Section 7, General Clauses Act deals with the effect of repeal, and, broadly stated, it provides, 'inter alia' that the repeal of an Act would not affect a right which had vested in a party under the repealed Act and it safeguards any legal proceedings which the party may institute in assertion of the said right. This is how the material portion of Section 7 reads :

"....the repeal shall not .....
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be 'instituted', continued or enforced.

and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed." Under the provisions of this section even if a proceeding is instituted subsequent to the repeal of an Act, it will be continued as if the repeal of the Act had not taken place. Section 89 of the present Act, however, does not seem to protect legal proceedings in respect of vested

rights which may be instituted subsequent to the commencement of this Act, unlike Section 7, General Clauses Act. It does not refer to the institution of legal proceedings, but mentions merely their continuance and disposal, which clearly denotes pending proceedings. That is why we hold that it is only pending proceedings in respect of vested rights that are saved from the operation of this Act; so that even in respect of vested rights which are saved, if a suit to enforce them is filed subsequent to the commencement of the Act, the provisions of this Act will apply, and if any question mentioned in Section 70 arises between the parties, it will have to be decided by the Mamlatdar. In the present case it is common ground that the suit was instituted much before the present Act came into force. The suit was in fact filed on 26-6-1946, and was decreed by the trial Court on 29-6-1948. The appeal against this decree was preferred on 4-8-1948, and it was disposed of on 26-8-1949. It was during the pendency of the appeal that the present Act came into force on 28-12-1948. Therefore, in our opinion, it would not be open to the appellant to contend that the civil Court has no jurisdiction to try the plea which he has raised. Our attention has been drawn to an unreported decision of the learned C.J. in - *'Rajgouda Appa Patil v. Anna Appaji Chaugule*[6]*',* in which a similar view has been expressed. My brother Vyas has also taken a similar view in - *'Bhimji Velji v. Pritamlal Bapubhai Desai*[7]*',*

12. We would, however, like to add that in the present appeal we are not called upon to consider whether it would be open to the decree-holder to secure possession of the agricultural land by executing the decree, which may be passed in his favor by the civil Court. Before answering the said question, the effect of Section 29 will have to be considered. We are at present concerned only with the question as to whether the civil Court's jurisdiction is ousted in pending proceedings on the ground that in these

[6] Civil Revn. Appla. No. 686 of 1950 (Bom)

[7] S. A. No. 666 of 1950 (Bom)

proceedings a plea under Section 70(b) is raised, and we answer that question in the negative.

13. Since this matter has been referred to us for the decision of the point of jurisdiction, we must now send it back to Shah, J. for disposal of the appeal in accordance with law.
Answer accordingly.