BOMBAY HIGH COURT

Abdul Rahiman Jamaluddin

Vs.

Vithal Arjun

Special Civil Applns. Nos. 2405, 2869 and 2870 of 1956

(Shah and Gokhale, JJ.)

18.02.1957

JUDGMENT

Shah, J.

1. The petitioner challenges by this application the vires of Section 34(2A)(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, as amended by Section 8(3) of Bombay Act 33 of 1952.

2. The facts which give rise to the petition may be set out: The lands in dispute are S. Nos. 13 and 21 of the village of Purar and belong to the petitioner Abdul Rahiman Jamaluddin Hurjuk. The first respondent is a protected tenant of these lands. The petitioner filed Tenancy Application No. 19 of 1954-55 in the Court of the Mamlatdar of Mangaon, District Kolaba, for an order against the first respondent for possession under Section 29(2) read with Section 34(1) (i) of the Bombay Tenancy and Agricultural Lands Act, 1948, alleging that the petitioner had a large family and that the income derived as rent from his other lands was not adequate for the maintenance of the members of his family and that he wanted the suit lands for personal cultivation. The petitioner submitted that he had terminated the tenancy by serving one year's notice upon the first respondent as required by law.

3. The application was resisted by the first respondent. He claimed that he as a protected tenant of the lands, that the name of the petitioner was not entered in the Record of Rights on 1st January 1952 as Kabjedar and the petitioner could not sue for possession, that the lands were not required *bona fide* for personal cultivation by the petitioner, that the tenancy was not terminated by notice as required by law, and that in any event the notice was invalid.

4. The Mamlatdar passed an order for possession in favour of the petitioner holding that the name of the petitioner was entered in the Record of Rights on 1st January 1952, that the land was required *bona fide* for personal cultivation and that the tenancy had been duly terminated by

proper notice.

5. Against that order an appeal was preferred to the District Deputy Collector, Mahad Division, Kolaba. The District Deputy Collector dismissed the appeal. In the view of the Deputy Collector the income from the suit lands would constitute the principal source of the petitioner's income and that the assessment receipt produced by the petitioner evidenced the requisite entry in the Record of Rights.

6. Against the order passed by the Deputy Collector dismissing the appeal, the first respondent invoked the revisional jurisdiction of the Bombay Revenue Tribunal. A Full Bench of the Tribunal held that fulfillment of the requirement prescribed by Section 34(2A)(1) constituted a condition and the petitioner had no remedy for enforcement of his right unless the condition was fulfilled.

7. It is undisputed that in the area in which the lands are situate the Record of Rights under Ch. X-A of the Bombay Land Revenue Code have not been prepared. Having regard to the circumstances that Record of Rights are not prepared and Section 34(2-A)(l) of the Tenancy Act imposes an obligation upon a landlord to show that his name was entered in the Record of Rights on 1st January 1952, before he can terminate the tenancy of a protected tenant, the Government of Bombay have issued executive instructions that in those areas where no Record of Rights are maintained the landlord may be permitted to prove that he was the owner of the land on 1st January 1952. The Tribunal observed that the Legislature having failed to incorporate a provision which rendered it unnecessary for landlords in areas where the Record of Rights were not maintained to show that their names were entered in the Record of Rights on 1st January 1952, they would 'not be exercising their jurisdiction properly if a benevolent interpretation was given of the provisions contained in Clause (1) of Sub-Section (2-A) of Section 34 of the Act'. The order passed by the Tribunal setting aside the orders of the Mamlatdar and the District Deputy Collector and dismissing the application filed by the petitioner is challenged in this application under Article 227 of the Constitution.

8. It is urged on behalf of the petitioner that Section 34 (2-A) (1) of the Bombay Tenancy and Agricultural Lands Act, 1948, is ultra vires the State Legislature in that it infringes the right to property conferred upon the petitioner by the Constitution and that provision is not saved by Article 31-A or Article 31-B of the Constitution. It is also urged that the condition imposed by Section 34(2-A) of the Tenancy Act amounts' to an unreasonable restriction upon the right of the petitioner to hold property within the meaning of Article 19(1) (f) read with Article 19 (5) of the Constitution.

9. The village of Purar in which the lands are situate was originally part of the Janjira State. By an order passed under the Extra Provincial Jurisdiction Act, 1947, that State merged with the Bombay Presidency. No record of Rights was maintained in the village of Purar before the

merger of the Janjira State, and no record has even been prepared since the merger. Under Section 34(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, if a landlord requires the land held by his protected tenant *bona fide* for personal cultivation, he may notwithstanding anything contained In Section 14 terminate the tenancy by giving one year's notice in writing, stating therein the reasons for such termination. By Sub-Section (2) certain restrictions are imposed upon the exercise of the right of the landlord to obtain possession of the land. By Sub-Section (2-A) which was inserted by Section 8 (3) of the Bombay Act 33 of 1952, it was inter alia provided that if the landlord *bona fide* requires the land for any purpose specified in Sub-Section (1) his right to terminate the tenancy shall be subject to the conditions among others, that the land held by the protected tenant on lease stands in the Record of Rights in the name of the landlord on the first day of January 1952 as the superior holder. It is submitted by Mr. Limaye that this condition infringes the right to property in a manner not warranted by the provisions of Article 31 of the Constitution and unreasonably restricts the landlord's right to hold the land in dispute.

10. Ex facie the provision which imposes a condition upon a landlord requiring him to show that the land, of which tenancy is sought to be terminated stood in his name on 1st January 1952 in the Record of Rights, when no Record of Rights was in fact prepared is unreasonable. It is urged by the learned Advocate-General that the landlord could not comply with the requirement of Section 34(2-A)(1) only on account of his own negligence and that in deciding the vires of Section 34(2-A)(1) the Court must take into account not only the state of affairs existing at the date when the tenancy was sought to be terminated but the possible steps which the landlord could have taken to compel the State to prepare the record by timely action. In order to appreciate this argument it may be necessary to refer to certain provisions of the Bombay Land Revenue Code. Chapter X-A of the Bombay Land Revenue Code deals with the Record of Rights. By Section 135-A it is open to the State Government by notification in the Official Gazette to direct that the entire chapter or any specified provisions thereof shall not be in force in any specified local area, or with reference to any lands or any class of villages or lands, or generally. By Section 135-B it is provided that a Record of Rights shall be maintained in every village and such record shall include the particulars specified in Clauses (a) to (d) of Sub-Section (1) of that section. The Advocate-General says that no notification has been issued under Section 135-A and the State of Bombay was bound to maintain a Record of Rights in the area which constituted formerly the Janjira State, and if the State of Bombay did not carry out its statutory obligation to maintain the Record of Rights, the petitioner could have applied to this Court, for a writ of mandamus directing the State to prepare the Record of Rights, and the petitioner having failed to do so, especially after 1953 when he must have realised that if he desired to terminate the tenancy of his protected tenant he had to show that on 1st January 1952 the land stood in his name, failure to comply with the requirement of Section 34(2-A) (1) is directly attributable to his own negligence and on that score Section 34(2-A)(1) cannot be regarded as ultra vires. We are unable to accept that contention.

11. Whether a statute is ultra vires must be judged in the light of circumstances existing as at the date when the challenge to its validity is raised. It is not in our judgment open to the State to contend that if the attention were invited to the statutory obligation of the State which it has failed to carry out, the State might possibly have taken steps to rectify its error and thereby enabled the landlord to terminate the tenancy effectively under Section 34(2-A)(1). The validity of the provision must be judged only in the light of the fact that neither on 1st January 1952 nor on the date on which the tenancy was sought to be terminated by the landlord by notice served upon the tenant was there in existence any Record of Rights. As the statute imposed an obligation upon the petitioner to show that his name is entered in the record, which did not exist, it must in our judgment be regarded as unreasonable and therefore void.

12. Article 19(1) (f) of the Constitution confers upon all citizens inter alia the right to acquire, hold and dispose of property; and it is the right of every owner to hold, use and enjoy his property after lawfully terminating the tenancy under which the property is held by the tenant. Undoubtedly the right is not absolute and may be limited by restrictions placed on the exercise of that right, but the restrictions must be reasonable. That the petitioner might have persuaded the State to prepare the Record of Rights under Section 135-B of the Bombay Land Revenue Code, in our judgment, does not make the condition imposed by Section 34(2-A)(1) of the Tenancy Act anytheless unreasonable, when in fact no Record of Rights was prepared. In our view, the failure on the part of the petitioner to apply for a writ of mandamus compelling the State to prepare the Record of Rights must be entirely disregarded in judging the vires of Section 34(2-A)(1) in so far as it infringes the right to hold property under Article 19(1) (f) read with clause (5) of that Article.

13. It was then urged that in any event the impugned provision was saved by the operation of Articles 31-A and 31-B of the Constitution. It has not been contended that the impugned restriction placed upon the right of the petitioner is justified by Article 31. The contention that the impugned provision is validated by Article 31-B notwithstanding the infringement of the right to property vested in the petitioner is easily disposed of. It is true that in the Ninth Schedule to the Constitution, the Bombay Tenancy and Agricultural Lands Act, 1948, is one of the Acts specifically mentioned. By Article 31-B none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof are to be deemed void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provision of the Third Part of the Constitution, and notwithstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force. Evidently Article 31-B has been enacted with a view to protect from challenge the provisions of the specified Acts. But the protection in our judgment can only apply to the Acts as they stood at the date when the Constitution (First Amendment) Act, 1951, was enacted. If any other interpretation of Article 31-B were permissible, it would in effect confer upon a subordinate Legislature the power of amending the Constitution. The effect of Article 31-B and the Ninth Schedule is to incorporate the diverse provisions of the Acts in the

Constitution and the provisions of those Acts are rendered free from challenge as inconsistent with or taking away or abridging any rights conferred by the provisions of the Third Part of the Constitution. There is nothing in Article 31-B which confers upon the Legislatures which had originally passed these Acts the power to amend them inconsistently with the provisions of the Constitution or to take away or abridge the rights conferred by the Constitution. If the provisions of the Acts specified in the Ninth Schedule have to be amended, the amendments must either be consistent with the provisions of the Constitution or be saved under Article 31-A of the Constitution. If those provisions are not saved by Article 31-A and are otherwise inconsistent with the Constitution, they must be held void. The Constitution can be amended only by Parliament and in the manner provided by Article 368 of the Constitution, and any attempt to amend the provisions of any of the Acts mentioned in the Ninth Schedule so as to take away or abridge any of the rights conferred by the Third Part of the Constitution by a Legislature other than the Parliament of India and in a manner different from that provided in Article 368 is in our judgment void and ineffective. We are therefore of the view that Article 31-B does not assist the State in maintaining that Section 34(2-A)(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, is intra vires.

14. The relevant part of Article 31-A on which reliance is placed on behalf of the State and by the protected tenant is as follows:-

> "Notwithstanding anything contained in Article 13, no law providing for (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights.........shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31." Under clause (2) (b) of the Article 31-A, the expression 'rights', in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure holder or other intermediary and any rights or privileges in respect of land revenue. The question that falls to be determined is whether the condition imposed by the impugned provision amounts to 'extinguishment or modification' of any right in an estate. The right of a landlord under the Bombay Land Revenue Code in any agricultural land governed by the provisions of the Bombay Land Revenue Code is, by Section 3(5), an estate, and the right of the landlord to terminate the tenancy of a tenant in occupation and to obtain possession is a right in an estate. But the restriction sought to be placed upon the right of the landlord by the impugned provision does not in our judgment amount to extinguishment or modification of that right. Under Section 5(3) it is open to a tenant to terminate the tenancy in respect of any land at any time by surrendering his interest therein in favour of the landlord. Under Section 14 it is open to a landlord, notwithstanding any law, agreement or usage, or decree or order of a Court of law, to terminate the tenancy of any land in circumstances set out in els. (a), (b), (c), (d) and (e) thereof. If a tenant fails to pay the rent within the period provided or he fails to pay reasonable rent or does an act which is destructive or permanently injurious to the land, or

> has sub-divided, sub-let or assigned the land in contravention of Section 27 or sub-lets the land or fails to cultivate it personally or uses it for purposes other than agricultural, the tenancy may be terminated by the landlord. In order to enforce this right fulfilment of the condition that the landlord's name be entered in the Record of Rights on 1st January 1952 is not prescribed. The absence of entry of the name of the landlord in the Record of Rights on 1st January 1952 has therefore not the effect of extinguishing the right of the landlord either to obtain possession or to terminate the tenancy. If in pursuance of a surrender made by a tenant or in enforcement of the right arising under Section 14, a landlord may obtain possession of property even though his name is not entered in the Record of Rights on 1st January 1952 and even if the tenant is a protected tenant, it would be difficult to hold that by imposing the condition provided by Section 34(2-A)(1) the Legislature intended to extinguish the right of the landlord either to terminate the tenancy or to obtain possession of the land. In our judgment by imposing the condition it cannot also be said that the right of the landlord was sought to be modified. The right of the landlord continues in its full force and vigour; only a procedural requirement appears to be imposed upon the enforcement of the right by the impugned provision. In our judgment the modification which is contemplated by Article 31-A is a modification in the proprietary right and not in the method for enforcement of the right.

15. In *Thakur Ragubir Singh v. Court of Wards, Ajmer*[1], their Lordships of the Supreme Court held that a provision which suspends the proprietary title of a landlord was not saved by the operation of Article 31-A of the Constitution. Section 112 of the Ajmer Tenancy and Land Records Act (XLII of 1950) provided that "If a landlord habitually infringes the rights of a tenant under this Act, he shall, notwithstanding anything in Section 7 of the Ajmer Government Wards Regulation, 1888 (1 of 1888) be deemed to be a 'landlord who is disqualified to manage his own property' within the meaning of Section 6 or the said Regulation and his property shall be liable to be taken under the superintendence of the Court of Wards." The validity of this provision was challenged by a disqualified proprietor. Their Lordships of the Supreme Court held that Section 112 could not be regarded as 'reasonable' restriction imposed in the interests of the general public on the exercise of the right conferred by Article 19(1) (f), because it completely negatived the right, by making its enjoyment depend on the mere discretion of the executive. Their Lordships also held that the section was not validated by Article 31-A of the Constitution as it was not 'a law providing for the acquisition by the State of any estate or of any rights therein or for the extinction or modification of any such rights' within the meaning of Article 31-A. Their Lordships observed: "The word 'modification' in the context of Article 31-A only means a modification of the proprietary right of a citizen like an extinguishment of that right and cannot include within its ambit a mere suspension of the right of management of the estate for a time, definite or indefinite." The modification contemplated by Article 31-A is therefore a modification of the proprietary right, and the restriction imposed upon Section 34(2-A)(1) is not such a modification. An erroneous entry in the Record of Rights maintained under Ch. X-A of the Bombay Land Revenue Code can always be corrected, and armed with such an entry

corrected under the procedure provided by the Bombay Land Revenue Code or by a separate suit it may be open to a landlord to obtain possession of property consistently with Section 34(2-A)(1). So long as the erroneous entry remains, the right of the landlord may be regarded as suspended, but on the rectification of the error the right becomes enforceable. It may be possible for the State, as the learned Advocate-General argued, to prepare the Record of Rights retrospectively for areas in which no record is prepared, and if the record is so prepared, the restriction imposed by the impugned provision will disappear. It is evident therefore that so long as there is no Record of Rights or there is an erroneous entry in the record, the landlord's right to terminate the tenancy and to claim possession from a protected tenant for purposes mentioned in Section 34 remains suspended, but mere suspension of the right of the landlord is not in our judgment extinguishment or modification of the proprietary right. We are therefore of the view that Article 31-A does not protect the impugned provisions against the vice of infringing the Constitutional guarantee of right to property.

16. We uphold the argument advanced on behalf of the petitioner and are of the view that Section 34(2-A) (1) of the Bombay Tenancy and Agricultural Lands Act, 1948, is inconsistent with the right to property conferred by Part HI of the Constitution and is therefore void in so far as it requires landlords owning lands in areas in which Record of Rights is not prepared to show that their names were entered in the Record of Rights on 1st January 1952. On the view taken by us the order passed by the Bombay Revenue Tribunal must be set aside. We direct that the proceedings be remanded and the Tribunal do hear and dispose of the same according to law. There will be no order as to costs.

[1] 1953 SCR 1049

Petition allowed.