BOMBAY HIGH COURT

Chimanabaj Rama Naik

Vs.

Ganpat Jagannath Naik

Special Civil Appln. No. 1626 of 1957

(Chagla, C. J. Tendolkar and Datar, JJ.)

15.01.1958

JUDGMENT

Chagla, C.J.

1. A very short question as to limitation arises for our determination in this Full Bench and the question depends upon the proper construction to be given to Section 29(2) of the Bombay Tenancy and Agricultural Lands Act.

2. The facts briefly are that on 4-11-1954 the landlord made an application for possession of the lands held by us tenant on the ground that he had sub-let one of the lands contrary to the provisions of Section 27 of the Bombay Tenancy and Agricultural Lands Act. The landlord contended that he was not aware of this sub-letting until November 1953. On the facts found it is clear that the sub-letting took place more than two years before 4-11-1954 and the question that arises is whether if the subletting took place, more than two years before the date of the application, which is 4-11-1954, the application of the landlord to obtain possession is barred by limitation.

3. Now, we have to consider a few sections of the Tenancy Act in order to decide this question and the first section is Section 14 which provides :

> "Notwithstanding any agreement, usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be terminated unless such tenant - (and the relevant sub-clause is sub-clause (d)) -
> (d) has sub-let the land or failed to cultivate it personally....."

It is clear from this section that the sub-letting by itself does not lead to an automatic termination of the tenancy. The Tenancy Act has put impediments in the way of the landlord from terminating the tenancy of his tenant and Section 14 removes these impediments and lays down the various cases in which he can terminate the tenancy and one of the cases is where the tenant has sub-let the land or failed to cultivate it personally. Therefore, under Section 14 the tenancy of

a tenant is liable to be terminated in the event of his sub-letting the land. There is no obligation upon the landlord to take possession. There is no obligation upon him to terminate the tenancy. He has merely a right to terminate the tenancy, which right he may or may not exercise. He may ignore or overlook the breach constituted by the sub-letting, in which case the tenancy would not be terminated and the tenant could continue to hold the land as the tenant of the landlord. Now, a proviso was added to this section by Bombay Act XXXIII of 1952 and that proviso requires a statutory notice to be given by the landlord. That statutory notice was given by the landlord. The proviso provides the method to be adopted by the landlord for terminating the tenancy. If he intends to terminate the tenancy, he must give a statutory notice of three months' duration. Before the proviso the section did not lay down the mode of terminating the tenancy. But it is clear that the landlord had to terminate the tenancy by some conscious act. He must show his clear unequivocal intention that in view of the subletting by the tenant he wanted to terminate the tenancy.

4. The next section is Section 27 which provides that "no sub-division or sub-letting of the land or assignment of any interest held by the tenant shall be valid. Such sub-division, sub-letting or assignment shall make the tenant liable to termination". The language of this section further emphasizes the view that we have taken of Section 14, because Section 27 clearly states that the result of the sub-letting is that the tenancy becomes liable to termination. The tenancy is not in fact terminated; there is only the right of the landlord to terminate the tenancy and the liability of the tenant to have his tenancy terminated. The final section is Section 29(2) :

> "No landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land or dwelling house, as the case may be, is deemed to have accrued to him."

The one fact that immediately strikes the reader of this section is that the Legislature had advisedly not made the time, when the actual right to take possession accrues to the landlord, the starting point of limitation. It was open to the Legislature to have indicated some actual act which resulted in the starting of the period of limitation. But instead of doing so, the Legislature has inserted a legal fiction and the legal fiction is that or, have not to consider for the purpose of limitation when the right to obtain possession actually accrued to the landlord, but what you have to consider is when the right to obtain possession accrued to him fictionally by reason of the fiction introduced by the Legislature. Therefore, it is clear that under Section 29(2) limitation does not begin to run from the time when the right to obtain possession actually accrues to the landlord. It begins to run from a time antecedent to that point of time. It begins to run from a point of time when in fact he has no right to obtain possession, but the Legislature for the purpose of limitation considers that he has a right to obtain possession.

5. Now, if this scheme is clear, then there is no difficulty in construing this section. The first question we must ask ourselves is : When does the right to obtain possession actually accrue to the landlord ? In view of what we have already said that sub-letting by itself does not bring about a termination and that the tenancy is only liable to be terminated, it is clear that when a tenant sublets there is no right in the landlord to obtain possession. Some further act is necessary on his

part before the right to obtain possession can arise and that further act is either the giving of a notice or the taking of some unequivocal act indicating his intention to terminate the tenancy.
It is at that point of time that the right to possess actually accrues to the landlord. But as we have already said, that is not the point from which limitation starts, Therefore we must look to something antecedent to the actual moment of time when the right to possess accrues to the landlord and that antecedent point of time is the creation of the sub-tenancy. What the Legislature says is that when the tenant creates a sub-tenancy, although the right to obtain possession has not accrued to the landlord for the purpose of limitation look upon the creation of the sub-tenancy as the starting point of limitation.

6. Now, Mr. Jahagirdar accepts the position that there is a legal fiction. He also accepts the position that the Legislature has not indicated the actual act which will start the point of limitation. But according to him the legal fiction is not what we suggest is the fiction introduced by the Legislature. According to Mr. Jahagirdar the legal fiction is the knowledge on the part of the landlord of the creation of the sub-tenancy by the tenant. According to Mr. Jahagirdar the right to possess arises on the creation of the sub-tenant, but inasmuch as he must terminate the tenancy, inasmuch as he must take some unequivocal act, he should have knowledge of the creation of the sub tenancy and it is that knowledge which for the purpose of limitation is considered by the Legislature to be the legal fiction and it is to indicate that knowledge that the expression "deemed to have accrued" is used in Section 29(2). We fail to understand what knowledge has got to do either with the actual right to possession or the fictional right to possession. The other difficulty in the way of accepting Mr. Jahagirdar's argument is that really he postpones the legal fiction to the actual right to possess accruing to the landlord. If the right to possess has already accrued to the landlord, then it is difficult to understand why a legal fiction had to be introduced at a point of time subsequent to the actual right. Further, if Section 14 merely makes the tenancy terminable at the option of the landlord, then it is difficult to accept Mr. Jahagirdar's contention that the right to obtain possession arises by reason of the subtenancy created by the tenant. The creation of the sub-tenancy as provided by Section 14 at the highest merely creates an inchoate right in the landlord.
That right can only be completed by some unequivocal act on the part of the landlord. Therefore, we have two stages; the inchoate right created by the sub-tenancy and the completed right created by either the giving of notice or the doing of some unequivocal act and the Legislature by legal fiction wants us to look upon the inchoate right as the actual right. That is the legal fiction created by Section 29(2).

7. Now, there are conflicting decisions which have necessitated this Full Bench. It will be sufficient for our purpose to refer only to those judgments which have been reported. There are three reported judgments. The first is the judgment of Mr. Justice Dixit and Mr. Justice Vyas reported in *Rachgouda Puragouda v. Appasaheb*[1], and in that judgment Mr. Justice Dixit took the view that as the sub-letting took place on a particular date, it was that date that a right to obtain possession must be deemed to have accrued to the applicant within the meaning of Section 29(2) of the Act. That view has been reiterated by Mr. Justice Dixit and Mr. Justice *Shelat in Bhailalbhai Tulsidas v. Shankerbhai*[2],

8. There is a subsequent decision of Mr. Justice Bavdekar and Mr. Justice Gokhale in *Suibraya Varadappa v. Gopal Krishna*[3], which has taken the view for which Mr. Jahagirdar is contending. With very great respect to the learned Judges who

[1]58 Bom LR 64 [3]59 Bom LR 62
[2]59 Bom LR 1081

decided that case, we find it difficult to accept the view put forward by them in their judgment. The view taken by Mr. Justice Bavdekar is that the right to obtain possession itself arises only when the tenant has sub-let the land and the landlord has come to know of the sub-letting. Again with respect, it is difficult to understand what the knowledge of the landlord has got to do with his right to obtain possession. We can understand the contention that the right arises when the sub-letting takes place as contended by Mr. Jahagirdar, or we can understand the other view that the right arises when the tenancy is terminated by some unequivocal act on the part of the landlord. But to introduce this uncertain element of knowledge in a legal right created in. the landlord is to hedge the right with some factor which the law does not recognize. Having taken that view, Mr. Justice Bavdekar further takes the view in his judgment that in using the expression "deemed to have accrued", the Legislature has not introduced any legal fiction at all and he construes that expression to mean the actual accrual of the right to obtain possession. This view also we find it very difficult to accept. If the Legislature wanted the actual right to obtain possession, to be the starting point of limitation, there seems no reason whatever why the Legislature should have deliberately and advisedly used the expression "deemed". It would not be right to impute to the Legislature a complete ignorance of the meaning of the English expression "deemed". Inasmuch as the judgment of Mr. Justice Bavdekar and Mr. Justice Gokhale is based upon these two views which we find it with respect, difficult to accept, in our opinion the decision was erroneous inasmuch as it took the view that the starting point of limitation arose from the date of the knowledge of the landlord and not from the date when the sub-tenancy actually took place.

9. There are two further general observations which we might make. The first is that the Tenancy Act was put on the statute book in order to give security of possession to the tenants and it may well be that the Legislature took the view that if two years had elapsed after the actual sub-letting, whether the landlord knew about it or not the tenant's possession should not be disturbed and that was the view of the Legislature it could only effect to that view by the language it has used in Section 29(2). The other observation, is that to introduce the element of knowledge on the part of the landlord in order to determine the period of limitation would be introducing a very uncertain incalculable factor. The actual fact of sub-letting is easy to ascertain and determine. Knowledge is something personal and is much more difficult to determine and therefore one can again understand why the Legislature did not intend this factor to be the material factor in determining the period of limitation.

10. We will slightly modify the question framed by the Division Bench and the question so modified will read as follows :

> "Is the right to obtain possession of the land deemed to have accrued to the landlord on the date on which the land was sub-let, or on the date on which the landlord came to know of the sub-letting ?"

And our answer would be : "on the date on which the land was sub-let."
Answer accordingly.