

# BOMBAY HIGH COURT

Vasant

Vs.

Dikkaya

Special Civil Appln. No. 2947 of 1974

(Deshpande and Lentin, JJ.)

13.09.1979

## JUDGEMENT

### **Deshpande, J.**

1. This case raises a question of importance as to the authority of any statutory tenant to assign his tenancy rights and is referred to the Division Bench by Kanade, J., because of his difference on this point with the view of Mts. Justice Sujata Manohar indicated in the case of *Hargovind Dharamsey and Co. v. Ruby and Co<sup>l</sup>.*, The facts so far as relevant to the point raised are not in dispute, The petitioners are the heirs of the landlord - original defendant. He was the owner of house C.S. Nos. 319 and 320 situated at Peth Bhag, Sangli. House C.S. No. 319 with which we are concerned, consisted of a ground floor and the first floor. Both the houses were let out to one Labhashankar Pandya in the year 1940. He sublet the ground floor of House No. 319 to one Gopalkrishna. He was running a hotel therein. Sub-tenancy of Gopalkrishna was held to be valid in an earlier Civil Suit No. 138 of 1956 by the landlord against him and the tenant, long before Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (referred to hereinafter as 'the Rent Act') was amended in the year 1959. The landlord again instituted two suits for possession against the tenant and the sub-tenant being Suit Nos. 218 and 219 both of 1961. Suit against the tenant - Pandya - was decreed and the landlord ultimately got possession of the first floor in execution of the decree on 7th July, 1964. The suit against the sub-tenant, Gopalkrishna, was, however, dismissed on 29th September, 1962. He thus himself became the tenant under Section 14 of the Rent Act.

2. Gopalkrishna died on 8th October, 1970. Before his death he assigned, his business of hotel along with the tenancy rights in the ground floor by an assignment deed dated 13-10-1969 in favor of the present plaintiff-respondent Pujari. The respondent thereupon instituted a declaratory Suit No. 351 of 1969 on 12-12-1969, before the death of the tenant of his having become the tenant of the 1st floor on the strength of the said assignment deed. This Suit, and Suit No. 273 of

1969 by the landlord against him and Gopalkrishna for enforcing his right of access from the ground floor stair-case to the first floor were tried together. This suit was dismissed on 30-3-1973 though the landlord's suit was decreed with which we are no more concerned in this case. On appeal by the plaintiff, however, the same was allowed and the suit has been decreed on 30-3-1974

<sup>1</sup> AIR 1979 Bom 69

declaring the plaintiff to have become the tenant. Validity of this decree is challenged by the heirs of the original landlord in this Special Civil Application.

3. That the assignor Gopalkrishna was a statutory tenant is not in dispute. The only question is whether statutory tenant's is competent to so assign his tenancy rights in the premises to the plaintiff. Assignment of tenancy rights under the Bombay Rent Act can be effective and valid, only if it is covered by the proviso to Section 15(1) thereof. Mr. Ajit Shah, the learned Advocate, appearing for the respondent-plaintiff, relied on this proviso before Kanade, J. It has, however, consistently been held by this Court that statutory tenant possesses only a right to remain in possession and he does not hold any transferable or heritable estate or interest in the premises so held by him as such statutory tenant. This view was affirmed by the Supreme Court in *Anand Nivas Pvt. Ltd. v. Anandji*<sup>2</sup>, This case further holds that prohibition against transfer and assignment under Section 15(1) of the Rent Act, and relaxation thereof under the proviso, is applicable only to the contractual tenant, and not to the statutory tenant, whose tenancy is *per se* not transferable. Mr. Rane, the learned advocate for the defendant-petitioner, relied on this judgment before Kanade, J. in support of his contention that statutory tenant did not possess any transferable interest and Section 15(1) or the proviso on which reliance was placed was inapplicable to the tenancy of the statutory tenant.

4. Mr. Ajit Shah in turn relied on a subsequent judgment of the Supreme Court in the case of *Damadilal v. Parashram*<sup>3</sup>, and contended that a statutory tenancy is transferable in the same manner as the contractual tenancy is and prohibition against the transfer of tenancy right even of a statutory tenant still has to be traced only to Section 15(1) of the Act but the assignment in this case was covered by its proviso. He relied also on the judgment in Hargovind's case (AIR 1979 Bombay 89) (supra) by a learned single Judge of this Court upholding the statutory tenant's right to assign his tenancy along with the assets of the business in terms of the proviso to Section 15(1) of the Rent Act, and the Government Notifications concerned thereunder. The learned Judge followed the ratio of Damadilal's case and found the ratio of Anand Nivas case (AIR 1965 SC 414) to be irrelevant for two reasons. Firstly, that the reasoning therein was disapproved in Damadilal's case, and secondly, that the wording of Section 2(i) and Section 14 of the M. P. Act and that of corresponding Section 5(11) and Section 15(1) of the Bombay Rent Act was similar. Kanade, J., however, found it difficult to ignore the ratio of Anand Nivas case directly dealing with Section 15 of the Bombay Rent Act, and to follow Damadilal's case dealing with the provisions of the M.P. Act. Hence this reference.

5. Mr. Rane's contention before us is threefold. Firstly, that the decision in Damadilal's case, (AIR 1976 SC 2229) dealing with the heritability of the statutory tenancy cannot have the effect of impairing the ratio in Anand Nivas case (AIR 1965 SC 414) on the issue of transferability thereof. Secondly, that the decision in Anand Nivas case on Sections 12 and 15 of the Act on its wording and the scheme of the Act, cannot be said to have been overruled by its decision on the wording and scheme of any other enactment. Thirdly, that the decision on Section 15 of the Act having been subsequently affirmed by the larger Bench of four Judges in *J.S. Murarji v. Sovani*<sup>4</sup>, cannot be held to have been overruled by a Bench of three Judges in Damadilal's case.

<sup>2</sup> AIR 1965 SC 414

<sup>4</sup> AIR 1973 SC 772

<sup>3</sup> AIR 1976 SC 2229

6. It is necessary to examine the facts and ratio of each of these two cases closely to consider the validity of these contentions. The tenant had sublet a portion of the premises to the appellant in Anand Nivas case (AIR 1965 SC 414) long after the expiry of the lease period, and his having become the statutory tenant, and after the institution of eviction suit against him for non-payment of rent. This suit, to which the appellant was not a party was decreed. On the failure of his attempt to resist the execution of the decree, the appellant instituted a fresh suit for declaration of his having become a tenant on the basis of the said sub-lease, and for injunction against eviction. The appeal to the Supreme Court before a Bench of three Judges, arose out of the interlocutory proceedings on the application of the appellant for interim injunction, which was rejected by all the courts throughout. Three questions arose for consideration, namely - (1) whether the statutory tenant possessed any transferable interest in his tenancy so as to be competent to sublet the premises under the ordinary law of leases and, if not, (2) whether the provisions of the Bombay Rent Act authorize such statutory tenant to sublet the premises or any portion thereof held by him as such statutory tenant, and (3) whether the sub-lease was hit by the principles of *lis pendens* under Section 52 of the T.P. Act ? The learned Judges differed on all these three points.

7. On the first question Sarkar, J., accepted the legal position (para 9) that a statutory tenant had "no estate or property in the demised premises", but held that he had "nonetheless an interest, a right in the premises occupied by him, which he may be empowered to transfer". The learned Judge made a distinction (para 7) between estate and property in the tenancy and a mere "interest" to retain the premises and sublet it, which according to him, did not necessarily involve "transfer of estate or property". On the other hand, Shah, J., speaking for the majority held that no statutory tenant can have any transferable interest in the tenancy, his only right being to remain in possession on payment of rent and complying with other conditions of tenancy.

8. On the second point, Sarkar, J., found, the wording of Section 13(1)(e) of the Rent Act on par with the wording of Section 4(1)(h) of the English Act, and an implied authority therein for the statutory tenant to sublet as held in English case relied on by him. Shah, J., on his interpretation of Section 12(1) found statutory tenant to have no transferable interest in the tenancy and distinguished the English cases cited before him and relied on by Sarkar, J., on the basis of the wording of Section 15(1) of English enactment enabling the statutory tenant to enforce the beneficial terms of tenancy agreement as against the wording of Section 12(1) requiring him

merely to carry out the terms and conditions thereof. The learned Judge then took notice of the width of the inclusive definition of the word 'tenant' under Section 5(11) of the Act and indicated how it depended on the context whether reference in any Section was intended to the statutory or contractual tenant. On this test, the word "tenant" in Section 12(1) was found by him to mean only a statutory tenant, whilst the same under Sections 13(1)(e), 14 and 15 to mean a contractual tenant. He also further held that Sub-Section (2) of Section 15 introduced in the Act by 1959 Amendment Act to validate the sub-leases prohibited under Sub-Section (1) of Section 15 cannot apply to the statutory tenant when Sub-Section (1) itself applied to the contractual tenant.

9. On the third point, while Sarkar, held Section 52 to be inapplicable for want of compliance with the Bombay Amendment Act 14 of 1939, Shah, J., found the sub-lease to have been hit by the principles of *lis pendens* under Section 52 of the T.P. Act, as the amended provision did not apply to the place where the house was situated.

10. Coming then to Damadilal's case (AIR 1978 SC 2229) the tenant therein died during the pendency of his Second Appeal in the High Court against a decree for eviction passed against him for the *bonafide* need of the landlord and non payment of rent. His heirs lost the appeal in the High Court and Supreme Court. The landlord in addition to raising other points, challenged, the right of the heirs to inherit the statutory tenancy of their father and prosecute appeals in defense thereof. Reliance was placed on the ratio of Anand Nivas case (AIR 1985 SC 414) as also the subsequent judgement of a Bench of two learned Judges of the Supreme Court in *J.C. Chatterjee v. S.K. Tandon*<sup>5</sup>, holding statutory tenancy not to be heritable. The case was heard by a Bench of three Judges. Gupta, J., speaking unanimously for the Court, first noted (para 10) how the decision in both these earlier cases "proceed on the basis that a tenant whose tenancy has been terminated, described as statutory tenant, has no estate or interest in the premises but only a personal right to remain in occupation" and indicated how "the term 'statutory tenancy' is borrowed from the English Rent Acts". The learned Judge then traced the origin of the conception of 'statutory tenancy' since the English Rent enactment of 1915 and emphasized how the same was based, not on the text of the Section, but on the marginal note thereof. The learned Judge then indicated how the said conception not crystallized in the statute when the words "statutory tenant" were, for the first time, defined in Section 49(1) of the 1954 Enactment to mean as "a tenant who retains possession by virtue of the Rent Acts and not as being entitled to a tenancy" (Underlining supplied), The learned Judge then made the following observations in para 11 of the judgment :

"The concept of a statutory tenant having no estate or property in the premises which he occupies is derived from the provisions of the English Rent Acts. But it is not clear how it can be assumed that the position is the same in this country without any reference to the provisions of the relevant statute". The learned Judge also observed :

"Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject-matter of the tenancy, and heritability is an incident of the

tenancy. It cannot be assumed, however, that with the determination of the tenancy the estate must necessarily disappear and the statute can only preserve his status of irremovability and not the estate he had in the premises in his occupations."

11. The learned Judge then examined the relevant provisions of the Madhya Pradesh Accommodation Control Act, and relying on the wording of Section 2(i) and Section 14 thereof, held that ordinary incidence of heritability continued to attach to the statutory tenancy thereunder.

12. It is difficult to escape the conclusion that the view expressed in Anand Nivas case (AIR 1965 SC 414) as to the statutory tenant basically not having any interest, estate or property in the demised premises is irreconcilable with the view in Damadilal's case (AIR 1976 SC 2229) that heritability is the incidence of the tenancy and that a statutory tenant does not cease to hold such an estate, interest and property therein as such ordinary

<sup>5</sup> AIR 1972 SC 2526

incidence of tenancy unless the statute protecting his such possession provides to the contrary. Transferability is as much the incidence of any tenancy as heritability. Origin of tenancy being in the contract, the same is enforceable by or against the heirs and transferees, unless any personal element is involved in the contract itself. To this extent we find ourselves in agreement with Mrs. Justice Sujata Manohar and hold that view indicated in Damadilal's case is binding on us. This conflict in the views cannot be explained either on the ground that Damadilal's case was dealing with a Madhya Pradesh enactment or with the question of mere heritability of the tenancy. A question involving merely of an interpretation of Section 2(i) of the said Act ultimately turned on the basic incidents of any tenancy without regard to any particular property or any Act. This is what a Division Bench, to which one of us (myself) is a party had occasion to emphasise in the judgement in the case of *Sou. Nakabai @ Anusayabai w/o Maruti Naikwadi v. Mahadu S. Adsule*<sup>6</sup> while considering whether the statutory tenancy under the Bombay Tenancy Act in respect of lands belonging to the Public Trust Act to which application of Section 40 of the Act is excluded, was heritable or not.

13. The contention of Mr. Rane as to the competency of the later Bench of three Judges to overrule the ratio of the earlier Bench of equal number of Judges need not detain us in the event of there being clear conflict, the decision of such later Bench would be binding on us. Secondly, the decision in Anand Nivas case (AIR 1965 SC 414) is based not so much on the incidence of statutory tenancy as on the interpretation of Sections 12 to 15 of the Rent Act. All the Judges were unanimous on statutory tenant having no estate or property in the tenancy. Even while expressing dissent as to the extent and nature of any statutory tenant's "interest" in the tenancy, Sarkar, J., proceeded on the hypothesis that the power of transfer of even such "interest" required authority of law. The determination of true scope and import of Section 13(1)(e) and consequently of Sections 12, 14 and 15 appear to have been assumed to be the main point in controversy in that case and the decision on the first point indicating conflict on a narrow margin appears to have been treated as mere observations. This may have prompted the later Bench to

dispense with any need to refer the point to a larger Bench.

14. Thirdly, the difference of opinion, though irreconcilable, centres round a very narrow margin namely whether initial presumption should be (1) of the statutory tenant ceasing to have no such estate, or interest or property with the end of his contractual tenancy, as held by Shah, J., or (2) of his possessing such estate, etc., as an incidence of tenancy till the statute concerned provides to the contrary. Legislative competency to clothe even such statutory tenancy with the attribute of transferability is not doubted even in Anand Nivas case (AIR 1965 SC 414). Provisions of the English enactment to that effect and the points based thereon are discussed by Shah, J., in his judgment. The first contention of Mr. Rane is thus liable to be rejected. These aspects of the matter do not appear to have been brought to the notice of Kanade, J. On this point of initial presumption as to the subsisting incidence of the tenancy, we shall have to follow the ratio of Damadilal's case (AIR 1976 SC 2229) in preference to the decision in Anand Nivas case and shall have to proceed on the assumption that statutory tenant does ordinarily possess transferable interest in his tenancy. We shall have to find out from the provisions of the Bombay Rent Act, if anything therein has the effect of destroying it.

<sup>6</sup>(Letters Patent Appeal No. 72 of 1975 in Second Appeal No. 1481 of 1967) D/-14-8-1979 : (AIR 1980 Bom 208)

15. Mr. Rane's second and third contentions appear to us to be formidable. The decision in Anand Nivas case (AIR 1965 SC 414) as to the import of Sections 12 and 15 appears to be conclusive of whether the same is destructive of the assumed incidence as to transferability of statutory tenancy. Even on the hypothesis of the statutory tenancy being *per se* not transferable, it was argued therein that Section 13(1)(e) implied an authority for the statutory tenant to sublet, and reliance was placed on certain English rulings in support thereof. Though Sarkar, J., accepted this contention, Shah, J., for the majority rejected it holding firstly that Section 12(1) prohibited such transfer and, secondly, that Sections 13, 14 and 15 were applicable only to the contractual and not to the statutory tenants. Emphasizing how corresponding Section 15 of the English Act empowered statutory tenant to enforce the beneficial terms of earlier contract of lease. Shah, J., pointed out how Section 12(1) of the Bombay Rent Act made protection of his even mere possessory right conditional on compliance with conditions of the initial tenancy. The learned Judge then concluded as follows in paragraph 27 p. 422 :

"Section 12(1) of the Act merely recognizes his right to remain in possession so long as he pays or is ready and willing to pay the standard rent and permitted increases and performs the other conditions of the tenancy, but not the right to enforce the terms and conditions of the original tenancy after it is determined."

16. It is true, what was relied on by the appellant therein was an express term of tenancy authorizing such sublease. This was found, on the assumption of its existence, to have become ineffective by the Supreme Court on the expiry or termination of lease, as Section 12(1) in the view of the Supreme Court prevented him from enforcing any rights or benefits, contrary to the corresponding provision in the English Act. If express authority was found to have become so

ineffective, mere incidence of tenancy, adverted to in Damadilal's case (AIR 1976 SC 2229) cannot be assumed to have any better effect.

17. This decision as to the scope of Section 12(1) of the Bombay Rent Act based on its wording and the context, obviously runs counter to the assumed ordinary incidence of transferability of the statutory tenancy. This, in other words, is a clear provision indicating legislative intent to the contrary to rob the tenancy of this attribute or incidence in terms of the requirements of the ratio of Damadilal's case (AIR 1976 2229). Looked at from this point of view there is no conflict in decisions of these two cases on this point. Ratio of Anand Nivas case (AIR 1965 SC 414) still holds good and binding.

18. Theory of the suggested implied statutory authority to sublet was rejected also by holding that Section 13(1)(e) and Sections 14 and 15 were applicable to contractual tenants alone. The learned Judge observed as follows in this context at page 425 para 33 :

"By clause (1) of Section 15 all transfers and assignments of interest in the premises, and subletting of premises, by tenants are, subject to any contract to the contrary made unlawful. The clause, however, saves contracts to the contrary and to be effective can operate only in favor of contractual tenants. A statutory tenant having no interest in the property, it was plainly unnecessary to prohibit transfer of what was ineffective. Nor can there be letting of the premises by a statutory tenant, for letting postulates a transfer of the right to enjoy property made for a certain time, express or implied, in consideration of price paid or promised, and a statutory tenant has merely a personal right to resist eviction. Section 15(1) therefore applies only to contractual tenants. The proviso to the clause also furnishes an indication to that effect for the exemption which the Provincial Government may grant, can only be in respect of leases or a class of leases".

19. Appellant in Anand Nivas case (AIR 1965 SC 414) also relied on Sub-Section (2) of Section 15 introduced in the Act in 1959 to validate sub-leases created till then in spite of the prohibition under Section 15(1) of the Act, as sub-lease in his favour was effected prior to the said amendment. This contention was rejected on two grounds, namely (1) that the terms of Section 12(1) prohibited any transfer of interest in the statutory tenancy and (2) that when Sub-Section (1) of Section 15 applied only to contractual tenant, the proviso thereto or Sub-Section (2) thereof also would apply to contractual tenant alone and not to statutory tenant. Reliance by Mr. Ajit Shah on the proviso to Section 15(1) thus is of no assistance.

20. This interpretation of Sub-Section (1) of Section 15 is further affirmed by a larger Bench of the Supreme Court in *J.S. Murarji v. Sovani*<sup>7</sup>, The appellant therein was claiming to be a sub-tenant not from the tenant Occhaval but of his sub-tenant Sovani. His claim was rejected on the ground that only the then invalid sub-lease from the contractual tenant like Occhaval, and not from his sub-tenant, that is contemplated to be validated under Sub-Section (2). Mr. Rane is right

in contending that Damadilal's case (AIR 1976 SC 2229) not only does not overrule this ratio of Anand Nivas case (AIR 1965 SC 414) as to the interpretation of Section 15 (1) but the Bench was not competent to do so when larger Bench had affirmed it. The ratio of this part of the majority judgment in Anand Nivas case remained untouched by the judgment in Damadilal's case. Firstly, it is a direct judgment on the relevant Sections of the Bombay Rent Act. Secondly, though the relevant definition part of Section 2(1) of the M.P. enactment is word to word identical with Section 5(11)(b) of the Bombay Rent Act, the wording of Section 14 of the former is slightly different from the wording of Section 15 of the latter. Thirdly, there is no reference in Damadilal's case to any provision corresponding to Section 12(1) of the Bombay Rent Act. The view in Anand Nivas case as to statutory tenancy being not transferable, is based mainly on the wording of this Section, independent of its view as to the ordinary incidence of any statutory tenancy. Hargovind Dharamsey case (AIR 1979 Bombay 89) (supra) on which Mr. Ajit Shah very vehemently relied, does not take note of these vital factors, Observation therein about dissenting view of Sarkar, J., being approved in Damadilal's case is not borne out by the text of the said case. This interpretation of Section 15(1) is integrally connected with the interpretation of Sections 12(1), 13(1)(e) and 14 of the Bombay Act. Damadilal's case cannot be said to have overruled this part of the judgement. On the other hand, this part of the judgment is illustrative of the legislative intent to destroy the ordinary incidence of tenancy as to transferability. With respect, we are unable to agree with the ratio in Hargovind's case.

21. Mr. Ajit Shah then contends that the interpretation of Sections 12 and 15 of the Rent Act in Anand Nivas case (AIR 1965 SC 414) is largely influenced by its view as to the initial presumption as to the subsisting incidence of tenancy, after the tenant becomes a statutory tenant. Such interpretation, so contends Mr. Shah, should cease to be effective when basic view as to such incidence is virtually discarded in Damadilal's case (AIR 1976 SC 2229). We have already adverted to the narrow difference of view indicated in

<sup>7</sup> AIR 1973 SC 772

these two cases on the question of initial presumption as to such incidence. This view, however, cannot be said to be the basis of the interpretation of Sections 12 to 15 in Anand Nivas case. The ratio of Anand Nivas case thus in regard to scope of Sections 12 and 15 still holds good.

22. Mr. Shah contends that the scope of Section 15 of the Act requires reappraisal in the light of (1) the Explanation, added to the proviso under the Amendment No. 17 of 1968, and (2) Section 5(11)(c) as amended by Act No. 22 of 1978, both with retrospective effect from the date of the enactment in 1948, which were not in existence when Anand Nivas case (AIR 1965 SC 414) was decided by the Supreme Court. The contention is devoid of merit. The Explanation merely enables all subsequent transferees or assignees of the lessees of the premises to avail of the proviso and the Notification thereunder and nullifies the effect of the judicial decision of this Court in Nayak's case (69 Bom LR 551) : (AIR 1968 Bombay 51). The judgement does not at all deal with transfers after the contractual tenancy comes to an end. Amended Section 5(11)(c) does make statutory tenancy also heritable to a limited extent and under certain contingencies. It is difficult to see how these amendments can have any effect either on the import of Section 15(1)

or the ratio of Anand Nivas case, particularly when the proviso and Sub-Section (2) is held in that case to have no restrictive effect on Section 15(1) of the Act. Section 5(11)(c), before its amendment in 1978, also contained an element of heritability to a certain extent, the amendment merely clarifying legislative intent as to the priority for the family members residing with the tenant. The character of the provision on this point remains unaltered.

23. Mr. Shah then contends that in application of Section 15 of the Act to the statutory tenant may at best prevent the plaintiff from availing of the proviso. It still cannot prevent him from relying on the ordinary incidence of tenancy adverted to in Damadilal's case (AIR 1976 SC 2229) once his transferee could be held as tenant, within the wide inclusive definition under Section 5(11)(b) of the Rent Act, and prohibitive provision of Section 15(1) is out of the way. Precisely this very contention was raised in Anand Nivas case (AIR 1965 SC 414) and was accepted by Sarkar, J., but rejected by Shah, J., speaking for the majority, on the ground that Section 12, under which possession of the statutory tenant is protected itself prohibits such transfer. Transferee being a tenant under the definition is outweighed by the prohibition against transfers traced judicially in Section 12(1) of the Rent Act. This contention also is thus liable to be rejected.

24. We thus find ourselves in agreement with the conclusion of Kanade, J., and not with that of Mrs. Sujata Manohar, J.

25. The assignment in dispute not being thus valid and effective, the plaintiff's suit is liable to be dismissed and the landlord's petition is liable to be allowed.

26. Rule accordingly made absolute with costs throughout.  
Order accordingly.