
(1980) 02 BOM CK 0021
In the Bombay High Court
Case No : Second Appeal No. 1296 of 1973

Ankush Hiranman Magar and Others APPELLANT
Vs
Thakubai Maruti Tupe and Others RESPONDENT

Date of Decision : 25-02-1980

Acts Referred:

Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 — Section 2, 4A
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 14, 29, 32, 32(1), 32(M)1

Citation : AIR 1981 Bom 350 : (1981) 83 BOMLR 152

Hon'ble Judges : Madon, J

Bench : Single Bench

Advocate : B.P. Apte and L.G. Khare, for the Appellant; A.C. Agarwal, for the Respondent

Judgement

1. The question that arises for determination in this Second Appeal is, "Whether on an application for an exemption certificate being made u/s 88C of the Bombay Tenancy and Agricultural Lands Act, 1948, (Bom. LXVII of 1948) (hereinafter for the sake of brevity referred to as "the said Act"), during the pendency and final disposal of the said application, the land which is the subject-matter of the said application either does not vest in a tenant u/s 32 of the said Act or if it has become vested, it becomes divested by reason of the making of the said application, so that if, during the pendency of these proceedings, the land is incorporated within the limits of a Municipal Corporation the tenant loses the benefit conferred upon him by the said Section 32?".

2. Before discussing this question, it will be convenient first to set out the facts which have given rise to this debate. The appellants are the heirs and legal representatives of one Hiranman. Hiranman and the second respondent were the co-owners of five agricultural plots of land situate in village Hadapsar in Taluka Haveli in the District of Pune, each of them having an equal share therein. The original first respondent, Maruti Narayan Tupe, who died during the pendency of this appeal and whose heirs and legal representatives are respondents Nos. 1A to

1N, was a protected tenant in respect of the said plots of land. After the coming into force of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, (Bom. XIII of 1956) Hiranman made an application to the Mamlatdar for a certificate of exemption u/s 88C of the said Act on the ground that his holding did not exceed an economic holding as defined in Section 6 of the said Act and that his total annual income including the rent of these plots did not exceed Rs. 1,500. After issuing notice to Maruti and after holding an inquiry as provided by Sub-section (3) of the said Section 88C the Mamlatdar decided that the said plots of lands were exempt from the operation of the provisions of Sections 32 to 32R of the said Act, and issued a certificate of exemption to Hiranman on December 16, 1961. Maruti thereupon filed an appeal to the Collector. During the pendency of this appeal, on Mar. 3, 1962 these lands were inducted within the limits of the Poona Municipal Corporation. The first respondent's appeal succeeded and by his order dated Oct. 14, 1962 the Collector dismissed this application. Thereafter in 1969 the appellants as the heirs and legal representatives of Hiranman filed the suit, out of which this Second Appeal arises, in the Court of the Civil Judge, Junior Division. Poona, against Maruti and the second respondent for partition of the said lands and possession of their one-half share therein. In the suit the appellants contended that Maruti had no right to purchase the said lands by reason of the facts that during the pendency of the proceedings for obtaining the exemption certificate, the lands had become incorporated in the limits of the Poona Municipal Corporation and on the date of such incorporation the certificate of exemption granted by the Mamlatdar was still in force. They further contended that the subsequent decision in appeal had no effect because on the date of the incorporation of the said lands into the municipal limits the exemption certificate being in force, a subsequent decision in appeal cancelling it would operate only from the date when it was given on which date the lands formed part of municipal limits. The suit was resisted by Maruti alone. The contentions raised by the appellants found favour with the trial Court and it decreed the appellants' suit. Maruti went in appeal. The learned VIth Extra Assistant Judge, Poona, who heard the appeal allowed it and dismissed the appellants' suit. It is against this order and judgment of the learned Extra Assistant Judge that this Second Appeal is filed.

3. In order to test the validity of the contentions raised in this Second Appeal it is necessary to refer now to the relevant statutory provisions. The said Act was extensively amended by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 (Bom. XIII of 1956). Clause (14) of Section 2 of the said Act defines a "protected tenant" as meaning a "person who is recognised to be a protected tenant u/s 4-A". u/s 4-A a person is recognised to be a protected tenant, if such person has been deemed to be a protected tenant under Sections 3, 3-A and 4 of the Bombay Tenancy Act, 1939. There is no dispute that the first respondent was a protected tenant within the meaning of the aforesaid definition. Sub-section (1) of Section 32 provides as follows:--

"32. Tenants deemed to have purchased land on tillers" day.

(1) On the first day of April 1957 (hereinafter referred to as "the tillers" day") every tenant shall, subject to the other provisions of this section and the provisions of the next succeeding sections, be deemed to have purchased from his landlord, free of all encumbrances subsisting thereof on the said day, the land held by him as tenant, if-

(a) such tenant is a permanent tenant thereof and cultivates land personally;

(b) such tenant is not a permanent tenant but cultivates the land leased personally; and

(i) the landlord has not given notice of termination of his tenancy u/s 31: or

(ii) notice has been given u/s 31, but the landlord has not applied to the Mamlatdar on or before the 31st Mar. 1957 u/s 29 for obtaining possession of the land; or

(iii) the landlord has not terminated his tenancy on any of the grounds specified in Section 14, or has so terminated the tenancy but has not applied to the Mamlatdar on or before the 31-3-1957 u/s 29 for obtaining possession of the lands:

Provided that if an application made by the landlord u/s 29 for obtaining possession of the land has been rejected by the Mamlatdar or by the Collector in appeal or in revision by the Maharashtra Revenue Tribunal under the provisions of this Act, the tenant shall be deemed to have purchased the land on the date on which the final order of rejection is passed. The date on which the final order of rejection is passed is hereinafter referred to as "the postponed date."

XX XX XX"

There is a further proviso to this subsection with which I am not concerned.

4. u/s 32G, as soon as may be after the tillers" day the Tribunal is to publish or cause to be published a public notice in the prescribed form in each village within its jurisdiction calling upon all tenants who u/s 32 are deemed to have purchased the land, all landlords of such lands and all other persons interested therein to appear before him on the date specified in the notice. On that date the Tribunal is to record the statement of the tenant whether he is or is not willing to purchase the land held by him as a tenant. Where any tenant fails to appear or if he makes a statement that he is not willing to purchase the land, the Tribunal is to make an order in writing declaring that such tenant is not willing to purchase the land and that the purchase is ineffective. In view of the contention of Mr. Apie, learned Advocate for the Applicants, it is necessary to notice the language of Sub-section (3) of Section 32G which contains this provision. The relevant part of that subsection is as follows:

"What any tenant fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective."

If the tenant is willing to purchase the land, the Tribunal is to proceed to determine the purchase price of such land in the prescribed manner. u/s 32K, a tenant other than a permanent tenant is to deposit with the Tribunal the entire amount of the price either in lump sum within one year from the date of the order determining the price or in such annual instalments not exceeding twelve with simple interest at the rate of 4 1/2 per cent, per annum on or before such dates as may be fixed by the Tribunal. The amount so deposited is to be paid over to the former landlord. If a tenant-purchaser fails to pay the entire amount of purchase price within the period fixed by the Tribunal, or if the tenant-purchaser is in arrears of four instalments where the number of instalments fixed is four or more, and all the instalments in any other case, the amount of the purchase price remaining unpaid and the amount of interest at the rate of 4 1/2 per cent, per annum, if any, is to be recoverable by the Tribunal as an arrear of land revenue. Section 32M provides as follows:--

"32M. Purchase to be ineffective on tenant purchaser's failure to pay purchase price:

(1) On the deposit of the price in lump sum or of the last instalment of such price the Tribunal shall issue a certificate of purchase in the prescribed form, to the tenant-purchaser in respect of the land. Such certificate shall be conclusive evidence of purchase. In the event of failure of recovery of purchase price as arrears of land revenue under Sub-section (3) of Section 32K, the purchase shall be ineffective and the land shall be at the disposal of the Tribunal u/s 32P and any amount deposited by such tenants-purchaser towards the price of the land shall be refunded to him.

(2) Where the purchase of any land has become ineffective for default of payment in time of the price in lump sum or in instalments, but the tenant-purchaser has nevertheless continued in possession at the commencement of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1964, then the purchase of the land shall not be deemed to be ineffective, until the Tribunal fails to recover the amount of the purchase price under Sub-section (3) of Section 32K." u/s 32P (1), where the purchase has become ineffective, or where the tenant fails to exercise the right to purchase the land within the specific period, the Tribunal is to dispose of the land as provided in the said section. Prior to its amendment by the Amendment Act of 1956. Section 88 (1) exempted certain lands from the operation of the said Act. Clause (c) of Section 88 (1) provided as follows:

"88, (1) Nothing in the foregoing provisions of this Act shall apply:--

XXXX (c) to any area within the limits of Greater Bombay and within the limits of the municipal borough of Poona City and Suburban, Ahmedabad, Sholapur, Surat and Hubli and within a distance of two miles of the limits of such boroughs; or."

Section 88 was recast by the Amendment Act of 1956 and a new section, Section 43C, was inserted in the said Act. u/s 43C, nothing in Sections 32 to 32R and

certain other section specified therein are to apply to lands in the areas within the limits inter alia of a municipal corporation constituted under the Bombay Provincial Municipal Corporations Act, 1949. The Poona Municipal Corporation is a Corporation constituted under the Bombay Provincial Municipal Corporations Act, 1949.

5. u/s 88C of the said Act, save as otherwise provided by Sections 33A, 33B and 33C nothing in Sections 32 to 32R is to apply to lands leased by any person if such land does not exceed an economic holding and the total annual income of such person including the rent of such land does not exceed Rs. 1,500/-This provision, however, does not apply where the tenant is a permanent tenant. A person who is eligible for this exemption is to make an application in the prescribed form to the Mamlatdar within whose jurisdiction the land is situate for a certificate that he is entitled to such an exemption. On receipt of such an application the Mamlatdar is to give notice to the tenant or the tenants of the said land, to hold an inquiry and to decide that the land leased by such person is exempt as claimed. If the Mamlatdar declares that the land is so exempt, he is to issue a certificate in the prescribed form to the landlord. The decision of the Mamlatdar is to be final subject to an appeal to the Collector.

6. It is the contention of Mr, Apte, learned Advocate for the Applicants (Appellants?), that unless and until the application of Hiranman for exemption u/s 88C was decided, the land did not vest in the tenant Maruti. Mr. Apte next contended that even assuming on the tillers" day the land becomes vested in Maruti, on such an application for exemption being made, the land becomes divested and as those plots of land were incorporated within the limits of the Poona Municipal Corporation while the exemption certificate of the Mamlatdar was in force the subsequent decision in appeal of the Collector holding that Hiranman was not entitled to exemption u/s 86C was ineffective because by incorporation within the Poona Municipal Corporation limits the land had ceased to be subject to the provisions of Sections 32 to 32R Mr. Apte lastly relied upon the first proviso to Section 32 (1) under which when a landlord made an application for recovery of possession u/s 29 and the application failed, the tenant is deemed to have purchased the land on the date on which the final order of rejection of application was passed, which date is referred to in the said Act as "the postponed date." Relying upon this proviso, Mr. Apte submitted that the position with respect to an application for certificate of exemption u/s 88C was the same as that of an application for recovery of possession u/s 29, and, therefore, until the application was finally disposed of the land did not vest in the purchaser, and in the present case as at the date of the final order the lands were within the limits of the Poona Municipal Corporation, they could never vest in Maruti u/s 32 (1) because they were taken out of the operation of Sections 32 to 32R by virtue of the provisions of Section 43C.

7. These contentions now fall to be examined. The basis of Mr. Apte's submissions is that the vesting of land u/s 32 (1) is a conditional vesting

dependent upon the payment of the purchase price fixed by the Tribunal. If, however, the position u/s 32 (1) is that the land vests immediately on the tillers" day subject to its being divested on default of payment, then the contention of Mr. Apte would necessarily fail. The answer must therefore, depend upon the language of the relevant sections. Section 32 (1) expressly provides that, "On the first day of April, 1957 (hereinafter referred to as "the tillers day") every tenant shall..... be deemed to have purchased from his landlord, free of all encumbrances subsisting thereof on the said day, the land held by him as "tenant, if.....". Under this sub-section, it is on the first day of April, 1957 that a tenant is deemed to have purchased the land from his landlord. It is pertinent to bear in mind that this is a deeming provision. There is no agreement at any time between the landlord and the tenant for sale by the landlord to the tenant or purchase by the tenant from the landlord of the land in question. It is a statutory sale which is effected. The price is not fixed, but is to be fixed thereafter in accordance with the provisions of Section 32H and is to be payable in the manner provided in Section 32K. None-the-less, by this deeming provision of Section 32 (1), the purchase is complete on the tillers" day and the land becomes vested in the tenant as from that date. This conclusion is further fortified by the language used in the other relevant sections of the said Act. I have already reproduced above Sub-section (3) of Section 32G and Sub-section (1) of Section 32M under both of which on the happening of the contingencies set out therein the purchase becomes ineffective. The language used in Sections 32G (3) and 32M (1) shows that the purchase had automatically taken place on the tillers" day but in view of the happening of the contingencies mentioned in Section 32G (3) or 32M (1), that purchase had subsequently become ineffective. A deeming provision is a legal fiction and it must be given its full force and effect and carried to its logical conclusion, (see *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, Lord Acquit in a passage, which has now become almost a classic, said in *East End Dwellings Co. Ltd. V. Finsbury Borough Council*, (1951) 2 All ER 587 :--

"If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it..... The statute says that one must imagine a certain state of affairs. It does not say that, having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

It may be mentioned that this passage of Lord Asquith was cited with approval by the Supreme Court in the case of *State of Bombay v. Pandurang Vinayak*.

8. If such is the language of the statute and the effect of the legal fiction which is created by the deeming provision of Section 32 (1), its consequences and effect can only be prevented by express statutory provision. The conditions on the fulfilment of which this legal fiction comes into operation are expressly set out in

Section 32 (1). Once these conditions are fulfilled, there is no scope for the legal fiction not to take effect. It must take effect in its full force. The first proviso to Section 32 (1) upon which Mr. Apte has placed so much reliance does not in any manner help the Appellants' case. That itself enacts another legal fiction. It is that where an application for recovery of land made by the landlord which was pending on the prescribed date is rejected, "the tenant shall be deemed to have purchased the land on the date on which the final order of rejection is passed." This postponed date is thus expressly provided for by the first proviso to Section 32 (1) and is available only in the case where an application u/s 29 for obtaining possession of the land by the landlord is pending on the prescribed date and is subsequently rejected either by the Mamlatdar or the Collector in appeal or in revision by the Maharashtra Revenue Tribunal. The Act contemplates various other applications to be made under different sections of the Act. There are all applications which may either be allowed or rejected. The first proviso to Section 32 (1), however, makes exception only in respect of one single type of application, namely, the application by the landlord u/s 29 which was pending on the date prescribed. This proviso can, therefore, have no bearing whatever on any other application which may be made under some other provision of the Act.

9. The contention of Mr. Apte that though Maruti's appeal to the Collector succeeded and the certificate of exemption granted by the Mamlatdar to Hiranman was cancelled and set aside, nonetheless on March 3, 1962 when these lands were incorporated within the limits of the Poona Municipal Corporation the certificate was in force, and, therefore, the provisions of Section 43C became applicable to them so as to take away, these lands within (outside?) the purview of Sections 32 to 32R for all times, does not merit any detailed consideration. The fact that before the final conclusion of these proceedings these lands were incorporated within the limits of the Poona Municipal Corporation would make no differences, because the Mamlatdar's certificate, once the Collector had held it was wrongly issued, could have no force or effect. An appeal was pending and in the appeal it was held that the certificate was wrongly granted. Under Sub-section (5) of Section 88C, the Mamlatdar's decision is to be final "subject to appeal to the Collector." Therefore, the final decision is of the Collector. The Collector having held that Hiranman did not qualify for exemption u/s 88C, the mere fact that he made an application, which turned out to be false, could not prevent the full statutory operation of Section 32 (1) and prevent the land from being vested in the First Respondent as purchaser in his capacity as protected tenant. The subsequent inclusion of land within the limits of the Poona Municipal Corporation cannot have the effect of divesting the land which had once vested in the tenant u/s 32 (1). The land could be divested only on the happening of the specific contingencies set out in the Act to which I have referred to earlier, namely, the contingencies provided for in Sections 32G 32H. The position in law is clear on a plain read me of the relevant sections themselves, and it is really not necessary to refer to any authorities. However, as certain authorities have been cited. I will now turn to them.

10. A somewhat similar situation came up for consideration of the Supreme Court in *Sakharam @ Bapusaheb Narayan Sanas and Another Vs. Manikchand Motichand Shah and Another*, In that case the appellants were protected tenants within the meaning of the Bombay Tenancy Act, 1939. When the said Act was enacted, the 1939 Act was repealed and as mentioned earlier, u/s 88 (1) (c) of the said Act, prior to its being amended by the Amendment Act of 1956, the said Act did not apply inter alia to lands within the limits of the municipal borough of Poona City. The lands in question were found to be within the Poona Municipal limits. The question arose whether by reason of the enactment of the said Act and the provisions of Section 88 (1) (c) thereof, the appellants had lost the protection which they had got as a protected tenant under the 1939 Act which protection was continued by the said Act. The Supreme Court held that the provisions of Section 88 were entirely prospective and they were not intended to take away what had already accrued to the tenant acquiring the status of a "protected tenant."

11. The question whether u/s 32 there is immediate vesting in the tenant on the tillers" day or whether the vesting is postponed until the amount of purchase price is paid, has also been considered in another decision of the Supreme Court in *Sri Ram Ram Narain Medhi Vs. The State of Bombay*, After analysing the provisions of the said Act, Bhagwati, J., who spoke for the Court, said (at pp. 824-5 of Bom LR) : (at p. 472 of AIR)

"The title of the landlord to the land passes immediately to the tenant on the tiller"s day and there is a completed purchase or sale thereof as between the landlord and the tenant. The tenant is no doubt given a locus penitential and an option of declaring whether he is or is not willing to purchase the land held by him as a tenant. If he fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall, by an order in writing, declare that such tenant is not willing to purchase the land and that the purchase is ineffective. It is only by such a declaration by the Tribunal that the purchase becomes ineffective. If no such declaration is made by the Tribunal, the purchase would stand as statutorily effected on the tiller"s day and will continue to be operative, the only obligation on the tenant then being the payment of price in the mode determined by the Tribunal. If the tenant commits default in the payment of such price either in lump or by instalments as determined by the Tribunal, Section 32M declares the purchase to be ineffective, but in that event the land shall then be at the disposal of the Collector to be disposed of by him in the manner provided therein. Here also the purchase continues to be effective as from the tiller"s day until such default is committed and there is no question of a conditional purchase or sale taking place between the landlord and tenant. The title to the land, which was vested originally in the landlord, passes to the tenant on the tiller"s day or the alternative period prescribed in that behalf. This title is defeasible only in the event of the tenant failing to appear or making a statement that he is not willing to purchase the land or committing default in payment of the price thereof as determined by the Tribunal. The tenant gets a vested

interest in the land, defeasible only in either of these cases and it cannot, therefore, be said that the title of landlord to the land is suspended for any period definite or indefinite."

If the title of the tenant-purchaser is defeasible only in those cases, the subsequent inclusion of any lands within the particular municipal limits to which these provisions do not apply cannot operate so as to divest the tenant-purchaser of the right which has already been vested in him.

12. In Spl. Civil Applns. Nos. 225 to 228 of 1959. Pokhraj Trilokchand Jain v. Janaradan Khandu, unreported, decided on October 8, 1959, a Division Bench of this High Court was considering a similar situation. The facts were that the land in question was situate in village Kopri. The tenant became the owner thereof on the tillers" day by reason of the provisions of Section 32 (1) of the said Act. During the pendency of the proceedings for determining the price, the land was included within the limits of the Thana Municipal Borough with effect from August 1, 1958, by a notification issued by the Government under the Bombay Municipal Boroughs Act, 1925. It was contended before the Deputy Collector who was constituted the Agricultural Lands Tribunal and before whom the proceedings for determining the price were pending that by reason of the provisions of Section 43C, nothing in Sections 32 to 32R would apply to the land and the Tribunal would, therefore, have no jurisdiction to determine the purchase price. This contention was rejected by the Tribunal. The Division Bench of this High Court consisting of Chainani, C. J. and V. B. Desai, J., upheld the Tribunal's decision following the Supreme Court decision in Sri Ram Ram Narain Medhi Vs. The State of Bombay, . However, a learned Single Judge of this High Court, Bhasme, J., in Spl. Civil Appln. No. 150 of 1966, Bhagwant Baburao Sonar v. Shivram Namdeo, unreported, decided on April 8, 1970, took a contrary view. Though the judgment of the Supreme Court in Sri Ram Ram Narain Medhi v. State of Bombay was referred to before Bhasme, J., the judgment of the Division Bench referred to above was not pointed out to him. In a later case, Vaidya, J., in Pralhad Ganaba Kapare Vs. Sadaba Rambhau Bhonsale and Another, differed, and in my opinion rightly differed, from Bhasme, J., and after relying on the above Supreme Court decision and other decisions held that the title acquired by the tenant u/s 32 (1) of the said Act cannot be divested by a notification issued subsequently incorporating the land within municipal limits. In view of this conflict of decisions between Vaidya, J. and Bhasme, J., a subsequent matter was referred to a Division Bench and the Division Bench consisting of Tulzapurkar and Shah, JJ., in Spl. Civil Appln. No. 1023 of 1970 Nissim Simon Dindorkar v. Narayan Vithu Kavle, Unreported, decided on Sept. 2/3, 1974, upheld the view taken by Vaidya, J.

13. The last authority to which reference need be made is a decision of another learned single Judge of this High Court, Palekar, J., as he then was, in Yadav Yeshwant Mali Vs. Pundlik Pandurang Patil, , referred to by Mr. Apte, learned Advocate for the Appellants. In that case, Palekar, J. held that the land belonging

to a certificated landlord, whatever the day may be when the certificate for exemption was issued to him on an application made within the prescribed period, is u/s 88C (1) exempt from the operation of Sections 32 to 32R of the said Act. I fail to see how this decision in any manner supports Mr. Apte's case. The certificate which is referred to here is one which has become final under the provisions of Section 88C. Under that section, however, the certificate given by the Mamlatdar is not final in all cases. It is finally provided no appeal is filed. Where an appeal is filed, it is the decision of the Collector which is the final decision and if in appeal by the tenant he dismisses the landlord's application for an exemption certificate which on the Collector's decision was wrongly given by the Mamlatdar, the Mamlatdar's certificate cannot, during the pendency of the appeal, have the effect as if it had become final under Sub-section (5) of Section 88C.

14. The result is that this Second Appeal fails. The Appellants will pay to Respondents Nos. 1A to 1N the costs of this Second Appeal. The Second Respondent will bear and pay his own costs of the appeal.

15. Appeal dismissed.