

(2002) 04 BOM CK 0077

In the Bombay High Court

Case No : Civil Rev. Application No. 931 of 1993

Babulal @ Damodhar Gujarathi and Others

APPELLANT

Vs

Kisan Patil since deceased through his legal heirs and
representatives

RESPONDENT

Date of Decision : 05-04-2002

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 85A, 88(1)

Citation : (2004) 1 MhLj 734

Hon'ble Judges : Naresh H. Patil, J

Bench : Single Bench

Advocate : R.M. Borde, for the Appellant; V.T. Choudhari, for the Respondent

Final Decision : Allowed

Judgement

Naresh H. Patil, J.—The petitioners have filed this civil revision application being aggrieved by an order dated 20th July, 1993 passed below Exhibit 23 in Regular Civil Suit No. 97 of 1990, by the Civil Judge, Junior Division, Chopada, District Jalgaon, ordering reference of issue Nos. 2, 3 and 5 to the Mamlatdar under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short, "the Act of 1948").

2. The plaintiffs had raised the contentions that the suit land was owned by them. The respondents defendants were in possession of the suit lands as the legal representatives of one Kisan Shripat Patil. The said Kisan Patil was inducted in the suit land by the mother of the plaintiffs, Tarabai w/o Hiralal, on 5th June, 1945 by executing a rent deed in his favour. Accordingly, Kisan came in possession of the suit land as a tenant. The suit land was situated within the municipal limits of Chopada town. The municipal district of Chopada was constituted in the year 1905 by the then Government of Bombay by publishing a notification under the Bombay Local Boards and District Municipal Act, 1910. The said notification was published in the Government Gazette of Bombay on 17th June, 1910. The suit lands were situated within the municipal limits. In view of

the issuance of the notification, it is the case of the plaintiffs that, the provisions of the Act of 1948 were not applicable to the suit lands. The tenant of the suit lands was not entitled to claim protection of the provisions of the Act of 1948. Kisan, the original tenant, had expired. His legal representatives are, thereafter, in possession of the suit lands. It is contended that after the death of the plaintiffs' mother Tarabai. Kisan tried to take the benefit of the Act of 1948 and filed an application to the Tenancy Authorities. The Tenancy Authorities passed an order on 26th February, 1962 to the effect that the landlady Tarabai Hiralal was the widow and as such the provisions of Section 32-A of the Act of 1948 were not applicable to the present case. On 30th January, 1975 the Tenancy Authorities passed an order stating that as the suit land was within the municipal limits of Chopada town, the mutation was taken in the revenue record accordingly in respect of the suit lands. The petitioners further contend that the Government of Maharashtra had applied the provisions of the Maharashtra Regional and Town Planning Act, 1966 to the area in which the suit lands are situated. The suit lands were reserved in the said plan for residential and parking purposes. Relying on the said reservation it is contended that the suit lands were exempted by virtue of Section 88(1)(b) of the Act of 1948 after the application of the provisions of the Maharashtra Regional and Town Planning Act, 1966. The plaintiffs issued a notice on 20th June, 1987 to the deceased Kisan terminating his tenancy under the provisions of Section 111 of the Transfer of Property Act. Deceased Kisan had replied to the said notice on 26th June, 1987. It is further contended that the defendant Kisan had admitted in his reply that as the suit lands were situated within the municipal limits, the provisions of the Act of 1948 were not applicable and as such no purchase price was fixed. Rest of the contentions were denied by him.

3. It is further contended that the defendant Kisan died on 23rd April, 1988. The notice of termination of tenancy was served upon the defendants' father. As the defendants did not hand over the possession the plaintiffs had to file the suit.

4. The defendants had filed written statement and denied the claim of the plaintiffs. It was mainly contended by them that their father Kisan was in possession of the suit lands since 1945 and after his death the lands came in possession of the present defendants. The name of Kisan was recorded as tenant as per Section 3-A of the Act of 1948. The name of deceased Kisan was recorded in Form D vide Mutation Entry No. 9744 and after his death, the said entry was amended and modified in the name of the present defendants vide Mutation Entry No. 2179. The defendants came to be in possession of the suit lands as heirs of the original tenant Kisan. It is their case that on tillers' day, their father was in possession of the suit land and, therefore, they are deemed purchaser of the suit land. They further contended that on 6th May, 1970 and 26th June, 1987 they issued notices to the owner expressing their willingness to purchase the suit lands under the provisions of the Act of 1948 and they resisted the grant of any relief u/s 85 of the Act of 1948 in favour of the plaintiffs. They contend that the issue regarding claim of tenancy of the defendants be framed and referred to the

Tenancy Court u/s 85-A of the Act of 1948.

5. The suit was filed on 23rd July, 1990 and the learned Judge vide endorsement dated 10th August, 1992 passed an order to the effect that as defendants claimed that they are tenants of the suit land, a reference was to be made to the Tenancy Court to determine the point of tenancy.

6. It is pleaded that after the said order was passed, an application, Exhibit 12, was submitted by the plaintiffs on 23rd October, 1992 contending that an issue regarding tenancy of the defendants was framed but in this case the plaintiffs had admitted that the defendants were the tenants and hence it was not necessary to refer the issue to the Tenancy Court. The plaintiffs prayed for modifying the order passed by the Lower Court on 10th August, 1992. The Trial Court on the said application had passed the order of recasting the issue and the following issue was recast:

"Whether in view of inclusion of the suit land within the municipal region, the provisions of the Tenancy law has no application?"

7. After recasting the issues the defendants had filed an application dated 14th June, 1993 and prayed for trying the issue No. 3 as a preliminary issue. On 28th June, 1993 the plaintiffs submitted their say at Exhibit 18 and objected to treat the issue No. 3 as preliminary issue and further contended that the Court should hear all the issues. It was further contended that as the reference to the Tenancy Court was already negated by the Trial Court, the plaintiffs be permitted to lead evidence on all the issues and the suit be tried accordingly.

8. The Civil Judge, Junior Division, Chopada heard the said application Exhibit 16 and by an order dated 20th July, 1993 passed below Exhibit 16 deleted issue No. 3 and further recast the other issues. The Trial Court had recast the issues at Exhibit 23. After framing of the said issues, the Trial Court, referred the issue Nos. 2, 3 and 5 to the Mamlatdar for determination according to law by an order dated 20-7-1993. It is this order passed below Exh. 23 which is impugned in the present civil revision application u/s 115 of the CPC by the plaintiffs.

9. During pendency of the petition original plaintiff No. 2 had expired and accordingly his legal representatives are brought on record of this Court.

10. The issue Nos. 2, 3 and 5 which were recast as per order passed below Exhibit 23 are as follows:

(2) Do plaintiffs prove that Section 32G was not applicable to the suit land as it was within municipal limits (on 1-4-1957)?

(3) Do defendants prove that deceased Kisan Shripat was protected tenant and become tenant-purchaser of the suit land since 1-4-1957?

(5) Do plaintiffs prove that the tenancy rights of the defendants are legally terminated by notice dated 26-6-1987?"

11. Shri R.M. Borde, learned Advocate appearing for the petitioners had seriously objected to the referring of the above quoted issue Nos. 2, 3 and 5 on the ground that in view of the specific pleadings on the part of the plaintiffs that deceased Kisan was inducted in the suit lands as tenant, it was not necessary to refer the issue to determine as to whether the defendant was a protected tenant or whether the plaintiffs prove that Section 32G of the Act of 1948 was not applicable to the suit lands. The issues, which were sought to be referred to the Mamlatdar by the Trial Court, do not fall for the consideration of the Mamlatdar in the eye of law and in view of the facts of the present case. In other words it was submitted that the Mamlatdar will not be competent to adjudicate upon the issues referred by the Trial Court for determination. The crux of the matter is the main objection to the impugned order raised by the petitioners placing reliance on the notification constituting municipal district of Chopada in the year 1905 by the then Government of Bombay. The notification under the Bombay Local Boards and District Municipal Act was published on 15th June, 1910 and the same was published in the Government Gazette of Bombay on 17th June, 1910. Copy of the said notification is annexed at Exhibit A to the civil revision application. Heavy reliance was placed on the provisions of Section 88 of the Act of 1948. The relevant provisions of Section 88 of the Act of 1948 are reproduced as under:

"88(1) Save as otherwise provided in Sub-section (2), nothing in the foregoing provisions of this Act shall apply. --

(a) to lands belonging to or held on lease from the Government;

(b) to any area which the State Government may, from time to time, by notification in the Official Gazette, specify as being reserved for non-agricultural or industrial development;

(c) to an estate or land taken under the management of the Court of Wards or of a Government Officer appointed in his official capacity as a guardian under the Guardians and Wards Act, 1890;

(d) to an estate or land taken under management by the State Government under Chapter IV or Section 65 except as provided in the said Chapter IV or Section 65, as the case may be, and in Sections 66, 80-A, 82, 83, 84, 85, 86 and 87;

....."

Section 88(1)(b) reads that nothing in the foregoing provisions of the Act shall apply to any area which the State Government may, from time to time, by notification in the Official Gazette specify as being reserved for non-agricultural or industrial development. In this case as the lands were reserved for residential and parking purposes they were certainly reserved for the non-agricultural purposes. In view of the provisions of Section 88(1)(b) of the Act of 1948 the suit lands are exempted from the application of the said Act. The tenants of the

suit lands therefore cannot seek protection of the said Act of 1948. It is further argued that Section 88(1)(b) in this case operates retrospectively.

12. The learned Advocate for the petitioners in support of his contentions has mainly relied on (1) Mohanlal Chunilal Kothari Vs. Tribhovan Haribhai Tamboli, . (2) Smt. Parvati and Others Vs. Smt. Fatehsinhrao Pratapsinhrao Gaekwad, . (3) Pandurang Ramchandra Mandlik (Since Deceased) by his Lrs. and Another Vs. Shantibai Ramchandra Ghatge and Others, . (4) Laxmibai Kisanrao Tamhane and Others Vs. Trivenibai, . (5) Uttamchand Hukumchand Shet and Others Vs. Vishwanath Bindravan Bundelkhandi and Others, . (6) Laxmibai Samba Jadhav and Others Vs. Bharatlal Premchand Gandhi and Others, . (7) Nilesh Construction Company and Another Vs. Gangubai and Others, . (8) Ramrao Parashuram Ghogle v. Mukund Govind Kini, 1986 (1) BCR. 361 and (9) N.D. Muthu Swamy Rao and Ors. v. Mewalal Rajaram Dube and Ors., 1988 Mh.L.J. 242 = 1988 Mh.LR. 708.

13. In the case of M/s Nilesh Construction Company (supra) the Division Bench of this Court, while following a reported case in Sidram Narsappa Kamble Vs. Sholapur Borough Municipality Another, , had observed that the effect of the notification u/s 88(1)(b) of the Act of 1948 excludes the operation of the provisions of the Tenancy Act, because the imperative words of Section 88, "nothing in the foregoing provisions of the Act shall apply" to the area reserved for non-agricultural or industrial development. The "foregoing provisions" are Sections 1 to 87-A and, therefore, the moment a Notification is issued u/s 88(1)(b), none of the provisions of Tenancy Act will apply in the case of any area which has been specified as being reserved for non-agricultural or industrial development. It is contended that the effect of a Notification u/s 88(1)(b) is to exempt lands from the operation of the provisions of the Tenancy Act, retrospectively is now settled by the decisions of the Supreme Court in Sidram Narsappa Kamble Vs. Sholapur Borough Municipality Another, . In the case of Laxmibai v. Trivenibai, (supra) the Division Bench of the Court had taken a view that where the questions arise for determination in a suit are whether a notification was issued by the State Government in regard to lands reserved for non-agricultural or industrial development and whether the lands in dispute are in the areas so mentioned in the notification, the jurisdiction of the Civil Court to decide those questions is not barred. In the case of N.D. Muthu Swamy Rao (supra) this Court had relied on the Division Bench judgment of this Court in M/s Nilesh Construction Co. (supra) and further endorsed the view that the notification issued u/s 88(1)(b) of the Act of 1948 shall operate retrospectively. In the case of Mohanlal Chunilal Kothari (supra) a 5 Judges Bench of the Supreme Court had dealt with an issue arising out of the provisions of Section 88 of the Act of 1948. In the case of Smt. Parvati and others (supra) the Supreme Court had dealt with a case concerning the effect of the Notification dated 21st May, 1958 u/s 88(1)(b) of the Act of 1948 specifying the lands within the municipal limits of Baroda city reserved for non-agricultural and industrial development. The Supreme Court had referred to its earlier reported cases in

Sidram Narsappa Kamble Vs. Sholapur Borough Municipality Another, and Sakharam @ Bapusaheb Narayan Sanas and Another Vs. Manikchand Motichand Shah and Another, while dealing with this case. Section 88(1) is given retrospective effect. The conclusion was, therefore, drawn that the determination of rent by the Mamlatdar under Sections 8 and 9 of the Tenancy Act automatically becomes ineffective and non est by virtue of Section 88(1)(b) of the Act of 1948 and the notification made thereunder.

14. Shri V.T. Choudhari, learned Advocate for the respondents urged that the Trial Court has rightly referred the issue Nos. 2, 3 and 5 for determination of the Mamlatdar. It is Mamlatdar alone who could determine the issue of tenancy and there was no illegality in referring the said issues. He relied mainly on the judgments in (1) Harshadrai Raghunathji Desai Vs. Balubhai Maganlal Batliwala and Another, . (2) Pralhad Ganaba Kapare v. Sadama Rambhau Bhosale, 1973 Mh.L.J. 124 = (1972) 74 BLR 687, and (3) Tenancy Law Reporter Volume 23 Number 3. In the case of Harshadrai Raghunathji Desai (supra) the Division Bench of this Court had considered the provisions of the Act of 1948 and the provisions of sections 85 and 88. It was observed in this case that in order to decide whether a person is a tenant or not, the Mamlatdar has power to decide under the Act of 1948. Such a question cannot be decided by the Civil Court in view of Section 85. In deciding a question whether an occupant is a tenant one has to decide question whether the land is in possession of the tenant is a land used for agriculture purpose or for a purpose as defined in Section 88(1)(b). The question is not to be decided in absurdity. In the case of Pralhad Ganaba Kapare (supra) this Court had held that the tenant had acquired title to the lands which vests in him u/s 32 of the Act of 1948. Issuance of notification by the Government u/s 88(1)(b) of the Act excluding the land from the operation of sections 32 to 32R will not divest the tenant and the Agricultural Lands Tribunal had power to determine the purchase price in respect of the land u/s 32G of the Act of 1948.

15. The learned Advocate for the respondents submitted that the petitioners are raising the issue before this Court at a premature stage. The issue could be dealt with only after the Mamlatdar determines it according to law. In such determination no prejudice could be caused to the case of the plaintiffs. The Civil Court being not competent to decide on the issues relating to the tenancy no illegality could be found in the impugned order passed by the Trial Court. The learned Advocate did not dispute on the factual contention raised by the petitioners that a notification is in existence reserving the suit lands for non-agriculture purposes.

16. The provisions of Section 85-A of the Act of 1948 reads as under:

"85-A. (1) If any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as the "Competent Authority") the Civil Court shall stay the suit and refer such

issues to such Competent Authority for determination.

(2) On receipt of such reference from the Civil Court, the Competent Authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

Explanation.-- For the purpose of this section a Civil Court shall include a Mamlatdars' Court constituted under the Mamlatdars' Court Act, 1906."

17. The issue for consideration of this Court is limited to the scope and extent of the impugned order passed by the Civil Judge, Junior Division, Chopada below Exhibit 23 referring the issue Nos. 2, 3 and 5 to the Mamlatdar and the Agricultural Lands Tribunal for determination according to law. The parties are still to lead evidence in the suit and contest the real issue in controversy. It is true that the petitioners do not dispute that deceased Kisan was inducted in the suit lands as a tenant. It is the application of the provisions of Section 88(1)(b) relying on which the petitioners contend that the protection under the Act of 1948 cannot be made applicable to the defendants. The jurisdiction of Civil Court is not barred to decide the issue relating to applicability of Section 88(1)(b) of the Act of 1948. The issue raised by petitioners goes to the root of the matter. In fact, issue No. 2 relates to the said point raised by the petitioners. From the pleadings of the parties and the case law cited by them I am of the view that it is not warranted to refer the issue Nos. 2, 3 and 5 to the Mamlatdar for determination at this stage. The Civil Court can very well determine the effect of the rival pleadings of the parties based on questions of law. The reference to the Mamlatdar's Court in view of the fact that the tenancy of the deceased Kisan was admitted by the plaintiffs, was not called for. The plaintiffs have prayed for quashing the order dated 20-7-1993 passed below Exhibit 23 ordering reference of the issue Nos. 2, 3 and 5 to the Mamlatdar under the provisions of the Act of 1948. I find that the Trial Court has committed error in referring those issues to the Mamlatdar at that stage in a mechanical manner.

18. In the result, the civil revision application is allowed. The impugned order dated 20-7-1993 passed by the Civil Judge, Junior Division, Chopada, below Exhibit 23, referring the issue Nos. 2, 3 and 5 in Regular Civil Suit No. 97 of 1990 to the Mamlatdar and Agricultural Lands Tribunal for determination according to law, is hereby quashed and set aside. The interim order dated 7-9-1993 passed by this Court staying the further proceedings of the suit is vacated. In view of the facts of the case, the Trial Court is directed to dispose of the suit as expeditiously as possible on its own merits without being influenced by the observations made by this Court in this order. All the available issues are kept open for the contesting parties to be raised before the Civil Court as permissible under law.

19. Rule is made absolute in terms of the above order with no order as the costs.