

(1970) 01 GUJ CK 0004

In the Gujarat High Court

Case No : Special Civil Application No. 96 of 1966

Dahyabhai Limjibhai and Others

APPELLANT

Vs

Amarchand Jagjivan and Another

RESPONDENT

Date of Decision : 20-01-1970

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 3, 31, 31
Transfer of Property Act, 1882 — Section 113

Citation : AIR 1971 Guj 73 : (1971) 12 GLR 235

Hon'ble Judges : J.B. Mehta, J

Bench : Single Bench

Advocate : M.A. Trivedi, for N.V. Karlekar, for the Appellant; B.J. Shelat, for the Respondent

Judgement

1. The petitioners tenants challenge in this petition the order of the Revenue Tribunal, dated August 10, 1965, by which the Revenue Tribunal has set aside the order of the Prant Officer and has restored the order of the Mamlatdar for possession of half of the lands in question, in an application u/s 32T of the Bombay Tenancy and Agricultural Lands Act, 1948, hereinafter referred to as the Act, by respondent No. 1, certified landlord. Mr. Trivedi challenges the said order of the Tribunal on the following grounds: -

(1) That the order of the Revenue Tribunal is patently erroneous in so far as it has held the mandatory condition in Section 32T(5)(c) of the Act was fulfilled.

(2) That the Revenue Tribunal patently erred in holding that the landlord bonafide required the lands in question for personal cultivation.

(3) That in any event, the Revenue Tribunal patently erred in holding that the doctrine of waiver recognised u/s 113 of the Transfer of Property Act could not be invoked on the ground that it was inconsistent with the provision regarding the determination of lease under the Tenancy Act.

2. As regards the first contention of Mr. Trivedi, it must be kept in mind that the

Prant Officer had ignored the admission made by the tenant himself that the suit lands stood in the name of respondent No. 1 certified landlord on January 1, 1952, in the revenue records as Kabjedar and had continued to stand in the said records till the relevant date December 13, 1960. The Prant Officer had gone on a mere conjecture that illiterate tenant might have made this admission without understanding its true import. Even the landlord's evidence was to the same effect. The Tribunal had seen even the certified copy of the revenue record of the Baroda State produced before it. Therefore, the Prant Officer's finding being clearly a conjectural finding was perverse and it was rightly set aside by the Revenue Tribunal by holding that the relevant condition u/s 32T of the Act was fulfilled.

3. As regards the second contention of Mr. Trivedi, he mixes up the requirements of Sections 31 and 32T of the Act. The provisions of termination u/s 31 of the Act can apply only when the conditions of Section 31A are fulfilled. Section 31-A(c) provides a further restriction that the income by the cultivation of the landlord of which he is entitled to take possession is the principal source of income for his maintenance. No such restriction is enacted by the Legislature in Section 32T for the obvious reason that a different test is envisaged by the Legislature in this context. The right to terminate the tenancy u/s 32T of the Act and to make an application for possession is conferred only on a certified landlord, who holds a certificate u/s 88-C(4) of the Act. The relevant condition for being a certified landlord u/s 88-C(1) is that the landlord of such exempted land does not hold such land more than one economic holding and the total annual income of such landlord including the rent of such land does not exceed Rs. 1,500/-. It is only such small holders of land who would get such a certificate of exemption u/s 88C of the Act. That is why the Legislature did not envisage the same test as is required when the notice of termination u/s 31 of the Act for bon fide requirement of the land for personal cultivation is given, in which case alone the restriction u/s 31-A(c) has to be fulfilled. Therefore, the Revenue Tribunal was right in holding that the landlord's claim was a bona fide one in respect of this land for personal cultivation in the circumstances of the case. Therefore, on this ground no patent error is disclosed.

4. As regards the third contention of Mr. Trivedi the same must be upheld. The Revenue Tribunal has relied upon *Raja Ram Mahadev Paranjyape and Others Vs. Aba Maruti Mali and Others*, , where it was held by their Lordships that the provisions of Section 114 of the Transfer of Property Act were inconsistent with the provisions of the Tenancy Act and could not therefore u/s 3 of the Tenancy Act govern the tenancies to which it applied. That ratio could never apply for concluding the present question whether the doctrine of waiver would apply as embodied in Section 113 of the Transfer of Property Act.

5. Section 3 of the Tenancy Act in terms provides as under:-

"The provisions of Chapter V of the Transfer of Property Act, 1882, shall, in so far as they are not inconsistent with the provisions of this Act, apply to the tenancies

and leases of land to which this Act applies".

Therefore, we must consider the particular provision of Chapter V of the Transfer of Property Act, 1882, in question for finding out whether it is inconsistent with the provisions of the Tenancy Act, for if it is not inconsistent, such a provision would clearly apply by reason of Section 3 of the Tenancy Act to all the tenancies and leases of land to which the Tenancy Act can apply. An identical question is completely concluded by the decision of the Supreme Court in *Vithal Vasudeo Kulkarni and Others Vs. Maruti Rama Nagane and Others*, . Their Lordships in terms referred in that decision to the earlier decision in *Raja Ram Mahadev Paranjype and Others Vs. Aba Maruti Mali and Others*, and distinguished the same. At p. 463, their Lordships held that the Legislature could never have intended that the principle of waiver would not apply to the cases of determination of tenancy under the Transfer of Property Act, especially, as such a result would be contrary to all principles governing the relations between a landlord and tenant. Their Lordships further pointed out that the Legislature, on the contrary, had been careful to provide expressly by Section 27 (present Section 30) of the Tenancy Act that except as otherwise provided, no other provision contained in the Act shall be construed to limit or abridge the rights or privileges of any tenant under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a Court or otherwise howsoever. Their Lordships, therefore, in terms stated; "The Act, therefore, does not rule out the payment by the tenant and acceptance by the landlord of arrears of rent before a suit for eviction is instituted resulting in waiver by the landlord of the termination of tenancy by him". Mr. Shelat vehemently argued that this ratio was applicable only when the waiver was founded on acceptance of rent before a suit for eviction was instituted. It would be wrong to read this ratio of a general character as limited to the particular facts. Their Lordships have in terms held that there is nothing in the Tenancy Act which rules out an application of the principle of waiver especially when a provision like the old Section 27 or new Section 30 by way of saving provision is enacted, and when this is a general principle governing the relations between the landlord and tenant. In *The Calcutta Credit Corporation Ltd., and Another Vs. Happy Homes (P) Ltd.*, and 474, their Lordships pointed out that the law under the Transfer of Property Act on the question of waiver is not different from the law in England, Section 113 of the T.P. Act clearly contemplates waiver of the notice by any act on the part of the person giving it, if such an act shows an intention to treat the lease as subsisting and the other party gives his consent express or implied therefor. In the latest decision in *Tayabali Jaffarbai Tankiwala Vs. Asha and Co. and Another*, , their Lordships in terms relied upon Illustration (b) to Section 113 of the Transfer of Property Act, which is in the following terms:-

"(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived."

Their Lordships pointed out that if only the language of the illustration were to be considered, as soon as the second notice was given the first notice would stand waived. Their Lordships further considered that it was wholly unnecessary for that case to decide whether for bringing about a waiver u/s 113 of the Transfer of Property Act a new tenancy by an express or implied agreement must come into existence. All that need be observed, according to their Lordships, was that Section 113 in terms did not appear to indicate any such requirement and all that had to be seen was whether any act had been proved on the part of the landlord which showed an intention to treat the lease as subsisting provided there was an express or implied consent of the person to whom the notice was given. On the facts of that case, their Lordships found that there could be no doubt that the serving of the second notice and what was stated therein together with the claim as laid down and amplified in the plaint showed that the landlord waived the first notice by showing an intention to treat the tenancy as subsisting and that that was with the express or implied consent of the tenant to whom the first notice had been given because he had even made payment of the rent which had been demanded though it was after the expiration of the period of one month given in the notice. Therefore in a case arising under the Rent Act this principle of waiver was invoked by their Lordships. It is, therefore, not open to Mr. Shelat to contend that the principle of waiver could not apply in cases arising under the Rent Act or the Tenancy Act.

6. Mr. Shelat also relied upon the decision in *Ranjit Chandra Chowdhury Vs. Mohitosh Mukherjee*, , their Lordships referred to two earlier decisions in *Ganga Dutt Murarka Vs. Kartik Chandra Das and Others*, , and in *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, , where it was held in connection with the statutory tenancy that the landlord accepting rent does not assent to a new contractual tenancy but continues the old tenancy. In the *The Calcutta Credit Corporation Ltd., and Another Vs. Happy Homes (P) Ltd.*, , the same subject was discussed in detail. In terms their Lordships referred to Section 113 of the Transfer of Property Act. Therefore, this decision could not help Mr. Shelat, as it only makes the distinction between the new tenancy being created and the old being continued. In cases arising u/s 113 of the T.P. Act, when the notice is waived the old tenancy would revive and continue. Therefore, that decision also would not show that Section 113 of the T.P. Act would not be applicable in cases where the tenancies are governed by the Rent Act or the Tenancy Acts.

7. Finally, Mr. Shelat relied upon the decision in *Ganga Dutt Murarka Vs. Kartik Chandra Das and Others*, , their Lordships had considered the principle of holding over u/s 116 of the Transfer of Property Act, which provided that if a lessee or under lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106. Their Lordships in terms made

the following observations:

"It is however, well settled that where a contractual tenancy to which the rent control legislation applies has expired by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises, acceptance of rent from the tenant by the landlord after the expiration of determination of the contractual tenancy will not afford ground for holding that the landlord has assented to a new contractual tenancy".

At p. 1070, their Lordships pointed out that where immunity is granted under the rent control legislation to the tenant against eviction mere acceptance of amounts from him which were equivalent to rent after the contractual tenancy had expired or which were fixed as standard rent did not amount to acceptance of rent from a lessee within the meaning of Section 116 of the Transfer of Property Act, and the failure to take action which was consequent upon a statutory prohibition imposed upon the Courts and not the result of any voluntary conduct on the part of the landlord would not also amount to assenting to the lessee continuing in possession. Thereafter, their Lordships observed as under:-

"Of course, there is no prohibition against a landlord entering into a fresh contract of tenancy with a tenant whose right of occupation is determined and who remains in occupation by virtue of the statutory immunity. Apart from an express contract, conduct of the parties may undoubtedly justify an inference that after determination of the contractual tenancy, the landlord had entered into a fresh contract with the tenant, but whether the contract justifies such an inference must always depend upon the facts of each case".

This decision is in the context of Section 116 of the Transfer of Property Act for finding out whether a new tenancy had come into existence. Their Lordships merely observed that merely from acceptance of some amounts which were equivalent to the rent and merely from the inaction of the landlord, no such new tenancy could be implied u/s 116 of the T.P. Act. Even while making this observation, their Lordships pointed out that the conduct of the parties may justify an inference that after the determination of the contractual tenancy the landlord had entered into a fresh contract with the tenant, but whether the conduct justifies such an inference must always depend upon the facts of each case. In the present case, the question is not of a new tenancy u/s 116 of the Transfer of Property Act but is whether the old tenancy continues by reason of the waiver of the notice to quit, so that the contractual tenancy would be revived under Illustration (a) to Section 113 of the Transfer of Property Act. This illustration is as under:-

"(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived".

In view of the language of this illustration, it is obvious that if the landlord files a

suit for recovery of rent for the subsequent period after the termination of the contractual tenancy and thereafter the tenant even pays rent in execution of such decree the terms of this illustration would be clearly fulfilled so as to bring the case under the principle of the waiver contemplated u/s 113 of the Transfer of Property Act, as with the consent of the tenant to whom such notice was given the landlord has done that act showing the intention to treat the lease as subsisting. Mr. Trivedi in this connection rightly relied upon a decision of the Maharashtra High Court Division Bench consisting of Kotval and Shah, JJ., in Bapurao Vs. Waman and Others, , where in a writ petition such a plea of waiver was allowed and it was held that the landlord by his act not only waived the original notice of ejectment but also waived the benefit of the order for possession which was made in his favour by reason of execution of the rent decree for the subsequent period. Mr. Shelat, however, vehemently argued that in the present case, when this contention was raised before the Prant Officer, he did not record any evidence. Even the Revenue Tribunal has not gone into the facts, as it came to the conclusion that the principle of waiver could not apply, as it was wholly inconsistent for the determination of the tenancy under the Tenancy Act. Therefore, at no stage any of the lower authorities has gone into the relevant facts for recording the finding as to the waiver. This is entirely a question of fact, and this Court should not in this writ petition conclude that question especially when there are no materials on the record. Mr. Shelat argued that if the record of these suits was produced, it might be pointed out that the rent which was claimed was claimed without prejudice and that acceptance was even without prejudice to the rights or that the claim was really for compensation for use and occupation. In any event, unless all these facts are gone into by the fact finding authorities, it would not be proper for this Court to conclude this question, especially when there was no clear issue to this effect raised before the Mamlatdar. There is great force in this contention of Mr. Shelat especially when there is nothing on the record which would enable me to conclude this question. Therefore, the matter must be remanded to the Revenue Tribunal, which shall determine whether on the facts of the case the notice to terminate the contractual tenancy in the present case served to the certified landlord was waived as contended by the petitioner tenant because of the suits for recovery of subsequent rent and by execution of those decrees. As sufficient time has now elapsed, the Revenue Tribunal shall dispose of the matter as expeditiously as possible.

8. This petition is accordingly allowed by accepting only the last contention of the petitioner, and the matter is remanded to the Revenue Tribunal for further disposal in the light of the aforesaid observations in accordance with law. Rule accordingly made absolute. There shall be no orders as to costs in the circumstances of the case.

9. Petition allowed.