
(1985) 07 GUJ CK 0014
In the Gujarat High Court

Joshi Chhaganlal Garbaddas (Decd.) through his Heirs
Vishnuprasad and Others

APPELLANT

Vs

Raising Khodasing and Others

RESPONDENT

Date of Decision : 23-07-1985

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 25A, 25A
Transfer of Property Act, 1882 — Section 58c, 58d

Citation : (1986) 1 GLR 69

Hon'ble Judges : R.A. Mehta, J

Bench : Single Bench

Judgement

R.A. Mehta, J.—In this Second Appeal the main question of law that arises is whether an issue regarding tenancy arises in the present suit and is required to be referred to the tenancy court under the Bombay Tenancy & Agricultural Lands Act.

2. The appellant is the original plaintiff who had filed the suit for redemption of the mortgage property being agricultural land. The suit was contested on the ground that there was an absolute sale and not in mortgage. However the plea of the defendants was negated and it was held that the suit transaction was a mortgage and the preliminary decree for redemption was passed. The First Appeal to the District Court and the Second Appeal to the High Court failed. Thereafter proceedings for final decree were taken before the trial court. At that stage the respondents-defendants raised a new contention based on Section 25A of the Bombay Tenancy and Agricultural Lands Act, 1948, which gives protection to a tenant who becomes usufructuary mortgagee of the same land and it provides that if any Land is mortgaged by a landlord by way of a usufructuary mortgage to a tenant cultivating such land, the tenancy of such land shall be in abeyance during the period the mortgage subsists and after the expiry of the said period it shall be lawful to the tenant to continue to hold the land on the terms and conditions on which he held it before the mortgage was created. The defendants therefore raised a contention that there were tenants cultivating the

suit land prior to the creation of the usufructuary mortgage and, therefore on redemption of the usufructuary mortgage the tenancy is revived and no decree for actual possession can be passed in the redemption suit.

3. The learned trial Judge held that the defendants failed to prima facie prove that they were tenants of the suit land prior to the mortgage transaction and therefore rejected the contention and passed the final decree. In the appeal of the defendants the learned Assistant Judge held that the issue regarding tenancy was required to be referred to the tenancy court. Therefore the final decree of the trial court was reversed by remanding the matter to the trial court with the following two issues, the returned to the tenancy Court:

1. Whether the defendants were the tenants of the suit land prior to the mortgage transaction dt. 24th May 1951;
2. Whether their tenancy rights revived u/s 25A of the Tenancy. Act as alleged by the defendants.

Being aggrieved by this, the original plaintiff has filed this Second Appeal.

4. The learned Counsel for the appellant has submitted that there is no prima facie case in the contention of the defendants and the learned trial Judge had rightly held that there is no evidence even of a prima facie case regarding prior tenancy. It is also contended that Section 25A is not attracted in the present case at all because there is no usufructuary mortgage as defined in Section 58(d) of T.P. Act, and the mortgage in this case has been held to be a mortgage by conditional sale as defined in Section 58(c) of T.P. Act. For this purpose reliance is placed on the judgment of this Court in Second Appeal No. 324/72 against preliminary decree between the same parties arising in this very suit. In that Second Appeal against the preliminary decree the question was whether the suit transaction was an absolute sale or a mortgage by way of conditional sale and the court held that this was not a transaction of absolute sale but it was a transaction of mortgage by conditional sale. At that stage the court was only concerned with the question whether it was a sale or a mortgage and there was no question as to the nature of the mortgage. Therefore, it cannot be said that the question of nature of the mortgage has been decided between the parties.

5. The learned Counsel for the appellant has also submitted that once it has been held that the suit transaction is in the nature of a mortgage by conditional sale, it is not open to the parties to contend to the contrary and not open to this Court at his stage to open the question again. The earlier decision in S.A. No. 324/72 was only on the question of absolute sale and conditional sale (mortgage) and not on the question of nature of the mortgage. If a mortgage is by way of conditional sale it does not necessarily mean that it is not a usufructuary mortgage. If the ingredients of usufructuary mortgage are also satisfied by delivery of possession it may also amount to usufructuary mortgage. The two mortgages are not necessarily mutually exclusive and one mortgage can be of both types. That question had not been examined and was not required to be

examined at that stage. The question arises now only in the context of tenancy and that question has to be decided by the tenancy court.

6. Moreover, the question regarding prima facie case of tenancy does not arise for consideration of the civil court. If an issue arises, which is required to be decided by a tenancy court, the civil court has no jurisdiction to decide the same even in going into that question.

7. The learned Counsel for the appellant has submitted that even the issue regarding tenancy does not arise from a more vague plea of tenancy. The learned Counsel for the appellant has submitted that the tenant has failed to indicate any detail whatsoever. He has not indicated as to how the alleged tenancy was created, by whom it was created and what were the terms and conditions of such alleged tenancy. Reliance was placed on the judgment of a Division Bench of Bombay High Court in the case of Nilesh Construction Company and Another Vs. Gangubai and Others, wherein it has been held that before a reference to the Mamlatdar for deciding the issue of tenancy under the Tenancy Act is made, the alleged tenant must disclose in his pleadings details about the tenancy and the exact nature of the right which is claimed by him and an issue of tenancy cannot be raised on a vague plea. The Division Bench had relied on the earlier judgment in the case of Pandu Dhondi Yerudkar and Another Vs. Ananda Krishna Patil, the learned Judge of the Bombay High Court observed that "When a vague plea is made by the defendant contending that he is a tenant of the land the court should hesitate to frame such an issue on such a vague plea unless the defendant is able to give particulars showing the time when the tenancy was created, the person by whom it was created and terms on which it was created. However, in para 4 the Bombay High Court held that "Whenever an issue as regards tenancy is framed the court has no other option but to refer such issue for decision to the authorities under the Act." In para 5 a pious hope was expressed that the Legislature should intervene to give discretion to the civil court to consider whether a bona fide dispute or question arises in a suit, which is required to be determined under the Tenancy Act so as to defeat vague and frivolous pleas at the threshold. However, the Legislature has not acted on that suggestion. Therefore the question still remains within the exclusive jurisdiction of the tenancy court. In the present case the issues have already been raised by the lower appellate court and they are within the exclusive jurisdiction of the tenancy court and, therefore, at this stage and in these civil proceedings, there is no jurisdiction to go into the questions which are essentially required to be decided by the tenancy court.

8. The next contention urged was that after the preliminary decree, such contention of tenancy is barred by principles of constructive res judicata. That question has been decided by a judgment of this Court delivered by S.N. Sheth, J. in C.R.A. No. 443 of 1965 on 17th August 1970. While upholding that such a plea of tenancy can be raised at a later stage in the final decision proceedings, the court observed that "it will be open to the defendants to go to the Mamlatdar

and make an application under the provisions of the Tenancy Act for declaration that they are tenants of the suit lands. Nothing will prevent them from doing so it in such an application the Mamlatdar decides that they are the tenants then obviously that decision will obstruct the delivery of possession even if it is awarded by the final decree". In fact such a contention can be raised even in execution proceedings. Therefore there is no reason why such point cannot be raised after a preliminary decree in the same suit.

9. In the case of A.A. Shirdone and Others Vs. Saheb H. Tajbhokhari, the Supreme Court held that a relief for actual possession from the mortgagees who claimed to be protected tenants could be granted only by the revenue court and not by the civil court, and the mortgagor on the basis of the decree for redemption can get only symbolic possession and not actual physical possession of the land in dispute. That was also a case under the Bombay Tenancy and Agricultural Lands Act.

In the result the Second Appeal fails and is required to be dismissed.

10. However, some further directions would be necessary in view of the fact that the lower appellate court has directed reference of the two issues to the tenancy court. The appellant-plaintiff has already deposited the amount of redemption as directed by the trial court. That amount is lying deposited in the court. However, it is not invested. It is therefore directed that the amount of redemption money deposited by the appellant be invested in a nationalised bank so as to earn interest thereon. The other direction is required to be issued in view of the fact that these proceedings are pending since last 18 years. The civil suit was filed in 1967. There was one complete round by way of Second Appeal. Now there is going to be a third round in the tenancy court. In view of the fact that the proceedings have been delayed for a considerable period, it is now in the interest of justice that the proceedings before the tenancy court are expedited. The trial court is, therefore, directed to see that issues are referred to the tenancy court without any delay and latest by 1st September 1985. The tenancy court is also directed to see that the proceedings before it are complete latest by 31st Dec. 1985 and the finding on the issue are remitted to the trial court by that date.

11. With the aforesaid direction, the judgment and order of the lower appellate court is confirmed and the Second Appeal is dismissed with no order as to costs.