
(1989) 07 BOM CK 0031

In the Bombay High Court

Case No : Letters Patent Appeal No. 63 of 1986 in Writ Petitions No's. 325 of 1981, 537 of 1982 and 801 of 1982

Khanqah-Kadria Trust (Wakf), Balapur

APPELLANT

Vs

Shevantabai Shivaji

RESPONDENT

Date of Decision : 18-07-1989

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 30, 40, 40(1)
Constitution of India, 1950 — Article 14

Citation : (1989) MhLj 891

Hon'ble Judges : C. Mookerjee, C.J.;V.A. Mohta, J;C.S. Dharmadhikari, J

Bench : Full Bench

Advocate : S.A. Bobde, V.D. Chahande, D.M. Karkare and S.D. Malke in L.P.A. No. 63 of 1986, R.N. Deshpande and S.R. Deshpande in W.P. No. 537 of 1982 and W.P. No. 801 of 1982, for the Appellant; B.S. Deshpande in L.P.A. No. 63 of 1986, C.P. Kalele, in W.P. No. 537 of 1982 A.M. Bapat and Vivek Palshikar, For respondents Nos. 1 to 4 in W.P. No. 801 of 1982, for the Respondent

Judgement

V.A. Mohta, J.—The following question needs to be answered in this reference.

Whether a statutory tenancy of a land owned by a public trust is heritable under the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (the Vidarbha Act)?

2. In a large part of the State, land tenancies were governed by the Bombay Tenancy and Agricultural Lands Act, 1948 (the Bombay Act). In Vidarbha, they were governed by different enactments. The Vidarbha Act was enacted in the year 1958, as the preamble itself indicates, "with a view to bringing the status and rights of tenants as far as possible in line with those prevailing in certain other parts of the State." In the instant matter we are chiefly concerned with sections 54 and 129 of the Vidarbha Act, which we reproduce for ready reference :

54. (1) Where a tenant dies, the landlords shall be deemed to have continued

the tenancy -

(a) if such tenant was member of an undivided Hindu family to the surviving member of the said family, and

(b) if such tenant was not a member of an undivided Hindu family, to his heirs, on the same terms and conditions on which such tenant was holding at the time of his death.

(2) Where the tenancy is inherited by heirs other than the widow of the deceased tenant, such widow shall have a charge for maintenance on the profit of such land.

(3) The interest of an occupancy tenant in his holding shall on his death pass by inheritance or survivorship in accordance with his personal law.

129. Nothing in the foregoing provisions except section 2, the provision of Chapter II (excluding sections 21, 22, 23, 24 and 37) and section 91 and the provisions of Chapters X and XII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in sections mentioned above shall apply -

(a) to lands held or leased by a local authority, or university established by law in the State.

(b) to lands which are the property of a trust for an educational purpose, hospital, Panjarapole, Gaushala, or an institution for public religious worship, provided the entire income of such lands is appropriated for the purposes of such trust; and

(c) to lands assigned or donated by any person before the commencement of this Act for the purpose of rendering any of the following services useful to the community, namely maintenance of water works, lighting or filling of water troughs for cattle;

(d) to any land taken under management by a civil, revenue or criminal Court:

Provided that, from the date on which the land referred to in clause (d) is released from such management, all the provisions of this Act shall apply thereto, but subject to the following modifications, that is to say, -

(i) in the application of section 38 to such land, for the time mentioned in sub-section (1) thereof for giving notice to the tenant and making an application for possession, there shall be substituted a period of one year from the date of the release of land from such management, and the said section shall not apply so as to entitle a landlord to terminate a tenancy of a tenant (or his successor-in-title) in respect of whom the had an opportunity to terminate u/s 38;

(ii) if on the date on which the land was taken under management, the landlord was personally cultivating the land then on the release of the land from management the tenancy of any person subsisting at the date of the release

shall be deemed to be terminated, and the land shall be restored to the possession of the landlord;

(iii) the right of the tenant to purchase the land under the relevant provisions relating thereto shall be exercised within one year from the expiry of the period during which the landlord is entitled to terminate the tenancy as provided in clause (i).

Explanation. - For the purpose of clause (b), a certificate granted by the Collector after holding an inquiry, that the conditions mentioned in the said clause are satisfied by the trust shall be the conclusive evidence in that behalf.

The provisions in the Bombay Act corresponding to sections 54 and 129 are sections 40 and 88B. They read thus :

40. (1) Where a tenant (other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy.

(2) Where the tenancy is inherited by heirs other than the widow of the deceased tenant, such widow shall have a charge for maintenance on the profits of such land.

88B. (1) Nothing in the foregoing provisions except sections 3, 4B, 8, 9, 9A, 9B, 9C, 10, 10A, 11, 13 and 27 and the provisions of Chapters VI and VIII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in the sections mentioned above, shall apply -

(a) to lands held or leased by a local authority, or University established by law in the Bombay area of the State of Maharashtra; and

(b) to lands which are the property of a trust for an educational purpose, a hospital, Panjarapole, Gaushala or an institution for public religious worship :

Provided that -

(i) such trust is or is deemed to be registered under the Bombay Public Trusts Act, 1950, and

(ii) the entire income of such lands is appropriated for the purpose of such trust;

(c) to lands assigned or donated by any person before the 1st day of August 1956 for the purpose of rendering any of the following services useful to the community, namely : - maintenance of water works, lighting or filling of water troughs for cattle;

(d) to lands taken under management temporarily by the Civil, Revenue or Criminal Courts by themselves, or through receivers appointed by them, till the decision of the tide of the rightful holders :

Provided that, from the date on which the land referred to in clause (d) is released from management, all the foregoing provisions of this Act shall apply thereto; but subject to the notifications that in the case of a tenancy, not being a permanent tenancy, which on that date subsists in the land -

(i) the landlord shall be entitled to terminate the tenancy u/s 31 or u/s 33B in the case of a certificated landlord within one year from such date; and

(ii) within one year from the expiry of the period during which the landlord or certificated landlord is entitled to terminate the tenancy as aforesaid, the tenant shall have the right to purchase the land u/s 32 (or u/s 33-C in the case of an excluded tenant) and

(iii) the provisions of sections 31 to 31-D (both inclusive) (or sections 33-A and 33-B in the case of a certificated landlord) and sections 32 to 32-R (both inclusive) (or sections 33-A and 33-C in the case of an excluded tenant) shall, so far as may be applicable, apply to the termination of a tenancy or the right to purchase the land, as aforesaid :

Provided further that, -

(a) in the case of a permanent tenancy the permanent tenant shall be entitled to purchase the land held by him on permanent tenancy -

(i) within one year from the date on which the estate or land is released from management, or

(ii) where such estate or land was released from management after the tillers" day but before the commencement of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1960, within one year from such commencement, and

(b) where such permanent tenant is desirous of exercising the right conferred on him under this proviso, he shall accordingly inform the landlord and Tribunal in the prescribed manner within the said period of one year and the provisions of sections 32 to 32-R shall, so far as may be applicable, apply to the right of the permanent tenant to purchase the land.

(2) For the purposes of this section, a certificate granted by the Collector, after holding an inquiry, that the conditions in the proviso to sub-section (1) are satisfied by any trust shall be conclusive evidence in that behalf.

It would be seen that by virtue of section 129(b), section 54 of the Vidarbha Act is made inapplicable to lands owned by public trusts and provisions in pari materia exist in the Bombay Act. In the case of *Nakabai @ Anusayabai Maruti Naikwadi vs. Mahadu Sakharam Adsule and others*, 1980 Mh.L.J. 105 - a case under the Bombay Act - it was held that tenancy rights in respect of lands owned by public trust are heritable. In the case of *Ramchandra Nagoji Bondre and others vs. Shri Mangaleshwar Maharaj Sansthan and others*, 1986 Mh.L.J. 125 - a case under the Vidarbha Act - a contrary view was taken. A reference to the Full Bench was made since it was felt that there was a conflict of opinion between

two Division Benches of this Court on the point.

3. We may at this stage notice some of the provisions of the Vidarbha Act which are not made applicable to the lands belonging to the public trusts u/s 129 and which have some relevance to the point. Section 2(32) defines the term "tenant" as under :

2. (32) "tenant" means a person who holds land on lease and includes -

(a) a person who is deemed to be a tenant under sections 6, 7 or 8.

(b) a person who is protected lessee or occupancy tenant and the word "Landlord" shall be construed accordingly.

Section 5 makes the provision of Chapter V of the Transfer of Property Act applicable to the tenancies and leases governed by the Vidarbha Act in so far as they are not inconsistent with the provisions of the said Act. Section 6 creates deemed tenancies: Section 7(1)(b) and section 10(1) read thus :

7(1) Every person who by himself or through his predecessor-in-interest -

(b) held as a tenant belonging to any public trust of a religious or charitable nature for a continuous period of three years immediately before the 1st day of April 1957, shall be deemed to be a tenant of the said land for the purpose, of this Act.

10(1) : A person who or whose predecessor-in-title held land as tenant or protected lessee on the first day of January 1953 or thereafter and who has subsequently been dispossessed by a surrender of tenancy before the date of the commencement of this Act may within a period of one year from the date of the commencement of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) (Amendment) Act, 1960, apply to the Tahsildar for the restoration of his tenancy on the same terms and conditions on which he held the land before such surrender unless the land has been put to a non-agricultural use on or before the appointed day.

They refer respectively to the expression "predecessor-in-interest" and "predecessor-in-title" of a tenant. Section 33(I)(i) and (ii) reads thus :

33.(1) No sub-division or sub-letting of the land held by a tenant or assignment of any interest therein shall be valid :

Provided that if the tenant dies, -

(i) if he is a member of a joint family, the surviving members of the said family, and

(ii) if he is not a member of a joint family, his heirs, shall be entitled to partition and sub-divide the land leased subject to the following conditions, namely :-

(a) each sharer shall hold his share as a separate tenant,

(b) the rent payable in respect of the land leased shall be apportioned among the sharers, as the case may be, according to the share allotted to them,

(c) the area allotted to each sharer shall not be less than the unit which the State Government may, by general or special order, specify, in this behalf having regard to the productive capacity and other circumstances relevant to the full and efficient use of the land for agriculture.

(d) if such area is less than the unit referred to in clause (c), the sharers shall be entitled to enjoy the income jointly but the land shall not be divided by metes and bounds,

(e) if any question arises regarding the apportionment of the rent payable by the sharers, it shall be decided by the Tahsildar whose decision shall be final.

It also refers to successors and/or survivors of a deceased tenant.

4. The Vidarbha Act creates, what is by now commonly termed as "statutory tenancy" which has been described as "phantom tenancy" or "life after death". It gives protection to lessees even after the termination of the contract of lease and creates several rights in their favour. Those lessees cannot be evicted except on certain specified grounds and except in a particular manner through special machinery under the Act. Statutory tenancy can be terminated on several grounds, but the "death of a tenant" is not such ground. Origin of statutory tenancy is generally in the contract - as is the case not only in all the three matters before us but also in Nakabai as well as Ramchandra - but in case of deemed tenancy it may not be so.

5. Tenancy rights are basically and ordinarily heritable, though the law governing the manner of inheritance may be different. Lease creates an interest in the estate and not merely a personal right to remain in possession. Heritability is a well-known and essential incident of lease. Thus, the source of heritability of tenancy rights is in the very nature of lease rights and not in section 54 as has been canvassed on behalf of the public trust. Section 54 merely regulates heritability in a particular manner taking into consideration the purpose of the legislation. It is significant to notice that heritability u/s 54 is different than under general law. The last word on the subject of heritability of a statutory tenancy has been written in the case of Gian Devi Anand Vs. Jeevan Kumar and Others, . This decision has taken a review of many earlier decisions on the point. The case of Ganpat Ladha Vs. Sashikant Vishnu Shinde, has been expressly overruled. The cases of Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, and Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another, stand impliedly overruled and the ratio of the case of Damadilal and Others Vs. Parashram and Others, has been reaffirmed. In order to appreciate the ratio in Smt. Gian Devi Anand it is necessary to notice its basic background. The case relates to Delhi Rent Control Act, 1958, in which the statutory tenancy for residential purposes is made heritable in a particular manner and there is no provision about heritability of tenancy for commercial purposes. Based on the

distinction, a point was raised that tenancy for commercial purposes is not heritable. The contention was repelled on the ground that in the absence of express provision about heritability of commercial tenancy, the ordinary law of inheritance would apply. The following observations are crucial:

34.-----The mere fact that in the Act no provision has been made with regard to the heirs of tenants in respect of commercial tenancies on the death of the tenant after termination of the tenancy, as has been done in the case of heirs of the tenants of residential premises, does not indicate that the Legislature intended that the heirs of the tenants of commercial premises will cease to enjoy the protection afforded to the tenant under the Act. The Legislature could never have possibly intended that with the death of a tenant of the commercial premises, the business carried on by the tenant, however flourishing it may be, and even if the same constituted the source of livelihood of the members of the family, must necessarily come to an end on the death of the tenant only because the tenant died after the contractual tenancy had been terminated. It could never have been the intention of the Legislature that the entire family of a tenant depending upon the business carried on by the tenant will be completely stranded and the business carried on for years in the premises which had been let out to the tenant must stop functioning at the premises which the heirs of the deceased tenant must necessarily vacate, as they are afforded no protection under the Act.-----

36.-----In the absence of any provision regulating the right of inheritance, and the manner and extent thereof and in the absence of any condition being stipulated with regard to the devolution of tenancy rights on the heirs on the death of the tenant, the devolution of tenancy rights must necessarily be in accordance with the ordinary law of succession.

The clear ratio of the above decision is that every tenancy - irrespective of its nature - is ordinarily heritable, heritability being the essential and important incident of tenancy under the ordinary law. The source of the incident has to be traced only in ordinary law of inheritance and not in the statute creating the tenancy. Therefore, the assumption that the only source of heritability of a statutory tenancy under the Vidarbha Act is section 54 is basically incorrect.

6. Yes, it is permissible for a statute creating statutory tenancy to regulate the rights in a particular manner and to provide even for extinction of the heritability. Such extinction though permissible, cannot be readily inferred. Clear legislative intention destructive of so important an incident of tenancy like heritability will have to be discerned. We are unable to see any provision in the Vidarbha Act which is inconsistent with and/or contrary to the ordinary law of inheritance. Indeed we find certain express provisions (which are not made inapplicable to the lands of the public trusts u/s 129) which are indicative of consistency with the ordinary law on the subject. Most important provision is section 33. Sections 7 and 10 also refer to the concept of successor of a tenant. The expression "shall be deemed to have continued the tenancy" used in section 54(1) is also

important since it reiterates the pre-existing legal position. Section 40(1) of the Bombay Act uses at the end the words "to such heir or heirs of the deceased tenant as may be willing to continue the tenancy" which are also consistent with the concept of heritability. Nakabai has held that tenancy rights in respect of the land of a public trust are heritable under the said Act. The Division Bench has strongly relied upon Damadilal which as indicated earlier has been reaffirmed in Smt. Gian Devi Anand. We are in agreement with what has been expressed and held in Nakabai. It is pertinent to notice that even ""Ramchandra " has agreed with Nakabai as far as its legal position obtained under the Bombay Act is concerned by observing :

11.-----But it is obvious that in view of the pronouncements of the Supreme Court, to which we have adverted, that proposition can no longer be regarded as good law, and so far as the provisions of section 40 of the Bombay Tenancy Act are concerned, the proposition laid down in Nakabai's case regarding the heritability of the statutory tenancy under the Bombay Tenancy Act, with respect, cannot be open to question.

What persuaded the Division Bench in Ramchandra to take a different view under the Vidarbha Act is the difference in language between section 40 of the Bombay Act and section 54 of the Vidarbha Act and the absence of the words "to such heir or heirs of the deceased tenant as may be willing to continue the tenancy" in section 54. We are unable to persuade ourselves to a view that the above difference in the language used in the two sections is so material as to attribute contradictory legislative intent on the subject. We have already noticed the preamble of the Vidarbha from which it is clear that the principal purpose of its making was to bring the status and rights of tenants in Vidarbha as far as possible at par with the status and rights of tenants already prevailing in the other parts. Not that there are no differences in the two provisions. There are few but perhaps they were necessitated because of the special conditions and earlier laws operating in this region. But we are unable to see any logic or reason - and none is pointed out to us despite repeated queries - behind the necessity for making an unusual and odd departure for the purposes of public trusts in Vidarbha only. In our view, the difference is Inconsequential and relevant words merely state the obvious.

7. Smt. Gian Devi Anand's ratio was sought to be distinguished on behalf of the public trusts on the basis of the provisions of deemed tenancy under the Vidarbha Act, types of which do not exist in the Delhi Act. It is argued that at least statutory tenancy which does not have origin in the contract, would not attract the said ratio. The submission does appear attractive in the first blush, but is not sound. A "tenant" as defined by section 2(32) is made one class for the purposes of the Act. There is no warrant to make a distinction between a tenant and tenant depending upon the origin. If any such classification is recognised, there is possibility of a successful attack based on violation of Article 14 of the Constitution. One of the principles of construction of statutes warrants an

interpretation which saves the provision if possible. In that context, following observations in Smt. Gian Devi Anand have also to be borne in mind.

2.-----Though the expression "statutory tenant" has not been used in any rent control legislation the concept of statutory tenant finds recognition in almost every rent control legislation. The definition of "tenant" in Section 2(1) of the Delhi Rent Control Act, 1958 - and I am referring here to the provisions of the Delhi Rent Control Act, 1958 because that is the statute with which we are concerned in the present case - includes a statutory tenant. It says in clause (ii) that "tenant" includes any person continuing the possession after the termination of his tenancy. Such a person would not be a tenant under the ordinary law but he is recognised as a "tenant" by the rent control legislation and is therefore described as a statutory tenant as contradistinguished from contractual tenant. The statutory tenant is, by virtue of inclusion in the definition of "tenant", placed on the same footing as contractual tenant so far as rent control legislation is concerned. The rent control legislation in fact, as pointed out by this Court in a seven judge Bench decision in V. Dhanapal Chettiar Vs. Yesodai Ammal, does not make any distinction between contractual tenant and statutory tenant. "It does not permit the landlord to snap his relationship with the tenant merely by his act of serving a notice to quit on him. In spite of the notice, the law says that the continues to be a tenant and he does not so enjoying all the rights of a lessee and is at the same time deemed to be under all the liabilities such as payment of rent etc. in accordance with the law." The distinction between contractual tenancy and statutory tenancy is thus completely obliterated by the rent control legislation. Though genetically the parentage of these two legal concepts is different, one owing its origin to contract and the other to rent control legislation, they are equated with each other and their incidents are the same. If a contractual tenant has an estate or interest in the premises which is heritable, it is difficult to understand why a statutory tenant should be held not to have such heritable estate or interest. In one case, the estate or interest is the result of contract while in the other it is the result of statute.....

8. There is yet another angle to the case which has to be borne in mind. The Vidarbha Act is a beneficial and social legislation the principal object of which is to give protection to the tenancy rights and therefore, benefit of doubt even if any, must go in favour of heritability even in respect of a statutory tenancy origin of which is deemed tenancy. There are many guiding decisions of the Supreme Court on the point but we will notice the one under the Bombay Act - Jivabhai Purushottam vs. Chhagan Karson, 1961 NLJ 505. It may be noticed that the concept of deemed tenancy very much exists also under the Bombay Act.

9. It was submitted on behalf of the Public Trust that section 54 is a complete code into itself so far as inheritance is concerned and therefore it is impermissible to look into the general law. Our special attention was invited to section 37 of the Vidarbha Act (corresponding to section 30 of the Bombay Act) which is made inapplicable to the lands of the public trusts u/s 129. Section 37

reads thus :

37. Save as provided in this Act, the rights and 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 shall not be limited or abridged.

We have already held that section 54 merely regulates inheritance of tenancy rights in a particular manner and that wherever section 54 applies, inheritance would be in accordance with those provisions and wherever it is not made applicable it would be in accordance with the general law. Section 30 of the Bombay Act has been considered in *Nakabala*. Rightly has it been observed that it preserves the rights and privileges of a tenant under other enactments, usages and customs to the extent to which they are not inconsistent with the Act. In application of section 37 to the lands belonging to the public trust cannot be so interpreted as to put those tenancies in a disadvantageous position. On the subject of effect of a complete code, reliance is placed on the case of *Sanghvi Jeevraj Ghewar Chand and Others Vs. Secretary, Madras Chillies, Grains and Kirana Merchants Workers Union and Another*, . It has no application. It is a famous case under the Payment of Bonus Act which has been held to be exhaustive of all claims about bonus considering the historical background, the legislative intention and the scheme of the said Act.

10. Several other decisions such as the case of *Vithal Dattatraya Kulkarni and Others Vs. Smt. Shamrao Tukaram Power and Others*, , the case of *Thakorelal Amratlal Vaidya Vs. Gujarat Revenue Tribunal and Others*, and the case of *Madhukar Purushottam Patil vs. State of Maharashtra and others*, 1986 Mh.L.J. 781 (which has considered *Thakorelal*) which have taken a view that statutory tenancy is not heritable like contractual tenancy have been brought to our notice. The background of each of those cases is entirely different. That apart, it is unnecessary to examine in detail these cases since the last word on the point has been uttered in *Smt. Gian Devi Anand. Cases of Dahya Lala and others vs. Rasul Mahomed Abdul Rahim and others*, 1962 NLJ 682 and *Jagan alias Jagannath Umaji vs. Gokuldas Hiralal Tewari and others*, 1987 Mh.L.J. 1114 were cited before us to show how deemed tenancy can be created and how before merger of deemed tenancy into statutory tenancy, there is no heritability in the rights. We have already held that the different sources of statutory tenancy make no difference.

11. Our attention was also drawn to sections 168 and 172 of the M. P. Land Revenue Code (repealed by the *Vidarbha Act*) which dealt with the subject of devolution of ordinary tenant's rights and" devolution of rights of occupancy tenants. They pass by inheritance or survivorship in accordance with the personal law. The submission is that since such specific provisions are not to be found in the *Vidarbha Act*, legislative intention in favour of extinction of heritability should be inferred. The submission is not sound and cannot be accepted. Even those provisions were not the source of heritability. We have

already dealt with this subject in details earlier.

12. To summarise, our conclusions are that (i) Section 54 of the Vidarbha Act is not the only source of heritability of the tenancy, (ii) Section 54 merely regulates the manner of inheritance, (iii) Wherever section 54 does not apply, inheritance is governed by the ordinary law, (iv) The basic scheme of the Bombay Act and Vidarbha Act on the subject is not different, and (v) Ramchandra does not lay down the correct legal position.

13. In the result, the question is answered in the affirmative.

The Letters Patent Appeal and the two writ petitions may now be placed before the respective Benches for disposal in accordance with law. No costs.