
(1969) 08 GUJ CK 0014
In the Gujarat High Court

Mohansing Umedsing

APPELLANT

Vs

Dullabhbai Jerambhai and Others

RESPONDENT

Date of Decision : 19-08-1969

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 50

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 37, 37(4), 37(4), 37(5)

Citation : (1970) 11 GLR 588

Hon'ble Judges : S.H. Sheth, J;B.J. Divan, J

Bench : Division Bench

Judgement

B.J. Divan, J.—The petitioner in both these matters is the same individual and the first respondent in each of the matters was formerly his tenant in respect of some agricultural lands belonging to the petitioner. The lands are situated at Delad village in Olpad Taluka of Surat District. The petitioner is the owner of four fields bearing S. Nos. 190/1,160/1, 17774 and 187, admeasuring 4 acres and 5 gunthas, 1 acre, 30 gunthas, 0 acre, 25 gunthas and 2 acres and 7 gunthas respectively. All these S. Nos. are situated in Delad village. He is also the owner of various other S. Nos. situated in Sayan and Delad villages of Olpad Taluka. The first respondent in Spl. C.A. No. 289 of 1963 was the tenant of the lands situated in Delad village and the first respondent in Spl. C.A. No. 290 of 1963 was the tenant in respect of other lands situated in that village. The petitioner had served notices on the two tenants u/s 34 of the Bombay Tenancy and Agricultural Lands Act (hereinafter referred to as the Act), being notices dated March 30, 1949. Thereafter, the petitioner filed two suits for recovery of possession from the two tenants and these proceedings were adopted u/s 29 read with Section 31 of the Act. On April 25, 1950, both the suits were compromised and under the terms of the compromise by an order of the Mamlatdar, possession was delivered by the two tenants of the lands in question to the petitioner. This was done on May 30, 1950. The petitioner in each of the two matters contends that after he got possession from his tenants, he had been cultivating the lands by himself and had continued personally cultivating the

lands. Thereafter, the two tenants filed suits u/s 37 read with Section 39 of the Act as it stood after the amendment of 1956, for restoration of possession of those lands. The suits were filed on January 17, 1957. The Mamlatdar, who heard those two suits, followed the decision of the Bombay High Court in Special Civil Application No. 2517 of 1958, decided on October 25, 1958, by a Division Bench of the Bombay High Court, consisting of Chainani, Ag. C.J. (as he then was) and Shelat J. (as he then was), and dismissed both the suits on the preliminary ground, that as the tenancy of the tenants had been terminated under the old Section 34, which had been repealed and not u/s 31, the provisions of Section 37 did not apply to the tenants' cases. In that particular matter, the Division Bench of the Bombay High Court had held that Section 37, as it then stood, contemplated possession being taken after termination of the tenancy u/s 31 and the Division Bench was unable to find any authority under which references to Section 31 could be read as references to Section 34 of the Act as it stood prior to its amendment in 1956. As the tenancy had not been terminated u/s 31, no relief could be granted u/s 37 of the Act.

2. The tenants filed appeals, which were disposed of by the Prant Officer by his Order, dated July 31, 1961; and he dismissed both the appeals. The Revision Petitions filed by the tenants to the Revenue Tribunal were, however, allowed by the Revenue Tribunal and thereafter the landlord has filed these two petitions before this High Court challenging the decision of the Revenue Tribunal.

3. The two petitions came up for hearing before our learned brother J.B. Mehta J. in the first instance and by his judgment, dated January 19, 1968, our learned brother indicated that the two matters should be dismissed. However, after the judgment was pronounced on January 19, 1968, but before it was signed, our learned brother's attention was drawn to two decisions of two different Single Judges of this High Court. Our learned brother felt some difficulty about following those decisions, particularly in the light of the decision of the Supreme Court in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha*, and he was unable to agree with the view taken by these two Single Judges in their respective judgments. Hence he did not pass any final order in these two matters and has referred the petitions for disposal by a Division Bench in view of the difference between him and the two Single Judges of this High Court. It is under these circumstances that these two matters have now been placed before us.

4. At this stage it is important to bear in mind that Section 37 of the Act as it stood prior to its amendment by Bombay Act No. XIII of 1956, only referred to Section 34 of the Act. Bombay Act No. XIII of 1956, provided for the right of the landlord to terminate the tenancy and to obtain possession of the land on the ground of personal cultivation u/s 31 of the Act and not u/s 34, as was the position prior to the amendment of 1956. After the amendment of 1956, the relevant portion of Section 37 provided:

37. (1) If after the landlord takes possession of the land after the termination of

the tenancy u/s 31, he fails to use it for any of the purposes specified in the notice given u/s 31 within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him.

It was under these circumstances that the Division Bench of the Bombay High Court in Special Civil Application No. 2517 of 1958, decided on October 25, 1958, held that the provisions of Section 37 of the Act, after the amendment of 1956 could not apply to the case of a tenant who had been evicted by the landlord under the provisions of Section 34 of the Act as it stood prior to its amendment in 1956. The Division Bench took the view that Section 37 as it stood after the amendment of 1956, could only apply to the case of a tenant whose tenancy had been terminated u/s 31 of the Act. We are in respectful agreement with that decision of the Division Bench of the Bombay High Court; and even otherwise we are bound by that decision as it was delivered by a Division Bench of the Bombay High Court prior to the bifurcation of the State of Bombay on May 1, 1960.

5. The Act was again amended by the Gujarat Legislature by Gujarat Act No. XVI of 1960, which came into force on December 13, 1960. As a result of that amendment of 1960, Sub-sections (4) and (5) were added to Section 37. Section 37(4) and Section 37(5) are in the following terms:

(4) Where before the commencement of the amending Act, 1955, a landlord in accordance with the provisions of this Act as then in force has terminated the tenancy of any land by giving notice to the tenant that he required the land for cultivating personally or for any non-agricultural purpose and has taken possession of the land whether before or after such commencement, then if he fails to use the land for the purpose specified in the notice within one year from the date on which he took possession or ceases to use it for the purpose specified in the notice at any time within twelve years from the date on which he took possession, the foregoing provisions of this section shall, notwithstanding any decree or order of a Court or tribunal, apply to such failure or cessation, as the case may be, as if there had been a termination of the tenancy u/s 31.

(5) Where a failure or cessation referred to in Sub-section (4) has taken place before the date of the coming into force of the Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960, the liability of the landlord under Sub-section (1) to restore possession of the land to the tenant shall commence from that date.

It may be pointed out that the Amending Act, 1955, referred to in Sub-section (4) of Section 37, as newly introduced by the Gujarat Act No. XVI of 1960, is Bombay Act No. XIII of 1956. It is thus clear that the effect of the decision of the Bombay High Court in Special Civil Application No. 2517 of 1958, was sought to be removed by the Gujarat Legislature by introducing Sub-section (4), because

by that sub-section even though the tenancy had been terminated by a landlord prior to the coming into force of the Bombay Act No. XIII of 1956 ;i.e. even though the termination of the tenancy and the taking over of the possession by the landlord had been u/s 34 of the Act, as a result of the provisions of Section 37(4), the provisions of Section 37 were made applicable as if the termination of the tenancy had been effected u/s 31 of the Act. But to our "mind the most important question that requires determination in the instant case is the effect of Sub-section (5) of Section 37 introduced by Gujarat Act No. XVI of 1960, along with Sub-section (4). It must not be forgotten that by the very Amending Act by which Sub-section (4) was introduced in Section 37 by the Gujarat Legislature, Sub-section (5) was also introduced and it says that where the failure of the landlord to use the land for the purposes specified in the notice or cessation of the landlord to use it for the purpose specified in the notice has taken place before the date of coming into force of Gujarat Act No. XVI of 1960 i.e. before 13th December 1960, then the liability of the landlord to restore possession under Sub-section (1) of the Act shall commence from 13th December 1960, and not as of any earlier date.

6. It has been argued by Mr. N.C. Shah, on behalf of the petitioner, that since the liability of the landlord to restore possession to the tenant in accordance with the provisions of Section 37(1) arose only on December 13, 1960, the applications filed by the two tenants in 1957 seeking restoration of possession u/s 37 of the Act were premature, because the liability of the landlord commenced only on December 13, 1960. In our opinion, it cannot be gainsaid that it is only after the amendment of Gujarat Act No. XVI of 1960, and as a result of insertion of Sub-section (4), that for the first time the tenants, whose tenancies had been terminated u/s 34 of the Act, as it stood prior to August 1, 1956 (on which date Bombay Act No. XIII of 1956 came into force) got the right u/s 37(1) to seek restoration of possession because of the failure of the landlord to use it for the purposes or cessation on the part of the landlord to use it for any of the purposes specified in the notice to quit. It is in the context of this legislative history that we have to consider the impact of Sub-section (5) on the cases of those tenants, whose tenancies had been terminated prior to August 1, 1956.

7. In *Chhitabhai v. Naginlal* 8 G.L.R. 222, Vakil J. sitting singly held that Sub-section (5) of Section 37 of the Act lays down that where the right to the tenant arose under Sub-section (4) to make the application, the liability of the landlord under Sub-section (1) to restore possession of the land to the tenant arose from the date on which the Amending Act came into force i.e. December 13, 1960. According to Vakil J. it was, therefore, obvious that till the Amending Act came into force, the tenant had no right to maintain the application; and the right that is given under the Amending Act is based on the liability of the landlord to restore possession from a particular date; and any proceedings, therefore, which were taken by the tenant u/s 37 before that date have to be held to be premature and cannot be given effect to by any Court of law. At page 224 of the report, Vakil J. in that particular case observed:

That if, Sub-section (5) was not included in the Amending Act, the application of the tenant as it was filed, subject of course to the contention which I have mentioned herein above raised by the other side, would be maintainable. But Sub-section (5) itself makes the position entirely clear as to what was intended by the Legislature and we have not to fish in unknown waters to find out the intention of the Legislature.

8. Bhagwati J. (as he then was) sitting singly in *Dhanabhai v. Udesing* VIII G.L.R. 660, followed the decision of Vakil J. in *Chhitabhai's* case (*supra*) and held:

Since the right to demand restoration of possession of the land from the landlord, though in respect of failure or cessation arising prior to the coming into force of Gujarat Act XVI of 1960, is being conferred on the tenant by introduction of Sub-section (4) Gujarat Act XVI of 1960, that right comes into existence from the date on which it is conferred and not from an earlier date with retrospective effect. The right of the tenant to demand restoration of possession of the land from the landlord in a case failing within the newly added Section 37, Sub-section (4) must, therefore, be held to arise for the first time on the date of coming into force of Gujarat Act XVI of 1960 and if an application is made by the tenant for restoration of possession of the land prior to that date it would be premature and not maintainable.

9. Both these learned Judges have considered in extenso the legislative history and also the fact that the right of the tenant, whose tenancy had been terminated under old Section 34, as it stood prior to August 1, 1956, came into existence only as a result of the insertion of Sub-section (4) of Section 37 by Gujarat Act No. XVI of 1960; and prior to December 13, 1960, when Gujarat Act XVI of 1960 came into force, such a tenant had no right to file an application for restoration of possession if the other conditions laid down in Section 37(1) were not satisfied and such an application was liable to be dismissed because of the interpretation put upon Section 37(1) by the Bombay High Court in its decision in Special Civil Application No. 2517 of 1958. Instead of leaving it to the Courts of law to determine as to with effect from what particular date, the liability of the landlord to restore possession to the tenant, whose tenancy had been terminated prior to August 1, 1956, under the old Section 34 of the Act, came into existence, the Legislature in clear and unmistakable terms has provided in Section 37(5) that the liability of the landlord to restore possession commences from December 13, 1960, when the failure or cessation which is referred to in Sub-section (4) has taken place prior to December 13, 1960. As pointed out by Bhagwati J., (as he then was) reading Sub-sections (4) and (5) of Section 37 of the Act together, it is clear that though Sub-section (4) of Section 37 declares that Section 37, Sub-section (1) shall apply even in cases where a landlord has taken possession of the land after terminating the tenancy of the tenant under the old Section 34 as if the termination of the tenancy were u/s 31 and a liability is, therefore, imposed on the landlord to restore possession of the land to the tenant if the landlord has failed to use the land for any of the purposes specified

in the notice within one year from the date on which he took possession or ceased to use it for the purpose specified in the notice at any time within twelve years from the date on which he took such possession, such liability is made to commence only from the date of coming into force of Gujarat Act XVI of 1960. The Legislature by enacting Sub-section (5) has, therefore, made it clear that the right of such a tenant whose case is covered by Section 37(4), comes into existence from the date on which such a right is conferred and not from any earlier date with retrospective effect. The right of the tenant to demand restoration of possession of the land in a case falling within Section 37(4) must, therefore, be held to arise for the first time on the date of the coming into force of Gujarat Act No. XVI of 1960 i.e. on December 13, 1960.

10. Our learned Brother Mehta J. felt difficulty in following the decisions of Vakil J. and Bhagwati J. (as he then was) because of the view that he took about the decision of the Supreme Court in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha*, . In that case, the Supreme Court inter alia considered the effect of the proviso to Section 50 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and the Supreme Court was also concerned with the effect of Section 12 of the Act. The proviso to Section 50 of the said Act enacted as follows:

Provided that all suits and proceedings between a landlord and a tenant relating to the recovery or fixing of rent or possession on any premises to which the provisions of Part II apply which are pending in any Court, shall be transferred to and continued before the Courts which would have jurisdiction to try such suits or proceedings under this Act or shall be continued in such Courts, as the case may be, and all the provisions of this Act and the rules made thereunder shall apply to all such suits and proceedings.

It was contended before the Supreme Court that this proviso had retrospective effect and Section 12 of the Rent Act was to apply to all pending cases, whenever the Act is extended to fresh areas. It was in the context of these two provisions of the Bombay Rent Act that the Supreme Court held that the point of time when Section 12(1) will operate is when the decree for recovery of possession will have to be passed and the language of that sub-section applies equally to suits pending when Part II comes into force and those to be filed subsequently. The Supreme Court rejected the contention of the respondent before it. With respect to our learned brother Mehta J. we are unable to agree with him that an identical question to the one which we have to determine in the present case had arisen before the Supreme Court in the above case. With respect to him, he has not taken into consideration the full impact of Section 37(5) of the Tenancy Act as has been done by Vakil J. and Bhagwati J. (as he then was) in their respective decisions referred to above. The question before us is not about the circumstance of an application u/s 37 but the question is as to from what date the landlord's liability to restore possession, in those cases where Sub-section (4) of Section 37 comes to the rescue of the tenant, arose for the first time. If the Legislature had

not enacted Sub-section (5) of Section 37 of the Act, the conclusion of our learned brother Mehta J. is possible and as pointed out by Vakil J. in his judgment, if the Legislature had not enacted Sub-section (5), it could have been argued that as the Legislature has enacted a deeming fiction by inserting Sub-section (5) in Section 37, operation of that deeming fiction should be retrospective. However, in our opinion, the Legislature in clear and unmistakable terms had enacted that the date from which the liability of the landlord to restore possession under Sub-section (4) is to come into force and that date is clearly and indubitably December 13, 1960.

11. Under these circumstances, we are in full agreement with the view taken by Vakil J. and Bhagwati J. (as he then was) and we are unable to agree with the view taken by our learned brother Mehta J. in his referring judgment. It must, therefore, be held that the two applications or suits filed by the two tenants for restoration of possession in each of these two Special Civil Applications were premature and not maintainable on the respective dates on which they were filed. It is common ground before us that both these applications were filed by the tenant concerned in 1957. The first respondent in Spl. C.A. 290 of 1963 had filed that application on January 17, 1957. It does not become clear from the record as to exactly when the first respondent in Spl. C.A. 289 of 1960 filed his application before the Mamlatdar but some clue is offered regarding the date of the filing from the fact that the application filed by the first respondent in Spl. C.A. 280/1960 was numbered as Tenancy Case No. 413 of 1956-57 by the Mamlatdar and the application filed by the first respondent in Spl. C.A. 282/1963 was numbered as Tenancy Case No. 414 of 1956-57 by the Mamlatdar. It is, therefore, clear that both the applications were filed by the tenant after August 1, 1956 and before December 13, 1960. In the light of the conclusions that we have arrived at regarding the interpretation to be placed on Section 37(4) and (5) it must be held that these two applications filed by the two tenants were premature and must be dismissed. Under these circumstances, the decision of the Revenue Tribunal in each of the two cases was wrong and must be set aside.

12. Mr. I.C. Bhatt, appearing on behalf of the first respondent, in each of these two petitions has urged before us that the case should be remanded back to the Mamlatdar, so that the matter could be disposed of on merits but as we have come to the conclusion that the two applications filed by each of these two tenants was premature, nothing further survives and it must be held that the decision of the Mamlatdar and of the Prant Officer in appeal was correct. The view taken by the Revenue Tribunal at the stage of Revision Application in each of these two matters was erroneous. No useful purpose, in our opinion, would be served by remanding the matter back to the trial Court.

13. The result, therefore, is that in each of these two matters, the Special Civil Application is allowed and the order passed in revision by the Revenue Tribunal is set aside and the order passed by the Mamlatdar in the first instance and by the Prant Officer in appeal in each of these two matters is restored

14. The first respondent in each of the two matters will pay the costs or-the petition to the petitioner. The rule is made absolute in each of the two matters.