

(1972) 11 GUJ CK 0005
In the Gujarat High Court
Case No : Second Appeal No. 655 of 1967

Motibhai Nathabhai

APPELLANT

Vs

Ramchandra Martandrav Vahivatdar

RESPONDENT

Date of Decision : 15-11-1972

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 84
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 3, 4A, 83B, 88E, 88H
Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 2(12)
Transfer of Property Act, 1882 — Section 106 , 117

Citation : AIR 1974 Guj 95 : (1974) GLR 18

Hon'ble Judges : S.H. Sheth, J

Bench : Single Bench

Advocate : A.L.M. Patel, for the Appellant; N.V. Karlekar, for the Respondent

Judgement

1. The plaintiff is the trustee of Ramji Mandir at Baroda. The suit lands are the properties of the trust of Ramji Mandir. These lands are situated in the Panchmahals District. On April 26, 1958, the plaintiff obtained an exemption certificate in respect of the suit lands u/s 88B of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as "the Tenancy Act"). Thereafter he served upon the defendant a notice terminating his tenancy in respect of the suit lands. It was alleged W that notice that the defendant was an annual tenant thereof. This notice was served u/s 84 of the Bombay Land Revenue Code and the termination of the tenancy became effective from March 31, 1961. On 31st December 1960, the defendant sent to the Plaintiff reply to the notice by which he denied the claim made by the plaintiff. On August 9, 1961, the plaintiff filed the present suit for recovery of possession of suit lands and for the recovery of Tents.

2. In defence the defendant contended that he was a protected tenant in respect of the suit lands and that therefore, Section 4B of the Tenancy Act operated against the termination of his tenancy. The trial Court passed in favour of the plaintiff decree for Possession and rent. The defendant appealed to the District

Court. The learned Appellate Judge, after hearing the parties, dismissed the appeal. The plaintiff had filed cross-objection is before the District Court claiming future mesne profits which the trial Court had denied to him. They were dismissed.

3. That appellate decree is challenged by the defendant in this second appeal. The Plaintiff has filed cross objections in this second appeal claiming future mesne profits in respect of the suit lands.

4. Mr. Patel appearing for the original defendant, has raised before me the following four contentions-

(1) On the basis of the Plaintiff's case in the plaint the defendant is the annual tenant and his tenancy cannot be terminated in view of the Provisions of Section 4B of the Tenancy Act

(2) In view of the fact that the defendant is a protected tenant, his tenancy cannot be terminated on account of the provisions of Section 4B of the Tenancy Act.

(3) The notice terminating the tenancy of the defendant is illegal. -

(4) Section 88E of the Tenancy Act, as inserted by Section 31 of the Gujarat Devasthan Inams Abolition Act, 1969. read with the Schedule to the said Act bars the present suit

5. On behalf of the plaintiff. Mr. Karlekar has raised the contention that the Courts below were in error in rejecting the plaintiff's claim for future mesne profits in respect of the suit lands.

6. So far as the first contention raised by Mr. Patel is concerned the Plaintiff himself has stated in the Plaint that the defendant was an annual tenant in respect of the suit lands, Exhibit 30 is the exemption certificate , granted to Plaintiff in respect of the suit lands, u/s 88B of the Tenancy Act. It is dated April 26. 1958. Now, Section 88B, so far as it is relevant for the Purpose of the present case provides as under:-

"Nothing in the foregoing provisions except Sections 3, 4B. 8. 9. 9A, 9B 9C, 10A, 11, 13 and 27 and the provisions of Chapters VI and VII 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)

(b) to lands which are the property of a trust or an institution for, Public religious worship

(c)

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 purposes of such trust

(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 has not been disputed before me that the two requirements of the Proviso to sub-section (1) of Section 88B are satisfied inasmuch as the Ramji Mandir Trust has been registered under the Bombay Public Trusts Act. 1950. and the entire income of the said lands is appropriated for the purposes of that trust. The certificate of registration issued under the Bombay Public Trusts Act. 1950 has been produced at Exhibit-31. The certificate of exemption. Exhibit 30. In its turn states that these two, requirements of the proviso to sub-section (1) of Section 88B are satisfied. Under sub-section (2) of Section 88B. the certificate of exemption. Exhibit 30, is the conclusive evidence of the facts stated therein. I, therefore, hold that so far as the proviso to sub-section (1) of Section 88B is concerned- its requirements are fully satisfied in the instant case. If that is so, what is the effect of the certificate of exemption granted under sub-section (1) of Section 88B on the suit lands? The effect is that only the provisions of Sections 3, 4-13, 8, 9, 9A, 9B, 9C, 10, 10A, 11, 13 and 27 and such of the provisions contained in Chapters VI and VIII of the Tenancy Act as are applicable to matters specified in the aforesaid sections apply to the suit lands. The remaining provisions of the Tenancy Act do not apply. Mr. Patel has relied upon Sections 3 and 4B of the Tenancy Act in support of his contention. These are some of the sections which are applicable to the suit lands. Now Section 3 of the Tenancy Act 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".

Basing his arguments on this section he has urged that Section 106 of the Transfer of Property Act (which is in Chapter V) governs the termination of the tenancy in respect of the suit lands. In other words his contention is that the Plaintiff ought to have served upon the defendant six months' notice expiring with the end of the year of the tenancy or the purpose of termination of his tenancy. He has overlooked the provisions of Section 117 of the Transfer of Property Act, which provide that none of the provisions of Chapter V shall apply to leases for agricultural purposes, except in so far as the State Government may by notification published in the Official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases together with or subject to those of the local law, if any for the time being in force. Section 3 of the Tenancy Act has inter alia brought both these sections into force. If both are in force. then Section 106 cannot apply to the instant case unless

there is a notification issued by the State Government u/s 117, He has not been able to show me any such notification. Therefore, Section 106 of the Transfer of Property Act has no application to the lease in respect of the suit lands. If Section 106 has no application to the instant case under the aforesaid circumstances it does not become applicable merely by virtue of the provisions of Section 3 of the Tenancy Act. By virtue of the provisions of Section 3 of the Tenancy Act, such provisions of Chapter V of the Transfer of Property Act are applicable as are otherwise applicable to agricultural leases or are otherwise made applicable to such leases. The argument raised by Mr. Patel, on the strength of Section 3 of the Tenancy Act therefore fails and is rejected.

7. Mr. Patel has next argued that Section 4B of the Tenancy Act hits the present suit. It provides as under-

"No tenancy of any land shall be terminated merely on the ground that the period fixed by agreement or usage for its duration has expired.-

Tenancy has been defined by Section 2(17) in the following terms:-

"Tenancy" means the relationship of landlord and tenant".

Section 4B militates against the termination of the tenancy only in so far as it is sought to be done on the ground that the period of duration for which the tenancy was granted has expired or the period during which the tenant could be in possession has expired. In the instant case, the notice served by the plaintiff upon the defendant does not seek to terminate the tenancy on the ground of efflux of time. There are several other grounds which are stated in the notice. He has alleged that in Survey No. 533 which is one of the suit lands the defendant has constructed a permanent building and that he has been tethering cattle therein and that therefore he has been causing waste of the suit lands. According to the plaintiff the waste or damage to the suit land caused by the defendant has been permanent. The second -around, which he has stated, is that the trees, which had been standing on the suit lands, have been cut away by the defendant and that therefore he has caused permanent damage to the suit lands. He has next alleged that the defendant has not been, personally cultivating the suit lands and that he has been giving them to others for cultivation and that therefore, he has been causing waste of the suit lands. The next ground which he has urged is that the defendant, has not paid rent for the years from 1956-57 to 1958-59. It is therefore, clear that the plaintiff has terminated the tenancy of the defendant on grounds other than efflux of time. Section 4B of the Tenancy Act therefore, does not come in the way of the plaintiff. Mr. Patel's argument based on Section 4B, therefore, fails and is rejected. The first contention raised by Mr. Patel has therefore no substance whatsoever.

8. In support of the second contention, he has invited my attention to Section 89 of the Tenancy Act, the material part of which is as follows:-

"(1) The enactment specified in Schedule I is hereby repealed to the extent

mentioned in the fourth column thereof.

(2) But nothing in this Act or any, repeal effected thereby

(a)

(b) shall save as expressly -provided in this Act, affect or be deemed to affect,-

(i) any right, title interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(ii) any legal proceeding or remedy in respect of any such right title interest, obligation or liability or anything done or suffered before the commencement of this Act.

and any such proceeding shall be continued and disposed of as if this -Act was not passed."

He has not relied upon any other sub Section of Section 89. So far as sub-sections (1) and (2) of Section 89 are concerned, he has placed reliance only upon the effect of repeal provided in sub-section (2), in so far as right- which accrued the defendant under the Bombay Tenancy Act, 1939 are concerned. The question, therefore, which arises, is this: What were the rights which the defendant acquired under the Bombay Tenancy Act,1939 and what are the rights which have been saved by sub-sections (1) and (2) of Section 89 of the Tenancy Act? Mr. Patel has not argued before me that the defendant had acquired more or higher rights under the Bombay Tenancy Act" 1939 than the right is which have been saved to him under Sections 3. 3-A and 4 of the Bombay Act, 1939 as modified and incorporated in Schedule I to the Tenancy of 1943. Therefore, the question of c6rnpar"ng the rights which accrued to him under the Bombay Tenancy Act of 1939 with those which the modified Sections 3. 3-A and 4 of that Act (vide Schedule I lo the Tenancy Act of 1943) continue in force for him does not arise. So also the question of considering the effect of repeal so far as this aspect of the case is concerned, does not arise. He has proceeded on the basis that the defendant had only the rights which the aforesaid three modified sections continued in force for him. Mr. Patel has placed reliance upon the said Sections 3 and 3-A of the Bombay Tenancy Act, 1939. Section 4 of the said Act has indisputably no application to the instant case, Section 3 provides as under:-

"3. A tenant shall be deemed to be a protected tenant in respect of any land if:-

(a) he has held such land continuously for a period of not less than six years immediately preceding either-

(i) the first day of January 1938, or

(ii) the first day of January 1945, and

(b) he has cultivated such land personally, during the aforesaid period.

Explanation I:- If the person who held such land on the first day of January 1938

or the first day of January 1945 as the case may be, came to hold the same by inheritance or succession from another person or if he has held such land as a tenant and is an heir to such other person, the period during which such other person held such land as a tenant shall be included in calculating the period of six years under this section.

Explanation II.- If the person who held such land on the first day of January 1933 or the first day of January 1945, the case may be held as a tenant at any time within six years before the said date from the same landlord in the same village any other land which he cultivated personally, the period during which he held such other land shall be included in calculating the period of six years under this section.

Explanation III.- Where any land is held by two or more persons jointly as tenants all such persons shall, if any one of them cultivated and continues to cultivate such land personally and if the other conditions specified in this section are fulfilled, be deemed to be protected tenants in respect of such land."

Section 3-A provides as under-

"3-A, Every tenant shall, from the eighth day of November 1947 be deemed to be a protected tenant for the purpose of this Act and his rights as such protected tenant shall be recorded in the Record of Rights, unless his landlord has prior to the aforesaid date made an application to the Mamlatdar for a declaration that the tenant is not a protected tenant.

Explanation- A person shall not be deemed to be a protected tenant if such person has been on an application made by the owner of the land as provided in Section 3-A of the Bombay Tenancy Act, 1939 declared by a competent authority, not to be a protected tenant."

It is clear that before a tenant invokes the provisions of the said Sections 3 and 3-A of the Bombay Tenancy Act, 1939, it must be proved that he has held the land in question continuously for a period of not less than six years immediately preceding either the first day of January 1918 or the first day of January 1945 and that he had cultivated such land personally during the aforesaid period. The learned Appellate Judge has dealt with this aspect of the case in the following terms:-

"Undoubtedly there is no controversy that the tenancy of the appellant had commenced prior to 1946 and consequently under the terms of the old Act of 1939 he was to be counted a protected tenant and therefore ordinarily the appellant would have enjoyed the status of a protected tenant but for the consideration that this Section 4A was excepted from the body of Section 88-B(1) of the Act and so far as Section 88B(1) was concerned this Section 4A was not included therein"

Therefore according to the learned Appellate Judge the defendant was a protected tenant within the meaning of Sections 3, 3-A and 4 of the Bombay

Tenancy Act , 1939 (as modified and incorporated in Schedule I to the Tenancy Act, 1948). In cases where Section 4A applies - and it applies in a very large number of cases - the tenancies protected under Bombay Tenancy Act, 1939 are recognised under the Tenancy Act. 1943 and continue in force with all the Protection which the latter Act accords to them. However since Section 4A of the Tenancy Act does not apply to cases in which exemption certificates have been granted u/s 88B (vide Section 88B -it excludes the application of Section 4-A) the Protected tenancy of the defendant cannot be recognised. While this is the - position on one hand on the other hand his tenancy cannot be terminated on the ground of efflux of time because Section 4B which applies to such cases bars such a termination Excepting the ground of efflux of time the defendant's tenancy can be terminated on any other ground riot u/s 106 of the Transfer of Property Act because as stated above, it has no application to agricultural leases, but u/s 84 of the Bombay Land Revenue Code. Indeed it shall be a ground other than the ground of efflux of time which is barred by Section 4B. The notice, Ex-36, served by the -plaintiff upon the defendant states grounds which are not hit by Section 4B. I have referred to them in the foregoing parts of this judgment. They are completely de hors the forbidden field and prohibited area carved out by Section 4B. Therefore, See- 4B does not come in the way of the plaintiff and does not hit the termination of the defendant's tenancy by the plaintiff in any manner whatsoever. Out of abundant caution, however let us see whether Sections 8, 9, 9A, 9B, 9C, 10, 10A, 11. 13 and 27 which, in addition to Sections 3 and 4-13, govern cases of lands exempted u/s 88B of the Tenancy Act, grant any protection to the defendant in this behalf. Section 8 provides for the maximum and the minimum of the rent Payable by a tenant to his landlord notwithstanding any law custom, usage, agreement or the decree or order of a court Section 9 deals with the rate of rent payable by a tenant to his landlord. Section 9A deals with the quantum of rent payable by a tenant to his landlord. Section 9B exempts a landlord from any liability to make contribution to the cost of cultivation. Section 9C provides for payment of rent by a tenant to his landlord until the rent is fixed in accordance with the "Provisions of the Tenancy Act. Section 10 provides for refund to a tenant of such rent as has been recovered by his landlord in contravention of the provisions, of the Tenancy Act and for incidental matters. Section 10A provides for a tenant's liability to pay land revenue and certain other cesses. Section 11 abolishes the -payment of all cesses, howsoever described, by a tenant to his landlord except the rent and those cesses which have been specified in Section 10A. Section 13 provides for suspension and remission of rent, Payable by a tenant to his landlord, under the circumstances specified therein. Section 27 prohibits subdivision, subletting or assignment of a land by a tenant. This brief reference to the said sections shows that they protect a tenant in matters relating to rent payable by him to his landlord and protect the land against subdivision, subletting and assignment which, in their turn, protect the landlord who has a right to recover Possession, prevent fragmentation and development of absentee landlordism. If, therefore, a landlord has a right to terminate his tenant's tenancy in order to recover its

possession, the said sections do not come in the way of the landlord. Chapters VI and VIII of the Tenancy Act apply only in so far as they or any part of them is applicable "to any of the matters referred to in the sections, mentioned above". In this view of the matter, it is clear that the defendant has no special protection at all against the termination of his tenancy and recovery of possession by his landlord. The second contention raised by Mr. Patel, therefore, fails and is rejected.

9. The third contention raised by Mr. Patel relates to the validity of the notice- The Plaintiff has terminated the defendant's tenancy on the ground that the defendant has been his annual tenant. He, therefore, gave him three months' notice u/s 84 of the Bombay Land Revenue Code. Mr. Patel has expressly stated to me that, u/s 84 of the Bombay Land Revenue Code, the notice will be valid, if the defendant is an annual tenant of the plaintiff. He has, however, contended that the defendant is a protected tenant and that therefore notice u/s 84 of the Bombay Land Revenue Code is not sufficient. According to him six months notice expiring with the end of the year of the tenancy should have been served by the plaintiff upon the defendant. This argument raised by Mr. Patel cannot be accepted because it is based upon Section 106 of the Transfer of Property Act, which does not apply to agricultural leases by virtue of Section 117 of that Act. The third contention raised by Mr. Patel on the strength of Section 106 of the Transfer of Property Act, therefore fails and is rejected.

10. The last contention which Mr- Patel has raised, is based upon Section 88E, of the Tenancy Act, This contention could not be taken up in the written statement nor could it be argued before the two Courts below because Section 88E was, inserted in the Tenancy Act with effect from November 15, 1969. At that time, the Present second appeal was pending I have permitted Mr. Patel to argue that point because if the subsequent amendment alters the rights of the parties, its effect must be considered. I have heard Mr. Patel and Mr. Karlekar at length on this point. Section 88E was inserted in the Tenancy Act by Section 31 of the Gujarat Devasthan Inams Abolition Act, 1969 (hereinafter referred to as "the Devasthan Inams Act") Section 31 thereof provides as follows:

"The enactments specified in column of the Schedule shall be amended to the extent specified in column 2 thereof." The Schedule refers to two Acts with one of which I am concerned in this Second Appeal. It is the Tenancy Act. Firstly, Section 88B of the Tenancy Act has been amended and the expression "an institution for public religious worship" has been deleted. The effect of this amendment to Section 88B of the Civil Procedure Code. A person who is in possession of an agricultural land under a contract between him and his landlord and who is not protected by any other enactment is in wrongful possession of that land after the termination of his tenancy. There is, therefore, no reason to deprive on this ground the plaintiff of the future mesne profits. In my opinion the plaintiff is entitled to them.

22. In the result, the appeal fails and is dismissed with costs. The cross

objections are allowed and the decree passed by the Courts below is varied by inserting the direction that, on the application of the plaintiff, the trial Court shall determine future mesne profits of the suit lands from the date of the suit until delivery of possession and pass, according to law, an appropriate final decree in that behalf. There shall be no order as to costs in the cross objections.

23. Mr Patel on behalf of the defendant applies for certificate of fitness under clause 15 of the Letters Patent , Certificate is granted,

24. Order accordingly