(2010) 12 GUJ CK 0092

In the Gujarat High Court

Case No : Special Civil Application No. 3532 of 1992

Patel Rameshbhai APPELLANT

Vs

Prabhudas A. Patel and Another RESPONDENT

Date of Decision : 15-12-2010

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 135(D), 23(1B), 32(G), 4, 76(A)

Citation : (2010) 12 GUJ CK 0092

Hon'ble Judges : Ravi R. Tripathi, J

Bench : Single Bench

Advocate : Jitendra M. Patel, for appelent No. 1 and 1.2.1, for the Appellant; B.C. Dave, for Respondent Nos. 1 - 2, for the Respondent

Judgement

Ravi R. Tripathi, J.—The Petitioner - Kalidas Mathurbhai Patel is before this Court through his heir, as the Petitioner expired during the pendency of this petition.

1.1 The Petitioner is aggrieved by judgment and order dated 30.11.1990 passed by the Hon''ble Gujarat Revenue Tribunal in Revision Application No. TEN/BA/199/87, a copy of which is produced at Annexure-H, page No. 35 and the order of the Deputy Collector dated 05.03.1987, a copy of which is produced at Annexure-G, page No. 34A.

2. The facts of the case are as set out in paras-2 to 6 of the petition. The same are reproduced for ready perusal:

2. The Petitioner says that the land bearing S. No. 1085/2 admeasuring OA-14 gs. And the land bearing S. No. 105/3 admeasuring OA-13 gs are situated in the sim of village Por. The Respondents'' father deceased Ambalal Khushalbhai was never a tenant at any point of time but the said lands were mortgaged with possession for Rs. 575/- by the Petitioner in the year 1953-54 and in the year 1956-60 the amount was paid back by the Petitioner to the deceased Ambalal and the possession was also given back to the Petitioner. Thus, there was no

relationship of the landlord and the tenant between the parties. A writing of mortgage dated 15-4-59 was also produced on the record of the case and the parties have also deposed accordingly that the land was mortgaged with deceased Ambalal. Inspite of this evidence all the courts held that the opponent was a tenant of the land without really understanding the controversy between the parties.

3. The Petitioner says that as the land was mortgaged in favour of the deceased Ambalal and entry No. 488 was wrongly made in the revenue record showing the said person as tenant but before certifying or making entry no notice was ever served upon the Petitioner u/s 135D of the Bombay Land Revenue Code. Thus, the said entry cannot be relied upon against the Petitioner.

4. The Petitioner says that in view of the aforesaid illegal entry, the proceedings u/s 32(1B) of the Act were initiated and the Mamlatdar by judgment and order dated 23-8-76 held that the opponent was the tenant on 1-4-57. Therefore, no order could be passed u/s 32(1B). He has passed order to take proceedings u/s 32G of the Act. This order was reviewed by the Deputy Collector and he had given direction to initiate proceedings u/s 84C of the Act. After the direction, the Mamlatdar started inquiry u/s 84C of the Act and he by his order dated 15-12-77 closed the inquiry as opponent was held to be the tenant on 1-4-57. The appeal filed by the present Petitioner against the aid order was dismissed by judgment and order dated 30-8-1979.

5. The Mamlatdar again started inquiry u/s 32G of the Act and he by his order dated 18-9-87 held that the opponent is not the tenant of the land. Thereafter, again the proceedings were initiated in the year 1981 u/s 32G of the Act and the Mamlatdar by his judgment and order dated 16-8-81 held that the opponent is not the tenant of the suit land. The said decision of the Mamlatdar was revised by the Deputy Collector while exercising suo motu jurisdiction u/s 76A of the Act and he by his order dated 14-6-82 remanded the matter back to the Mamlatdar.

6. Mr. Jitendraer preferred revision application No. TEN.B.A.923/82 before the Gujarat Revenue Tribunal and the Gujarat Revenue Tribunal by his judgment and order dated 23-8-84 was pleased to allow the said revision application by setting aside both the orders and remanded the matter back to the Mamlatdar to take fresh proceedings according to law. A copy of the said order is annexed hereto and marked as Annexure ''A''.

2.1 The parties had long-drawn litigations between them and finally, the Hon''ble Gujarat Revenue Tribunal passed order on 30.11.1990, which is under challenge.

3. Mr. Jitendra M. Patel, learned Advocate for the Petitioner submitted that the Hon''ble Revenue Tribunal has missed a neat question of law, i.e. the Respondents, through their predecessor-in-title could not have been considered to be the tenants under the provisions of Clause-C of Section 4 of the Bombay Tenancy & Agricultural Lands Act, 1948. Clause-(c)of Section 4 provides that, if a person is lawfully cultivating the land belonging to another person as a

mortgagee in possession, he will not be a deemed tenant of such land.

3.1 Learned Advocate for the Petitioner invited attention of the Court to the important evidence in this regard which is in the nature of deposition of the Respondents herein. The evidence of Respondent No. 1 is at Annexure-B, wherein in chief, he has stated that, "his father Ambalal Khushalbhai was cultivating the land bearing survey No. 1985/2 and 1985/3 of village ''Por'' in the year 1953-54; that the land was cultivated up to 1957-58; that since 1958-59, the possession of the land is that of Kalidas Mathurbhai (the present Petitioner, who died during the pendency of the petition)" There is no ambiguity at all in the deposition of Respondent No. 1 because in the chief itself, he has stated that, "his father had taken this land in mortgage; that the amount of mortgage was Rs. 700/-; that he has a receipt thereof and he will produce the same on the next date of hearing". However, totally out of context, he has stated one sentence that, "We, the heirs are the tenants of this land and therefore, this land should be given to us after fixing the purchase price".

3.1 In the cross-examination, Respondent No. 1 has stated that, "he has brought the writing of mortgage from the file; this writing is made on a blank paper and there are no signatures of the witnesses". It is also stated in the cross-examination that, "Shri Kalidas Mathurbhai had given this land to his father on 05.04.1956 (sic-05.04.1953) on payment of Rs. 575/- by the father of the deponent to Shri Kalidas Mathurbhai and that his father had never paid any share or amount to Shri Kalidas Mathurbhai; that his father was cultivating the land towards interest of the amount". Finally, it is stated by the witness that, "when the amount was paid back to his father, his father handed over possession".

3.2 Similarly, learned Advocate for the Petitioner invited attention of the Court to deposition of Respondent No. 2, which is produced at Annexure-C. It is also on the same lines as that of Respondent No. 1. In the cross-examination, Respondent No. 2 has stated that, "the matter pertains to the life time of his father and he does not have any personal information". However, he has stated that, "the possession of the land was taken back during the life time of his father and that his father was cultivating the land being a mortgagee".

4. The authorities have taken different views in different proceedings, but the fact remains that the authorities missed this cardinal fact, which is the determinative factor in the matter.

5. Learned Advocate for the Petitioner submitted that as the land was in possession as a mortgagee with the father of the Respondents, his name is bound to be in village form No. 7/12, but merely because his name appears in village form No. 7/12, that does not confer on him a status of tenant.

5.1 Learned Advocate for the Petitioner relied upon a decision of the Hon''ble the Apex Court in the matter of Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim, wherein the Hon''ble the Apex Court was pleased to hold that, "a person who is in possession of the land a a mortgagee cannot be considered to be a deemed tenant". The relevant discussion is found in paras-3, 5 and 7, which are reproduced for the ready perusal:

3. The Bombay Tenancy Act of 1939 was enacted, to protect tenants of agricultural lands in the Province of Bombay and for certain other purposes. That Act was repealed by Section 89 of the Bombay Tenancy and Agricultural Lands Act, 1948, which came into operation on December 28, 1948. By the repealing clause, certain provisions of the Act of 1939 with modifications were Continued. By the Act of 1948, u/s 2(18) as it, stood at the material times, a tenant was defined as an agriculturist who holds land on lease and. includes a person who is deemed to be tenant under the provisions of this Act." Section 14 of the Act provides that notwithstanding any agreement, usage, decree or order of a Court of ''law, the tenancy of any land held by a tenant shall, not be determined unless the conditions specified, in that section are fulfilled. It was unnecessary to set out the conditions because it is common ground that, the tenancy of the Respondent was not sought to be determined on any of the grounds in Section 14, it was in execution of the award made by the Debt Relief Court that the Respondent was dispossessed Section 29, by Sub-section (2) provides that no landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Maltdar. For obtaining such order he shall make an application in the prescribed form x x X". Section 4 of the Act, in, so far as it is material provides: "A person lawfully, cultivating any land belonging to an-other person shall be deemed to be a tenant if such land is not cultivated personally by the owner and'' if such'' person is not (a) a member of the owner''s family, or (b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of" the owner''s family, or (c) a mortgagee in possession"" Section 4 seeks to confer the status of a tenant upon a person lawfully cultivating. Land belonging to another. By that provision, certain persons who are not tenants under the ordinary law are, deemed to be tenants for purposes of the Act. A person who is deemed a tenant, by S. 4 is manifest, in a clear apart, from the tenant who holds lands on lease from the owner. ;Such person would be invested with the Status of a tenant if three conditions are fulfilled(a) that he is cultivating land lawfully) (b) that the land belongs to another person, and (c) that the is not within the excepted categories.

4. xxxx

5. But Dr. Barlingay, on behalf of the Appellants,contended that a person can be said to be lawfully cultivating land within the meaning of s.4 only if he has derived his right to cultivate directly from the owner of the land, and not from some other person who has a limited interest, such as a mortgagee from the owner. Counsel also contended that the expression mortgagee in possession" in cl. of Section 4. includes, a person claiming a derivative right such as a tenant of the mortgagee in possession. We are unable to agree with these Contentions.

The Bombay Tenancy Act of 1939 conferred protection upon tenants against eviction, converted all subsisting contractual tenancies for less than ten years, restricted the rights of landlords to obtain possession of land even on surrender, granted the status, of protected tenants to all persons who had personally cultivated land for six years prior to the date specified, provided for fixation of maximum rates of rates of rent abolition of cesses and suspension and remission of rents in certain contingencies, and barred eviction of tenants, from, dwelling houses. The Act was found inadequate and was substituted by the Bombay Tenancy and Agricultural Lands Act of 1948. The latter Act preserves the essential features of the Act of 1939 provides for additional rights and protection to tenants such as fixation of reasonable rent, commutation of crop share into cash, right to procedure of naturally growing trees on land, relief against termination of tenancy for non payment of rent, special rights and privileges of protected tenants, vesting of estates in Government for management, restriction on transfer of agricultural land and the constitution of Special Tribunals for deciding disputes relating to value of land. The two Acts were manifestly steps in the process of agrarian reform launched with the object of improving the economic condition of the peasants and ensuring full and efficient use of land for agricultural purpose. The provisions of the Bombay Tenancy and Agricultural land Act, 1948 must be viewed in the light of the social reform envisaged thereby.

6. xxxx

7. Under the Transfer of property Act, the right of a tenant who has been inducted by a Mortgagee in possession ordinarily comes to an end with the extinction of the mortgage by redemption, but that rule, in our judgment, has no application in the interpretation of a statute which has been enacted with the object of the granting protection to persons lawfully cultivating agricultural lands. Nor has the contention that the expression "''mortgagee in possessions includes a tenant from such a mortgagee any force. A mortgagee in possession is excluded from the class of deemed tenants on ground of public policy: to confer that-status upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character. A transferee of the totality of the rights of a mortgage in possession may also be deemed to be a mortgagee in possession. But a tenant of the mortgagee in possession if; inducted on the land in the ordinary course of management under authority derived from the mortgagor and so long as the mortgage subsists, even under the ordinary law he is not liable to be evicted by the mortgagor. It appears that the Legislature by restricting the exclusion to mortgagees in possession from the claw of deemed tenants intended that the tenant lawfully inducted by the mortgagee shall on redemption of the mortgage be deemed to be tenant of the mortgagor. In our view, therefore, the High Court was right in holding that the Respondent was entitled to claim the protection of the Bombay Tenancy and Agricultural Lands Act, 1948 as a deemed tenant.

5.2 As this Court indicated to the learned Advocate for the Petitioner that the aforesaid contentions raised by him are sufficient to decide the controversy involved in the matter, he has not argued other points, which are set out in the petition itself.

6. Learned Advocate Mr. B.C. Dave for the Respondents vehemently contested the petition and submitted that the authorities below have rightly not relied upon the ''mortgage'' transaction, pleaded by the Petitioner. He submitted that the fact that the mortgage is claimed to be by a ''writing'' on a simple paper and not a stamp paper is suggestive of the fact the same cannot be relied upon. He submitted that even under the law, a transaction of mortgage cannot be believed if it is not executed in a proper manner and if it is not registered.

7. The question is as to whether ''ignoring the deposition of the Respondents'' herein will be doing substantial justice or will be adding to the technicalities. The Court is of the opinion that the Respondents are truthful, being persons from the rural background whereby they volunteered themselves and disclosed true facts. Otherwise they could have as well said that there was no such transaction and that their father was cultivating the land as a tenant. Their deposition is natural and the facts disclosed by them in their depositions inspire confidence. Therefore, contentions raised by the learned Advocate for the Respondents are not found to be acceptable.

8. Learned Advocate for the Respondents vehemently submitted that as there are concurrent findings recorded by the Courts below, this Court should not interfere with the same.

9. The Court would have accepted this submission of the learned Advocate for the Respondents but for the fact that it is a pure question of law which is required to be considered by this Court namely a person, who is in possession of land as a mortgagee, can be considered to be a tenant. Hence, this submission is also not found acceptable.

10. Learned Advocate for the Respondents also submitted that even when a question of law is involved, the concurrent findings cannot be brished aside and cannot be interfered by this Curt.

11. This submission is also not found to be acceptable and hence, rejected.

12. In view of the aforesaid clear settled position of law and as this Court has found the material which has come on record in the form of depositions of the Respondents, quite trustworthy and hence acceptable, the petition is required to be allowed. The same is accordingly allowed. The judgment and order dated 30.11.1990 passed by the Hon''ble Gujarat Revenue Tribunal in Revision Application No. TEN/BA/199/87, a copy of which is produced at Annexure-H, page No. 35 and the order of the Deputy Collector dated 05.03.1987, a copy of which is produced at Annexure-G, page No. 34A, are quashed and set aside. Rule is made absolute. No costs.

