

(1971) 09 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No. 1094 of 1968

Patel Shanabhai Vithalbhai

APPELLANT

Vs

Patel Bakorbhai Vithalbhai and Others

RESPONDENT

Date of Decision : 04-09-1971

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 15, 29(4), 31(1), 32, 32

Citation : AIR 1972 Guj 184

Hon'ble Judges : Thakkar, J

Bench : Single Bench

Advocate : I.C. Bhatt, for the Appellant; J.J. Shah, for the Respondent

Judgement

1. An interesting question relating the interpretation of Ss. 32 and 32-G of the Bombay Tenancy and Agricultural Lands act, hereinafter referred to as the "Tenancy Act" which does not appear to have been debated so far clamours for solution in this petition under Article 227 of the Constitution of India at the instance of a tenant who, according to the landlord, was dispossessed without due authority of law 3 days before the tillers' day (April 1. 1957). The proposition has been canvassed on behalf of the landlord that if on the tillers' day the tenant was not in actual physical possession, he is not entitled to the benefit of Sections 32 and 32-G of the Tenancy Act notwithstanding the fact that the landlord had obtained possession of the land in question without due authority of law and even if the tenancy has not been lawfully terminated. The proposition canvassed by the landlord has found favour with the Revenue Tribunal and that has provided the tenant with the occasion to approach this Court by way of the present petition.

2. A few facts may be stated. The dispute relates to S. Nos. 444, 445 and 446 situated within the limits of village Sonia in the Thasra Taluka of Kaira District. It is not in dispute that the petitioner was a lawful tenant holding the land on lease from the landlord from about 20 years before the tillers' day. According to the landlord the tenant voluntarily handed over possession of the said lands to him

on December 28, 1956 i.e., 3 days before the tillers" day. According to the tenant he was forcibly dispossessed subsequent to the tillers" day but before January 20, 1959. Soon after the tillers" day proceedings were initiated by the Mamlatdar. Thasra, under S. 32-G of the Act inasmuch as the petitioner was admittedly a tenant in respect of the land in question on April 1, 1957. In the course of the proceeding the petitioner made a statement on January 20, 1959 that he wanted to purchase the land and that he was willing to pay the price before the authorities under the Tenancy Act. He also made a statement that he was in possession of the land upto 1958, (see paragraph 2 of the judgment of the Gujarat Revenue Tribunal). The statement of the landlord was also recorded on the same day. He deposed that the tenant was cultivating the land for the last 7 years but that before the date of giving evidence he had obtained the possession without approaching the Mamlatdar and the lands were in his possession (vide paragraph 2 of the judgment of the Gujarat Revenue Tribunal). Though the tenant expressed his willingness to purchase the land in 1959, the Mamlatdar instead of passing an appropriate order appears to have shelved the matter. Two years later, though nothing remained to be done save fixing the purchase price, on April 23, 1961 for inexplicable reasons he issued fresh notices to parties instead of proceeding to pass orders in accordance with law. It is stated that in response to this notice the petitioner declared that he did not want to purchase the lands. Thereupon on April 29, 1961 the Mamlatdar recorded an order holding that the sale had become ineffective on account of the tenant's refusal to purchase the land. The petitioner filed a review application against the said order on October 21, 1961 on the ground that he had already expressed his willingness to purchase the land on January 20, 1959 and that, therefore, the order for fixing the sale - price should follow and that there was no occasion for holding a fresh proceeding in 1961 to reascertain his willingness. This application was rejected by the Mamlatdar on May 4, 1962. Thereupon the petitioner filed an appeal to the Court of the Deputy Collector. The Deputy Collector allowed the appeal by his order dated May 9, 1962 and remanded the matter to the Mamlatdar to decide it in accordance with the statement made by the petitioner on the first occasion which alone was relevant. The landlord thereupon appealed to the Gujarat Revenue Tribunal by way of Tenancy Application No. 617 of 1962. The Tribunal allowed the revision partially on the ground that the Deputy Collector had not decided the question whether the appeal preferred before him was within time. The Deputy Collector was directed to first decide the question whether the appeal was within limitation and then to proceed to disposed of the appeal in accordance with law. The matter thus went back to the deputy Collector. He formed that opinion that the appeal was within time and, therefore. Remanded the matter to the Mamlatdar for deciding the question in accordance with the first statement made by the petitioner. The Mamlatdar in stead of deciding the matter on the basis of the first statement made by the petitioner as directed by the Deputy Collector allowed the landlord to raise a new contention by an application dated October 27, 1964. The contention was that possession of the land was handed over by the tenant to the landlord 3 days before the tillers"

day and that therefore he had ceased to be a tenant. The Mamlatdar granted the request and raised the issue as to whether the applicant was in possession of the lands on the tillers" day (April 1, 1957) as a tenant. On October 14, 1965 the Mamlatdar passed the order Annexure "A". He came to the conclusion that the petitioner was not in possession on April 1, 1957 and that the proceedings u/s 32-G must stand terminated. The petitioner carried the matter by way of Appeal No. 232 of 1965 to the Deputy Collector at Kaira. The Deputy Collector dismissed the appeal on his taking the view that as the evidence supported the finding that the petitioner was not in possession of the land on the tillers" day he was not entitled to become a deemed purchased. The petitioner preferred a revision application being Application No. TEN. A. 624/67. The Tribunal by its judgment and order dated February 29, 1968 rejected the petition on taking the view that the question as to whether the petitioner was or was not a tenant was not open any more, yet, inasmuch as the petitioner was not in possession on the tillers" day (April 1, 1957), he was not entitled to claim the benefit of Section 32 and 32-G of the Tenancy Act.

3. The learned counsel for the petitioner has urged the following points in support of the petition :-

(A) The finding recorded by the Mamlatdar, the Deputy Collector and the Tribunal that the petitioner was not in possession of the lands on April 1, 1957 is perverse and contrary to evidence.

(B) There was no warrant for taking the view that for claiming the benefit of Section 32 or 32-G, it was a condition precedent to satisfy that the tenant was in physical possession of the land on the tillers" day (April 1. 1957).

(C) That the landlord not having raised any such contention till the proceedings terminated with an order that the sale had become ineffective the landlord was precluded from raising such a contention at the subsequent stage.

4. The validity or otherwise of these submissions may now be examined.

5. As I am of the opinion that the petitioner (B) and (C) it is not necessary for me to examine the question as to whether the finding recorded by the Mamlatdar, the Deputy Collector and the Gujarat Revenue Tribunal that the petitioner was not in possession on 1.4.1957 is perverse as contended by the petitioner. I. therefore, do not propose to discuss this aspect of the matter.

6. Re: -- Ground (B) : In order to understand the argument, the material provisions in so far as material require to be quoted:-

"32. (1) On the first day of April 1957 (hereinafter referred to as "the tillers" day") every tenant shall, subject to the other provisions of this section and the provisions of the next succeeding sections, be deemed to have purchased from his landlord, free of all encumbrances subsisting thereon the said day, the land held by him as tenant, if-

- (a) such tenant is a permanent tenant thereof and cultivates land personally;
- (b) such tenant is not a permanent tenant but cultivates the land leased personally; and

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"32-G. (1) As soon as may be after the tillers" day the Tribunal shall publish or cause to be published a public notice in the prescribed form in each village within its jurisdiction calling upon-

- (a) all tenants who u/s 32 are deemed to have purchased the lands
- (b) all landlords of such lands, and
- (c) all other persons interested therein,

to appeal before it on the date specified in the notice. The Tribunal shall issue a notice individually to each such tenant, landlord and also, as far as practicable, other persons calling upon each of them to appear before it on the date specified in the public notice.

(2) The Tribunal shall record in the prescribed manner the statement of the tenant whether he is or is not willing to purchase the land held by him as a tenant.

(3) Where any tenant fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective:

Provided that if such order is passed in default of the appearance of any party the Tribunal shall communicate such order to the parties and any party on whose default the order was passed may within 60 days from the date on which the order was communicated to him apply for the review of the same.

(4) If a tenant is willing to purchase, the Tribunal shall, after giving an opportunity to the tenant and landlord and all other persons interested in such land to be heard and after holding an inquiry determine the purchase price of such land in accordance with the provisions of Section 32-H and of sub-section (3) of Section 63-A:

Provided that where the purchase price in accordance with the provisions of Section 32-H is mutually agreed upon by the landlord and the tenant, the Tribunal after satisfying itself in such manner as may be prescribed that the tenant's consent to the agreement is voluntary may make an order determining the purchase price and providing for its payment in accordance with such agreement."

Now Section 32(1) clearly provides that every tenant shall on the first day of April 1957 be deemed to have purchased from his landlord free of all encumbrances the land held by him as tenant if he fulfils the condition embodies

in C1. (a) or C1. (b) subject to the other provisions of the section. Now sub-section (1) of Section 32 nowhere imposes a condition that the tenant must be in physical possession of the land. The same is the case with regard to Section 32-G. Section 32 (10) enjoins the Agricultural Lands Tribunal to issue a notice calling upon all tenants who are deemed to have purchased the land to appear before it on the date specified in the notice and to determine the price to be paid by the tenants to the landlord. It also employs the expression "tenants" and does not refer to the aspect as to whether or not the tenant is in physical possession of the land. There is therefore, prima facie no warrant for holding that a tenant must be in physical possession of the land on the tillers" day (1.4.1957). all that is required for the tenant to establish is that the relationship of landlord and tenant subsists and that he satisfies the requirements of Sections 32(1)(a) and 32(1)(b), and that there is no provision which takes away such a right from him. The Section itself does not make possession on the tillers" day sine qua non for becoming a deemed purchaser. Realizing this difficulty, the learned counsel for the landlord argued that sub-section (1) of Section 32 refers to a tenant and that the expression "tenant" has been defined by clause (18) of Section 2 of the Tenancy Act to mean "a person who holds land on lease". It was argued that the expression "holds land on lease" carries with it the in-built concept of possession. Now clause (21) of Section 2 of the Tenancy Act provides a key to the words and expression used in the Tenancy Act which have not been defined by Section 2 of the Act. The expression "to hold land on lease" has not been defined by the act. The key provided is that such expression shall be assigned the meaning which is assigned to it in the Bombay Land Revenue Code and the Transfer of Property Act. Now the Bombay Land Revenue Code contains the definition of the expression "to hold land". The expression has been defined to mean "to be lawfully in possession of land" whether such possession is actual or not. It is, therefore, clear that actual physical possession is not necessary in order to hold that a person holds land on lease and that accordingly he is a tenant. In fact recourse to Land Revenue Code is not necessary for even a commonsense approach can lead one to the same conclusion. Take the instance of a person who holds the property on lease who is forcibly dispossessed by someone. Can it be said that he has ceased to be a tenant or that he has ceased to hold the property on lease? The answer is obvious. In any case having regard to the definition contained in the Bombay Land Revenue Code, the matter is placed beyond the pale of controversy. The learned counsel for the landlord could not thereupon carry the matter any further. He then argued that though the landlord had obtained the possession in contravention of Section 15 and sub-section (4) of Section 29 of the Tenancy Act, he could yet claim that the petitioner was not his tenant as he had surrendered his interest. There is no substance in this argument. The point is covered by Vallabbhai Nathabhai Vs. Bai jivi and Others, wherein the Supreme Court has observed that in the case of the surrender which is not valid and binding on the tenant, there is no termination of tenancy and, therefore, the landlord is not entitled to retain the land even though the possession thereof had been handed over to him or has been voluntarily taken

by him. The law enunciated by the Supreme Court is clear that any surrender which is in contravention of the provisions of the Tenancy Act does not bring about a termination of tenancy. There is, therefore, no manner of doubt that the relationship of landlord and tenant continued to subsist notwithstanding the fact that the possession was taken over by the landlord in contravention of the provisions contained in Section 15 and Section 29 (4) of the Tenancy Act. It may be emphasized that the landlord does not dispute the factual position that he had obtained possession without there being a surrender in writing verified before the Mamlatdar in a prescribed manner and that the surrender is in contravention of Section 15 and sub-section (4) Section 29 of the Tenancy Act. It is, therefore, clear that whether actual physical possession was or was not with the tenant, he continued to enjoy the status of a tenant and the tenancy had not been determined. This there is no substance in the submission of the learned counsel for the landlord that inasmuch as the petitioner did not have the actual possession he could not be said to be a tenant within the meaning of Section 32 and 32-G. Having failed on both these points, the learned counsel for the landlord urged an argument based on Section 32(1)(b). It was argued that in order to claim to have become entitled to the right u/s 32 as a deemed purchaser, the tenant must be cultivating the land leased to him personally. It was contended that since he had surrendered the possession, it could not be said that he was cultivating the land personally on the tillers" day. Now the admitted facts are that even according to the landlord the petitioner was in possession till three days before the tillers" day and was cultivating the land personally. It is, futile to contend that the petitioner was not cultivating the land personally merely because three days before the tillers" day the landlord had obtained the physical possession. Again the expression "cultivate personally" which has been defined by sub-section (6) of Section 2 shows that the land must be cultivated on one's own account by one's own labour or by the labour of any member of one's family or under the personal supervision of oneself, of one's own family, by hired labour or by servants on wages payable in cash or kind but not in crop share. The distinction drawn by the Legislature is between cultivation personally and cultivation through a tenant. If two days before the material day a trespasser dispossesses the tenant, can it defeat the tenant's rights on the grounds that he is not personally cultivating the land ? It is apparent that no such argument can be advanced. So also if dispossession by a trespasser will not convert personal cultivation into cultivation otherwise, the dispossession by the landlord himself cannot improve the matter from the point of view of the landlord. There is, therefore, no substance in this connection either.

7. Lastly it was argued by the learned counsel for the landlord that sub-section (1-A) of Section 32 carried with it the concept that the right to become a deemed purchaser was conditional on the tenant being in possession of the land in question on April 1, 1957. Sub-section (1-A) of Section 32 of the Tenancy Act is in the following terms:-

"32. (1-A) (a) Where a tenant, on account of his eviction from the land by the

landlord, before the 1st day of April 1957, is not in possession of the land on the said date but has made or makes an application for possession of the land under sub-section (1) of Section 29 within the period specified in that sub-section, then if the application is allowed by the Mamlatdar, or as the case may be, in appeal by the Collector or in revision by the Gujarat Revenue Tribunal, he shall be deemed to have purchased the land on the date on which the final order allowing the application is passed.

(b) Where such tenant has not made an application for possession within the period specified in sub-section (1) of Section 29 or the application made by him is finally rejected under this Act, and the land is held by any other person as tenant on the expiry of the said period or on the date of the final rejection of the application, such other person shall be deemed to have purchased the land on the date of the expiry of the said period or as the case may be, on the date of the final rejection of the application."

Now clause (a) of sub-section (1-A) comes into operation in the case where a tenant has made or makes an application under sub-section (1) of Section 32. In the present case no such application has been made. Therefore, the provision does not come into operation. The provision which applies where the tenant has not made any such application within the time prescribed by sub-section (1) of Section 29 is clause (b) of sub-section (1-A) of Section 32. In such a case the only disability for the tenant which arises is when the landlord has created a fresh tenancy after obtaining the possession. If such a fresh tenancy has been created and if the application made by the tenant for possession under sub-section (1) of Section 29 has been rejected or he has not made any such application, such new tenant would be entitled to the benefit of the deemed purchase clause u/s 32-G read with Section 32(1). In other words, all that has been enacted by clause (b) of sub-section (1-A) of Section 32 is that if the tenant does not make any application and if meanwhile the landlord has created a fresh tenancy, the tenant will not be entitled to the benefit of Sections 32(1) and 32-G but the new tenant will be entitled to the said benefit. It is, therefore, clear that there is nothing in clause (1-A) (a) or clause (1-A) (b) which is in conflict or derogation of the right conferred on the tenant by Section 32(1). It will be recalled that sub-section (1) of Section 32 provides that every tenant shall on the first day of April 1957 be deemed to have purchased the land held by him as a tenant subject to the rider that there is nothing to the contrary in any other provision of the Act. According to the learned counsel for the landlord there is something in clause (1-A) (a) and clause (1-A) (b) which detracts from the right conferred by section 32(1) and that accordingly the tenant cannot be deemed to have purchased the land. As has been discussed a short while ago, there is nothing in clause (1-A) (a) or clause (1-A) (b) which takes away the right of the tenant to become a deemed purchaser except in a case where he has not made any application u/s 29 and where the landlord has meanwhile created a fresh tenancy in favour of someone else. In such an eventuality the right to become a deemed purchaser is conferred on the new tenant. In the present

case, fortunately for the petitioner, the landlord has not created any fresh tenancy. The contingency in the contemplation of clause (b) of sub-section (1-A) of Section 32 has, therefore, not arisen. It cannot, therefore, detract from the right conferred by Section 32(1) read with Section 32-G. It is therefore, futile on the part of the learned counsel for the landlord to argue that the right conferred by Section 32(1) has been defeated by the landlord having obtained illegal and unlawful possession of the land in question from the tenant in contravention of Sections 15 and 29(4) of the Tenancy Act. Surely the Legislature did not want to confer immunity from the provision of Sections 32(1) and 32-G of the Tenancy Act on landlords who took the law in their own hands and obtained possession in contravention of Section 15 and Section 29(4) of the Tenancy Act? No such intention can be attributed to the Legislature to confer a benefit on the wrongdoer who flouts the provision of the Tenancy Act enacted for the benefit of the tenant. Unless one were to take the view that such was the intention of the Legislature, it would not be possible for the Court to uphold the contention of the landlord that though admittedly he had obtained possession of the land in question three days before the tillers' day in contravention of the provisions of Sections 15 and 29(4) of the Tenancy Act by virtue of his own illegal conduct, he had become entitled to claim immunity from the effect of Section 32(1) and Section 32-G. Under the circumstances the view taken by the Revenue Tribunal cannot be sustained.

8. The petition is, therefore, allowed. The impugned order passed by the Revenue Tribunal in Application No. TEN. A. 624/67 is quashed and set aside. It is declared that the petitioner has become a deemed purchaser of the land in question on the tillers' day (April 1, 1957) and that the competent authority must proceed to determine the sale price u/s 32-G of the Act. Rule is made absolute to the aforesaid extent with costs.

9. Petition allowed.