

(2008) 10 GUJ CK 0011
In the Gujarat High Court

Case No : Letters Patent Appeal No. 604 of 2002 in Special Civil Application No. 2437 of 1990

Pravinkumar Maganlal Patel

APPELLANT

Vs

Surat People's Co-op Bank Ltd.

RESPONDENT

Date of Decision : 10-10-2008

Acts Referred:

Bombay Tenancy Act, 1939 — Section 2A
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 2, 2(18), 2(6), 4, 41(2)
Constitution of India, 1950 — Article 227

Citation : (2008) 3 GLH 770

Hon'ble Judges : S.R. Brahmbhatt, J; Bhagwati Prasad, J

Bench : Division Bench

Advocate : M.C. Bhatt, for the Appellant; A.J. Patel, Id. Advocate for Megha Jani, for Respondent 1, for the Respondent

Judgement

Bhagwati Prasad, J.—The present Letters Patent Appeal is filed by the appellant challenging the judgement and order dated 14.2.2002 of this Court whereby the Special Civil Application filed by the respondent bank was allowed by the learned Single Judge. The learned Single Judge has noticed that the dispute of the parties is to the land bearing Survey No. 49/11 situated in village Bhatbet, Taluka Choryasi, Dist. Surat and the land bearing Survey No. 591 situated in village Pal, Taluka Choryasi, Dist. Surat. The appellant contended that by an agreement entered into between the appellant and the respondent bank on 13.6.1973, tenancy was created in favour of the appellant. The appellant cultivated the disputed land and after deducting expenses, two-third share of the net profit was given to the respondent Bank.

2. After considering the facts and arguments of the learned Counsel for the parties, learned Single Judge came to the opinion which reads as under:

I am of the opinion that the respondent has failed to establish that he was a tenant with respect to the said lands. The bank has successfully established that

it was cultivating the lands personally through hired labour. Further the Tribunal and the authority below have resorted to erroneous approach to the matter at issue. Neither the Tribunal nor the authority below has given a finding that the respondent was a tenant with respect to the said lands. Instead, the Tribunal and the authority below have held that the respondent was not a servant of the Bank and he, therefore, is a deemed tenant as envisaged u/s 4 of the Act. The question was whether the respondent can be said to be a deemed tenant within the meaning of Section 4 of the Act and not whether he was a servant of the Bank or what was his relationship with the Bank. The respondent may or may not be the servant of the bank. He may be said to be manager or a supervisor employed by the Bank to supervise the agricultural operations on the said lands. Be that as it may, the respondent has failed to prove that he was cultivating the said lands as a tenant or that he was cultivating the said lands at all. In the cases in the above referred three judgements, the facts undisputed were that the tenant concerned was cultivating the land in question personally and that he was being paid in crop share. The facts in the said matters are quite distinguishable and the said judgements shall lend no support to the respondent herein.

3. Impugning the said judgement, learned Counsel for the appellant stressed that the learned Single Judge has gone wrong in not considering the true purport and import of deeming provision of Section 4 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as "the Act" for short) because according to learned Counsel Section 4 of the Act gives a deeming clause and in this deeming fiction the land having been cultivated by the appellant should be deemed to be under his tenancy. Section 2(18) of the Act, according to learned Counsel, defines the status of a tenant and according to him includes a deemed tenant u/s 4 of the Act and thus if the test of Section 2 is applied, there is no escape from the conclusion that the appellant is a tenant in terms of Section 4 of the Act because the appellant was not paid in cash and was paid in crop share if the reading of the agreement of the appellant and the respondent bank is concerned. Therefore, crop share being permanent and dominant factor, if that was the consideration between the bank and the appellant, there is no escape from the conclusion that the appellant was a deemed tenant and if he was a deemed tenant then the findings of the learned Single Judge deserve to be quashed and set aside. Learned Counsel has relied on a decision of this Court in the case of Thakor Kesaji Ranaji (Decd.) by his Heirs and Lrs. Thakor Lilaji Kesaji Vs. Vallabhdas Parshottamdas Parikh, and has stressed that this Court has held at paragraph 22 as follows:

It is very clear from the aforesaid decision that what is required to be seen and examined is whether a person has been in lawful cultivation of the land who is not being paid any wages in cash or in kind but by way of crop share. In that case, reliance was also placed on the decision of the Apex Court rendered in Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim, Dahya Lal's Case (supra) was decided by a Bench of five Honourable Judges of the Apex Court. In Dahya Lal's case (supra), the provision which came up for consideration was

Section 4 of the Bombay Tenancy Act. It is clearly held in Dahya Lal's case (supra) that the Tenancy Act encompassed with its beneficial provisions not only tenants who held land for purpose of cultivation under contract from the land-owners but persons who are deemed to be tenants. The ratio enunciated in the aforesaid two decisions of the Apex Court is attracted squarely to the facts of the present case.

4. Thus, according to learned Counsel, the findings of learned Single Judge then are contrary to the binding decision of this Court on the point. Learned Counsel further relied on a decision of the Bombay High Court in the case of Dinkar Vithoba Salgaonkar and Ors. v. Sharad Jagannath Kulkarni and Ors. reported in 1999(1) Bom. L.R. 486 wherein it was decided by the Bombay High Court enumerating the same provisions which are in question as under:

The Appellate Court has recorded a finding that the petitioners were lawfully cultivating the lands i.e. Survey Nos. 45/13 and 45/19. According to the Appellate Court even this was admitted by the respondents. Those lands were belonging to the respondents. According to their own case, there was crop sharing between the two. In view of this, clearly, Section 4(b) is attracted. The Appellate Court has failed to consider the import of the words "but not in crop share" and has erroneously held that the petitioners have failed to prove that their case is not hit by the provisions of Section 4(b). Even considering the case of respondents, it is not hit in respect of these lands i.e. Survey Nos. 45/13 and 45/19. The finding in this respect was perverse.

5. It was held that since there was crop sharing between the parties, the tenants would be deemed tenants under the Act and thus the same provision which has been interpreted to be applied, the judgement of learned Single Judge is not a correct proposition of law.

6. Learned Counsel for the appellant has further relied on a decision of the Hon'ble Supreme Court in the matter of Jagan alias Jagannath Umaji Vs. Gokuldas Hiralal Tawari, in which the Hon'ble Supreme Court has held at paragraph No. 8 as under:

As far as the case before us is concerned as we have already pointed out that the appellant was admittedly cultivating the lands in question and was not a member of the landlord's family nor was he a hired labourer. The landlord did not belong to any of the classes specified in Sub-section (2) of Section 41. The aforesaid cultivation was clearly lawful because the respondent to whom the lands belonged had permitted him to do so. It is true that the record shows that this right to cultivate the land and appropriate the produce was given to the appellant because of the services he was performing as a Pujari of the aforesaid temple of the respondent and as he was looking after the dharamshalas. By reason of these facts, it might be said that he was cultivating the said lands as a servant of the respondent, but he was not being paid any wages in cash or kind but by way of a crop share, the share being the entire crop. In these circumstances, he must

be held to be a deemed tenant of the said lands under the provisions of Section 6 of the Vidarbha Tenancy Act. The fact of his cultivating the land as a servant of the respondent would make no difference because he was being paid for his services by way of a crop share and hence was not covered by the provisions of Clause (b) of Sub-section (1) of Section 6. The learned Judge of the High Court was in error in coming to the conclusion that merely because the appellant was a servant of the respondent, he could not be held to be a tenant in respect of the said lands. The learned Judge altogether failed to notice that although the appellant was a servant, he was not given wages payable either in cash or kind but by way of a crop share and hence not covered by the exception carved out by Clause (b) of Sub-section (1) of Section 6. From the observations made by the learned Single Judge, it appears that he proceeded on the wrong footing that in order to be a deemed tenant, a person must show that his lawful cultivation owes its origin to some sort of tenancy. In fact, the whole aim of Section 6 is to confer deemed tenancy upon person who are not already tenants of the land in question. We may point out that this conclusion finds some support from the decision of this Court in *Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim*, decided by a Bench of five learned Judges of this Court. In that case the provision which came up for consideration was Section 4 of the Bombay Tenancy and Agricultural Lands Act, 1948, the material portion of which runs as follows:

A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not

It was held that this Act encompassed with its beneficent provisions not only tenants who held land for purpose of cultivation under contracts from the land owners but persons who are deemed to be the tenants.

Thus, there was no escape than to hold that the appellant was a deemed tenant.

7. Learned Counsel has further relied on a decision of a Division Bench of this Court in the case of *Harshadrai v. Paragji* reported in 1961 G.L.R. 505 wherein it has been held at page 508 as under:

If two views can be taken as to the construction of a document and the view of the Tribunal cannot be said to be patently unsound or erroneous, the High Court will not exercise its jurisdiction under Article 227 of the Constitution (vide *Satyanarayan v. Mallikarjun* 62 Bombay Law Reporter 146).

8. Thus, learned Counsel strenuously contended that by plethora of decisions the law has been interpreted in favour of the appellant that as and when there is cultivation personally and on crop share basis, the appellant was required to be declared as deemed tenant and therefore learned Counsel prayed that the findings of the learned Single Judge are not in accordance with law and therefore deserve to be set aside.

9. Per contra: learned Counsel for the respondent submitted that the opinion expressed by the learned Single Judge is perfectly in accordance with law

because the entire case of the appellant rests on the deeming language of Section 4. Deeming is by fiction. Deeming provision cannot be considered to be absolute and all deeming provisions have a character of being rebuttable. Interpreting the same Section, according to learned Counsel for the respondent, the Bombay High Court in the case of Gulabrao M. Wani v. Hemakashiram Gajare reported in (1956) 59 BLR 194 has held as under:

It is clear from the facts of the case that opponent No. 1 is not a member of the owner's family nor does he fall in any of the categories as mentioned in the above definition. It is, however, apparent that he is lawfully cultivating the land belonging to the applicant. We have, therefore, to see whether he shall be deemed to be a tenant for the purposes of this Section. The phrase "deemed to be" in our opinion raises a presumption in favour of the person lawfully cultivating the land, of his being a tenant. But that presumption, in our opinion, is a rebuttable presumption. The explanation to Section 4 reads thus:

A person shall not be deemed to be a tenant under this Section if such person has been on an application made by the owner of the land as provided u/s 2-A of the Bombay Tenancy Act, 1939, declared by a competent authority not to be a tenant.

This sufficiently supports our view. Section 4 in itself does not confer any status of tenancy as stated above: it only raises a presumption. In our opinion, it is clear from the terms of the agreement that there was a special contractual relationship between the applicant and opponent No. 1. That contractual relationship is not in the nature of tenancy and, therefore, obviously opponent No. 1 is not a tenant.

10. Thus, learned Counsel for the respondent contended that before deeming assistance is required to be invoked, it is to be seen what is the relationship of the parties and for which learned Counsel drew attention of the Court towards the agreement between the parties. The relevant portion of the agreement when read in Gujarati reads as under:

sdrhu jmInma> ibyar`nI jrur pDe tae te tmea beNke Aapvanu> 0e. Ane qet mjuraenI m>jurI p` mare beNkna nam4I beNkna Naa`a> l[ne, cukvvanI 0e. qetI kam ma3e h5 lakDu lavvu> pDe tae te A>genae qcR p` mare beNk JeaDe4I na>`a l[ne krvanea 0e.sdrhu jmInma> je tul]Tpn 4ay te beNkna nam4I mare saesay3I ma> naqvanu> 0e. Ane tenI iv8yk p/vm mare beNk trf4I Ane beNkna nam pr krvanI 0e. sdrhu jmInnae kbJae beNknae 0e. Ane beNk trf4I j te jmInma> suprvIzn raqIx Ae3le mare sdrhu jmIn pr g5aetIyt trIkenae 0e. jmIn mare kbjae haevanae n4I Ane te ivru^6 hu> kae[qae3I tkrar kru> tae Aa lqa`4I rd batl 4ay 0e. t4a tenI kae[ gervtR`u>knI tmae beNk ibn nae3Ise mne menejrma>4I Ou3ae krI ka!I mukae shI tema> mare kae[tkrar levanI n4I hu> tmarI trf4I sdrhu jmIn]pr deqwa5 raqu> te bdl tmare mne qcR jta je ne3]pr 4ay tenI Aek ttyax rkm dr v8eR AapvanI nkKI kyuR 0e.

11. According to learned Counsel for the respondent, in the agreement the land

which was defined was also not to the extent as has been considered by the Courts below and it was only 2 acres 4 gunthas 10 H. Thus, the learned Counsel for the respondent urged that the interpretation as given by the Bombay High Court is plain and simple and establishes the case in favour of the respondent and upholds the view taken by the learned Single Judge. The learned Counsel further stressed that a Division Bench of this Court in the case of Ambalal Vallabhbai Patel v. Mangalbhaji Dhulabhai Bhoi reported in 1978 G.L.R. 799 held at paragraph No. 16 interpreting the same provision of law as under:

Section 4 is not an instrument for a dishonest person to dupe a simple, unwary and honest person. If a dishonest person enters into an agreement of sale with another, pays a small amount towards the earnest money, enters into possession in anticipation of the conveyance of the title to him, deliberately commits breach of the agreement, goes back upon it and claims tenancy when the intending vendor seeks to recover possession of his land from him, what happens? Shall the dishonest person succeed? Will he be able to achieve his evil design successfully under the protection of law? If we take this view, it will be removed from achieving its last mentioned laudable objective and will operate as a fountain of dishonesty and crookedness creating poverty where there is none without removing it from any other social pocket. It cannot be imagined that the Legislature, by enacting Section 4 in a very wide language, thought of trapping the honest and the simple for making them prey of the wily and the dishonest. Therefore, Section 4 does not operate in the field of agreement of sale under which possession has been delivered to the intending vendee.

12. In this judgement, according to the learned Counsel, it has been stated by the learned Judge that a "legal fiction" is one which is not an actual reality but which the law requires the Court to accept it as a reality. This is how the deeming clause is to be construed. Deeming clause as has been interpreted by the learned Single Judge has rightly been done and there is no illegality in the same and thus prayed that the appeal deserves to be dismissed.

13. We have given our thoughtful consideration to the question of fact and law urged before us. The first and the foremost question of this matter is to look into the definition of tenant which reads as under:

Section 2(18) - "tenant" means a person who holds on lease and includes:

- (a) a person who is deemed to be a tenant u/s 4;
- (b) a person who is a protected tenant; and
- (c) a person who is a permanent tenant;
- (d) a person who, after the surrender of his tenancy in respect of any land at any time after the appointed day but before the specified date has continued, or is deemed to have continued, to remain in actual possession, with or without the consent of the landlord, of such land till the specified date;

and the word "landlord" shall be construed accordingly.

14. Thus, according to definition of "tenant" a person would be a tenant if he is a deemed tenant u/s 4. Thus, we have to see whether Section 4 brings the appellant within the definition of a tenant. Section 4 of the Act reads as under:

Section 4 - A person lawfully cultivating any land belonging to another 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 or any member of the owner's family, or

(c) a mortgagee in possession.

15. A plain reading of the language of the Section requires that a person has to be lawfully cultivating the land. The character of the appellant is defined by the parties by an instrument executed by both the parties. According to that instrument, the appellant was not described as to be a person who would cultivate the land. In terms of the agreement, the person has been defined to be the Supervisor and he was to get the land cultivated through agricultural labourer. Thus, the opening sentence of Section 4 of the Act requires a person to lawfully cultivate the land. This would not engulf the character of the appellant to be a person lawfully cultivating the land, if at all, he took some agricultural operations for himself because he only was required by the bank to have supervised the agricultural operations.

16. The agreement and arrangement to cultivate can be seen to have been necessitated upon simple contingency that a juristic entity like bank can never personally cultivate any land at its disposal. It had to fall back upon some person who can do or get done cultivation for it. The term of agreement shows the appellant as a Supervisor. Thus, he on this count alone, is not covered by Section 4.

17. Another factor which is canvassed by the appellant in his favour is that he is cultivating the land and is being paid by crop share. A servant who is paid in cash is not included in the deeming fiction. This is a negative covenant in Section 4 that if he is paid in crop share then he could be deemed to be a tenant but then this is by such expression of language which did not stipulate that a Supervisor who is paid in terms of agreement would be deemed to be a crop sharer and therefore deeming provisions of Section 4 of the Act would not come to the rescue of the appellant and would not make him a person who is cultivating the land lawfully. Since it cannot be construed from the agreement that any lawful activity was conferred on the appellant to make his cultivation lawfully, any other provisions of Section 4 would not be available to him to claim deemed tenancy.

18. The controversy can be viewed from another angle wherein Sub-section 6 of Section 2 defines "to cultivate personally". Personal cultivation being defined in the definition clause Sub-section 6 of Section 2 which is quoted hereinbelow requires the personal cultivator to cultivate the land on one's own account.

Section 2(6) - "to cultivate personally" means to cultivate land on one's own account:

(i) by one's own labour, or

(ii) by the labour of any member of one's family, or

(iii) under the personal supervision of oneself or any member of one's family, by hired labour or by servants on wages payable in cash or kind but not in crop share.

19. If the status of the appellant is viewed from the definition clause then it would be seen that the appellant was not cultivating on his own account since the appellant was not cultivating on his own account. If a reference is made to the agreement then it would be seen that it was on account of the bank the cultivation was made. Thus, he cannot be considered to be covered by the definition of "cultivating personally". If he was not cultivating personally then again the requirement of Section 4 that a person lawfully cultivating the land would not engulf the appellant in that. In this regard, this may be said that the law relied on by the learned Counsel for the appellant is distinguishable on account that in the case of *Harshadrai v. Paragji (supra)* it is stated that if two views of the construction of the document can be taken then one which has been taken should not be disturbed. Here two views are not possible from the reading of the agreement which clearly specifies the appellant to be the Supervisor.

20. As regards law relied upon in the case of *Thakor K.R. (Decd.) by his heirs v. V.P. Parikh (supra)* suffice it to say that in this case the facts were clearly to the effect that "naokar-nama" was alleged to have been executed subsequent to the tenant having come into possession of the land and he was then held to be lawfully cultivating the land. Naokar-nama came subsequent to his entering as tenant. Thus, the document having come into existence later, then the case is distinguishable on facts.

21. As regards decision of the Bombay High Court in the case of *Dinkar v. Salgaonkar v. Sharad J. Kulkarni (supra)* suffice it to say that, that proceeded on the admitted facts where the respondents were said to have admitted that the cultivator was lawfully cultivating the land. Therefore, this case is also distinguishable. So also in the case of *Jagan Alias Jagannath Umaji v. Gokuldas Hiralal Tewari (supra)* wherein the Hon'ble Supreme Court has noticed that the appellant was admittedly cultivating the land. The case has decided on the admitted facts. There are no such admitted facts in this case.

22. In the present case, the bank could not due to its position cultivate the land. Therefore, it was required to appoint somebody to supervise the agricultural

operations and in that case the ratio of *Ambalal Vallavbhai Patel v. Mangalbhai Dhulabhai Bhoi* (supra) clearly lays down that those who dishonestly wants to travel that character are not favoured. In any case, the discussion made by us regarding law stated above clearly establishes that the case of the appellant is not covered by Section 4 of the Act because he was not lawfully cultivating the land and was inducted as a Supervisor who was not cultivating the land on his own account which is required for personal cultivation. In that background, the findings of the learned Single Judge are not seen to be erroneous and do not require any interference in this appeal. We accordingly uphold the judgement of the learned Single Judge and dismiss the appeal. There shall be no order as to costs.

Learned counsel for the appellant requested for continuance of stay order. In the facts and circumstances of the case, we are not persuaded that any case is made out for continuance of the stay order granted by this Court during the pendency of the appeal. Request is therefore rejected.