

(1954) 11 BOM CK 0006
In the Bombay High Court
Case No : Second Appeal No. 1003 of 1952

Sakharam Alias Bapusaheb Narayan Sanas	APPELLANT
Vs	
Manikchand Motichand Shah	RESPONDENT

Date of Decision : 22-11-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1955) 57 BOMLR 223

Hon'ble Judges : Shah, J;Gajendragadkar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shah J.

1. The plaintiff filed suit No. 86 of 1950 in the Court of the Joint Civil Judge, Junior Division, at Poona, against four defendants for a decree for possession of certain agricultural lands and for future mesne profits and costs of the suit. The defendants by their written statement contended inter alia that the Court had no jurisdiction to try the suit in view of the provisions of the Bombay Tenancy and Agricultural Lands Act.

2. The learned trial Judge held that the Court had jurisdiction to try the suit. He held that the lands which were the subject-matter of the suit being within the limits of the Municipal Corporation of Poona, the provisions of the Bombay Tenancy and Agricultural Lands Act of 1948 did not apply. The learned trial Judge considered the other contentions raised by the defendants and passed a decree in favour of the plaintiff for possession and future mesne profits and costs of the suit.

3. Against the decree passed by the trial Court, the defendants preferred an appeal to the District Court at Poona; and in appeal the learned District Judge confirmed the decree passed by the trial Court. Defendants Nos. 1 to 4 have come to this Court in second appeal.

4. Mr. Kotwal, who appears on behalf of the appellants, has contended that the defendants were recognised as protected tenants under the Bombay Tenancy Act of 1939, and their right as protected tenants is expressly saved by Section 89 of the Bombay Tenancy and Agricultural Lands Act of 1948; and that even though Section 88, Sub-section (1), Clause (c), excludes the lands, which are the subject-matter of the suit and in respect of which the defendants were recognised as protected tenants, from the operation of the Act, the defendants are still entitled to set up in the suit their rights as protected tenants and to claim the benefits to which they were entitled Under the Bombay Tenancy Act of 1939.

5. In order to appreciate the contention raised by Mr. Kotwal it is necessary to refer to certain provisions of the Bombay Tenancy and Agricultural Lands Act of 1948. By Section 89, Sub-section (1), the Bombay Tenancy Act of 1939 to the extent mentioned in the Schedule is repealed. Sub-section (2) of Section 89 provides (in so far as that sub-section is material) that nothing in the Act or any repeal effected thereby shall, save as expressly provided in the 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.

In the Schedule to the Act in the fourth column the extent of repeal of the Bombay Tenancy Act of 1939 is set out. The Schedule states that the whole of the Bombay Tenancy Act of 1939, except Sections 3, 8A and 4 as modified in certain particulars, is repealed.

6. Section 88, Sub-section (i), provides in so far as it is material

Nothing in the foregoing provisions of this Act shall apply:?

(c) to any area within the limits of Greater Bombay, within the limits of the Municipal Corporations constituted under the Bombay Provincial Municipal Corporations Act, 1949, within the limits of the Municipal Boroughs constituted under the Bombay Municipal Boroughs Act. 1925, and within the limits of any cantonment.

7. Section 31 of the Act provides that

For the purposes of this Act, a person shall be recognised to be a protected tenant if such person has been deemed to be a protected tenant u/s 3, 8A or 4 of the Bombay Tenancy Act of 1939.

8. Now the effect of Section 88, Sub-section (i), Clause (c) of the Bombay Tenancy and Agricultural Lands Act of 1948 is to exclude from the operation of

Sections 1 to 87 of the Act those areas which are specified in that sub-section. Therefore to land situate in the area specified in the sub-section, even if it be used for agricultural purposes the provisions of the Act do not apply, and the rights of the parties to a dispute relating to that land are governed by the ordinary law of the land and unaffected by the provisions of the Bombay Tenancy and Agricultural Lands Act of 1948. Evidently the lands in dispute are situate within the area of the Municipal Corporation of Poona, and the provisions of Sections 1 to 87 of the Act of 1948 cannot apply to those lands. It is urged, however, by Mr. Kotwal that under the Bombay Tenancy Act of 1939 the defendants were protected tenants of the lands in dispute, and their rights in the lands are expressly saved by Sub-section (2), Clause (6)(i) of Section 89, and there is nothing in the Bombay Tenancy and Agricultural Lands Act of 1948 which deprives the defendants of the benefit of those rights in this suit instituted by the plaintiff. The argument of Mr. Kotwal is that notwithstanding the repeal of the Bombay Tenancy Act of 1939, the defendants must be regarded as protected tenants and the privileges and rights which the defendants had under that Act can be claimed in their full force and effect against the landlord or owner of the property who claims relief against them which could not have been granted if the Bombay Tenancy Act of 1939 were in force.

9. But as observed hereinbefore the entire Bombay Tenancy Act of 1939 is not repealed by Sub-section (2) of Section 89 of the Act of 1948. The Legislature has not repealed Sections 3, 3A and 4 of that Act. Those sections deal with protected tenants, and persons who should be deemed to be protected tenants even though evicted out of the lands held by them. The Legislature while saving those provisions of the Act of 1939 has made certain modifications therein. Having done so, by Section 81 the Legislature has recognised those persons, who were protected tenants under the Act of 1939, as protected tenants under the Bombay Tenancy and Agricultural Lands Act of 1948. In other words the Legislature has conferred upon persons who were recognised as protected tenants under the Act of 1939 the rights and privileges available to protected tenants under the Act of 1948. If Section 88 of the Act of 1948 had not been enacted by the Legislature, the defendants who were recognised as protected tenants under the Act of 1939 would be entitled to claim the rights which were conferred upon them by the Act of 1939 and affirmed by the Act of 1948. But the Legislature has excluded from the operation of the Act of 1948 certain classes of leases, and also lands which are situate in specified areas. Once that exclusion is made, whatever rights may be deemed otherwise to have been conferred by Section 31 upon protected tenants must be regarded as ineffective, if the land is of the description mentioned in Section 88 or that the land is within the area specified in that section. It is true that the Legislature by Sub-section (2) of Section 89 has purported to protect the right, title and interest of persons who were governed by the Tenancy Act of 1939, notwithstanding the repeal of that Act; but it is provided that those rights or privileges will not be exercisable if there is an express provision to the contrary made in the Act. The Legislature has provided

by Section 88, that the lands situate in certain areas will not be governed by the provisions of the Act of 1948, and that must be regarded as "an express provision to the contrary", and the rights acquired under the Act of 1939 cannot be exercised if the lands in respect of which they are claimed are situate within the area specified in Section 88, Sub-section (1), Clause (c) of the Act of 1948.

10. The question may also be examined in the light of. the provisions of Clause (b)(ii), of Sub-section (2) of Section 89 of the Act of 1948. It is provided by that clause that legal proceedings in respect of the rights which are protected under Clause (b)(i) are not affected, and any such proceeding shall be continued and disposed of as if the Act of 1948 was not passed. The Legislature appears to have made rather a deliberate departure from the provisions contained in Section 7 of the Bombay General Clauses Act. Normally, when a statute is repealed, by reason of the provisions of Section 7 of the General Clauses Act, any legal proceeding, or remedy in respect of any right, title, interest, obligation or liability or anything done or suffered before the commencement of the new Act is liable to be instituted, continued or disposed of as if the repealing Act was not passed. But in enacting Sub-section (2) of Section 89 the Legislature has authorized the continuance and disposal of legal proceedings in respect of rights, titles, interests, obligations or liabilities already acquired, accrued or incurred before the commencement of the Act of 1948 as if that Act was not passed. But so far as institution of proceedings is concerned, the Legislature has not protected the rights, titles, interests, obligations or liabilities acquired, accrued or incurred under the Act of 1939. If a legal proceeding or a remedy in respect of any such right, title, interest, obligation or liability acquired, accrued or incurred is sought to be instituted after the Act of 1948 came into operation, it will have to be instituted and dealt with in accordance with the provisions of the Act of 1948, even though the source of the right, title, interest, obligation or liability was in the Act of 1939. That is the view which has been taken by a division bench of this Court, (of which my learned brother was a member) in *Dhondi Tukaram v. Dadoo Piraji* (1058) 55 Bom. L.R. 663. It was observed (p. 669):

Under the provisions of this section even if a proceeding is instituted subsequent to the repeal of an Act, it will be continued as if the repeal of the Act has not taken place. Section 89 of the present Act (Act of 1948), however, does not seem to protect legal proceedings in respect of vested rights Which may be instituted subsequent to the commencement of this Act, unlike Section 7 of the General Clauses Act. It does not refer to the institution of legal proceedings, but mentions merely their continuance and disposal, which clearly denotes pending proceedings. That is why we hold that it is only pending proceedings in respect of vested rights that are saved from the operation of this Act; so that even in respect of vested rights which are saved, if a suit to enforce them is filed subsequent to the commencement of the Act, the provisions of this Act will apply, and if any question mentioned in Section 70 arises between the parties, it will have to be decided by the Mamlatdar.

Therefore, even if it be assumed that the right as a protected tenant remains vested in the defendants after the enactment of Section 88, Sub-section (1), Clause (c), that right in its enforcement against the plaintiff must be regarded as illusory; and the proceeding in which the question as to its enforcement has arisen if instituted after the Bombay Tenancy and Agricultural Lands Act of 1948 is enacted must be governed by and decided according to the provisions of that Act, and not by and according to the provisions of the Bombay Tenancy Act of 1939. If the proceeding is to be decided according to the provisions of the Act of 1948, Section 88, Sub-section (2) must also apply to that proceeding.

11. This view is supported by another judgment of a division bench of this Court of which also my learned brother was a member: *Shivram Narayan Bhide v. Shridhar Keshav Patwardhan* (1853) First Appeal No. 166 of 1052, JJ., on July 17, 1958 (Unrep.). That case arose out of a suit filed by the landlord against the tenant for possession of land which was situated at Kothrud, within the limits of the Poona Municipality. The landlord filed the suit for possession of the land from the defendant alleging that the defendant was a tenant of the plaintiffs. The defendant disputed the title of the plaintiffs to the land. The suit was instituted by the plaintiff on February 28, 1951, for possession. It was contended by the defendant in that suit that in view of the provisions of the Bombay Tenancy and Agricultural Lands Act of 1948, the civil Court had no jurisdiction to entertain the suit, even though the land which was the subject-matter of the suit was situate in an area excluded from the operation of the Act. In dealing with that contention it was observed:

...Therefore, since the present suit was filed after the new Act came into force, though the defendant may have been a protected tenant and though that right may have been vested in him before the new Act [of 1948] came into force, he cannot claim to get out of the provisions of this Act because the present proceedings were commenced after the new Act came into force. That is the result of the provisions of Section 89 of this Act. Normally, therefore, the provisions of the new Act would have applied. But there is Section 88 which also has to be considered in the present case. It is common ground that Section 88 applies to the properties with which we are concerned in the present suit, and Section 88 provides that nothing in the foregoing provisions of the new Act shall apply to properties like those in suit. In other words, the effect of Section 88 is that the new Act will not apply. The old Act has been repealed by Section 89. While repealing the old Act vested rights are protected but the protection to the vested rights of the tenants turns out to be illusory because the suit in which the said right has to be asserted by the defendant has been instituted subsequent to the commencement of the new Act.

12. Mr. Kotwal contended that the observations made in the judgment to which reference has been made were not necessary for the decision of the appeal. The question which arose for decision in *Shivram Narayan's* case was whether the civil Court had in view of Section 85 of the Act jurisdiction to entertain the suit,

and it was held that the civil Court had jurisdiction to entertain the suit. The ratio decidendi of the decision was that the bar to the jurisdiction of the civil Court to entertain and decide the suit was removed by Section 88 which excluded the land from the operation of the Act. If that is the ratio of the decision, in our view, it must apply, with equal force to the question which has to be decided in the present case, viz, whether the defendants are entitled to set up the rights as protected tenants in respect of the lands so as to defeat the plaintiff's claim for possession of lands which are excluded by Section 88 from the operation of the Act.

13. Reliance in support of his submission was sought to be placed by Mr. Kotwal upon a decision of the learned Chief Justice in *The Commissioner of Poona City Municipal Corporation, Poona v. Shankar Parsharam Takale* (1952) Civil Revision Application No. 4, 1952 (Unrep.), 899 of 1951, decided by Chagla C.J., on April. That was a case in which a possessory suit was instituted in the Court of the Mamlatdar, Haveli, by the Municipal Commissioner of the Poona City Municipal Corporation against the defendant Shankar Parsharam Takale. The Mamlatdar passed a decree for possession against the defendant. In exercise of revisional jurisdiction u/s 23 of the Mamlatdar's Courts Act, the Assistant Collector reversed the order of the Mamlatdar, and dismissed the suit filed by the Commissioner holding that the defendant was entitled to the privileges of a protected tenant. In a further revisional application to this Court u/s 115 of the Civil Procedure Code, the learned Chief Justice took the view that the Assistant Collector was right in holding that the defendant was a protected tenant and his rights were saved by Section 89, Sub-section (2), Clause (b)(i) of the Act of 1948, and that the Mamlatdar was in error in passing an order for possession against the defendant. It was observed by the learned Chief Justice in the course of his judgment:?

...the error into which the Mamlatdar fell was that he did not give effect to the right which the opponent (defendant) had acquired taking into consideration Section 88(i)(a) which provides that nothing in the foregoing provisions of the Act shall apply to lands held on lease from the Crown, a local authority or a co-operative society, and the Mamlatdar took the view that as the opponent held the land on lease from a local authority the provisions with regard to protected tenant would not apply to the opponent. The Mamlatdar overlooked the fact that Section 88(1)(a) being a provision in the new Act did not apply to the lands within the area of the Poona Municipality, and therefore he had to consider the right of the opponent not in the light of Section 88(i)(a) but in the light of the provisions of the old Act, and under the old Act, as I said, there is no serious dispute that the opponent was a protected tenant.

Strictly speaking this was a decision only on the question whether Section 88(i) (a) applied to the proceedings which were before the Court; and the learned Chief Justice expressed the view that the provision did not apply, and the dispute between the parties had to be decided in the light of the provisions of the

Bombay Tenancy Act of 1939. It must be observed that the case does not appear to have been fully argued, and that the judgment of the division bench in Shankar Narayari's case has expressed a view which cannot be reconciled with the decision in that case. It may be pointed out that on the view accepted in *The Commr. of Poona Mun. Corporation v. Shankar Parshuram Takale* the proceedings instituted in the Court of the Mamlatdar themselves were incompetent. Explanation to Section 85 of the Act of 1948 provides that the expression "civil Court" includes a Mamlatdar's Court constituted under the Mamlatdar's Courts Act of 1906. The suit in that case having been instituted after the Bombay Act of 1948 was brought into operation, if Section 88(1)(a), which was the only provision which was relied upon, was inapplicable, Section 85 governed the suit, and the Court of the Mamlatdar was incompetent to entertain the same, and the suit could lie only in the revenue Court constituted under the Act of 1948. If the suit did not lie in the Court of the Mamlatdar, evidently no revisional application was competent before the assistant Collector, nor to this Court u/s 115 of the Civil Procedure Code, except on a question as to the Mamlatdar's competence to entertain the proceeding. It is true that Section 89(2)(b)(i) of the Act of 1948 is referred to in the judgment, but to what extent that provision effectively protected the rights acquired under the Act of 1939 and in what tribunal they can be litigated does not appear to have been argued. After anxiously considering the decision, with respect, we do not think that the judgment relied upon, which proceeded only upon the decision of a limited question as to whether to the proceedings before the Court Section 88(1)(a) of the Act of 1948 did or did not apply, may be regarded as decisive in the present case, where we are concerned to answer the question, whether the defendants in a civil suit are entitled to set up the rights and privileges of protected tenancy acquired under the Act of 1939 in respect of lands which are no longer governed by the provisions of the Act of 1948.

14. In that view of the case, the decree passed by the learned District Judge will be affirmed, and the appeal will be dismissed with costs.