

(1992) 03 BOM CK 0046

In the Bombay High Court

Case No : Civil Revision Application No. 594 of 1990

Shaikh Usman and Others

APPELLANT

Vs

Shaikh Badruddin and Another

RESPONDENT

Date of Decision : 27-03-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1994) 1 BomCR 362

Hon'ble Judges : N.P. Chapalgaonker, J

Bench : Single Bench

Advocate : R.D. Deshpande, for the Appellant; R.R. Jethalia, for the Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

N.P. Chapalgaonker, J.—Shaikh Badruddin, respondent No. 1 herein, had filed Regular Civil Suit No. 475 of 1987 in the Court of Civil Judge (S.D.), Jalna, for the recovery of possession of agricultural lands Block Nos. 24 and 25 situated at village Majarewadi, Taluka & District Jalna and for the mesne profits. It is the case of the plaintiff that he along with respondent No. 2 had purchased land Survey No. 6/2 admeasuring 14 Acres 7 Gunthas for consideration of Rs. 4,000/- from the previous owners Kachru, Sampat and Shankar. It is his further case that there was a partition between respondent Nos. 1 and 2 - purchasers and eastern half portion was allotted to respondent No.1/plaintiff, whereas western half portion was allotted to respondent No. 2 Imam. It is further contended that Survey No. 6/2 was divided and converted into Block Nos. 24 to 30 as per the proceedings under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. After this consolidation, respondent No. 1/plaintiff was allotted Block No. 27 and he has dug a well in this land allotted to him and petitioner No. 1 Shaikh Usman agreed to purchase land Block No. 25 by an agreement executed in favour of petitioner No. 3.

2. In this Civil Suit, defendant Nos. 1 to 4 filed their written statement

contending that since the "Akshatritiya" of 1962, plaintiff and defendant Nos. 2 and 3 and younger brother of defendant No. 3 i.e. Khannu were inducted as tenant. The terms of tenancy were also narrated in the written statement.

3. The learned trial Judge framed issue on 10th July, 1989. However, no issue regarding the alleged tenancy of the defendant was framed. On 9th November, 1989, an application came to be moved on behalf of defendant Nos. 2 and 3 that three additional issues be framed. The proposed Issue Nos. 2 and 3 were ordered to be framed and so far as proposed Issue No. 1 is concerned, the trial Court did not find it necessary to frame issue and was pleased to reject the application. The proposed Issue No. 1 prayed was to the following effect :

"Do defendants prove that defendants 2 and 3 are and were tenants of Survey No. 6/2 now Gat No. 24 to 29 along with plaintiffs and Khannu as contended by them?"

4. By this revision application, defendants seek to get this proposed Issue No. 1 framed and added by setting aside the order dated 5th May, 1990 passed by the learned trial Judge.

5. Shri R.R. Jethalia, learned Counsel appearing for respondent No.1, objected to the prayer for framing of this additional issue firstly on the ground that the issue has been already adjudged by the competent Court and, therefore, there is a bar to fresh suit by virtue of the principles analogous to section 11 of the Code of Civil Procedure, 1908. The second objection raised by Shri Jethalia is that in previous proceedings when the occasion did arise, present petitioners/defendants did not plead that they are tenants of the suit land and, therefore, the plea of tenancy is waived. The third submission of Shri Jethalia is that since the defendants have purchased the land, the tenancy has merged into sale and, therefore, they cannot fall back upon the contract of tenancy. Shri R.D. Deshpande, learned Counsel for petitioners, contended that no competent Court had decided the question of tenancy of the defendants in respect of the suit lands and they had not waived the plea of tenancy and, therefore, neither the principles of res judicata nor the waiver would preclude the entitlement of the defendants to get this issue framed and decided in the present suit.

6. In support of the third contention that the tenancy has merged into the contract and, therefore, defendants cannot fall back upon the contract of tenancy, Shri Jethalia relied on a judgment of Supreme Court in *Badri Narain Jha and Others Vs. Rameshwar Dayal Singh and Others*, . Section 111 of the Transfer of Property Act, 1882 listing the incidents of determination of lease of Immovable property, gives the vesting interest of the lessee and the lessor in the same person as one of the said incidences. In the light of this provision, Supreme Court was pleased to observe that if the lessor purchases the lessee's interest, the lease no doubt is extinguished as the same man cannot at the same time be both a landlord and a tenant. Relying on these observations, Shri Jethalia wanted this Court to hold that even statutory tenancy gets merged in the sale and,

therefore, a statutory tenant cannot fall back on the contract of tenancy in case the contract of sale is not valid. Principle of merger of one interest into another interest as statutorily recognized u/s 111(a) of the Transfer of Property Act, 1882 is governing the lease as a contract between the parties. If there is a statutory cover to such an agreement of lease, the clauses of determination as listed in section 111 of the Transfer of Property Act, 1882 become inoperative. Clause (a) of this section provides that the lease would be determined by efflux of the time limited thereby. It is well known that most of the tenancy laws do contain a provision that by efflux of time, the lease shall not be determined. Similarly, it is provided under the tenancy laws that the tenancy would be determined only as per the provisions of the Tenancy Act. The Hyderabad Tenancy & Agricultural Lands Act, 1950, by which tenancy of agricultural land is governed, section 6 provides that the tenancy shall not be terminated merely on the ground that the period fixed for its duration whether by agreement or otherwise has expired. Similarly, section 19 of the Tenancy Act in very clear terms provides that notwithstanding any agreement or usage or any decree or order of a Court of law, no tenancy shall be terminated otherwise than by the tenant by surrender of his rights to the landholder or on the grounds specified in sub-section (2). Sub-section (2) speaks about the wrongs which proved to have been committed by tenant and which would make himself lose of tenancy rights. The opening words of section 19 clearly provide that the termination of tenancy shall only be on the specified grounds. Provisions of the Tenancy Act protect the possession of the tenant and unless an application is presented within time to the Tahsildar by the landlord who has accrued right to gain possession, the tenant cannot be dispossessed. Looking to this protection given to the agricultural tenancy by this Act, it cannot be interpreted that the provisions of section 111(d) would be available for the landlord to say that once the sale deed is executed in favour of the tenant and he becomes the landlord, he cannot fall back upon his rights as tenant if the sale fails. The second point which will have to be considered while examining the applicability of section 111(d) to the present case is that it speaks about the vesting of the same right at the same time in one person. The vesting presupposes that the sale is a valid one. If the sale is not a valid one, there cannot be a vesting of right and if the sale is held to be valid then there is no question of proving the tenancy because it would be merely academic. But there cannot be a bar in pleading tenancy as an alternative case wherein the party apprehends that the sale may fail because of certain legal defects or otherwise. In this view of the matter, the contention raised by Shri Jethalia deserves to be rejected.

7. The second contention raised by Shri Jethalia is that the issue need not be framed and referred to the tenancy Court since the matter has already been decided and, therefore, there is a bar of the principles of res judicate. Section 11 of the Code of Civil Procedure, 1908 provides thus :

"No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under

whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Therefore, if an issue was directly and substantially an issue in a former suit in a Court competent to try that issue and if it is decided between the parties or between their predecessors in interest, then the principles of *res judicata* would operate. The previous decision, according to Shri Jethalia, is in respect of a mutation proceedings under the provisions of the Maharashtra Land Revenue Code, 1966. Under Chapter X of the Maharashtra Land Revenue Code, 1966, provisions have been made about the land records. It speaks about the maintenance of the record and rules have been framed under this Chapter which govern the entries in the revenue record such as 7/12 extracts. The Revenue Officers as are authorized under the rules are competent to decide the question of entries in the record of rights. Though entries in the record of rights may be considered to be the proof of the right entered therein, it does not contemplate an investigation into that right. Section 8 of the Hyderabad Tenancy & Agricultural Lands Act, 1950 provides that if any question arises whether any person is or was at any time in the past a tenant, the Tahsildar shall, after holding an enquiry, decide such question. The question of tenancy cannot be decided by the authorities acting under the rules framed by virtue of the Maharashtra Land Revenue Code, 1966. It is immaterial whether the same Tahsil Office or whether the same person holding an enquiry in respect of the record of rights, is also competent to hold an enquiry in respect of the tenancy because the nature of an enquiry under the rules governing the record of rights and the nature of enquiry in respect of the tenancy of an agricultural land as contemplated u/s 8 is totally different. Really speaking, record of rights is a record of what has already been determined. It records a right accrued to a party if *prima facie* the authority is satisfied that such a right is there. It records the possession of the property if the authority *prima facie* is satisfied that the party is in possession. It is no decision either about title or tenancy. In the case of *Jugal Kishore v. State of Maharashtra & others*, 1989 Supp (1) Supreme Court Cases 589 : 1988(4) Bom.C.R. 274 (S.C.) the question arose before the Supreme Court whether the question of tenancy can be gone into by the authorities acting under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 and whether the transfer was in favour of a tenant and bona fide one. For this purpose, the ceiling authorities had a jurisdiction to go into the question whether the tenancy was genuine one. The purpose of the enquiry was to find whether the sale was not hit by the provisions of the Ceiling Act. In the case before the Supreme Court, tenancy rights created by the landlord and transfer of possession to the tenant was in anticipation of the Act was the question to be decided. Therefore, the tenancy authorities under the Ceiling Act, had rejected the contention that the lands are not held by the landlord and for that purpose had examined the question of tenancy. The questions to be determined by the authorities under the Ceiling Act cannot be dealt by any Civil Code. By virtue of

provisions of section 45, a specific jurisdiction has been vested in the authorities acting under the Ceiling Act and, therefore, looking to these provisions, Supreme Court found that for this purpose the authorities acting under the Ceiling Act have a jurisdiction to go into the question of tenancy. Shri Jethalia relying on this decision wants to argue that the same principle is applicable so far as record of rights proceedings are concerned. The rules framed in respect of the record of rights as per Chapter X of the Maharashtra Land Revenue Code, 1966 do not give jurisdiction to the authorities to decide any question about any rights of tenancy. The enquiry is only in respect of the entries made and it neither decides the title nor the tenancy. In view of these facts, the revenue authorities holding an enquiry in record of rights proceedings do not have a jurisdiction to decide the question of tenancy. The question whether the defendants are tenants or not, has not been decided by any Court of competent jurisdiction and, therefore, the principles of res judicate analogous to the provisions of section 11 of the CPC are not applicable and, therefore, the contention raised by Shri Jethalia will have to be rejected.

8. The second contention raised by Shri Jethalia is in respect of the waiver. He argues that in the proceedings before the revenue authorities in respect of the record of rights, defendants have not contended that they are tenants and, therefore, it will have to be presumed that they have waived the right. The generally accepted connotation of "waiver" is that to constitute waiver there must be intentional relinquishment of known right or the voluntary relinquishment or abandonment of known existing legal right. It can either be express or can be inferred from the conduct of the parties. But the conduct must be of such a nature which would warrant the inference as the only conclusion derivable from that conduct. There can be waiver of a right created by the contract. But there cannot be a waiver of any right which has been protected by the statute or is a fundamental right. In the case of *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, a larger Bench consisting of five learned Judges of the Supreme Court per majority held that it is not open to a citizen to waive his fundamental rights conferred by Part III of the Constitution. Though it is true that a right of tenancy is not a fundamental right, nevertheless it is a right created by the statute. Even the tenant wilfully cannot surrender his tenancy rights except in accordance with the procedure laid down in the statute and even that will have to be accepted by the Tahsildar. That is the check against the undue influence, mis-representation, fraud or other allurement by which tenant may surrender his tenancy rights. The legislature wanted that the tenancy right should not be easily taken away and, therefore, special statutory protection has been granted to the agricultural tenancy. Can it be waived by a person? Answer is invariably in the negative. In this situation, no inference of the waiver is available if in the mutation proceedings, defendants did not raise contention of tenancy. There cannot be a waiver against a right created by the statute and which statute declares, cannot be extinguished except in accordance with the procedure laid down by that statute. This being the position,

the contention raised by Shri Jethalia in respect of the waiver will also have to be rejected.

9. In the result, revision application is allowed. Order dated 5th May, 1990 so far as it rejects the prayer for framing of the additional Issue No. 1 regarding the alleged tenancy of the defendants, is hereby quashed. The learned Civil Judge (J.D.), Jalna, hearing Regular Civil Suit No. 475/1987 is directed to frame the additional issue regarding alleged tenancy of the present petitioners/defendants and refer it to the Tenancy Tribunal as is required by the provisions of section 99-A of the Hyderabad Tenancy & Agricultural Lands Act, 1950. Rule is made absolute in the above terms. There shall be no order as to costs of this revision application.