

(1943) 09 BOM CK 0011
In the Bombay High Court
Case No : Appeal from Order No. 4 of 1943

Tulsiram Motiram Marwadi

APPELLANT

Vs

Shankar Nana Patil

RESPONDENT

Date of Decision : 06-09-1943

Acts Referred:

Dekkhan Agriculturists Relief Act, 1879 — Section 10A, 2

Citation : AIR 1944 Bom 313 : (1944) 46 BOMLR 621

Hon'ble Judges : Lokur, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Lokur, J.—This appeal raises an interesting question regarding the application of Section 10A of the Dekkhan Agriculturists Relief Act, 1879, to a transaction of 1902, on which the Courts below have differed. The property and the parties come from the district of Kolaba. The property in suit originally belonged to three brothers Budhya, Ganpat and Nana. They executed a sale-deed in favour of one Mathuralal Girdhardas for Rs. 2,000 on May 29, 1902, purporting to convey it to him absolutely. On the same day the vendee Mathuralal passed a document agreeing to reconvey the property to the vendors on repayment of Rs. 2,000 and allowed them to remain in possession as his tenants. Mathuralal owed some money to the plaintiff and after his death the plaintiff obtained a money decree in Suit No. 32 of 1929 against his adopted son, his daughter and the executor of his will. In execution of that decree in darkhast No. 346 of 1935 the property in suit was attached and put to auction. The plaintiff himself purchased it with the permission of the Court on November 23, 1938. The property continued in the possession of the original vendors as tenants and the plaintiff obtained symbolical possession through Court on July 18, 1939. In the meantime defendant No. 1, who is the son of one of the vendors, Nana, made an application to the executing Court to set aside the attachment, but his application was rejected. The plaintiff thereafter gave a notice of eviction to the

defendants and filed this suit to recover its possession from them, together with mesne profits and costs. The main contention of the defendants was that the sale of the property to Mathuralal in 1902 was really in the nature of a mortgage, and after paying the requisite Court-fees they asked for an account of the mortgage and for its redemption under the provisions of the Dekkhan Agriculturists' Relief Act. The trial Court held that the deed of agreement of re-conveyance was not admissible in evidence for want of registration and that the defendants were not entitled to lead oral evidence to prove the real nature of the transaction u/s 10A of the Dekkhan Agriculturists' Relief Act. The plaintiff's claim for possession and mesne profits was, therefore, decreed. But in appeal the learned Assistant Judge held that the defendants were entitled to claim the benefit of Section 10A of the Dekkhan Agriculturists' Relief Act, and, therefore, he reversed the decree of the trial Court and remanded the suit for determining whether defendant No. 1's father was an agriculturist in 1902 and for a fresh trial of the question of mortgage and accounts in accordance with the provisions of Sections 10A, 12 and 13 of the Dekkhan Agriculturists' Relief Act. It is from that order of remand that the plaintiff has now come in appeal.

2. The registered sale-deed of 1902 expressly conveys the property in suit to Mathuralal absolutely, and u/s 92 of the Indian Evidence Act, 1872, no oral evidence can be adduced to vary its terms except under certain circumstances, which are not alleged in this case. But the defendants want to avail themselves of the provisions of Section 10A of the Dekkhan Agriculturists' Relief Act to adduce oral evidence to prove that the transaction which was expressed as a sale was in reality a mortgage. This departure from the strict provisions of Section 92 of the Indian Evidence Act is permitted to an agriculturist party to a suit to enable him to prove the real nature of the transaction provided that

Such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction.

3. Although Section 10A was enacted in 1907 and extended to the District of Kolaba in 1911, it is held in *Ganpat Chandrabhan v. Tulsi* ILR (1923) 48 Bom. 214 : 26 Bom. L R. 118 s.c. to be retrospective in its application and its benefit extends to a transaction entered into before the enactment of the section, provided an agriculturist is a party to the suit and he or the person through whom he claims was an agriculturist at the time of the transaction. It is not disputed that the defendants are agriculturists at present, but it is contended that in 1902, when the transaction was entered into, neither they nor their predecessors-in-title could possibly be agriculturists as denned in Section 2 of the Dekkhan Agriculturists' Relief Act. According to the first clause of that section :

Agriculturist shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour

within those limits.

4. The defendants' predecessors-in-title were earning their livelihood in the District of Kolaba in 1902 when they passed the sale-deed in favour of Mathuralal, and the question is when the Act should be held to have been extended to that District. The Act came into force on November 1, 1879, and on that very day Sections 1, 11, 56, 60 and 62 were made applicable to the whole of British India and the rest of the Act was made applicable only to the Districts of Poona, Satara, Sholapur and Ahmednagar, but the local Government was empowered to extend from time to time wholly or in part the provisions of the Act to any other district or districts in the Presidency of Bombay or to any part or parts of any other such district or districts. Sections 2 and 20 were extended to the District of Kolaba in January, 1903, and some other sections in 1905 and 1909. Thus, when the transaction in suit took place in 1902, no section of the Act, other than the five which were applied to the whole of British India by Section 1, had been extended to the District of Kolaba. The decision of the full bench in *Sawantrava v. Giriappa Fakirappa* ILR (1913) 38 Bom. 18 shows that in 1902 no one could be an agriculturist in that district as defined in the first clause of Section 2. That was a case from the District of Dharwar to which also the different sections of the Act were extended at the same time as the District of Kolaba and the transaction in that case was of the year 1899. It was held that the plaintiff could not have been an agriculturist in that year and, therefore, was not entitled to the benefit of Section 10A. Adopting this view, the learned trial Judge disallowed oral evidence to prove the real nature of the transaction. But the learned Assistant Judge being of opinion that the authority of the decision in *Sawantrava v. Giriappa Fakirappa* was shaken by the subsequent full bench decision in *Ganpat Chandrabhan v. Tulsi* (supra) remanded the suit in order that the defendant might be allowed to lead oral evidence to prove that the transaction was really a mortgage. He says :

According to the decision in *Ganpat Chandrabhan v. Tulsi*, referred to above, if Sections 11, 56, 60 and 62 applied, it could be said that the Act applied for the purpose of the definition in Section 2 of the Act.

5. This is not what the full bench purported to decide in that case and it did not in any way differ from the ruling in *Sawantrava v. Giriappa Fakirappa*. That was a case from the District of Khandesh, to which only Sections 2 and 20 were extended on May 14, 1902, and Chapters V, VI and VII on February 3, 1903. The sale-deedi which was sought to be proved as intended to create only a mortgage was executed thereafter on April 27, 1905. Following the decision in *Chanbasayya v. Chennapgavda* ILR (1919) 44 Bom. 217 the trial Court in that case held that the executant of the sale-deed could not have been an agriculturist in 1905 as the part of the *Dekkhan Agriculturists' Relief Act* which had been then extended to the district was not " a substantial part of the Act." The question was referred to a full bench which overruled *Chanbasayyds* case and held that the extension of Sections 2 and 20 of the *Dekkhan Agriculturists'*

Relief Act to a, district was sufficient to make a person an agriculturist within the meaning of Section 2, if that person by himself or by; his servants or by his tenants earned his livelihood wholly or principally by agriculture carried on within the limits of, that District or ordinarily engaged personally in agricultural labour within those limits.

6. From this the learned Assistant Judge came to the further conclusion that the extension of even Sections 1, 11, 56, 60 and 62 was sufficient, and as those sections were extended to the whole of British India in 1879, the ruling in *Sawantrava v. Giriappa Fakirappa* (supra) must also be deemed to have been tacitly overruled. But the ratio decidendi of *Ganpat Chandrabhan v. Tulsi* shows that the full bench did not go to that length. On the interpretation placed upon it by the learned Assistant Judge, the words in the first clause of Section 2 "within the limits of a district or part of a district to which this Act may for the time being extend " would be redundant, since by Section 1 those five sections were extended to all the districts in British India from the very day on which the Act came into force. But, as observed by Coyajee J. in *Ganpat Chandrabhan v. Tulsi*, those words have reference to the extension of the Act to a district or to part of a district in the Presidency of Bombay and not to the original application of the five sections to the whole of British India. Out of the sections extended to the whole of British India¹ by Section 1, Section 11 requires certain kinds of suits against an agriculturist to be instituted and tried in a Court within the local limits of whose jurisdiction he resides and not elsewhere. The other three Sections 56, 60 and 62 deal with the registration of certain documents executed by an agriculturist before a Village Registrar. The *Dekkhan Agriculturists' Relief Act* is an Act of the Indian Legislature, though intended for the benefit of the agriculturists of this Province. The object of extending these four sections to the whole of British India was to prevent agriculturists residing in the favoured districts within the Presidency of Bombay from being sued, for instance in Calcutta or Madras Courts, and to require all British Indian Courts to recognise the registration of documents by Registrars in the favoured districts (see *Tulsidas Dhunjee v. Virbussappa* ILR (1880) 4 Bom. 624 In his referring judgment in *Ganpat Chandrabhan v. Tulsi*, Crump J. observed (p. 220) :-

As to the argument based on sections 1, 11, 56, 60 and 62 I would point out that these extend proprio vigore, to the whole of British India and stand on a different footing to those sections which are " from time to time extended" in virtue of the power conferred by Section 1. It is no doubt difficult to construe the Act logically in this matter, but I would apply the principle *ut res magis valeat, quam pereat*.

7. This passage was quoted with approval by the full bench and there is no doubt that the extension of any section of the Act to a district or any part of a district in the Presidency of Bombay within whose limits the person whose status is to be determined earns his livelihood is sufficient for the purpose of the definition in the first clause of Section 2. But the application of Sections 1, 11, 56, 60 and 62 to the whole of British India by Section 1 itself is not such an extension.

8. In the present case the transaction in suit took place in 1902 when no section of the Act was thus extended to the district of Kolaba after the Act came into force. Hence no one could then lay claim to the status of an agriculturist by earning his livelihood wholly or principally by agriculture carried on within the limits of that district.

9. Mr. Sukhtankar for the defendant relies also upon the second clause of Section 2 which provides :

In Chapters II, III, IV and VI, and in Section 69, the term " agriculturist", when used with reference to any suit or proceeding, shall include a, person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.

10. Section 10A falls in Chapter II, but this clause is intended to show that to invoke the aid of that section, it is not necessary that a person) should be an agriculturist both at the date of the suit and at the date of the transaction. It is enough if he is one at the date of the transaction, as held in *Sultan Rahim v. Ranchhodji* (1926) 29 Bom. L.R. 249. But the proviso to Section 10A makes it clear that he or the person through whom he claims must have been at the date of the transaction an agriculturist within the meaning of that word "as then defined by law."

11. It is further argued that in 1902 Section 2 had not been extended to the district of Kolaba and hence, there being no definition of the term " agriculturist", it should be taken as meaning an agriculturist in the ordinary sense of the term, in the same sense in which the word is used in Section 60, Civil Procedure Code. This reasoning is not sound, as the expression " as then defined by law " means " as denned in the Act at that time. " If there was no definition at all, then none could be an agriculturist within the meaning of that clause also, as held in *Mahadev Narayan v. Vinayak Gangadhar* ILR (1909) 33 Bom. 504 . In that case the question was whether the defendant was an agriculturist in 1871, and it was held that the term " agriculturist" first received a legal definition in the *Dekkhan Agriculturists' Relief Act* in 1879 and, therefore, in 1871 the defendant, whatever might have been his occupation in fact, could not have been " an agriculturist within the meaning of that word as then defined by law. " It follows, therefore, that the executants of the sale-deed through whom the defendants claim could not have been agriculturists in 1902 and the defendants are not entitled to the benefit of Section 10A. They cannot, therefore, be allowed to prove by oral evidence that the said sale deed was really intended to create only a mortgage.

12. As I have already said, when Mathuralal took the sale-deed in suit, he passed an unregistered document agreeing to reconvey the property on repayment of the amount of consideration. As held in *Harkisondas Bhagwandas v. Bai Dhanu* ILR (1926) 50 Bom. 566 that document cannot be admitted in evidence for want of registration. But Mr. Sukhtankar requests that he should be allowed to amend

the written statement and claim, on the assumption that the transaction is an absolute sale, that the defendants are in possession under the said agreement of reconveyance and are willing to pay Rs. 2,000 to the plaintiff and that, therefore, they are not liable to be evicted. This claim based on the doctrine of part performance was not urged in the trial Court, nor was the written statement sought to be amended on those lines. Such a claim is evidently based on the decision in *Harkisondas Bhagwandas v. Bai Dhanu* (supra) that, where the transaction was a bona fide sale, the agreement for re-purchase, though unregistered is admissible in evidence. But in this case the defendants still claim that the transaction is a mortgage and not a bona fide sale and it is not denied that the vendors entered possession as tenants of the vendee and not in part performance of the agreement of re-conveyance. That" agreement was sought to be used for the purpose of varying the terms of the sale-deed and to show that it was not really a deed of sale but a deed of mortgage. For that purpose it is certainly not admissible in evidence. This defence also must, therefore, fail.

13. I allow the appeal, set aside the order of the lower appellate Court and restore the decree of the trial Court. The respondents shall pay the costs of the appellant throughout.