

(1973) 04 GUJ CK 0009

In the Gujarat High Court

Case No : Letters Patent Appeal No. 115 of 1970

Vasanji Kevalbhai and Others

APPELLANT

Vs

Dahiben and Others

RESPONDENT

Date of Decision : 26-04-1973

Acts Referred:

Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952 — Section 29(2)
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 1, 11, 12, 13 , 15

Citation : AIR 1975 Guj 25 : (1974) GLR 780

Hon'ble Judges : S.H. Sheth, J;J.B. Mehta, J

Bench : Division Bench

Advocate : S.B. Vakil, for the Appellant; N.R. Oza, for the Respondent

Judgement

J.B. Mehta, J.—The defendants-tenants in this appeal challenge the eviction decree which has been passed by the learned Single judge in favour of the plaintiff purchasers of the three suit lands. There were other, companion matters which have not come on in appeal and in this appeal we are concerned only with the purchasers' suit for eviction, of the defendants tenants. The suit lands, originally bore S. Nos. 45 and 46 which are now divided into new S. No. 16 and, new S. Nos. 47 and 50 respectively of village Dumbhal in Chrisai Taluka, Surat District and there is no dispute that they were situated within the distance of two miles of the limits of surat Borough Municipality as on December 28, 1948, when the Bombay Tenancy and Agricultural Lands Act, 1948, hereinafter referred to as "the Act", or the 1948 Act" came into force. As far as old S.No.45 was concerned, there was a mortgage with a lease back on march 17, 1880 and that original owner Mulla Alibhai Mulla Habibulla by the sale deed, dated March 20, 1889, sold the same to the Acharya of Swaminarayan Temple, Vadtal, for Rs.1050, by Ex.164. As far as other S.No.46 was concerned, in the case also there was a mortgage with a lease back dated December 24, 1882, and by the sale deed, dated March 20, 1889, at Ex.165, that old S.No.46 was also sold by its owner Patel Vallabh Bhana to the then Acharya of Swaminarayan Temple, vadtal. By ex.485 by a registered lease dated January 23, 1890 for 51 cultivating

seasons (S.Y. 1946 to 1997) of old S. Nos. 45 and 46, the defendants ancestors Bhaga Govind and one Jaga Lallu became lessees. Thereafter by the lease dated April 21, 1901, at Ex.163, executed by Bhaga Govind in respect of both the S.No., he became lessee for 40 years on annual rent of Rs.115 and that lease was to expire on April 20, 1941. The Bombay tenancy Act, 1939, came into force in this area on April 1, 1941. The agreed period of lease expired and the tenant as averred by the plaintiffs in the plaint, continued to remain in possession. There was a registered lease by the Acharya in favour of the defendants Vasanji keval and Ranchhod Morar for five years on annual rent of Rs.115 and land revenue, on January 12, 1942, Ex.174, in respect of the two old S.No.s which had been given the three new S.Nos. as aforesaid. The Bombay Tenancy Act, 1939, had been amended on November 8, 1946 and the amended Section 23 provided for statutory extension of the lease by making it 10 years" lease. The Acharya had after the resolution of the committee after public advertisement entered into an agreement for sale of the suit lands to the plaintiffs on August 4, 1947 for Rs.42,270 and the sale deed was executed at Ex.162 on September 25, 1947, in favour of the plaintiffs-purchaser subject to the tenancy rights of the defendants. The tenants had applied meanwhile on August 14, 1947, for mutation of their names as Permanent tenants, while the plaintiffs-purchasers had terminated the lease by a notice at Ex.156, dated October 19, 1947, u/s 7 of the 1939 Act, on the ground of personal cultivation demanding possession on March 31, 1949. A reminder notice was again served at Ex.1256-A on June 18, 1948 demanding possession on expiry of March 31, 1949. As per the Mamlatdar's order, the defendants names had been entered in the revenue records, the State first confirmed this order on 28-1-49, but by the final order of the State Government dated December 16, 1969 the original order was treated as ineffective and not binding to the parties and all concerned were left to their respective position as August 13, 1947. The Tenancy Act of 1948 - present Act - came into force on December 28, 1948, and originally in view of the exemption u/s 88(1)(c), the provisions of section 1 to 87 became inapplicable by the Bombay Amendment Act, 33 of 1952, which came into force on January 12, 1953 there was a further amendment in the Bombay Tenancy Act, 1948, by the Act 13 of 1956 on August 1, 1956 also during the pendency of the suit. The plaintiffs present suit was filed on April 29, 1949 the trial Court had decreed the suit for possession with mesne profits while the learned Assistant Judge had dismissed the suit. The second appeal was allowed by the learned Single Judge as he held that the defendants were not protected under the Tenancy Act and that the Civil Courts could decide the present eviction suit and the controversy whether the defendants were permanent tenants and whether they were protected. On merits the learned Single Judge reversed the finding as regards the Benami character of the purchase by holding that the sale in favour of the plaintiffs purchasers was neither nominal and sham nor without consideration. The learned Single Judge further held that the defendants were not permanent tenants and as the suit notice terminating their tenancy was held to be legal and valid, the eviction decree was passed against the defendants. Therefore, the defendants have filed

the present appeal.

2. Mr. Vakil in this appeal challenged the finding of the learned Single Judge on the question of the jurisdiction of the Civil Court to pass such an eviction decree against these tenants by holding that they were not protected under the Tenancy Act, even when it became applicable on January 12, 1953, in respect of the suit lands. On merits Mr. Vakil challenged the three findings as the learned Single Judge could not reverse the pure finding of fact as regards the benami character of the sale deed taken by the plaintiffs-purchasers. He also challenged the findings that the defendants were not permanent tenants and that their tenancy was validly terminated. As we are holding that the defendants should succeed on the short ground that the Civil Court had no jurisdiction to pass the eviction decree when the Tenancy act became applicable to the suit lands protecting these tenants from January 12, 1953, by Act 33 of 1952 it would not be necessary to go into the other findings as to the merits.

3. The learned Single Judge has disposed of this question relying on the decision in s.No. Sidram Narsappa Kamble Vs. Sholapur Borough Municipality Another, , by the Full Bench of five judges. In that decision their Lordships had considered the effect of the words "save as expressly provided in this Act" in Section 89(s) (b) in respect of lands which were exempted from the provisions of Sections 1 to 37 by the express enactment of Section 88(a) in respect of lands held on lease from a local authority. Their Lordships in terms held that the clause "nothing in this Act shall affect or be deemed to effect" in Section 89(s)(b) was qualified by the words "save as expressly provided in this Act". Therefore if there was an express provision in the 1948 Act, that would prevail over any right, title or interest etc. acquired before its commencement. Those words, "save as expressly provided in this Act", qualify the words "any repeal effect thereby" and therefore even in the case of the repeal of the provision of 1939 Act, if there was an express provision which affected any right, title or interest acquired before the commencement of the 1948 Act, that would also not be saved. Their Lordships pointed out that Section 88 was clearly an express provision which took out such leased of land held from a local authority from the purview of section 1 to 87 of the 1948 Act. One of the express provisions was Section 31 itself, which recognized protected tenants and if that section was to be treated as non-existent so far as such lands held on lease from a local authority under the 1948-Act. Therefore, even though there was no such express provision destroying or taking away the rights of protected tenants acquired under the 1939-Act in respect of such lands held on lease from a local authority, their Lordships held at p.542 that the effect of the express provision contained in Section 88(s)(a) clearly was that Section 31 must be treated as non-existent so far as lands held on lease from a local authority were concerned, their Lordships in terms observed that no express provision was necessary stating that there would be no protected tenants after 1948 Act came into force with respect to lands held on lease from a local authority because that was the plain effect of the provisions contained in Section 31, 88 and 89(s) of the 1948 Act. Their Lordships

further pointed out at the end that even though Section 4-A took the place of Section 31 after the amendment of 1956, this amended Section 4-A did not apply to such lands held on lease from a local authority, because what was said in the context of Section 31 would equally apply to Section 4-A therefore, the tenants could not contend that they were protected tenants under the 1939 Act and were entitled to the benefit of section 31 or amended Section 4-a in view of the fact that Section 88(1)(a) was the express provision which took away interest of protected tenants under the 1939 Act in actual effect. Their Lordships overruled the decision in *Sakharam @ Bapusaheb Narayan Sanas and Another Vs. Manikchand Motichand Shah and Another*, where full effect was not given to the words "save as expressly provided in this Act" appearing in section 89(2)(b) and it was not noticed that there could be no protected tenants after the 1948 Act came into force. The said Section 88(1) in its application to such leases from local authority would have no meaning unless it affected rights of protected tenants contained in Section 31. Therefore, more as read in Section 89(2)(b) than was justified when it was held that the provisions of Section 89(1) (a) (b) and (c) were entirely prospective and were not intended to be of a confiscatory character to destroy the rights acquired under the 1939 Act as the protected tenants. Their Lordships in terms observed that the legislature might have well thought that the status of protected tenant should not be given to lessees of lands from a local authority, in the interest of the general public and, therefore, took away that interest by the express enactment of Section 88(1)(a). The status was after all conferred by the 1939-Act and it could be equally taken away by the 1948-Act. Their Lordships further pointed out that Section 88(1)(a) applied not only to lands held on lease from local authority but also the state, and one can visualise the situation where the State might need to get back lands leased by it in public interest. Therefore, the express provision was made in Section 88(1)(a) with respect to leased from a local authority or the State who had become protected tenants under the 1939-Act. To that extent their Lordships relied upon the decision in *Mohanlal Chunilal Kothari Vs. Tribhovan Haribhai Tamboli*, where it was held that Section 88(1)(d) must be applied retrospectively for unless that was done that provision would be rendered completely ineffective. Their Lordships, however, corrected the observations even in *Mohanlal Chunilal Kothari's* case by holding that this retrospective effect was not only upto 1948 but even so as to destroy even the rights acquired under the 1939 Act. Further proceeding, their Lordships pointed out that not only Section 88(1)(d) applied in future but even Section 88(1) (a), (b), (c) also applied in the future, and still all these provisions applied retrospectively so as to destroy the rights acquired even under the 1939 Act. Therefore, this decision clearly settles the legal position as to the true construction of these two relevant provisions in Section 88(1) (a) to (d) and Section 89(2) (b) as it categorically lays down that the effect is to take away rights which had accrued to the tenants even under the 1939-Act and therefore, they are retrospective not only upto the date of 1948-Act but so as to affect even the rights acquired under the 1939-Act. No doubt the decision is in the context of lands held, from a local authority u/s 88(1)(a) and in the context

of claim of protected tenancy u/s 31, but the ratio is capable of wider application.

4. We cannot agree with *Sidram Narsappa Kamble Vs. Sholapur Borough Municipality* Another, should be restricted only to lands leased by local authority or by the State u/s 98(1) (a) or that the decision was only in the context of rights of protected tenant merely because Section 31 or Section 4A was specifically referred to. The ratio is to the effect that *Sakharam @ Bapusaheb Narayan Sanas and Another Vs. Manikchand Motichand Shah and Another*, was overruled so far Section 88(1) (a), (.b), (c) were held to be prospective and not retrospective and so far as *Mohanlal Chunilal Kothari Vs. Tribhovan Haribhai Tamboli*, was concerned it also wrongly assumed that the retrospective effect was only upto 19,48 and that rights acquired under 1939-Act were not destroyed. In the wider public interest the object of the exemption was examined as it would be necessary to get back the leased lands, and, therefore, the retrospective effect was given to this widest extent. Therefore, on parity of reasoning even in case such lands within the limits of two miles of Surat Municipal Borough which attracted exemption u/s 88(1)(c), on the coming into force of this Act on December 28, 1948. in view of the express terms of Section 88(1)(c) all the rights of the tenants whether as protected tenants or otherwise, which were acquired even under 1939-Act were retrospectively destroyed. Therefore, Mr. Vakildar could not rely on the decision in *Hiralal Prabhubhai and Others Vs. Nagindas Atmaram Khatri*, for invoking the rights even under the amended Section 23 of the 1939. Actor the corresponding provisions of Section 5 of the 1948 Act or Section 4-B as amended after 1966 because this decision had in terms followed *Sakharam @ Bapusaheb Narayan Sanas and Another Vs. Manikchand Motichand Shah and Another*, , which had held the provisions of Section 88(1) as clearly prospective and not of any confiscator character so as to destroy rights acquired under the 1939-Act and which has not been expressly overruled in *Kamle's* case. That decision in *Hiralal's* case had considered the relevant provisions. It pointed out that Section 23 (1) of 1939-Act which was amended by the 1946-Act provided as under:-

"a) no lease of any land situated in any area in which this section comes into force made after the date of coming into force of this section in such area shall be for a period of less than 10 years; and

(b) every lease subsisting on the said date or made after the said date in respect of any land in such area shall be deemed to be for a period of not less than 10 years;."

Section 88(1)(e) of the 1948-Act before this amendment by the 1952-Act provided as under:-

"Nothing in the foregoing provisions of this Act shall apply-

(a)

(b)

(c) to any area within the limits of Greater Bombay or within the limits of the Municipal Borough of Surat and within a distance of two miles of the limits of such boroughs....."

The relevant portion of the amendment in 1952 was that Section 88(1)(c) was ended to read as under:-

"Nothing in the foregoing provisions of this Act shall apply (c) to any area within the limits of the Municipal Corporations constituted under the Bombay Provincial Municipal Corporations Act, 1949, within the limits of Municipal Boroughs constituted under the Bombay Municipal Boroughs Act, 1925, and within the limits of any cantonment....." Their Lordships pointed out that the gist of the provisions in their application to a lease of agricultural land situated within two miles of the limits of the Surat Borough Municipality may be stated as follows:- "Such a lease subsisting on the date of the amending Act of 1946, shall be deemed, to be for a period of not less than 10 years. Then Section 88(1)(c) exempted this land from the provisions of Secs. 1 to 87. The saving provision made in the repealing Section 89(2)(b)(i) preserved right title and interest by the lessee in such area. S. 88 was however amended by 1952 Act on July 12, 1953 and by that amendment the 1948-Act was extended to any area"-within a distance of two miles of the limits of Surat Borough Municipality. With the result, all the provisions of the 1948-Act would be applicable to a lease of agricultural land subsisting in such an area after the amendment came into force. If so such a lease can be terminated only in the manner prescribed by Section 14 thereof. Therefore, even though the landlord had terminated the lease with effect from March 31, 1952, by giving a notice on April 23, 1951 before the suit was disposed of, the 1952 amendment Act had come into force and by reason of the extension of the 1948-Act to the suit land, the landlord could not evict tenants except in the manner prescribed by the 1948-Act." Therefore. it was held that the High Court was wrong in holding that the tenants could not claim benefit of the provisions of 1948-Act. This decision would otherwise have clinched the issue, but as we have earlier pointed out it was based on the overruled decision in Sakharam's case. Therefore, as per the decision in Kamle's case it must be held that in such leases which were exempted u/s .88(1)(c) even within two miles of the limits of Surat Borough Municipality before 1952 Amendment Act, there could be no assumption that rights as a Protected tenant under the 1939-Act were still preserved and were not destroyed retrospectively. The decision to the extent it thus rests on Sakharam's aforesaid ratio would be affected by Kamle's decision. We would, however, clarify at this stage that this decision also considers the effect of the extension of the Act to this area within the two miles limit of Surat Borough Municipality by the amendment made in 1952-Act and so far as that amendment is concerned, their Lordships have categorically held at page 369 that after this amendment came into force on January 12. 1953, all the provision of 1948-Act would be applicable to the leases of agricultural lands subsisting in such area and such a lease would have to be terminated and the tenant would have to be evicted only in the manner prescribed by 1948-Act. Mr.

Oza would be right that although Kamle's decision proceeds on consideration of Section 31, and the corresponding Section 4-A after the 1956 Amendment, the same ratio would be applicable even so far as the rights of tenant are concerned u/s 5 of the 1948-Act which corresponds to the amended Section 23 of the 1939 Act. And even the rights of such tenants to claim extension of the statutory period of tenancy by claiming the status of irremovability would be destroyed not only from the date of the 1946-Act but even so far as the right which was acquired under the amended Sec-23 of the 1939 Act was concerned. That question, however, need not detain us any longer because in *Manekji Edulji Mistry and etc. Vs. Maneksha Ardeshir Irani and Another*, their Lordships in terms have pointed out the distinction between the rights of a protected tenant under S. 31 which could be terminated u/s 14, and the rights of a tenant u/s 5 of the 1948-Act or the amended Section 23(1) of the 1939 Act by which there was a statutory security of tenure by conferring only status of irremovability by extending the term under the statute. The protected tenants had an unlimited security as against the limited security given to a tenant u/s -5. Their Lordships however, categorically held at page 167 that a protected tenant could not advance the claims as ordinary tenant u/s 5. As the defendants were protected tenants under the 1939-Act and on which there is no dispute between the parties, it is not open to Mr. Vakil to advance a claim u/s 5. Therefore, at this stage we should proceed on the footing that the effect of Kamle's decision is that so far as these lands within two miles limits of Surat Borough Municipality were concerned, by reason of specific exemption u/s 88(1)(c) when the 1948-Act came into force nothing in Sections 1 to 87 was applicable and, therefore, the defendants-tenants' rights as protected tenants or otherwise to claim any protection under the acquired rights under the 1939-Act had been destroyed.

5. Even so, we will have to consider the effect of the 1952 Amendment which came into force on January 12, 1953, as to whether it conferred protection on these tenants even while this litigation was pending. Mr. Vakil vehemently relied on the aforesaid decision in *Hiralal Prabhubhai and Others Vs. Nagindas Atmaram Khatri*. But as we earlier pointed out that decision was in terms based on the overruled reasoning in *Sakharam's* case and to the extent it was based on that overruled decision, that reasoning cannot be invoked by Mr. Vakil. Besides, when 1952 Act came into force there was a statutory amendment in Section 88(1)(c), and there was no question of the effect of the repeal, which was made of the 1939-Act when the 1948 Act came into force on December 28, 1946, which is to be found in Section 89(2)(b)(i). This question has to be answered on the footing as to what is the effect of this amendment to the pending litigation, of course, bearing in mind that the effect of this amendment was stated to be in *Hiralal's* case that the 1918-Act became applicable to leases of agricultural lands subsisting in this area. and so the tenants could claim benefit of the Provisions contained in Sections 1 to 87 even in a Pending suit. In *Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai*, their Lordships had to consider this question in the context of the land in the town of Broach whereby the 1956 amendment

sought to restore to the tenants Protection of 1948-Act as originally enacted. By 1956 Amendment Act, while a suit for possession was pending, Section 88(1)(c) was repealed as it stood amended by the 1952 Amendment Act and the effect was to restore to the tenants the protection of the 1948-Act in these areas. No doubt there it was Section 43C provision who expressly provided for such retrospective restoration but while considering the effect of these provisions, at Page 466, their Lordships in terms laid down a principle of statutory construction that such amended statute which substituted new material in Section 86 and Section 88A to 88D for the old Section 88 must be regarded as a repealing enactment to which Section 7 of the Bombay General Clauses Act would apply. Therefore unless different intention appeared clarify as contemplated by Section 7 the amendment would not affect pending litigation. Their Lordships held that so far as the proviso to Section 43C was concerned. which stated that the rights acquired by the tenant under the 1948-Act on December 29, 1948 were not deemed to be affected by the 1951 Amendment Act, it clearly saved the rights acquired by the 1,948-Act before 1952-Act was enacted. Their Lordships further Pointed out that on the 1948-Act being enacted the tenants were entitled to the diverse rights. The right to claim that every contractual tenant was statutorily extended for a period of 10 years, the right to claim that tenancy may not be determined otherwise than in circumstances mentioned in Section 14, and in case of a protected tenant subject to the restrictions imposed by Section 34 that he shall not be deprived of possession otherwise than by an order u/s 29(2). These and other rights having been restored to the tenants retrospectively from the date of the 1952 Amendment Act by virtue of the express -provision made in proviso to Section 43C, the tenant even in a pending suit could raise a defence that he was entitled to the rights of a tenant or a protected tenant. Their Lordships approved the ratio of the Full Bench of the Bombay High Court in Maganbhai Jethabhai's case 60 Bom LR 1383. where the Bombay High Court held that the proviso to Section 43-C afforded protection to the tenant, if the tenant had the protection of the Act of 1948 as originally enacted, notwithstanding that the protection was taken away by the 1952 Amendment Act and that the protection of that proviso u/s 43C must be given in cases where there was claim in a pending litigation if the suit was not finally disposed of. This decision clearly settles the legal position that such amendment statute as 1952 amendment, which substitutes new Section 88(1)(c) for the old Section 88(1)(c) by making applicable the provisions in Ss. 1 to 87 to these lands situated within the two miles limit of the Surat Mpl. Borough, must be regarded as a repealing enactment to which Section 7 of the Bombay General Clauses Act would be attracted. We would have, therefore. to answer the material question as to which is the law which is to be applied to the pending litigation, by finding out whether a different intention appeared in this context when the protection of the Tenancy Act of 1948 was extended to tenants of these lands where originally the Legislature had given an exemption under the 19148-Act.

6. Mr. Oza vehemently argued that this question can be decide d only by

referring to the terms of the Amending Act and not by looking to the provisions as amended. On fast principle this contention is thoroughly misconceived as the Amending Act had never any independent existence. The amendment is written with the same pen and ink and goes into the original text and that is why we will have to look to the amended law as such to find out whether a different intention is disclosed so as to affect even pending litigation. In *Indira Sohanlal Vs. Custodian of Evacuee Property, Delhi and Others*, their Lordships reiterated the ratio laid down in *State of Punjab v. Mohar Singh* AIR 1955 SC 84 in the context of the corresponding Section 6 of the Central General Clauses Act, and in terms laid down that the line of enquiry would be, not whether the new Act expressly kept alive old rights and liabilities but whether it manifested an intention to destroy them. Section 6 would be applicable in such cases of a repeal of enactment followed by a fresh legislation. unless the new legislation manifested an intention incompatible with or contrary to the provisions of the section. Their Lordships in terms pointed out that such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law. There is equally no substance in Mr. Oza's contention that there must be an express provision for destroying old rights or for affecting pending litigation. That is not a necessary requirement, even though in *Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai*, their Lordships found such an express provision in the proviso to Section 43C. Their Lordships had approved the Full Bench decision in *Patel Maganbhai Jethabhai Vs. Somabhai Sursang*, where the ratio was categorical that intention to affect pending litigation may be found from express language or if there is necessary intendment to that effect. The Full Bench had followed in this context *Hutchison v. Jauncey* (1950) 1 KB 574, by a strong Bench of the Court of Appeal in England by Evershed M. R., Cohen L. J. and Asquith L. J. who had taken the view that looking to the peculiar character of the legislation like the Landlord and Tenant Rent Control Act, the Court should give retrospective effect to the pending action. The landlord's suit was dismissed and it was held that the tenancy was protected. The Court of Appeal had at pages 578 and 579 in terms taken the view that even on settled principles of Interpretation of Statutes (without recourse to section corresponding to S. 7 of the General Clauses Act) and when the law was altered during the pendency of the action, the rights of the parties were to be decided according to the law as it existed when the action was begun, unless the new statute showed a clear intention to vary such rights. The Court of Appeal, however, in terms held that if the necessary intendment of the Act was to affect Pending causes of action, the Court would give effect to the intention of the legislature even though there was no express reference to pending actions. The Court of Appeal took into consideration the definition of the word "tenant" in Rent Restriction Statute where even a tertian whose lease is terminated by the landlord and who continued in occupation was considered as tenant for claiming protection of the relevant S. 9. it provided in clearest terms that if it applied to the relevant tenancy then under the provisions of the Rent Restriction Act, the Court would say that it would not make an order for possession save in the specified

circumstances. The learned judges pointed out that the answers to the relevant question, as to what was the law applicable to such pending suits, whether one in force at the date of the institution of the suit or one in force at the date of the hearing or the date of the passing of the decree, had to be found out by going to the relevant terms of the statute, and if there was such prohibition on the Court passing decree for possession in respect of land held by such tenants who are intended to be Protected, there was necessary intendment to give retrospective effect to pending suits. Therefore, the pending suits were intended to be affected by alteration of law subsequent to the date of the institution of the suit in such a context. In view of this settled legal position, the Full Bench had in terms observed at page 1391 that the relevant question which had to be posed in such a context was as to the point of time at which the protection was sought to be given. The Court must always consider the class of cases which were intended to be covered by this protective umbrella created by the Legislature. Their Lordships also considered that the intention of the legislature was to protect such tenants as those areas were initially excluded from the operation of the Act and at a later stage were deemed to be fit to need protection and, therefore, the general object of the Legislature was to give a protection with retrospective effect. The Full Bench further pointed out that it was inclined to agree with the view that when the legislature was taking away a statutory exemption created by it there was no question of any vested rights being affected because none had any vested right to any statute being continued on the statute book as held in *Abbott v. Minister for Lands* (1895) AC 425. Therefore, even though *Ishvarlal Almaulas* case is decided on the basis of the proviso to Section 43C being express provision giving retrospective effect even to Pending litigation, by restoring the rights to the tenants with retrospective effect from the date of 1952 amendment, the ratio of this decision is categorical that retrospective effect in a pending litigation can be given in a case where such is a necessary intendment of the legislature looking to the character of the statute and the relevant factors.

7. In such a context we should always bear in mind some of the settled principles of construction which would be helpful to arrive at the legislative intention. One such principle is already indicated by the Court of Appeal as to the character of such benevolent legislation like Rent Restriction Act which is to protect tenant from the mischief of eviction. The legislature in such cases would be not only widening definition of tenant but also enunciating its legislative decision which would have to be applied by the Court as an absolute prohibition to any decree of eviction being passed even in a pending suit, where it lays down in the statute a bar against the decree being passed. Looking to the mischief which was sought to be suppressed by the legislature it would be frustrating the very object of the legislature if the protection intended by the legislature is not made available to tenants in a pending litigation. That is why in such cases law at the time of the passing of the decree would become the relevant test in view to the legislative decision which would be evident from such language which would make the point

as the relevant point of time and the law at the date of the institution of the suit would not be material in that context. The Court would have to take notice of the alteration in law and would have to mould its decree accordingly even in a pending suit. We find a host of high authorities in this connection for treating such amendment conferring Protection to the tenant as being applicable even to pending suits. An identical question had arisen in *Mohanlal Chunilal Kothari Vs. Tribhovan Haribhai Tamboli*, , We have already considered this decision in the context of interpretation of Sections 88 and 89 and to what extent it was overruled by *Kamle's* case. This decision, however, rests on the second ground which is material for our decision that the High Court had not noticed that the exemption notification, which was issued u/s 88(1)(d) exempting that land from the provisions of Sections 1 to 87 of the 1948 Act on April 24, 1951, was cancelled by the State Government by the subsequent notification, dated January 12, 1953. Therefore, when the judgment of the lower appellate Court was rendered, the position in fact and law was that there was no notification under clause (d) of Section 88(1) in operation so as to make the land in question immune from the benefits conferred by the Tenancy Law. In other words, the tenants could claim the protection afforded by the law against the eviction on the ground that the term of the lease had expired. Their Lordships also observed, that there was no substance in the contention that vested rights accrued to the landlord were affected and the subsequent notification could not take away rights which had accrued by the earlier notification. Their Lordships pointed out that if the land lord had obtained effective decree and had succeeded in ejecting the tenants as a result of that decree, which may have become final between the parties, that decree could not have, been reopened and the execution taken there under could not have been recalled. But it was during the pendency of the suit at the appellate stage that the second notification Was issued canceling the first and, therefore, the Court was bound to apply the law as it stood on the date of the judgment. In such a case there was no, question of taking away any vested rights in the land lord. Therefore, even though the, High Court had not noticed the alteration of law in this connection the conclusion was confirmed on this ground that the, tenants could not be ejected because of this alteration of law during the pendency of the litigation. Their Lordships in terms held that if the tenants can take advantage of the provisions of the , Act, it was apparent-that such a suit for possession against the tenant would lie in the Revenue Courts and not in the Civil Court and the Civil Court would have no jurisdiction to try the suit and the suit would have to be dismissed. This decision has completely concluded the question except for the contention of Mr. Oza that it was a case of fresh notification u/s 88(1)(d) whether the lands are taken out of the operation of the Tenancy Act by executive notification issued u/s 88(1)(d) or by statutory operation of Section 88(1)(d) to (c) itself, the Court would have to take notice of the alteration in law as laid down by their Lordships. In *Hiralal Prabhubhai and Others Vs. Nagindas Atmaram Khatri*, the effect of the 1952 amendment Act in respect of these very lands within the two miles of Surat Municipal Borough was held to be to protect tenants and that they could not be evicted except in the

matter prescribed by the Act. In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha*, , an identical question had arisen in the context of Section 12(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Their Lordships kept open the wider question as to the effect of Sections 50 and 51, the saving provisions. Their Lordships construed only plain terms of Section 12(1) by reference to the definition of the term "tenant" which in such rent restriction statute include not only tenant whose tenancy subsisted but even any person remaining, after the determination of the lease, in possession with or without the assent of the landlord. Their Lordships held that such a statutory tenant was by the express language of Section 12(1) entitled to the protection of the rule of decision enunciated by the legislature that the landlord is not entitled to recover possession. Their Lordships pointed out that Section 12(1) enacted that the landlord shall not be entitled to recover possession and not that no suit shall be instituted by the landlord to recover possession. The point of time when the subsection would operate was when the decree for recovery of possession would have to be passed. Therefore, the language of Section 12(1) was such that it clearly affected pending suits which could never be decreed -after the section had come into operation. Their Lordships further relied on the ordinary rule of construction that substantive rights should not be held to be taken away except by express provision or clear implication. but many Acts, though prospective in form, have been given retrospective operation, if the intention of the legislature was apparent. That is more so when the Acts were passed to protect the Public against some evil or abuse. (See Craies on Statute Law, 5th Edn. P. 365). Therefore as per the settled legal principles we would have to hold that there was such necessary intendment of the legislature especially looking to the character as the statutory amendment. The necessity was felt to bring these lands within the protective umbrella of the Act, even though initially when the 1,948 Act came into force exemption was granted. The legislature took away this exemption in respect of these relevant lands by amendment. Therefore, the mischief which the Legislature intended to remedy could be suppressed only by giving cover of the protective umbrella even in respect of pending litigation. There is, equally no substance of Mr. Oza's contention that the definition of tenancy in S. 2(17) of the Act envisage the subsistence of relationship of landlord and tenant. Section 2(18) defines a "tenant" as meaning a person who holds land 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, and

the word "landlord" shall be construed accordingly. The definition of "deemed tenant" u/s 4 is in the widest term as covering any person lawfully cultivating any land belonging, to other person. if such land is not cultivated by the owner and if such tenant is not within one of the three categories in clauses (a), (b) and (c) of being a member of owner's family, a servant on wages payable in cash or

kind but not in crop share or hired labourer, or a mortgage in possession.

In *Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim*, Otheir Lordships had pointed out what was the width of the definition of the term "deemed tenant", whose object was to afford protection to all persons other than those mentioned in clauses (a), (b) and (c) of Section 4 who lawfully cultivated land belonging to other persons, whether or not their authority was derived directly from the owner of the land. That is why even the mortgage's tenant was held to be a deemed tenant and their Lordships held that if possession of such deemed tenant in respect of the disputed land was obtained, even by execution of the award of the Debt Adjustment Court without the order of the Mamlatdar, such possession was obtained in violation of the express prohibition. Section 29 prohibited landlord from obtaining possession otherwise than under the orders of the Mamlatdar. The tenant was, therefore, held to be unlawfully dispossessed. Therefore, according to the definition of the deemed tenant, the object of the Act is to protect such statutory tenants who would have the status of irremovability conferred on them by the protective umbrella created by this Act. Even Section 31 created a fiction for the purposes of the Act that a person shall be recognised to be protected tenant if he was deemed to be protected tenant under Sections 3, 3 (b) and 4 of the 1939 Act and in case of such protected tenant, Section 14 provides that notwithstanding any law, agreement, usage, or the decree or order of a Court, the tenancy of such protected tenant on -any land shall not be terminated except as provided. therein. Section 5, as it stood even in 1952, had conferred such protection by statutory extension of the lease -period and had conferred status of irremovability on even ordinary tenant. Section 29(2) in terms is a clear legislative mandate that no landlord shall obtain possession of any land held by a tenant except under order of the Mamlatdar. Therefore, the legislative decision is apparent in the language of Section 29(2) which puts such an embargo not on mere institution of such action but for obtaining possession except under orders of the Mamlatdar. Therefore, even in a pending suit, the Civil Court would not be able to pass any decree ignoring this mandate of the legislature which clearly settled the point of time at which the protective umbrella comes into operation. Even Sections 70 and 85 provide for dispute being resolved by the revenue authorities as to the relevant questions mentioned in Section 70. In any event, so far as this eviction suit was concerned, in view of the protective provisions and in particular, in view of Section 29, the Civil Court would never have any jurisdiction to Dass decree for possession of the land. The amendment in law, which had already come into operation from January 12, 1953, was to be given effect to by the Court before passing decree of eviction as categorically laid down by their Lordship in *Mohanlal*'s case. Therefore, the provisions to which we have referred to clearly disclose a different intention to affect pending litigation. Unless that view is taken of such necessary intendment the mischief which was sought to be suppressed by the Legislature would result by eviction of these tenants. These tenants were deprived -of the statutory protection of 1948-Act because the lands were sought to be exempted u/s 88(1)(c) when the 1948-Act

came into Operation on December 28, 1948. But when the legislature decided upon giving them protection of the Act, unless the Court took notice of the change in law the salutary object of this benevolent legislation would be frustrated. Therefore, even if this question was any longer resintegra after Mohanlal Kothari's case, we must hold that a different intention was necessarily implied so as to affect the pending litigation.

8. Mr. Oza. however, vehement v. argued that the material fact which must be noticed is that as per Sidram Narsappa Kamble Vs. Sholapur Borough Municipality Another, , 1939 rights which, were acquired by the tenants were destroyed and during that period when there was exemption the landlord had terminated tenancy and even filed suit for eviction. That would hardly make any difference for determining whether pending litigation was sought to be affected by the statutory amendment in 19,52 which necessarily intended to protect those tenants who were once deprived of the statutory protection by the exemption created by the legislature. The argument of Mr. Oza that there was something like a vested right has already been answered in Mohanlal Kothari's case. Their Lordships in terms held that there was no question of any vested right in such case unless the landlord had obtained decree for possession and had obtained - possession by executing decree, Only then the right of the landlord would have ripened. There was no question of any vested, right when the amended statute was sought to be applied by the Court -at the appellate stage before passing a decree of eviction. The Court was bound to take notice of change in law in such circumstances and must refuse to pass a decree if such decree contravened the plain mandate of Section 29(2). Mr. Oza in this connection vehemently relied upon the decision of the Division Bench in Dhondi Tukaram's case 55 Bom LR 663 : (AIR 1954 Bom 100) , where the question of Section 89(2)(b) (ii) in its application to pending proceedings was considered. At p. 6,70 (of Born LR) = (at p. 104 of AIR). the Division Bench had in terms observed that they were considering the only question whether the Civil Court's jurisdiction was ousted in a pending proceeding on the ground that the plea of tenancy was taken u/s 70(b) in a pending litigation and were not considering at that stage the question of Section 29. Mir. Oza next relied upon the decision in Rajesab Wallad Imamsab Bagwan Vs. Harishchandra Honnawar, , by Shah, J. where at p. 641, it was in terms observed that a decree having been passed for possession, the tenancy relation had ceased to exist and the decree-holder was not a landlord within the meaning of Section 29(2). The execution of the decree was not held to be affected by Section 29 on the application of the Act. The learned Single Judge had distinguished the decision in Dhondi Tukaram v. Dadu Piraii. 55 Bom LR 663 : (AIR 1954 Bom. 100) by the observation that the effect of Section 29, was not considered would not suggest that the Court was prepared to take the view that the Civil Court had no jurisdiction to enforce compliance with a decree passed in the exercise of its jurisdiction. Mr. Oza could not draw any inspiration, therefore, from the observation at page 641, that there was nothing in Section 29 which required a decree-holder who had obtained decree for possession in his

favour from the Civil Court to apply to the Mamlatdar to execute the decree. We would consider this question immediately after referring to the decision of Shelat J. (as he then was) in *Parma Motiji v. Anand Frasad* (1961) 2 Guj LR 444, where it has been held that the 1952 Amendment was not retrospective so as to affect Pending litigation. This decision is directly on Section 29 and the learned Judge had in terms held that the pending suit was governed by the law as it was in force at the date of the institution of the suit. With great respect, the learned Judge had wrongly distinguished the Full Bench decision in *Magaribliai's case* (1968) 60 Bom LR 1383, which is approved by the Supreme Court, that there was an express provision to give retrospective effect in the proviso to Section 43(1)(c) for it clearly lays down that if such is the necessary intendment, retrospective effect has to be given. Both Shah J. and Shelat J. had not considered the relevant question which had to be posed in such circumstances as per the settled legal position that such an amendment is a repealing provision which necessarily attracts Section 7 of the Bombay General Clauses Act and, therefore, if a different intention appears from the provisions of the amended law, even -a pending litigation would have to be decided in the light of the amended law. Besides, the Full Bench had settled the question after following the -ratio laid down by the Court of Appeal that looking to the character of such rent restriction statute if the legislature has laid down a rule of decision in Section 29 that no possession shall be obtained except under order of the Mamlatdar even in a pending suit, the Civil Court would not be able to pass or enforce an eviction decree. In such cases under the very language used by the legislature to suppress is chief which was intended to be remedied, the point of time. Which was envisaged by the legislature at which protection was extended, was the date when the possession was to be obtained by the order of the Mamlatdar. Therefore, in such a statute, retrospective effect was Plainly intended and the Full Bench decision was wrongly sought to be distinguished. Therefore, both the decisions of Shah J. and Shelat J. could not be taken as good authority in view of the aforesaid settled legal position, especially as in *Mohanlal Chunilal Kothari Vs. Tribhovan Haribhai Tamboli*, even their Lordships have in identical situation held that the Court even at the stage of appeal would be bound to take notice of the change in law in such cases and would give protection to the tenant as intended by the Act.

9. Finally as Mr. Vakil sought to invoke even the amended Section 4A which corresponds to old Section 31, Mr. Oza had raised a preliminary contention that this point having not been raised before the learned Single Judge, it could not be permitted in the Letters Patent Appeal. We have already held that after the 1952 Amendment came into force on January 12, 1953, all the provisions in Sections 1 to 87 became applicable to these lands of these tenants not with standing that suit was already instituted by the landlord. Therefore, even the fiction of protected tenancy created by Section 31 or even by the present amendment in Section 4A after the 1956-Act would be available to the tenant. The contention of Mr. Oza was sought to be based on the decision of the Division Bench

consisting of Bhagwati J. (as he then was) and myself in Kadi Municipality Vs. New Chhotalal Mills Company Ltd., where it was pointed out that ordinarily a new point could not be permitted in a Letters Patent Appeal. That is not a rule of universal application. When a point is one which goes to the root of the matter or is an obvious point of jurisdiction which is sought to be argued on the facts on the record or when the same point is sought to be illuminated in its further nuances by resorting to additional arguments. In *Habib Nasarkhanji v. State*. (1970) 11 Guj LR 307, the Division Bench consisting of Vakil J. and my learned brother had in terms held that a point going to the root can be allowed even in Letters Patent Appeal. In the present case, Section 4-A is sought to be relied upon by Mr. Vakil as a further facet of his argument in support of his main point that as the protected tenant, his protection had come into full force from January 12, 1953, and the tenancy of such protected tenant could not be terminated except as provided by Section 14 and no possession could be taken except as provided in Section 29. Therefore, both u/s 31 and Section 4A when the legislature created this fiction that such a person for the purposes of this Act was to be recognised to be a protected tenant if he was deemed to be a protected tenant under Sections 3, 3 (a) and 4 of the 1939 Act. full effect must be given to this legal fiction even in a pending suit. Mr. Oza -argued that the rights acquired under the 1939 Act under Sections 3, 3 (a) and 4 by these defendants had already been destroyed by the initial exemption granted to these lands u/s 88(1) (c). But once this exemption was cancelled by the legislature, if this was not a vested right but something acquired under the exemption granted by the legislature, as soon as the legislature deleted this exemption, this legal fiction came into force and the Court was bound to give effect to this legal fiction. Therefore, the scheme of the Amended Act clearly reveals a contrary intention and unless the pending suit is affected, legal effect can never be given to the fiction created by the legislature during the pendency of the suit by applying Section 31 and Section 4A. and the tenant would be deprived of possession in plain violation of the mandate of Section 29. In that view of the matter, Mr. Vakil must succeed on this short ground that the Civil Court had in this pending suit no jurisdiction left after January 12, 1953 to pass any eviction decree as the tenant was entitled to protection under the Act which was applied from that date to these lands in question. Therefore, the plaintiff's suit as in *Mohanlal Chunilal Kothari Vs. Tribhovan Haribhai Tamboli*, must be dismissed on this short ground. Mr. Oza vehemently argued that this Court should go into the points on merits so that no remand would be necessary, if the matter is ultimately taken in, appeal to the Supreme Court. As we have taken the view as per the settled legal position as pointed out by us that the Civil Court would have no jurisdiction in this matter, it would not be proper for us to go into the merits and, therefore, on the three points on merits we express no opinion.

10. In the result, the Letters Patent Appeal must be allowed by reversing the decree passed by the learned Single Judge and by restoring the decree dismissing the plaintiff's suit passed by the learned Assistant Judge. There shall

be no order as to costs all throughout in the circumstances of the case.

11. Mr. Oza at the end made a request for a certificate under Article 133 (1). As pointed out by us in our decision, after Mohanlal Chunilal Kothari Vs. Tribhovan Haribhai Tamboli, and other decisions which we have referred to, we cannot consider that the case involves a substantial question of law of general importance even though we have held that the two decisions of the learned Single Judge Shah J. and Shelat J. which we have pointed out -are not good law. In any event, in view of Mohailal Kothari's decision we can never give opinion that the present question which we have decided needs to be decided by the Supreme Court. Therefore, both the relevant conditions prescribed under Article 133 (1) are not fulfilled in the present case and, therefore the certificate is refused.

12. Appeal allowed.