

(2009) 04 BOM CK 0132

In the Bombay High Court

Case No : Writ Petition No. 1978 of 1996

Zoroastrian Anjuman Funds Trust and Others

APPELLANT

Vs

Chimanaji Jayaram Mali (deceased) through his heirs

RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Citation : (2009) 04 BOM CK 0132

Hon'ble Judges : Borkar P.R., J.

Bench : Single Bench

Final Decision : Dismissed

Judgement

Borkar P.R., J.>/P> 1. By this Writ Petition the petitioner/trust challenges the judgment and order passed by the Agricultural Lands Tribunal and Tahsildar, Dhule in Tenancy Case No. 3 of 1986 decided on 19.4.1986; as modified by the Sub-Divisional Officer, Dhule Division, Dhule in Tenancy Appeal No. 10 of 1986 decided on 3.7.1987; as confirmed by the Maharashtra Revenue Tribunal at Bombay in Tenancy A. No. 173 of 1987 decided on 6.4.1990 holding that the respondent/tenant Chimnaji was entitled to purchase land Survey No. 12/2, situated at Dhule for the purchase price of Rs. 27,465.60 ps. under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948.

2. As per the petitioner/trust, the Agricultural Lands Tribunal, the Sub-Divisional Officer and the Maharashtra Revenue Tribunal failed to appreciate Section 43C along with its proviso under the Bombay Tenancy and Agricultural Lands Act, 1948. It is stated that due to misinterpretation, the three authorities have held that original respondent Chimnaji, who is now represented by his legal representatives, was entitled to statutory purchase on tillers day. Thus the exception carved out by Section 43-C of the Bombay Tenancy and Agricultural Lands Act, 1948 is ignored and even though original respondent Chimnaji was protected tenant, he was only entitled to continue in possession of the property as tenant and since property was within Municipal limits of Dhule Municipal Council (as it was earlier and now within limits of Dhule Municipal Corporation),

there could not be statutory purchase by the tenant on tillers" day.

3. At Annexure "A" with the Writ Petition, the V.F. 7/12 extract of the property in dispute, namely, Survey No. 12/2, situated at Deopur, Dhule is produced. The entries are from 1951-52 to 1964-65. In other rights column it is mentioned that since land is within Municipal limits the tenant was not entitled to purchase. Chimna Jairam Mali was protected tenant under Section 3-A (of the Bombay Tenancy and Agricultural Lands Act, 1948). In the cultivation column, name of Chimna Jairam Mali is shown as cultivator. Mode of cultivation is "3" i.e. as a tenant. There is also one well in the land.

4. It is argued that the suit land is within Municipal area since Municipal Borough was constituted in about 1912. Except the Maharashtra Revenue Tribunal all other authorities have accepted that the land is within Municipal limits. In the judgment passed by the Agricultural Lands Tribunal, Dhule, copy of which is produced as Annexure "C" with the petition, at the out set it is mentioned that the land was within Municipal limits of Dhule Municipality and the application was filed by tenant Chimna's heirs for fixing the purchase price of Survey No. 12/2, Deopur, Dhule under Section 32-G of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as, "the Bombay Tenancy Act"). Even in para 5 it is stated that the land is within Municipal limits. While answering point No. 3, it is specifically held that the land is within Municipal limits. In para 11 it is stated that by Mutation No. 3228 it is stated that Chimnaji was protected tenant but was not entitled to purchase since the land is within Dhule Municipal limits. We find same discussion in para 13 also. It is held that in spite of land being within Municipal limits, the tenant is entitled to purchase the property.

5. Even the Sub-Divisional Officer while deciding Tenancy Appeal No. 10 of 1986 has accepted position that the land is within limits Municipal Council, Dhule and we find this from the very first para of the judgment in which suit property is described as within Municipal limits. It is also not disputed that the petitioner/trust is the owner of the land. The Maharashtra Revenue Tribunal, in Revision though stated in para 2, "admittedly suit land is within limits of Dhule Municipal Council established from 1912" itself raised doubt in para 16. However, at the same time observed that though there was no copy of the Government Resolution or copy of notice issued by the Municipality to indicate that the land is within limits of Dhule Municipality, there was town planning map of Deopur area of Dhule Municipality produced before the Maharashtra Revenue Tribunal and on perusal of it, it appeared that Survey No. 12/2 was on the map of Municipal limits of Dhule. So unnecessarily the Tribunal has entertained doubt regarding admitted position. It has specifically stated in para 2, as stated earlier that it was admitted position that since 1912 the land was within the limits of Dhule Municipal Council.

6. The Bombay Tenancy and Agricultural Lands Act, 1948 replaced the original Bombay Tenancy Act, 1939. By Section 88 of the Bombay Tenancy and Agricultural Lands Act, 1948 for the first time by Sub-section (1)(c) the operation

of provisions of the Bombay Tenancy and Agricultural Lands Act were made inapplicable to area within limits of Greater Bombay and within limits of Municipal boroughs of Poona city and sub-urban, Ahmedabad, Sholapur, Surat and Hubli and within a distance of 2 miles of the limits of such boroughs. Chapter III-B was inserted by Bombay Act XIII of 1956 and Section 43-C came to be incorporated. It is as follows:

43-C. Nothing in sections 32 to 32-R (both inclusive) and 43 shall apply to lands in the areas within the limits of-

- (a) Greater Bombay,
- (b) a Municipal Corporation constituted under Bombay Provincial Municipal Corporations Act, 1949,
- (c) a Municipal borough constituted under the Bombay Municipal Boroughs Act, 1925,
- (d) a Municipal district constituted under the Bombay District Municipal Act, 1901,
- (e) a cantonment, or
- (f) any area included in a Town Planning Scheme under the Bombay Town Planning Act, 1954:

Provided that if any person has acquired any right as a tenant under this Act on or after the 28th December 1948, the said right shall not be deemed to have been affected by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952, or (save as expressly provided in Section 43-D), by the Amending Act, 1955, notwithstanding the fact that either of the said Acts has been made applicable to the area in which such land is situate. Bombay Act XIII of 1956 came into force on 1.8.1956. Thus Section 43-C with its proviso came into force on 1.8.1956. Section 88(1)(c) of the Bombay Tenancy and Agricultural Lands Act, 1948 was originally as follows:

88(1) Nothing in the foregoing provisions of this Act shall apply:

??? ???

(c) to any area within the limits of Greater Bombay and within the limits of the municipal boroughs of Poona City and Suburban, Ahmedabad, Sholapur, Surat and Hubli and within a distance of two miles of the limits of such boroughs.

By Bombay Act XXXIII of 1952 which came into operation on 12.1.1953, Clause (c) was substituted as follows:

(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. Section 43-D as it was inserted by Bombay Act XIII of 1956 was as follows:

43-D. (1) In the areas specified in Section 43-C, notwithstanding anything contained in sections 31 to 31-D (both inclusive) a landlord may terminate the tenancy of a tenant (other than a permanent tenant) in respect of any land with effect from the 31st day of May of any year by giving the tenant three months' notice in writing, if the landlord bona fide requires the land for any non-agricultural purpose:

Provided that the three months' period of such notice shall expire before the 31st day of May of such year. (2) The provisions of sections 29, 37 and 39 shall mutatis mutandis apply to the termination of the tenancy of a tenant in respect of any land under sub-section (1).

(3) For the purposes of this section in Greater Bombay, the functions of the Mamlatdar under Sections 29, 37 and 39 shall be performed by the Collector.

Section 43-D came to be deleted by Maharashtra Act 10 of 1977. Section 88 also came to be substituted by new section by Bombay Act XIII of 1956 and it was relating to exemption to Government lands and certain other lands from application of the provisions of the Bombay Tenancy Act.

7. The Bombay Tenancy Act of 1948 protected tenants from eviction after the expiry of periods of their tenancies and gave them a right to continue in possession of the lands subject to certain conditions. This protection could continue only so long as the Act applied to the lands in question.

8. By Section 43-C of the Bombay Tenancy Act, 1948 which was introduced by the Bombay Act of XIII of 1956, all areas within the limits of Municipalities have been brought within the operation of Tenancy Act except so far as the provisions of compulsory purchase of lands by tenants (sections 32 to 32-R) and the rights of landlord to terminate tenancy under new Section 43-D are concerned. The reasons for introduction of proviso to Section 43-C are that under new provisions of Chapter III-B inserted by Bombay Act XIII of 1956 all areas within limits of Municipalities have been brought within the operation of the Tenancy Act except so far as the provisions of compulsory purchase of lands by tenants (sections 32 to 32-R) and right of Landlord to terminate tenancy under Section 43-D are concerned. Legislature wanted to simultaneously protect the rights which had already vested in tenants. In view of the anxiety of the Legislature to afford protection to the tenants within Municipal areas [other than those in respect of which Notifications under Section 88(b) have been issued] the proviso to Section 43-C has been added.

As per commentary in the Bombay Tenancy and Agricultural Lands Act, 1948 by K.S. Gupte (Revised by A.K. Gupte) Eleventh Edition Page 448 the reasons given in the Statement of Objects and Reasons are as follows:

When the principal Act i.e. Bom. Tenancy and Agricultural Lands Act was passed

in 1948 except the Municipal areas of the Bombay, Poona, Sholapur, Ahmedabad, Surat and Hubli, all municipal areas were governed by the provisions of the Tenancy Act. The result has been that the tenants of agricultural lands in the said areas have acquired certain rights under that Act. By the Amending Act of 1952 the exemption was enlarged to the limits of borough Municipalities. Section 43-C extends that provision and makes it applicable to all Municipal districts. It is thought proper that whatever rights the tenants have acquired under the principal Act should not be affected by this extension. 9. The Supreme Court has occasion to consider Section 43-C and its proviso in the case of *Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai*, are as follows:

9. By the substantive clause of Section 43-C the tenants do not acquire in respect of lands described therein rights conferred by sections 32 to 32-R; that part of Section 43-C is therefore in the nature of a qualification or an exception, and functions as a proviso to sections 32 to 32-R. The proviso to Section 43-C goes on, not to carve out an exception or to impose a qualification to the exclusion prescribed by the main enactment, but deals with a matter which is unrelated thereto. In terms it seeks to protect rights acquired or arising not under sections 32 to 32-R (which were added by Act 13 of 1956) but under the principal Act 67 of 1948 on or after December 28, 1948, and those rights are protected not from the operation of the substantive part of Section 43-C, but from the operation of Act 33 of 1952, or of "the Amending Act of 1955". It may be recalled that by Act 33 of 1952, the Act ceased to apply to land within the Municipal boroughs, but the intention disclosed by the proviso to Section 43-C was to declare that all rights acquired by persons as tenants under the principal Act were to continue to remain available to them in respect of lands within the Municipal Boroughs as if Act 33 of 1952 were never enacted. The "Amending Act of 1955" is no other than Act 13 of 1956 [see the definition of "permanent tenant" in Section 2(10-A) added to the Principal Act and Section 1(1) of Act 13 of 1956]. The legislature has by referring to the "Amending Act of 1955" sought also to protect, save as expressly provided in Section 43-D, the rights acquired under Act 67 of 1948, notwithstanding the amendments made by Act 13 of 1956. By Section 48 of Act 13 of 1956, the scheme of exemption from the operation of the Act of certain provisions thereof was extensively amended in respect of different classes of land. Section 88 of Act 67 of 1948 as originally enacted substituted by sections 88, 88-A, 88-B, 88-C and 88-D. But this modified scheme of exemption and other provisions of the Act were by virtue of the proviso to Section 43-C not to affect the rights of tenants acquired on or after December 28, 1948 under Act 67 of 1948, save as expressly provided by Section 43-D.

12. Respondent became on the enactment of Act 67 of 1948 entitled as a tenant to the diverse rights conferred by that Act. The right to claim that every contractual tenancy is statutorily extended for a period of ten years, the right to claim that the tenancy may not be determined otherwise than in circumstances mentioned in Section 14, and in case of protected tenants subject to restrict jobs imposed by Section 34, the right not to be deprived of possession otherwise than

by an order under Section 29(2), were some of those rights vested in respondent before Act 33 of 1952 was enacted. These and other rights were restored to the tenants retrospectively from the date on which Act 33 of 1952 was enacted by virtue of the express provision contained in the proviso to Section 43-C. The legislature having restored the rights originally granted under Act 67 of 1948 with retrospective operation from the date on which Act 33 of 1952 was enacted, a person sued, before Act 13 of 1956 was brought into force, could in a pending suit set up the defence that he is entitled to the rights of a tenant or a protected tenant.

13. In *Patel Maganbhai Jethabhai Vs. Somabhai Sursang*, the Bombay High Court held that the proviso to Section 43-C affords 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 Bombay Tenancy and Agricultural Lands (Amendments) Act, 1952. The Bombay High Court also held that the protection of the proviso to Section 43-C must be given to the tenant even in cases where it is claimed in a suit filed before the amendment was enacted, if the suit is not finally disposed of. We agree with the Bombay High Court on both the questions decided in *Patel Maganbhai Jethabhai* case.

In para 2 and 5 facts involved in the case are stated. They illustrate how tenants required protection. In that case the landlord tried to take advantage of Bombay Act 33 of 1952 and issued notice to terminate tenancy from March 31, 1956 of protected tenant. In para 6 it is observed that the legislature also enacted by Act XIII of 1956 Section 43-C which by the proviso sought to restore with retrospective effect the rights which had been previously acquired under the Bombay Tenancy and Agricultural Lands Act 67 of 1948 on or after December 28, 1948, notwithstanding that the Bombay Act 33 of 1952 had been made applicable to the area in which the land is situate.

10. So it is argued by Shri P.M. Shah, Senior Counsel that in view of the interpretation laid down by the Supreme Court the rights of original tenant Chimnaji (and his legal representatives) as a protected tenant were preserved, but by Section 43-C he (they) was (are) not entitled to get right of statutory purchase incorporated in sections 32 to 32-R of the Bombay Tenancy Act. It may be noted that sections 31 to 32-R were substituted by Bombay Act 13 of 1956. As per Section 32 the tenant in possession on the 1st day of April, 1957 shall subject to the other provisions of Section 32 and next succeeding sections shall be deemed to have purchased from the landlord the land held by him as tenant. It may be noted that Section 43-C came into force by Bombay Act XIII of 1956 on 1.8.1956. So Section 43-C made sections 32 to 32-R and Section 43 inapplicable to lands which were within Municipal limits and in these circumstances the respondents/tenants have no right for declaration that they have become deemed purchasers on the tillers day i.e. on 1.4.1957. They are also not entitled to claim that purchase price should be fixed under Section 32-G and that they are entitled to get sale certificate under Section 32-M of the Act.

11. The various amendments to the Bombay Tenancy Act and the dates of coming into force of such amendments may be stated as below.

So considering the sequence of amendments and interpretation as laid down by the Supreme Court in the case of *Ishverlal*, in my considered opinion the view canvassed by Shri P.M. Shah, Senior Counsel appears to be correct. 12. So we may sum up position thus:

It was policy of the Government in the matter of land reforms to remove gradually all intermediaries and to make the tiller of the soil the occupant of land. The various amendments so far made to the Bombay Tenancy and Agricultural Lands Act, 1948 have all been directed towards achieving this object. All permanent and protected tenants and other tenants, subject to the right of the landlord to recover possession for personal cultivation or for non-agricultural purpose, would be deemed to have purchased the land cultivated by them from their landlords on 1st April 1957 called the tillers' day" at prices to be fixed within the prescribed limits. Restrictions have been placed on the tenant in respect of his purchasing land in excess of the "ceiling area" and on the landlord in respect of his evicting a tenant from a holding which is below the "economic holding". Similarly some of the provisions are not made applicable to municipal or cantonment areas in order to protect their industrial and non-agricultural development. But the rights already acquired by tenants are protected. Thus the rights which were acquired by the respondents/tenants prior to Bombay Act XIII of 1956 were protected, but such rights did not include the statutory purchase envisaged by sections 32 to 32-R incorporated by the Amending Act. 13. We find discussion regarding the validity and object of the amendments carried out in the Bombay Tenancy Act in the case of *Parashram Damodhar Vaidya Vs. The State of Bombay and Another*, . Their Lordships were considering the constitutional validity of compulsory purchase by tenants of lands held by them on April 1, 1957 and other related provisions.

14. In the case of *Patel Maganbhai Jethabhai Vs. Somabhai Sursang*, , Their Lordships considered the original Section 88(1)(c) and amendment thereto and also Section 53-C. Their Lordships on page 1389 observed that ordinarily proviso does not cover an ambit wider than the section itself. Section 43-C itself deals with sections 32 to 32-R and Section 43. These are all sections dealing with question of purchase of land by tenants and the section provides that these sections shall not apply to certain lands in the areas mentioned in that section. Then proviso is quoted and it is observed that there are two clear indications that this proviso was not intended to be a mere proviso to Section 43-C and that the legislature enacted it as a substantive provision of law.

Thereafter on page 1390 following observations are made:

It is clear that the proviso introduces a legal fiction, and the legal fiction is that any right that a tenant had under the Act on or after December 28, 1948, shall not be affected by the Amending Act of 1952 or by the Amending Act of 1955.

Therefore, the proviso first postulates a right that a person has as a tenant under the Act of 1948, that is, the date when the Act of 1948 came into force. Then it took into consideration the fact that the Amending Act of 1952 took away the rights of those tenants who were living within the areas to which Section 88-C was made applicable like the tenants living within the municipal borough area of Baroda, and here the Legislature introduced the legal fiction that although in fact and in law their rights were affected, their rights were taken away, the Court shall assume that those rights were not taken away and those rights always existed. Therefore, once there was a right in a person as a tenant under the Act of 1948, that right by a legal fiction is continued and is not permitted to be affected by the Amending Act of 1952 with which we are concerned. In that case question also arose whether proviso apply to the pending litigation with which we are not concerned in this case.

15. The case of Sri Ram Ram Narain Medho v. The State of Bombay 1958 (61) Bom.L.R. 811 is cited. The Constitution Bench of the Supreme Court considered the validity of various provisions of the Bombay Tenancy and Agricultural Lands Act and we find discussion on pages 823 and 824 regarding various provisions incorporated by sections 32 to 32-R.

16. The case of Amrit Bhikaji Kale and Others Vs. Kashinath Janardhan and Another, is cited. In para 6 Their Lordships considered that the title of the land which was vested originally in the landlord passes to the tenant on the tillers" day and this title is defeasible only in the event of the tenant failing to appear or making a statement that he is not willing to purchase land or commit default in payment of price thereto as determined by the Tribunal. But this would be so only in case sections 32 to 32-R apply to the given case and that here the case falls under Exception carved out by Section 43-C.

17. In this case the Advocate for the respondent placed on record certain documents to show as a result of order passed by the Agricultural Lands Tribunal purchase price was determined, purchase price was deposited and certificate under Section 32-M of the Bombay Tenancy Act was issued in favour of original tenant Chimnaji Mali. However, merely because there was no stay in appeal or merely because during pendency of Appeal or Revision, steps were taken for determining purchase price and for issuing sale certificate, that would not in any way defeat this Writ Petition which challenges the orders of the Agricultural Lands Tribunal as confirmed by the Sub-Divisional Officer and the Maharashtra Revenue Tribunal.

18. The case of Navinchandra Ramanlal Vs. Kalidas Bhudarbhai and Another, was referred by the Maharashtra Revenue Tribunal, but as paras 4 and 14 of the citation will show, village Acher where the land in question is situated was included in the area of Municipal Corporation of Ahmedabad on and from 30th May, 1959. Prior to that the tenant had become owner on tillers" day i.e. on 1.4.1957. In these circumstances, it is laid down that Section 43-C will not have effect of taking away right already vested in tenant. Thus in that case the tenant

had become statutory purchaser before the land was included in the Municipal area. So the facts of said case are different.

19. Considering the totality of the circumstances, in my opinion, this Writ Petition must succeed. The respondents/tenants are entitled to continue in possession of land as tenants. They shall have all rights of a protected tenant under the Bombay Tenancy and Agricultural Lands Act, 1948. However, since the land had been within Municipal area since prior to 1948, sections 32 to 32-R of the Bombay Tenancy and Agricultural Lands Act, 1948 are not applicable and in these circumstances the order passed by the Agricultural Lands Tribunal and Tahsildar, Dhule in Tenancy Case No. 3 of 1986 decided on 19.4.1986; as modified by the Sub-Divisional Officer, Dhule Division, Dhule in Tenancy Appeal No. 10 of 1986 decided on 3.7.1987; as confirmed by the Maharashtra Revenue Tribunal at Bombay in Tenancy A. No. 173 of 1987 decided on 6.4.1990 are hereby quashed and set aside. All acts done and action taken consequent to said orders are also quashed and set aside. The original application filed by the tenants/respondents for fixing purchase price of land Survey No. 12/2 of Deopur, Dhule under Section 32-G of the Bombay Tenancy and Agricultural Lands Act, 1948 is hereby dismissed. In the circumstances, the parties to bear their own costs.