Patel Maganbhai Jethabhai Vs Somabhai Sursang

Court: Bombay High Court

Date of Decision: July 15, 1958

Acts Referred: General Clauses Act, 1897 â€" Section 7

Citation: (1958) 60 BOMLR 1383

Hon'ble Judges: M.C. Chagla, C.J; V.S. Desai, J; Tarkunde, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

M.C. Chagla, C.J.
Very few cases that arise under the Tenancy Act are easy of solution and this case is no exception to that rule. The few

facts which require to be stated in order to understand and appreciate the question that arises for our determination are that the Tenancy Act of

1948 was applied to Baroda on July 30, 1949, and admittedly opponent No. 1 before us was a tenant recognized as such under that Act and

enjoying all the rights that that Act conferred upon him. Amending Act XXXIII of 1952 came into force on January 12, 1953, and by amending

Section 88 it excluded from the operation of the Tenancy Act lands situated within borough municipalities, and therefore the lands within the

Baroda Municipality were excluded, and admittedly the lands with which we are dealing in this revision application are situated within the Borough

Municipality of Baroda. Therefore, from January 12, 1953, the Tenancy Act of 1948 did not apply to these lands. The landlord then gave a notice

terminating the tenancy of the tenant and that notice determined the tenancy as of March 31, 1954. On April 13, 1954, the landlord filed a suit for

possession before the Mamlatdar, and the Mamlatdar decreed the suit on June 30, 1956. The tenant then went in revision before the Prant Officer,

and while that revision application was pending, the Amending Act of 1955 (XIII of 1956) came into force, and the question that arises for our

determination is whether the proviso to Section 43C enacted by that amendment protects the rights of the tenant which he had acquired under the

Act of 1948. In other words, whether the effect of that proviso is such that notwithstanding the notice terminating his tenancy, notwithstanding the

decree passed by the Mamlatdar, a tenant can claim protection under the Act of 1948 and resist the landlord"s suit for eviction.

2. Before we come to deal, with the effect of the proviso, it would be necessary to consider the effect of the Amending Act XXXIII of 1952. That

amendment, as we have already pointed out, excluded certain areas from the application of the Tenancy Act of 1948, and it may be said that in a

sense the Act was repealed to the extent that it applied to the municipal borough lands, and the question arises as to what would be the effect of

such a repeal. What has been urged before us by Mr. Paranjpe on behalf of the tenant is that inasmuch as the tenant had acquired certain rights

under the Act of 1948, the Amending Act of 1952 cannot affect his vested rights. There is no provision in the Amending Act of 1952 which

expressly seeks to affect vested rights, and in the absence of any such provision, by the ordinary canon of construction we must read the

amendment of 1952 as affecting only future rights and not interfering with rights which have already been acquired and which had become vested.

3. That raises a very interesting question which has been debated at the Bar and that question is whether the rights conferred upon a tenant by the

Tenancy Act are vested rights. On the one hand, it has been urged that important rights are conferred by the Tenancy Act upon the tenant. He gets

security, he cannot be evicted by the landlord except on specific grounds, the liability under the contractual tenancy to have the tenancy terminated

by a proper notice to quit no longer continues, and he remains a protected tenant so long as he complies with the conditions laid down in the Act,

and therefore it is said that when the Act of 1948 was applied to Baroda and when the tenant came within the purview of that Act, he acquired

important rights which rights could not be defeated by the Amending Act XXXIII of 1952 unless the Legislature so expressly enacted. As against

this, what has got to be borne in mind is that when one speaks of vested rights, those are rights which are not the creature of law or of an

enactment, but those are rights which are acquired by a person claiming them by some action taken by him under the law. Now, in this case the

tenant had a contractual tenancy. That contractual tenancy was in no way affected by the Tenancy Act. The Tenancy Act, as it were, put a cloak

of protection round the tenant and prevented the landlord from exercising his contractual rights. Can it be said that when that cloak was removed

and the parties were left to their contractual rights and obligations, there were same vested rights which the tenant still possessed? The tenant had

done nothing under the Tenancy Act which led to his acquiring any right. He had not changed his position ; he had not entered into any contract or

into any lease pursuant to the provisions of the Act, All that he acquired was the rights given by the Tenancy Act itself. The Legislature gave him

certain rights and the Legislature took away those rights. Was it open to the tenant to contend that the protection given by the law was a vested

right to which he was entitled and which could not be taken away from him by the Legislature unless the Legislature so expressly provided?

4. Now, it will be noticed that the General Clauses Act uses in Section 7 the expression ""affect any right, privilege, obligation or liability acquired,

accrued or incurred under any enactment so repealed."" This really is a paraphrase of a vested right and therefore a right or privilege must be

acquired or have accrued under any enactment. A right given by the enactment itself which has not been acquired by the party or which has not

accrued to the party is not a vested right in the sense in which vested right is understood. There is a leading authority on this point and that is an

English decision in Abbott v. Minister for Lands [1895] A.C. 4725 in the judgment of the Privy Council the Lord Chancellor says:

It may be, as Windeyer J. observes, that the power to take advantage of an enactment may without impropriety be termed a "right". But the

question is whether it is a "right accrued" within the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words

"obligations incurred or imposed". They think that the mere right (assuming it to be properly so called) existing in the members of the community or

any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly

be deemed a "right accrued" within the meaning of the enactment.

Therefore, the right of a tenant to be protected may be a right in the wide sense of the term. It is a legal right which he could assert in a Court of

law. But when we talk of a vested right, we are not talking of a right in that wide sense, but a vested right is a right used in the sense which the

Privy Council has defined and described, viz., a right of which a party claiming it has availed himself under the statute by doing any act and not

merely by relying on the right conferred by the statute itself. There is no suggestion in this case that the tenant did any set or in any way changed his

position as a result of the Tenancy Act which made him acquire a vested right or whereby a vested right accrued. His only contention is that the

protection was given to him by statute and that protection could not be taken away by the repeal of that statute without the Legislature expressly

providing that vested rights were sought to be affected. It may further be said that no person has a vested right to any law continuing on the statute

book. No citizen can say that a protection given to him by the Legislature must indefinitely continue and cannot be taken away unless, as we have

just pointed out, by reason of the presence of that law on the statute book he has acquired some right, he has taken some action, he has changed

his position which has brought into existence some right which is vested in him.

5. In view of the interpretation we are about to put on the proviso to Section 43C, it is not necessary expressly to decide this point. But we are

inclined to agree with Mr. Kotwal that this is not a case where the Tenancy Act conferred any vested right upon the tenant with regard to which he

could complain when the Tenancy Act ceased to apply to Baroda.

6. Now, on the question of vested right, there is some conflict of authority in this Court. There is an unreported judgment of Mr. Justice

Gajendragadkar and Mr. Justice Vyas in Moreshwar Parasharam Pathak v. Vithal Krishna Joshi (1954) First Appeal No. 144 of 1951, and in

that judgment those learned Judges took the view that the amendments introduced by Act XXXIII of 1952 were not retrospective and therefore

did not apply to the ease of tenants who were protected by the Act of 1948. It is clear that when the learned Judges say that the Act was not

retrospective they say so because in their opinion it was not intended to affect Tested rights, and we assume that the view taken by the learned

Judges was that the rights of the tenants were vested rights.

7. Now, there seems to be a contrary decision which is reported in Sakharam Narayan v. Manikchand Motichand (1954) 54 Bom. L.R. 223. It is

possible to explain that judgment so as not to bring about a conflict with the other judgment, and more particularly so, as Mr. Justice

Gajendragadkar was a party to this judgment. This judgment is of Mr. Justice Gajendragadkar and Mr. Justice Shah. There they were not dealing

with the Amending Act of 1952 but they were dealing with the Acts of 1939 and 1948. The Act of 1948 exempted from the operation of the Act

certain areas just as the Amending Act of 1952 exempted certain other areas, and the question that arose was whether a suit filed by a landlord to

recover possession of agricultural land situated within the limits of the Municipal Corporation, which lands were excluded from the operation of the

Act of 1948, could lie in a civil Court, even though the defendant set up the plea that he was a protected tenant under the Bombay Tenancy Act of

1939. The first thing that will be noticed about this decision is that it deals with the question of a forum. The question was whether the suit would lie

in a civil Court or it had to be brought before the Mamlatdar, and in coming to the conclusion that the Court did, it considered Section 89 of the

Act of 1948 and the Court pointed out the distinction between the language of Section 7 of the General Clauses Act and the language of Section

89, and it was pointed out that whereas u/s 7 of the General Clauses Act not only pending suits were saved but also future suits which arose out of

a right already accrued were saved, u/s 89 only pending suits were saved, and, therefore, after the repeal of the 1939 Act a proceeding would

have to be instituted under the provisions of the new Act although the right might have accrued under the old Act. Therefore, we do not read this

judgment as expressly negativing the unreported judgment in Moreshwar Parasharam Pathak v. Vithal Krishna Joshi.

8. There is also a judgment delivered by me and Mr. Justice Datar in Nanchand Amichand Gandhi v. Rama Malhari Pise (1958) Special Civil

Application No. 2882 of 1957 to which in the referring judgment Mr. Justice Dixit and Mr. Justice Miabhoy refer. There also the Bench took the

view that the tenant who had acquired rights under the Act of 1948 could not be affected by the provisions of Act XXXIII of 1952. Fortunately, it

is not necessary to resolve the conflict, if there is a conflict, because, in our opinion, the question that we have to consider is capable of being

decided on a proper interpretation of the proviso to Section 43C.

9. Turning to that proviso, it is a proviso to Section 43C and the ordinary canon of construction requires that the subject-matter of the proviso

should be limited to the subject-matter of the section itself. In fact the true function of a proviso is to take something out of a section and deal with

a part of the section. It is not the function of the proviso to cover an ambit wider than the section itself. But we have had numerous instances in the

past where the Legislature has in the shape and garb of a proviso enacted a substantive provision of law, and, therefore, if the language of the

proviso is clear and the subject-matter is clear, the Court will not be deterred from giving true effect to the proviso merely because it is a proviso to

that section, nor would the Court be compelled to say that the ambit of the proviso must be restricted to the ambit of the section itself. Whether the

proviso covers a wide ambit or not would depend upon the language of the proviso. Section 43C itself deals with Sections 32 to 32R and Section

43. These are all sections dealing with questions 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 comes the proviso:

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

43D), 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.

Now, there are two clear indications that this proviso was not intended to be merely a proviso to Section 43C and that the Legislature enacted it

as a substantive provision of the law. The first indication is that the proviso speaks of ""any right as a tenant."" It does not refer merely to the limited

rights with which Section 43C deals. The other indication which seems to us almost equally conclusive is that in this proviso Section 43D is

excepted. If the proviso dealt with only the subject-matter of Section 43(1), it was not necessary to provide ""save as expressly provided by

Section 43D"", because Section 43D deals with entirely a different subject-matter ; it deals with termination of the tenancy by the landlord. Section

43D is included in the proviso because the proviso was intended to refer to all rights of a tenant under the Tenancy Act and not merely the rights

given to him under Sections 32 to 32R and 43.

10. Therefore, having cleared the ground with regard to the preliminary difficulty as to whether the proviso has a wider significance and meaning

than what Section 43C contains, the next question is what is the proper effect to give to this proviso. 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 right must have been acquired on or after December 28, 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 88C

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.

11. Now, various criticisms have been offered to this interpretation by Mr. Kotwal. The first and perhaps the most forceful is the use of the

expression ""has acquired"" by the Legislature. Mr. Kotwal is right that in the strict grammatical sense the expression ""has acquired"" connotes a right

which existed in the past and has continued right up to the present moment, and therefore, Mr. Kotwal''s contention is that the proviso only deals

with those rights which subsisted at the date when the amendment came into force, but according to Mr. Kotwal if those rights had ceased to

subsist then the proviso had no application. Now, there are instances where the present perfect has been used in the past tense, and in our opinion,

looking to the proviso as a whole, the proper meaning to give to the expression ""has acquired"" is the past tense, riz., that the tenant did acquire or

had acquired at the time mentioned in the proviso the right under the Act. It is absolutely necessary to give this meaning, otherwise the proviso

would be meaningless and would not serve any purpose at all if it was intended only to apply to rights subsisting at the date when the amendment

came into force. If the rights already subsisted, there was no reason to safeguard them or to revive them or to save them. It is precisely because the

rights did not subsist, it is precisely because the rights were lost by the Amending Act of 1952, that the Legislature was compelled to introduce a

legal fiction and provide that the Courts must assume and suppose that those rights never ceased to exist.

12. Mr. Kotwal then wanted to make a distinction between two different positions, a position where a tenant''s tenancy was terminated before the

Amending Act came into force and a position where the tenancy was not terminated at that date, and Mr. Kotwal''s contention is that the proviso

only deals with those cases where the tenancy was in existence at the date when the Amending Act came into force, and not in cases like the one

we are dealing with where the tenancy had already been terminated. We fail to understand how this language of the proviso lends itself to this

rather fine and subtle distinction. Either the proviso deals with the rights which were acquired under the Tenancy Act of 1948 and which were lost

or which were withdrawn by the Amending Act of 1952, or it does not. But to concede that the proviso does refer to those rights and then to

make a distinction between those rights is, in our opinion, not possible under the language used by the Legislature. What is more, the scheme both

of the proviso and Section 43D becomes clear when one bears in mind the fact that the Tenancy Act is a social legislation and the object of the

Legislature was primarily and principally to protect tenants. The Legislature, having for certain reasons excluded certain areas from the operation of

the Act, at a later stage came to the conclusion that those tenants also needed protection, but with regard to those tenants it enacted Section 43D

which permitted the landlord to terminate the tenancy of those tenants on the conditions laid down in that section. Therefore, the interpretation we

are giving to this proviso is in no way inconsistent with the general object which the Legislature has in putting this piece of legislation on the statute

book.

13. The other question, and rather an important question that arises, is at what point of time can it be said that this proviso should be applied to

pending litigation. The general principle of law is that when a law is passed, it cannot affect pending litigation in the sense that a Court must apply to

the parties the law which was in force at the date when the action was brought before the Court. That is the material point of time and the law

obtaining at that point of time is the law which must determine the rights of the parties. That principle applies to all legislation-which is not

considered to be retrospective. But you may have laws which the Legislature expressly wishes to make retrospective. In other words, the

Legislature may pass a law which should apply not only to cases which were filed subsequent to the passing of that law, but even to cases which

had already been filed. In other words, a Court may be compelled to take notice of a law which was passed before it passed its final judgment to

mould that judgment in accordance with the law which was recently enacted. The question is in what class of cases does this proviso fall? It is said

that in this particular case the notice to terminate the tenancy was given before this amendment came into force, the tenancy was actually

terminated, the suit was filed, the suit was decreed, and it is only when the matter came before the Prant Officer that this amendment came into

force. There was no final judgment against the tenant in the sense that the judgment given by the Mamlatdar was subject to revision and a revisional

Court would be as much bound to take notice of the change in the law as the original Court. But it is said that whatever might be the fate of

landlords who might file suits after the material date when the amendment came into force, this particular landlord having gone to Court before that

date, his litigation should not be permitted to be affected by this amendment. For that purpose we must look again at the language of the proviso,

and there can be no doubt that the Legislature was at pains to emphasise the fact that the legal fiction which it was introducing should have full

sway and should regulate the rights of parties at all stages. The language used is ""the said right shall not be deemed to have been affected."" That

means at all times the tenant must be deemed to have been protected under the provisions of the Act of 1948, and therefore, in our opinion, this is

not one of those cases of which it could be said that the intention of the Legislature was the limited intention to control only that litigation which

would be filed after the amendment was passed.

14. Turning to the judgment which has taken the contrary view, there is an un-reported judgment of. Mr. Justice Chainani and Mr. Justice Patel in

Bhikanrao Fakirrao Deshmukh v. Supadu Sonu Choudhari (1957) Civil Revision Application No. 120 of 1957. There the learned Judges, have

taken the view that strong and distinct words are however required in order to alter the vested rights of the litigant as they stood at the

commencement of the action. With very great respect, we entirely subscribe to that proposition. The only question is whether the words used in the

proviso are such as to lead the Court to the conclusion that vested rights, in the sense in which the learned Judges have used that expression, were

intended to be affected by the amendment. The learned Judges then point out:

Ã¯Â¿Â½It is not necessary for us to decide this question in this application, because the right acquired by the defendant as a tenant has been affected

not only by the amendment made in the Act in 1952, but also by his tenancy having been terminated by a notice given to him by the plaintiffs in July

1955, at which time the Act did not apply to the suit land and when consequently there was no legal bar to the tenancy being brought to an end by

an appropriate notice given by the landlords, the plaintiffs.

With respect, again, that is the very matter which the proviso deals with. The proviso enacts that the notice given by the landlord was not a notice

in law which could terminate the tenancy, because at the date the notice was given, by a legal fiction introduced in the proviso, the tenant was

protected by the Tenancy Act, and it is common ground that if the Tenancy Act applied, the notice to quit was not a proper notice and the tenancy

could not have been terminated by the landlord. Therefore, as we said before, if we were to give to the legal fiction its full scope and meaning, then

no difficulty would be experienced in applying this proviso to a case of a landlord who has already terminated the tenancy. The very expression

terminated the tenancy"" is something which the proviso says should not be looked upon as a fact because by legal fiction the tenancy is not

terminated and the tenant continues to be the tenant under the provisions of the Tenancy Act.

15. There are English decisions to which our attention was drawn where in rent suits retrospective effect has been given to legislation of this

character. For a striking case see Hutchinson v. Jauncey [1950] 1 K.B. 574, In that case a suit was filed on May 25, 1949, by the landlord

claiming possession. On that date the law as it then stood did not protect that tenancy. While the suit was pending, an amendment was passed on

the June 2, 1949, and by that amendment the tenancy became protected and the question arose whether the amendment should be given

retrospective effect, and a rather strong Bench of the Court of Appeal in England, Evershed, Master of the Rolls, Lord Justice Cohen and Lord

Justice Asquith, held that looking to the peculiar character of the legislation the Court should give retrospective effect to the amendment and,

therefore, the landlord''s suit was dismissed and it was held that the tenancy was protected.

16. In our view, therefore, the proviso to Section 43C is retrospective in the sense in which we have indicated and it requires the Courts to afford

protection to the tenant if the tenant had the protection under the Act of 1948, notwithstanding the fact that that protection was taken away by the

Amending Act of 1952, and that protection must be given to the tenant even though the protection is claimed after the suit was filed and the

protection is afforded by a piece of legislation which was put on the statute book after the suit for ejectment has been instituted. Therefore, as far

as this revision application is concerned, inasmuch as the suit did not end in the sense that there was no finality to the judgment of the Mamlatdar,

and as there is no dispute that if the Tenancy Act applied the landlord could not terminate the tenancy and the tenant was protected, we come to

the conclusion that the Prant Officer was right in dismissing the plaintiff''s suit.

17. The result is that the revision application fails. Rule discharged with costs.