(1954) 07 BOM CK 0016

Bombay High Court

Case No: First Appeal No. 688 of 1950

Nagesh Janardan Kulkarni		APPELLANT
	Vs	
Jinnappa Shiddappa Samayi		RESPONDENT

Date of Decision: July 29, 1954

Acts Referred:

- Bombay Tenancy and Agricultural Lands Act, 1948 - Section 70
- Criminal Procedure Code, 1898 (CrPC) - Section 145

Citation: (1955) 57 BOMLR 272

Hon'ble Judges: M.C. Chagla, C.J; Dixit, J

Bench: Division Bench

Judgement

M.C. Chagla, C.J.
This appeal arises out of a suit filed by the plaintiff for a declaration that he is a permanent tenant of defendant No. 2 and the suit came to be filed by the plaintiff under the following circumstances. The land in question is survey No. 184 of Yemakamnardi and the landlords were defendants Nos. 1, 2 and 3, and on partition between them the land in question went to the share of defendant No. 2. Defendant No. 2 denied the permanent tenancy of the plaintiff and his case was that the plaintiff was an ordinary tenant and the tenancy was surrendered by the plaintiff in 1938 and that being done, defendant No. 2 gave the tenancy to defendant No. 5 on April 11, 1938. The plaintiff instituted proceedings before a Magistrate u/s 145 of the Criminal Procedure Code. The Magistrate did not give any decision and left the parties to agitate their rights in a competent Court. The Magistrate however appointed a receiver of the land in question and the receiver let out the land to defendant No. 4. The learned trial Judge has held that the plaintiff is a permanent tenant. He has also held that the plaintiff was in possession of the property till the property was attached by the Magistrate u/s 145, and that the defendants'' plea that the plaintiff''s suit was barred by limitation had not been established. A further question also arose before the learned Judge and that was whether defendant No. 4

had acquired the right under the Tenancy Act to hold possession of the property as a tenant for ten years from 1946, and that contention of defendant No. 4 was negatived by the learned Judge. The learned Judge therefore gave a declaration as sought by the plaintiff and also passed a decree for possession against defendants Nos. 1 to 5. It is from that decision that defendants Nos. 2 and 5 have appealed, which is appeal No. 688 of 1950. Defendant No. 4 has also appealed, which is appeal No. 689 of 1950.

2. Mr. Datar, who appears for these appellants, contends that the civil Court has no jurisdiction to try the issue with regard to whether the plaintiff was a permanent tenant or not. Our attention is drawn to Section 70 of the Tenancy Act which confers upon the Mamlatdar the jurisdiction to decide whether a person is a tenant or a protected tenant, and it is pointed out that u/s 85 the jurisdiction of the civil Court has been barred with regard to all matters which are to be settled, decided or dealt with by the Mamlatdar under the Act. Mr. Adarkar contends that the power of the Mamlatdar u/s 70 does not extend to deciding a question whether a person is a permanent tenant or not. Mr. Adarkar says that his client''s contention is not that he is a tenant, but that he is a permanent tenant and Mr. Adarkar says that permanent tenancy is a concept of law different from that of tenancy. A permanent tenant enjoys rights which are higher and in a certain sense different from rights enjoyed by a tenant, and the Legislature never intended that the Mamlatdar should decide complicated questions that would arise in determining the question as to whether a person is a permanent tenant or not. In this particular case the plaintiff''s case is that he is a permanent tenant by reason of the provisions of Section 83 of the Bombay Land Revenue Code ; in other words, he is not in a position to rely on any grant or lease, but he relies on the presumption of law that arises by reason of the antiquity of his tenancy. Now strictly there is no distinction between a tenant in whose favour a lease is executed in perpetuity and a tenant who is a permanent tenant by reason of a lost grant. The Transfer of Property Act in terms provides for a perpetual lease. In that sense our law is different from English law which does not recognise a perpetual tenancy. But whether a tenant is a permanent tenant by reason of an express lease or an express grant or he is a tenant by reason of the antiquity of his tenancy, he is a tenant on a lease and the duration of the lease is perpetuity.

3. Now, in this particular case the contest between the plaintiff and defendant No. 2 is this. Defendant No. 2 contends that the plaintiff is not a tenant at all and that his tenancy came to an end in 1938. Therefore, according to defendant No. 2, the plaintiff is a trespasser. Therefore the Court will have to decide whether the plaintiff is a trespasser as alleged by defendant No. 2 or he is a tenant as alleged by the plaintiff. Therefore in substance what the civil Court is called upon to decide is the question of the status of the plaintiff. Is he a trespasser or is he a tenant? It seems to us that that is the very question which the Legislature has left for the decision of the Mamlatdar. It would not be correct to say that the plaintiff is contending that he

is a permanent tenant and is not contending that he is a tenant. A permanent tenant is also a tenant. The expression "permanent" merely emphasises the duration of the tenancy. But where a question of status arises, the contradistinction is not between a tenant, the duration of whose tenancy is a particular period, and a tenant the duration of whose tenancy is some other period, but the contradistinction arises between a tenant on the one hand and a trespasser of the other. Therefore it does seem, looking to the language used in Section 70(b) and Section 85 that the Legislature did intend to oust the jurisdiction of the civil Court where the question arose as to whether a person was a tenant in order to repel the contention of the other side that he was a trespasser.

4. It is urged by Mr. Adarkar that the Bombay Tenancy and Agricultural Lands Act was not passed to protect permanent tenants, and therefore it is urged that u/s 70 the duties of the Mamlatdar are to be performed only for the purposes of the Act and if a permanent tenant is not within the ambit and purview of the Tenancy Act, then the Mamlatdar cannot discharge the duties imposed upon him u/s 70. In our opinion, it is not possible to take the view that the Bombay Tenancy Act does not apply to permanent tenants. It may be that a permanent tenant does not need the protection which the law has now given to an ordinary tenant and a protected tenant, but the definition of "tenant" in Section 2 is wide enough to cover a case of a permanent tenant, and there can be no doubt that with regard to the machinery provided by the Act for taking possession, that machinery would apply as much to a permanent tenant as to a protected or an ordinary tenant. Take for instance Section 29(1). That provides for the manner in which a tenant who is entitled to possession can obtain possession, and he can only do so provided he applies to the Mamlatdar. If the plaintiff was dispossessed and he wanted possession back, he could only get possession provided he followed the procedure laid down in Section 29(1), and in order that he should get possession the Mamlatdar would have to decide whether he is a tenant or not. The question as to the duration of his tenancy might be only relevant for the purpose of deciding whether he is a tenant. Therefore, in our opinion, it cannot be said that the Mamlatdar has not to decide questions indicated in Section 70 where the party concerned is a permanent tenant.

5. It is then urged that this being a declaratory suit, no question of possession arises, and therefore the civil Court is competent to give the relief for declaration and decide all issues necessary for giving that relief. Now, the very basis of a declaratory suit is that the party seeking the declaration is entitled to some right, and the I right for which the plaintiff contends in this case is that he is entitled to possession? as a permanent tenant or by reason of the fact that he is a permanent tenant. In this particular case he has not only obtained a declaration, but he has got a decree for possession. Mr. Adarkar says that he will be quite content with a mere declaration. But the declaration is intended as a means to the ultimate end of obtaining possession. In this particular case, if he gets the declaration he wants to get possession from the Magistrate who has attached the land. But the Tenancy Act

says that the only way he can get possession is by making the necessary application u/s 29. Therefore, the plaintiff wants to be armed with the declaration given by the civil Court in order to get the possession which he seeks. Now, if we were I to accede to the contention of Mr. Adarkar, the result may be that the declaration which the civil Court makes would not be binding upon the Mamlatdar when he hears the application made by the plaintiff for possession. Surely that is not the result to which we should be driven. If a civil Court gives a decision it must be at decision which must be respected and obeyed, and therefore it is clear that the Legislature now has debarred the civil Courts from deciding all questions which have a bearing upon a person''s right to be in possession as a tenant, and in substance what the plaintiff really seeks is a decision from the Court that he is entitled to be in possession as a tenant, the duration of his tenancy being perpetual. That is the very question which the Legislature has left the Mamlatdar to decide u/s 70. We must frankly confess that the question is not free from difficulty. As we have had occasion to point out in the past, the Bombay Tenancy and Agricultural Lands Act like the similar legislation in the Bombay Agricultural Debtors Relief Act does from time to time present conundrums for the solution of the Court. But in this particular case we are fortified by a decision given by a Division Bench consisting of Mr. Justice Gajendragadkar and Mr. Justice Vyas in Dhondi Tukaram v. Dadoo Piraji1, and that decision takes the same view with regard to a permanent tenancy as we are taking in this case.

6. But the view we take does not mean that the civil Court has no jurisdiction to entertain the suit. As a matter of fact, it is only the civil Court that can entertain a declaratory suit. All that our decision means is that a particular issue as to whether the plaintiff is or is not a tenant, the duration of whose tenancy is perpetual or permanent, is an issue which can only be tried by the Mamlatdar, and the ultimate decision of the Court whether to grant the relief to the plaintiff or not must be based on the decision of the Mamlatdar with regard to that issue. Therefore, as far as Appeal No. 688 is concerned, we must hold that the Court had no jurisdiction to try the issue as to whether the plaintiff was a permanent tenant of the suit land.

7. With regard to appeal No. 689, the position is even simpler and Mr. Adarkar does not seriously contest that position, because the issue as to whether defendant No. 4 was a tenant protected under the Tenancy Act obviously cannot be tried by the civil Court but must be tried by the Mamlatdar. Therefore we will set aside the decree of the trial Court, send the matter back to the learned Judge, and direct him to refer the two issues, viz. issues Nos. 1 and 4 which he has raised, to be determined by the Mamlatdar and the learned Judge will decide the suit according to law after he has received the decision of the Mamlatdar on these two issues. The trial Court will give directions as to the time within which the necessary decision should be obtained from the Mamlatdar on the two issues which are being referred to herein.

8. We should like to point out that as already indicated the Legislature could not possibly have intended that matters so difficult and so complex as those of

permanent tenancy should be left to be decided by a revenue Officer who can never have the training or an equipment of a Judicial Officer. Cases of permanent tenancy arising u/s 83 have been responsible for judgments of this Court and even of the Privy Council. The question as to whether a person is or is not a tenant under a written'' document is a very simple one, but when a tribunal is called upon to consider whether a person is a tenant by reason of the presumption arising u/s 83 of the Land Revenue Code, entirely different considerations come into play, and we are sure that the Legislature never intended that such difficult and intricate questions should be decided by the Mamlatdar. We, therefore, hope that the Legislature will take the earliest opportunity to amend the law and to make it clear to what extent the jurisdiction of the Mamlatdar should be circumscribed and to what extent the jurisdiction of the civil Court should be ousted.

9. There will be no order as to costs in Appeal No. 688. The respondent will pay the costs of the appeal in Appeal. No. 689, but costs of the suit will be costs in the cause.