

(1979) 08 BOM CK 0043

Bombay High Court

Case No: Letters Patent Appeal No. 72 of 1975

Sau. Nakabai

APPELLANT

Vs

Mahadu Sakharam
Adsule and Others

RESPONDENT

Date of Decision: Aug. 14, 1979

Acts Referred:

- Bombay Tenancy and Agricultural Lands Act, 1948 - Section 27, 30, 37, 39, 40
- Housing Repairs and Rent Act, 1954 - Section 12(1), 13(1), 14, 49(1)
- Transfer of Property Act, 1882 - Section 105, 106, 111

Citation: AIR 1980 Bom 208 : (1980) MhLj 105

Hon'ble Judges: Kotwal, J; Deshpande, J

Bench: Division Bench

Advocate: R.G. Samant, for the Appellant; B.P. Apte, for the Respondent

Judgement

Deshpande, J.

This Letters Patent Appeal, against a judgment of a learned single Judge of this Court in Second Appeal, on a certificate by him, raises a question of some importance, namely whether tenancy rights of a statutory tenant in the agricultural lands belonging to the Public Trust, covered by Section 88B of the Bombay Tenancy and Agricultural Lands Act (hereinafter referred to as "Act") are heritable or not.

2. The appellant--the original plaintiff and defendants Nos. 2 to 4 are sisters. Defendant No. 1 is the son of the defendant No. 2. Plaintiff's mother Bhagirathibai died on 31st May 1958. The plaintiff filed this suit for possession of her share, as an heir, in the properties left by her mother including the agricultural lands detailed at Serial Nos. B, C and D in part (1) of the plaint. The lands belong to a Public Trust and the deceased Bhagirathibai was the tenant thereof. The lands are held to have been covered by Section 88B of the Act. The plaintiff's suit was decreed by the Trial Court as well as the first Appellate Court. Apte J. however, allowed defendant No. 1's

Second Appeal to the extent of the lands in paras B to D of the plaint, on the limited ground that tenancy rights in the lands of the Public Trusts covered by Section 88B of the Act were not heritable. The correctness of this view is assailed in this appeal.

3. That lands belong to Devasthan and the Devasthan is registered as a Public Trust and is covered by Section 88B of the Act is not in dispute. All the Courts have proceeded on the basis that Bhagirathibai was a statutory tenant of the lands in dispute. It has been consistently held by this Court that statutory tenant holds only a personal right to remain in possession of the property, during his lifetime as long as he complies with other terms of tenancy, and that he does not hold any estate or heritable or transferable interest therein. This is because it is the statute that prevents his eviction notwithstanding the termination of his contractual tenancy. Judgments of this Court in [The State of Bombay Vs. Virendra Motabhoj and Others](#), and [Eruch J. Bapasola and Another Vs. B.D. Mirchandani](#), dealing with the tenancies in the house property and in [Bai Jamna Vs. Bai Dhani](#), dealing with the tenancy of agricultural lands are illustrative of this view. Judgment of the Supreme Court in the case of [Anand Nivas \(Private\) Ltd. Vs. Anandji Kalyanji Pedhi and Others](#), arising out of Rent Act further confirmed same view. Statutory tenant in this case was held incompetent to sublet. In the case of [Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another](#), statutory tenancy was held not to be heritable on the same basis.

4. u/s 40 of the Act however, certain heirs are deemed to have continued to be tenants after the tenant's death, while Section 27 of the Act preventing sub-division of the leased lands, permits it if it becomes necessary for partition between heirs of the tenants. The trial Judge and the first Appellate Court relied on those provisions, and upheld plaintiffs claim for partition as the heir. Apte, J. however, found that Section 40, the substantive source of inheritance was expressly excluded from its operation, to the lands of the Public Trusts and in the absence of substantive right of inheritance, mere permissibility of portion contemplated u/s 27 of the Act could not be at any avail.

5. Mr. Samant, the learned Advocate for the plaintiffs, however, drew our attention to a passage from Mulla's T. P. Act at page 645, 6th edition and to a recent judgment of the Supreme Court in the case of [Damadilal and Others Vs. Parashram and Others](#). He contends that if heritability is the ordinary incident of any tenancy, and not the creature of the excluded Section 40, the same cannot be excluded from the statutory tenancies unless, the Act is found to contain any provision inconsistent therewith or contrary thereto. According to Mr. Samant, far from any provision of the Act indicating any contrary legislative intent, Sections 27 and 40, rather are demonstrative of its intent to preserve and retain this incident of heritability. In application of the restrictive provision of Section 40 of the Act merely indicating which of the many heirs could claim such inheritance, cannot, and does not affect this ordinary incident, Mr. Samant's contention in our opinion, is well founded.

6. The passage from page 645 of the T. P. Act by Mulla, 6th Edition reads as follows :--

"The estate of the lessor and lessee are estates of inheritance, and the interest of the lessor and the lessee after their death vest in their heirs, executors or devisees. This is not so expressly stated in the Act for the Act does not deal with the subject of succession".

7. The learned author obviously could have contractual tenancies in mind while making the above statement. This, however, is held to be true in Damadilal's case (supra) even of the statutory tenancies also, unless statute concerned itself indicates to the contrary. In Damadilal's case, landlord claimed possession on the ground of default in payment of rent, and need for personal occupation. The suit was dismissed" by the trial Court but decreed in appeal. During the pendency of the Second Appeal in thp High Court, the tenant died and his heirs prosecuted the same though failed. The landlord succeeded on merits on both the points, in the High Court and the Supreme Court. The landlord also challenged the right of the heirs of the tenant to prosecute appeal in the High Court and the Supreme Court on the ground that statutory tenancy was not heritable and heirs could not claim any right therein. Reliance was placed by the landlord on the ratio of the Anand Nivas's case (supra) while resisting the heir's claim to inherit, such statutory tenancy.

8. The Court in its judgment first traced the origin of the undefined concept of statutory tenancy to the English Rent restriction enactment of 1915 and quoted the definition of the word "statutory tenant" from Section 49 (1) of Housing Repairs and Rent Act of 1954, further carried in subsequent 1957 enactments, to show how it expressly excludes "tenancy" and indicate how the rule of English case law as to the statutory tenancy being a personal right, was founded on this definition. After quoting observations from a few of the cases, the Court observed in para 11 page 2234:

"We find it difficult to appreciate how in this country, we can proceed on the basis that a tenant whose contractual tenancy has determined, but who is protected against eviction by the statute, has no right of property but only a personal right to remain in occupation, without, ascertaining what his rights are "under the statute".

Their Lordships then observed:

"The concept of a statutory tenant having no estate or property in the premises which he occupies is derived from the provisions of the English Rent Acts. But it is not clear how it can be assumed that the position is the same in this country without any reference to the provisions of the relevant statute".

The learned Judges then observed:

"Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject-matter of the tenancy, and inheritability is an

incident of the tenancy. It cannot, be assumed, however, that with the determination of the tenancy the estate must necessarily disappear and the statute can only preserve his status of irremovability and not the estate he had in the premises in his occupation."

Indicating how this assumption can be displaced by any positive provision of law, their Lordships further observed :

"It is not possible to claim that the "sanctity" of contract cannot be touched by legislation. It is, therefore, necessary to examine the provisions of the "Madhya Pradesh Accommodation Control Act", 1961 to find out whether the respondents' predecessors-in-interest retained a heritable interest in the disputed premises even after the termination of their tenancy".

9. The Court then quoted the definition of the word "Tenant" in Section 2 (1) of the Madhya Pradesh Accommodation Control Act and emphasised how persons remaining in possession after termination of tenancy, also were tenants under it. The Court then observed:

"The definition makes a person continuing in possession after the determination of his tenancy a tenant unless a decree or order for eviction has been made against him, thus putting him on par with a person whose contractual tenancy still subsists. The incidents of such tenancy must therefore be the same unless any provision of the Act conveyed a contrary intention",

10. The Court thus holds that every tenancy whether contractual or statutory is ordinarily heritable, heritability being an incident of tenancy. One has to examine the statute to ascertain if it is destructive of the same. This expressly overrules the earlier case law including the Anand Nivas's case (supra) under which, statutory tenancy was held merely to be a personal right of the ex- contractual tenant, and as such was neither heritable nor transferable. The judgment also demonstrates how English cases were based on the wording of the definition of the English law and as such were distinguishable and reliance thereon, without reference to the wording of our statute concerned was misconceived.

11. It is true that Chap. V of the T. P. Act dealing with leases of the immovable properties, does not expressly make tenancies inheritable. This inheritability however, flows firstly from tenancy being an interest in the property and secondly, from contract of tenancy in the very nature of things, being enforceable by or against the heirs of the parties to the contract. In the case of [Rambaran Prosad Vs. Ram Mohit Hazra and Others](#), the contract of lease is held normally, in the absence of contrary provision expressed or implied, to be enforceable against the parties thereto or their legal heirs and legal representatives including lessees and transferees.

12. Mr. Apte, the learned Advocate appearing for the respondents contends that ratio of Damadilal's case must be limited to the provision of the Madhya Pradesh Accommodation Control Act and cannot be held to be of universal application. In either case, so contends Mr. Apte, it can have no application to the cases arising out of Bombay Rent Act or to the laws dealing with tenancy of the agricultural lands. This contention is attractive superficially but is liable to be rejected on close scrutiny. The lease whether of agricultural lands or house property, is the creature of the contract and is governed by the Contract Act and the Chap. V of the T. P. Act which is expressly made applicable to the tenancies under the Act by Section 3 thereof. That contract of lease creates lessee's estate and interest in the immovable property is not disputable and not disputed by anyone. The judgment of the Supreme Court in Damadilal's case differs from its earlier one in Anand Nivas's case, on whether termination of contractual lease wipes out the said estate and interest when the tenant's possession is protected by the statute as long as tenant complies with terms of tenancy. According to the ratio of Anand Nivas's case it does, while according to the ratio of Damadilal's case, the same does not ipso facto get effaced unless statute so declares. The question involving merely of an interpretation of Section 2 (1) of the Madhya Pradesh Rent Act turned ultimately on the basic incidents of tenancy itself without regard to whether it pertains to house or agricultural property and whether it arises out of one local Rent Act or the other. It is therefore, idle to suggest that law laid down in this case is not applicable to Bombay enactments or land reform legislation. The definition of the word tenants in Section 2 (18) of the Act is wide enough to include statutory tenants in the same way as is Section 2 (1) of the Madhya Pradesh Act, dealt with in Damadilal's case, notwithstanding the two being worded differently. Ratio of Damadilal's case would apply to the present case with equal force.

13. In Anand Nivas's case, tenant had sublet a portion of the premises after expiry of lease period, and his having become merely a statutory tenant. In fact, the said sub-lease was effected by him after suit for possession was instituted by the landlord, for non-payment of rent. Sub-lessee resisted execution of the decree and filed a suit for injunction claiming protection of the Rent Act. This claim of the sub-lessee was rejected by all the Courts. His an-peal in the Supreme Court was heard by a Bench of 3 Judges. Shah, J. speaking for the majority held the sublease to be invalid, statutory tenant being, in his opinion, incompetent to so sublet the premises, he having no estate, property, or interest therein. Sarkar, J. did not record any express dissent on this point. Statutory tenant's claim to sublet was unheld by him relying on certain English cases and provisions of Sections 12(1), 13(1)(e) and Section 14 of the Bombay Rent Act. The wording of Sections 12(1) and 13(1)(e) was held by the learned Judge to be on par with Sections 4 (1)(h) and 15 (1) of the English Rent and Mortgage Interest (Restriction) Act, 1923. This was contrary to what Shah, J. had found. On the application of Section 52 of the T. P. Act also the learned Judges differed. Dissenting judgment gives an impression as if the sub-lease by statutory

tenant during pendency of the suit even after his having himself rendered liable to eviction also could be valid. No occasion, to examine the said question further however, arose because of Sarkar, J. being in minority. The three Judges' Bench in Damadilal's case, while overruling majority view of Shah, J. recorded in Anand Nivas case, as to the statutory tenant having no estate and interest in the suit premises, did not indicate any approval of the reasoning of Sarkar, J. Ratio of Damadilal's case, is binding on us being the later judgment of the coordinate Court, and as discussed earlier, supports the contention of Mr. Samant.

14. Mr. Ante then contends that exclusion of Section 40 from its operation to the lands of Devasthan itself is indicative of legislative intent to the contrary. This assumes that Section 40 of the Act is the source of right of inheritance. When the Supreme Court treats inheritability as the incident of the tenancy, it has obviously, the Contract Act and the T. P. Act in mind, as being the fountain of such inheritability, of which the tenancy is the creature. Section 40 of the Act therefore, cannot now be held to be such source, after the law enunciated in Damadilal's case. So considered Section 40 is merely restrictive of right of inheritance to a few out of the many heirs. So was Section 40, prior to its amendment as also the corresponding Section 9 of the 1939 enactment, though choice of the heirs was different. In application of Section 40 results merely in the opening succession to all the heirs of the deceased tenant, and not destroying the inheritability itself.

15. In a recent judgment in the case of [Vithal Dattatraya Kulkarni and Others Vs. Smt. Shamrao Tukaram Power and Others](#), to which our attention was drawn by Mr. Apte, the Supreme Court rejected a claim for possession of land from the landlord under Sections 37 and 39 of the Act made by the heirs of the tenant who died long before Section 40 was amended in 1956. Judgment indicates how, heirs' claim to the tenancy under it depended on landlord's offering the same and how no occasion for such offer could arise in the said case on account of the lands being in landlord's possession at the relevant time: In para 8 of their judgment the Court indicated how ratio of Damadilal's case was inapplicable.

16. Section 88B of the Act makes Section 30 applicable to the tenancies of the lands belonging to the Public Trusts covered by the said section. Section 30 preserves the tenants' rights and privileges available to him under other enactments, usages, and customs to the extent to which the same are not inconsistent with the Act. Mr. Apte relies on this exclusion and contends that incidents of tenancies such as the heritability adverted to in Damadilal's case supra, also would cease to apply with the in application of Section 30 of the Act. This assumes as if "incidents of tenancy" relied in the above case depend on the application of Section 30. This contention is untenable. Firstly; this provision of Section 30 is merely clarificatory and declaratory of what is even otherwise implicit. The section by itself does not create or destroy any rights whatsoever. Secondly, the incident of inheritability adverted to in Damadilal's case is the creature of the same law of which tenancy itself is the

product, it being its integral attribute and the question of deriving support for it from any "other provision, custom or usage" within the meaning of Section 30 does not arise. Under the authority of Damadilal's case even statutory tenancy would be assumed to be heritable unless statute points to the contrary. In application of Section 30 thus cannot put such tenancies to any disadvantage.

17. Operation of Section 14 of the Act providing for the grounds and mode of termination of tenancies, is also excluded u/s 88B (1). Section 4B prevents termination of tenancies only on the ground of the expiry of lease period and not on any other ground, under the provisions of the T. P. Act, if the same is available. Sections 106 and 111 of the T. P. Act would alone, therefore, govern such termination. Mr. Samant is right in contending that, omission to furnish, the death, as one of the causes for termination u/s 111 of the Act, also implies that tenant's interest even in such statutory tenancy does not terminate with his death but passes on to his heirs along with his other heritable property.

18. Reliance also was placed by Mr. Apte on the judgments of this Court in Donkagouda Ramchandragouda v. Revanshidappa Shivaligappa reported in AIR 1943 Bom 148 and in the case of [Bavasaheb Walad Mansursaheb Kotri and Another Vs. West Patent Press Co. Ltd. and Others](#), , and the Privy Council judgment in the case of Baboo Lekhraj Roy v. Kunhya Singh reported in (1877) 4 Ind App 223 to show how benefit of tenancies, for indefinite period, cannot be claimed by such tenants' heirs. Close reading of these cases would show how, tenancies in each of these cases were found, on the wording at the lease deeds, to be for the benefit of the tenant personally and durable only for his lifetime and were on that ground held to be not heritable. Period's description "for indefinite period" appears to have been attracted due to the inherent uncertainty of the period of such tenant's life itself. Duration of tenancy in the present case is governed by Section 4B of the Act which is expressly made applicable u/s 88B (1) of the Act. It will be misnomer to call such a tenancy protected by the statute as a tenancy for "an indefinite period." to attract the ratio of these cases. Reliance thereon by Mr, Apte therefore, is equally misconceived.

19. Mr. Apte objected to the applicant's relying on the "incidents of tenancy" for the first time in the Letters Patent Appeal as against her exclusive reliance on Section 40 earlier before the three Courts. The plaintiff's claim to the lands in dispute is entirely founded on her being one of the heirs of Bhagirathibai. Reliance on Section 40 before the two Lower Courts is found to be unwarranted by the single Judge and rightly. She cannot be prevented from relying on yet another principle of law, now enunciated by the Supreme Court in support of her same case when it does not involve investigation of more facts. Secondly, she had also relied on Section 27 of the Tenancy Act, throughout. Application of Section 27 is not excluded u/s 88B (1). This reliance cannot be said to have been entirely misplaced. Permissibility of the partition of the tenanted lands between the heirs of any tenant under the second

proviso to Section 27. in spite of the prohibition against sub-division of the lands, clearly implies legislative recognition of the heritability of the tenancies. There is nothing to suggest that the proviso or the section applies only to contractual and not to the statutory tenancies.

20. The result is that the appeal succeeds. The judgment of the single Judge is set aside and that of the Appellate Court and Trial Court is restored. In the circumstances of the case, there will be no order as to costs.

21. Appeal allowed.