Bai Jamna Vs. Bai Dhani

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Court : Mumbai

Decided On : Aug-06-1958

Reported in : (1959)61BOMLR419

Judge : Vyas and; Tambe, JJ.

Appeal No. : Special Civil Application No. 1367 of 1958

Appellant : Bai Jamna

Respondent : Bai Dhani

Disposition : Application allowed

Judgement :

Vyas, J.

1. This application which is made under Article 227 of the Constitution of India by the petitioners raises questions under Section 5 of the Bombay Tenancy and Agricultural Lands Act, 1948, as it stood before the amending Act XIII of 1956 came into force on August 1, 1956. What are the rights conferred on a tenant under Section 5 Is he a statutory tenant or a contractual tenant Are these rights (tenancy rights under Section 5) heritable? These are the questions which fall to be determined in this application and they arise in the following circumstances.

2. The petitioners are the landlords of 8. Nos. 108/3 and 193/3 situated at village Katargam, district Surat. Respondent No. 1, Bai Dhani, is the daughter of one Hari Lala. Hari Lala came on these lands as a tenant in the year 1954-55. It was a one vear's lease under which he came Into occupation of the lands. Hari Lala died on September 14, 1955. Thereafter, the present petitioners made an application, being Tenancy Application No. 439 of 1955, under Section 29 of the Act for obtaining possession of the lands from Bai Dhani. The Mamlatdar who heard the application came to the conclusion that Bai Dhani was a trespasser and he awarded possession of these lands to the present petitioners. On an appeal being made by Bai Dhani to the Prant Officer, the Prant Officer by an order made by him on April 15, 1956, held that the Mamlatdar had no jurisdietion to hear and decide the application No. 439 of 1955 which was made by the present petitioners, as' the proper remedy which the petitioners ought to have pursued was a remedy not under Section 29 of the Act, but under Section 84 of the Act. Consistently with this view of the matter which the Prant Officer took, he reversed the order of the Mamlatdar. Thereafter, on May 5, 1956, these petitioners made an application under Section 84 of the Act before the Assistant Collector, Surat. By an order made by her on June 8, 1956, the Assistant Collector held that Bai Dhani was a trespasser and she also awarded possession of these lands to the petitioners. From the order of the Assistant Collector, Bai Dhani went in revision before the Bombay Kevenue Tribunal. The Revenue Tribunal by an order dated September 5, 1956, remanded the ease to the Assistant Collector with a direction that the terms of tenancy of Hari Lala should be determined and further that it should be decided what rights did Hari Lala possess as a tenant and whether Bai Dhani, as the daughter of Hari Lala, was entitled to inherit the rights which Hari Lala had as a tenant. On remand the Assistant Collector by an order made by her on August 30, 1957, held that Hari Lala was a statutory tenant of these lands and that Bai Dhani, the daughter oft Hari Lala, could not inherit the tenancy rights of her father. From this decision of the Assistant Collector, Bai Dhani went in revision before the Bombay Revenue Tribunal and the Revenue Tribunal, by an order made by it on January 20, 1958, allowed the revisional application of Bai Dhani, The Tribunal held that under Section 5 of the Act of 1948, as it stood before the amending Act XIII of 1956 came into force, the tenancy which Hari Lala enjoyed was a statutory

tenancy, but the Tribunal held further that the rights of a statutory tenant were heritable rights and therefore Bai Dhani was entitled to continue to remain in possession of these lands. It is this view of the Bombay Revenue Tribunal which is challenged by the petitioners landlords in this application under Article 227 of the Constitution, their contention substantially being that the rights which a statutory tenant has in respect of the lands enjoyed by him are not heritable rights.

3. Now, it may be remembered that Hari Lala, the father of respondent No. 1 Bai Dhani, entered upon these lands in the year 1954-55 upon a lease which was a one year's lease. That being so, the Act that would., govern, this case would be the Act of 1948, as it stood before its amendment. The Amending Act XIII of 1956 came Into force on August 1, 1956. Now the relevant section of the Act of 1948 which would apply to the facts of the present case would be Section 5 Sub-section (1) Sub-section (1) provides:

No tenancy of any land shall be for a period of less that ten years:Provided that at the end of the said period and thereafter at the end of each period of ten years in succession, the tenancy shall, subject to the provisions of Sub-sections (2) and (3), be deemed to be renewed for a further period of 10 years on the same terms and conditions notwithstanding any agreement to the contrary.

It is clear that the statute, the language of which admits of no ambiguity, created a tenancy whose period was not less than ten years. 'Whatever might be the terms of the contract of lease, the Act of 1948 which came into force on December 28, 1948, created a law that with effect from December 28, 1948, there shall not be any tenancy for less than ten years. The statute did not say that if a contractual period would be deemed to be extend. To ten years,. It prohibited bited the creation of a tenancy for a period less than ten years. Clearly, therefore, by virtue of the statute, Hari Lala's tenancy which was one year's tenancy under the contract became a tenancy for ten years in conformity with the statute that was enacted with effect from December 28, 1948. Accordingly, in our view the Courts below were right in recording a finding of fact that Hari Lala was a statutory tenant. It is this concurrent finding of fact which the learned advocate Mr. Rajani Patel for the petitioners seeks to support and he contends further that the rights of a

statutory tenant are not heritable rights and, therefore, the landlords would be entitled to recover possession of these lands from Bai Dhani, the daughter of Hari Lala. It is the above-mentioned concurrent finding of fact of the Courts below which the learned advocate Mr. Oza, for respondent No. 1, seeks to challenge and he contends that Hari Lala was not a statutory tenant, but was a contractual tenant, and that the rights of contractual tenancy being heritable rights, Bai Dhani, the daughter of Hari Lala, would be entitled to continue to remain in possession of these lands.

4. Now, upon a question whether the tenancy rights of a statutory tenant are heritable or not, it was held in Eruch Bapasola v. Mirohandani : AIR1954 Bom56 , that a statutory tenancy does not create a right in property. The learned Chief Justice delivering the judgment of the Bench in that case observed that a statutory tenancy was merely a personal right given by the statute. There is no doubt that althought a statutory tenant remains in possession of the land and enjoys the land so long as he complies with the provisions of the statute, he has no estate or interest in the land as an ordinary tenant has. It is undeniable that his right is purely a personal one, and, that being so, unless the statute expressly authorises him to pas on that right to another person, the right must cease the moment he (the statutory tenant) parts with possession, of the land or dies. Also in The State of Bombay v. Virendra Motabhoy : AIR1951 Bom175 , it was held by this Court that a tenant, protected by a statute in the possession of demised premises, is a statutory tenant. It was observed that the right of such a tenant to remain inpossession of the premises was a personal right, and not a right which the tenant could assign or deal with, The learned advocate Mr. Oza, appearing] for respondent No. 1 Bai Dhani, contends that Hari Lala, the father of Bai Dhani, had a dual capacity: firstly, the capacity of a statutory tenant, the period of the statutory tenancy being not less than ten years, and, secondly, the capacity of a contractual tenant, the period of which tenancy, though the lease was initially a one year's lease, was deemed to have been extended to ten years by virtue of a legal fiction. Mr. Oza says that the contractual tenancy rights being heritable rights, Bai Dhani was entitled to continue to remain in possession of the lands. We are unable to accept the contention of Mr. Oza In our view, the extension of the period of contractual tenancy which would have been available under Section 23(1)(b) of

the Act of 1939 is not available under Section 5(1) of the Act of 1948. The legal fiction of extension of the period of contractual tenancy was done away with when the Legislature enacted the Tenancy Act of 1948. Mr. Oza has invited our attention to a decision of this Court in Dattu Narayan Patil v. Kitkul Popat Chaudhari (1958) Special Civil Application No. 358 of 1956, decided by Shah and Vyas JJ., on June 20, 1956 (Unrep.) in support of his contention that the period of the contractual tenancy, which initially was a one year's period in this case, must be deemed to have been extended to ten years. Now, it is to be remembered that the case which came up for consideration in Dattu Narayan Patil v. Kitkul Popat Chaudhuri was a case under the Tenancy Act of 1939. In that case, the original period of the contractual tenancy was five years, and this Court held that by virtue of the legal fiction created by Clause (b) of Section 23(1) the period of the contractual tenancy was deemed to have been extended to ten years. Section 5(1) of the Act of 1948 does not create fiction extending the contractual character of the tenancy from a period of less than ten years to a period of ten years. Section 5(1) prohibits tenancies of period less than years and creates a statutory tenancy whose period shall not be less than years. Mr. Oza contends that Section 5(1), by providing that no tenancy of any land shall be for a period less than ten years, extends the contractual character of a tenancy from a period less than ten years to a period of ten years. We have considered Section 23(1), Clauses (b) and (b), of the Act of 1939 and have also given an anxious thought to the provisions of Section 5(1) of the Act of 1948. In our view, the provisions of Section 23(1), Clause (a), of the Act of 1939 conferred upon every tenancy a statutory character of ten years' tenancy and, be it noted, this provision was kept intact by Section 5(1) of the Act of 1948. The provisions of Clause (b) of Section 23(1) of the of 1939 which, by a legal fiction, extended the period of contractual tenancy to ten years were dropped-and doubtless purposely dropped-when the Act of 1948 was enacted. In other words, the Act of 1948 did away with the artificial fiction that was created by Clause (b) of Sub-section (1) of Section 23 of the Act of 1939. Had the intention of the Legislature, while enacting the Tenancy Act of 1948, been to preserve the legal fiction incorporated in Clause (b) of Sub-section (1) of Section 23 of the Act of 1939 and had the Legislature intended, to provide that a contractual tenancy, though in fact not for ten years, would be deemed to be one for ten years, they

would have enacted, in Section 5 of the Act of 1948, a provision similar to the provision of Clause (b) of Sub-section (1) of Section 23 of the Act of 1939. But they did not do so. We must, therefore, reject Mr. Oza's contention that Section 5(1) of the Act of 1948 extends the contractual character of a tenancy from a period less than ten years to a period of ten years.

5. Mr. Oza has next invited our attention to Section 4 of the Act of 1948. Now Section 4 provides:

A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not-

(a) a member of the owner's family, or

(b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family, or

(c) a mortgagee in possession.

Mr. Oza contends that under the above-mentioned provisions of Section 4 of the Act his client Bai Dhani must be deemed to be a tenant, apart from being a statutory tenant under Section 5(1) of the Act. We have considered Mr. Oza's contention, but we are not impressed by it. It. is no doubt true that Section 4 does contain the expression 'shall be deemed to be a tenant', but the section does not say that a person lawfully cultivating any land belonging to another person shall be deemed to be a contractual tenant. When a person is deemed to possess a certain character, it is clear that he in fact does not possess that character, but by a legal fiction that character is conferred upon him. In the present case, no question arises of Hari Lala being deemed to be a tenant, since, in fact, he was a statutory tenant under the provisions of Sub-section (1) of Section 5 of the Act. In these circumstances, a recourse to Section 4 of the Act would not assist Mr. Oza's client.

6. The next contention of Mr. Oza is that the landlords' application, which in this case was an application under Section 84 of the Act, was not maintainable. Mr.

Oza contends that the proper procedure for the landlords to follow was a procedure under Section 29 of the Act and he says that the landlords should have applied before the Mamlatdar and not before the Assistant Collector. There is no force in the above contention of Mr. Oza. In a ease where a person is a trespasser and is sought to be evicted, the only section in the Tenancy Act which could be invoked is Section 84. Section 29 has no application to a case where a person is unauthorisedly in possession of land. Now, in this case, as I have stated adve, there is no question of a contractual tenancy for ten years in favour of Hari Lala. Hari Lala's rights under the contractual tenancy under which he entered upon these lands came to an end upon the expiry of one year from the date upon which he went into occupation of the lands. Under Sub-section (1) of Section 5 of the Act of 1948 Hari Lala became a statutory tenant, the period of such statutory tenancy being ten years. But it is to be noted, and I have already stated the reasons for this conclusion, that the rights of a tenant who is a statutory tenant are not heritable rights. The right of a statutory tenant to remain in possession of the land is merely k. a personal right. It is a right conferred upon him by a statute; it is not a right in property and therefore such right does not devolve upon his heirs after his death. In view of these circumstances, Bai Dhani's possession of the land which are the subject-matter of this application, being possession as a trespasser, the only remedy which was available to the landlords for evicting Bai Dhani from the lands was the remedy under Section 84 of the Act. Apart from the fact that this contention of Mr. Oza has no substance on merits, it may be remembered that this point, viz., that Section 84 of the Act would not be attracted in this case, was not taken by Mr. Oza's client before the Assistant Collector or even before the Eevenue Tribunal. That being so, the landlords had no opportunity to meet this point. Upon this ground also this particular point raised by Mr. Oza deserves to fail. However, as I have just stated, it fails even on merits.

7. Next, Mr. Oza has invited our attention to Section 40 which was introduced into the statute book by the Amending Act XIII of 1956. Section 40, Sub-section (1) provides:

Where a tenant (other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenant on the same terms and conditions on which

such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy.

Relying upon this section, Mr. Oza contends that the petitioners-landlords shall be deemed to have continued the tenancy in favour of Bai Dhani, the heir of Hari Lala, on the same terms and conditions upon which Hari Lala was holding the lands at the time of his death. We have carefully considered this contention also, but we have felt constrained to reject it. It is to be noted that Section 40 on which reliance is placed by Mr. Oza was not on the statute book when Hart Lala died. Hari Lala died on Sepetmber 14, 1955, and the section was introdued into the statute book on August 1, 1956. That being so, the provisions of this section would not be applicable to the facts of the present case. Mr. Oza contends, however, that the provisions of Section 40 of the Act must be given a retrospective effect and, says Mr. Oza, if the provisions are retrospectively applied, Bai Dhani must get the benefit thereof. In support of the contention that the provisions of Section 40 must be retrospectively applied, Mr. Oza has invited our attention to a decision of this Court in Parwatibai Vasudeo v. Shridhar. (1957) 60 Bom. L.R. 1157. The question which came up for consideration in that ease was about the effect of the Amending Act LXI of 1953 upon the Explanation below Sub-section (2)' of Section 13 of the Rent Control Act. This Court came to the conclusion that the Amending Act introduced a change in the provisions of Sub-section (2) of Section 13 and the Court held that as soon as the change was introduced the Amending Act finished itself and its purpose was served out. The Court observed in that case that the Amending Act had no independent existence and therefore what was done by it must relate back to the date when the original Act was passed. It pointed out that after the Amending Act came into force, the earlier Act must be read and construed, except where it would lead to repugnancy, inconsistency or absurdity, as if the altered words were written in the earlier Act with the same pen and ink and the old words scored out, so that thereafter there was no need to refer to the Amending Act at all. Now, it is to be noted that in this case there was an inconsistency 'between the rights conferred upon the tenant under Section 5(1) of the Act of 1948 and the rights conferred by Section 40 which was introduced into the statute book by the Amending Act XIII of 1956. Before the Amending Act XIII of 1956 came Into force, We Tenant had certain rights under Sub-section (1) of

Section 5. The provisions of Sub-section (1) of Section 5 did not find place in the Amending Act which came into force with effect from August 1, 1956, That being so, this would clearly be a case of inconsistency between the provisions of the earlier Act, which provisions are to be found in Sub-section (1) of Section 5 of that Act, and the provisions of Section 40 which was for the first time introduced I into the statute book with effect from August 1, 1956. Accordingly the decision of this Court in Parwatibai Vasudeo v. Shridhar would not assist Mr. Oza's client.

8. Decision in Parwatibai Vasudeo v. Shridhar was based upon a decision of the Supreme Court in Shamarao V. Parulekar v. The District Magistrate, Thana. : 1952 CriLJ1503 . It was held by the Supreme Court in this case that when a subsequent Act amended an earlier one in such a way as to incorporate itself or a part of itself into the earlier one, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with the same pen and ink and the old words scored out, so that there was no need to refer to the Amending Act at all. Now, the case with which we are dealing in this application is not a ease of incorporation of Section 40 or any part of the provisions of Section 40 into the old Section 5(1). As I have pointed out above, Section 5(1) does not find any place at all in the Act as amended by the Amending Act XIII of 1956. In other words, this is not a case of the amendment of Section 5(1). This is a case where the old Section 5(1) was removed completely from the statute book and an altogether new section, being Section 40, was introduced for the first time with effect from August 1, 1956. That being so, recourse to the case of Shamarao V. Paru, lekar v. The District Magistrate, Thana, would not assist Mr. Oza's client.

9. The next case to which our attention is invited by Mr. Oza is B.G. Chavan v. State of Bombay. : AIR1955 Bom334 . In that case, what the Court had to consider was the true effect of Act XXXV of 1954, substituting 'four years' for 'three years' in Section 25(1) of the Act Following the decision of the Supreme Court in shamarao V. Parulekar v. The District Magistrate, Thana, this Court held that where the words 'four years' were substituted in place of the original words 'three years', the altered words must be read and construed as if they had existed in the original Act. This decision again would be of little assistance to respondent No. 1 in this

case. This is not a case of removal of certain words from the old Section 5(1) and substitution of new words in their place. As I have just stated, this is a case where the provisions of Section 5(1) of the Act of 1948 were not incorporated in the Act as amended by Act XIII of 1956.

10. Mr. Oza has next referred us to an English decision in Hutchinson v. Jauncey. [1950] 1 K.B. 574. Now, this was a case in which in October 1945 the tenant of a house within the protection of the Rent Restriction Acts sub-let two rooms in it, sharing the use of the scullery for cooking with the sub-tenant. The sub-tenant subsequently bought the house subject to the tenancy, and in his capacity as landlord he served a valid notice to quit on the tenant expiring on April 25, 1949, and, on the tenant's refusing to comply with it, on May 25 he issued a plaint claiming possession. On that date as the law then stood, the tenancy was not within the protection of the Rent Restriction Acts owing to the sharing of the use of the scullery. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into force, which by Sections 7, 8 and 9 extended the protection of the Rent Restriction Acts to the various cases where the tenant shared accomodation with others. Section 10 provided that the three sections (ss. 7, 8 and 9)

shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period.

It was held by the learned Judges that on the true construction of Section 10 of the Landlord and Tenant (Rent Control) Act, 1949, the relevant provisions of the Act applied to pending matters. Mr. Oza relies upon this decision in order to contend that the provisions of Section 40 which were introduced into the statute book by the Amending Act XIII of 1956 should be given retrospective effect. This decision also will not help respondent No. 1 for the simple reason that by the language of Section 10 of the Landlord and Tenant (Rent Control) Act, 1949, itself, retrospective effect was given to the provisions of Sections 7, 8 and 9. Section 10 provided:

The three last foregoing sections shall apply whether the letting in question began before or after the commencement of Act etc., etc.

The English case, therefore, was a case in which the statute, itself retrospective-h provisions of certain sections thereof. That is not the case with Section 40 of the act, which was introduced into the statute book by Act XIII of 1956. Accordingly the provisions of a. 40 cannot be given, a retrospective effect and Mr. Oza's contention based upon Section 40 must fail. Whatever rights Hari Lala had in these lands as a contractual tenant came to an end upon the expiry of one year from the commencement of his contractual tenancy and thereafter the lands vested in the petitioners-landlords. The provisions of Section 40 cannot be construed retrospectively so as to take away the vested rights of the petitioners-landlords.

11. The last contention of Mr. Oza is that apart from the rights of a statutory tenant which Hari Lala had by virtue of Sub-section (1) of Section 5 of the Act of 1948, he had contractual rights also in respect of the lands, whose possession was enjoyed by him, by virtue of the provisions of the Transfer of Property Act. Mr. Oza has invited our attention to Sections 30 and 3 of the Tenancy Act of 1948 and has argued that in deciding the present application, due regard must be had to the law as contained in the Transfer of Property Act. Now, Section 30 of the Tenancy Act of 1948 provides:

Save as otherwise provided in Sub-section (3) of Section 6 and Sub-section (1) of Section 27, no other provision contained in this Act shall be construed to limit or abridge the rights or privileges of any tenant under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a Court or otherwise howsoever.

Relying upon this section, Mr. Oza contends that the law in respect of contractual rights under the Transfer of Property Act must be taken into consideration while deciding this application. If we turn to Section 3 of the Act of 1948, the section provides:

The provisions of Chapter V of the Transfer of Property Act, 1882, shall, in so far as they are not inconsistent with the provisions of this Act, apply to the tenancies and leases of lands to which this Act applies.

It is in this manner that Mr. Oza relying upon Sections 3 and 30 of the Tenancy Act of 1948 contends that due effect must be given to the contractual rights which Hari Lala had enjoyed in respect of these lands under the Transfer of Property Act. We have given an anxious thought to this submission of Mr. Oza, but we are of the view that the submission cannot prevail. Clause (a) of Section 111 of the Transfer of Property Act, which falls under Chapter V of the Act, provides: 'A lease of immoveable property determines by the efflux of time limited (thereby.' I have already stated above that the period of the contractual tenancy of Hari Lala was a one year's period. Clearly, therefore, the contractual tenancy of Hari Lala was determined by the efflux of time and it was determined upon the expiry of one year from the date upon which Hari Lala entered upon these lands by virtue of his contractual tenancy. It is true that even upon the expiry of one year from the date of commencement of the contractual tenancy of Hari Lala, he continued to remain in possession of the lands. It is to be remembered, however, that even after the provision of the Tenancy Act. By accepting rent from Hari Lala the landlords did not assent to Hari Lala holding over, or Bai Dhani holding over, as a tenant within the meaning of Section 116 of the Transfer of Property Act. The point which we wish to emphasise is that although the possession of these lands continued with Hari Lala after the determination of his contractual tenancy, the possession continued because Hari Lala was a statutory tenant by virtue of Section 5(1) of the Act of 1948. Hari Lala did not hold over and after his death, his daughter Bai Dhani did not hold over as a tenant by virtue of the proyisions of the Transfer of Property Act. In our view, after the expiry of one year from the date of commencement of the contractual tenancy of Hari Lala, Hari Lala had no right under the Transfer of Property Act in respect of these lands. That being so, this particular contention of Mr. Oza based upon Sections 3 and 30 of the Act of 1948 must also fail.

12. The result, therefore, is that this application made by the petitioners-landlords is allowed, the order made by the Bombay Revenue Tribunal on January 20, 1958, is reversed and the order made by the Assistant Collector on August 30, 1957, is

restored. There will be no order as to costs of this application.