

A.A. SHIRDONE ETC.

v.

SAHEB H. TAJBHOKHARI

March 20, 1985

[O. CHINNAPPA REDDY AND R.B. MISRA, JJ.]

Bombay Tenancy Act, 1939, ss.2A and 3A

Bombay Tenancy and Agricultural Lands Act 1948, ss.4 and 89(2) (b)

*Mortgagee in possession of land—Whether becomes 'deemed tenant'
Landowner—Mortgagor—Failure to file declaration before Mamlatdar that
mortgagee not a tenant—Whether ownership right lost—Symbolic or actual
physical possession—Entitlement of.*

Civil Procedure Code 1908, Section 9

*Civil Court whether possesses jurisdiction to grant possession in suit
governed by Tenancy Laws.*

The respondent mortgaged different portions of a plot of land to different persons. Five suits for redemption and actual possession of the mortgaged land against the mortgagees were filed, who contested the suits on the grounds that they were tenants of the suit land prior to the mortgage and were in possession thereof as such, that during the period of mortgage their tenancy rights remained in abeyance and after redemption their tenancy rights would revive again in view of the provisions of section 25A of the Bombay Tenancy and Agricultural Lands Act, 1948, and consequently the respondent could not get actual possession. It was further contended that the respondent could not get actual possession over the disputed land from the civil court as the proper forum was a revenue court.

The Civil Judge decreed the suits for possession holding that the defendants were not tenants of the suit land prior to the mortgage, and as such there was no question of revival of tenancy rights under section 25A of Act 1948.

A In appeals the District Judge held that in only one suit the defendant was in possession of the suit land as a tenant on the date of the mortgage and so his tenancy would revive after redemption of the mortgage. However, relying on sections 2A and 3A of the Bombay Tenancy Act 1939 it was held that the defendants in the other four suits also became deemed tenants under section 2A and consequently a protected tenant under section 3A of the said Act as it stood amended in 1946 and could not, therefore, be evicted from the suit land.

B All the appeals were, therefore, allowed, the defendants permitted to remain in actual possession of the suit land and the plaintiff-respondent getting only symbolic possession.

C The plaintiff filed appeals and the High Court reversed the judgment of the District Judge holding that the mortgagees in possession did not become 'deemed tenants' under the provisions of section 2A of the Act of 1939 as amended in 1946.

The respondent-defendants appealed to this Court.

Allowing the appeals,

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HELD : 1. A mortgagee in possession cannot become a deemed tenant under section 2A of the Bombay Tenancy Act of 1939 on the strength of the saving provision in section 89(2)(b) of the Bombay Tenancy and Agricultural Lands Act of 1948. [413F]

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Sidram Narsappa Kamble v. Sholapur Borough Municipality & Anr., [1966] 1 SCR 618, followed.

Salman Raje v. Madhavsang Banasang & Ors., 4 Guj. L.R. 817 and *Ishwara Bhau Sawant v. Pandurang Vasudeo Karmarkar*, 67 Bom.L.R. 558, overruled.

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Dinkar Bhagwant Salekar v. Babaji Mahamulkar, 59 Bom. L. R. 101 and *Jaswantrai Tricumlal v. Bai Jiwi*, 59 Bom. L. R. 168, *Shankar Kalyan Kulkarni & Ors. v. Basappa Sidramappa Kolar & Ors.* [1969] 2 Mys.L.J. 77 and *Patel Ambalal Manilal & Ors. v. Desai Jagdishchandra Naginlal & Ors.* 17 Guj. L.R. 578, approved.

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2. Two conditions were necessary in order to attract the provisions of section 2A(1) of the Bombay Tenancy Act, 1939. But in the corresponding section 4 of the Bombay Tenancy and Agricultural Lands Act of 1948 one more condition was added in addition to the old two conditions as provided in section 2A(1) of the Bombay Tenancy Act, 1939 and that additional condition excludes the mortgagee in possession from acquiring the status of a 'deemed tenant' within the meaning of section 4. If the cases in hand were to be governed by the Bombay Tenancy and Agricultural Lands Act 1948, the mortgagees in possession would be out of the purview of section 4 of that Act

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as mortgagees in possession have been excluded from being 'deemed tenants'. As the Act of 1948 has no retrospective effect the suits giving rise to the aforesaid appeals will be governed by the Act of 1939. [408H ; 409A-B]

3. In the instant case, the plaintiff-respondent was entitled to file an application for declaration before the Mamlatdar that the defendants were not tenants, within one year of the coming into force of the Amendment Act of 1946 as provided in sections 2A and 3A of the 1939. But he did not choose to do so and, therefore, he lost whatever right he had. [413G-H]

4. The relief for actual possession from the defendants who claim to be protected tenants could be granted only by the revenue court and not by the civil court. The plaintiff-respondent, therefore, on the basis of the decree for redemption can get only a symbolic possession and not actual physical possession for the land in dispute. [414A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 320 — 323 of 1971.

From the Judgment dated the 8th August 1970 of the Mysore High Court in Regular Second Appeals Nos. 435, 437, 438, 515 of 1964 respectively.

R.B. Datar, for the Appellants.

K. Rajendra Choudhary, for the Respondent.

The Judgment of the Court was delivered by

MISRA, J. The present connected appeals by special leave are directed against the judgment of the Karnataka High Court. The dispute in these appeals relates to survey No. 56. of Mangavati village measuring 18 acres and 30 gunthas. Different portions of the said plot were mortgaged by the respondent to different persons now arrayed as appellants in the aforesaid appeals.

The respondent filed five suits for redemption and actual possession of the mortgaged land against the aforesaid mortgagees. The suits were contested by the mortgagees and their grievance in the main was that they were tenants of the suit land prior to the mortgage and were in possession thereof as such. During the period of the mortgage their tenancy rights remained in abeyance and after redemption their tenancy rights would revive again in view of the provisions of s.25A of the Bombay Tenancy and Agricultural

A Lands Act, 1948 and the respondent could not get actual possession over the disputed land despite the redemption. It was further pleaded that the respondent could not get actual possession over the disputed land from the civil court as the proper forum was a revenue court.

B The learned Civil Judge decreed the aforesaid five suits by separate judgments holding that the defendants were not tenants of the suit land prior to the mortgage, and as such there was no question of revival of the tenancy rights after the redemption of the mortgagees, under s.25A of the Bombay Tenancy and Agricultural Lands Act, 1948. The mortgagor was entitled to get possession of the land after redemption of the mortgage.

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D The judgments of the Civil Judge gave rise to five appeals which were disposed of by the District Judge. In his opinion the defendants in four suits were not the tenants of the said land prior to the date of mortgage, but one of the defendants in one of the suits, viz., suit No. 94 of 1961, was in possession of the suit land as a tenant on the date of the mortgage and so his tenancy would revive after redemption of the mortgage. He, however, relying on ss.2A and 3A of the Bombay Tenancy Act, 1939 found that the other defendants in the four suits also became deemed tenants under s.2A and consequently a protected tenant under s.3A of the aforesaid Act of 1939 as it stood amended in 1946 and could not be evicted from the suit land. Accordingly, all the appeals were allowed and the judgments of the trial court were modified in that the defendants were to remain in actual possession of the suit land and the plaintiff-respondent would get only symbolic possession in pursuance of the decree for redemption.

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G Feeling aggrieved by the said decision the plaintiff filed appeals before the High Court, which in turn allowed the appeals and reversed the judgment of the District Judge holding that the mortgagees in possession did not become 'deemed tenants' under the provisions of s.2A of the Act of 1939, as amended in 1946. The defendants have now come to this Court and reiterate the same points as were raised by them before the High Court.

H In order to appreciate the points raised in these appeals it will be appropriate at this stage to refer to the relevant provisions of the Bombay Tenancy Act, 1939. Section 2A reads:

"2A. (1) 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,

unless the owner has within one year of the coming into force of the Bombay Tenancy (Amendment) Act, 1946 made an application to the Mamlatdar within whose jurisdiction the land is situated for a declaration that the person is not a tenant.

(2) Where an application under sub-section (1) has been made and the Mamlatdar refuses to make such declaration and the Mamlatdar's decision is not set aside by the Collector in appeal under sub-section (3) of section 13 or by the Provincial Government under section 28, the person shall be deemed to be a tenant for the purposes of this Act."

Section 3A reads:

"3A. (1) Every tenant shall, on the expiry of one year from the date of the coming into force of the Bombay Tenancy (Amendment) Act, 1946, be deemed to be a protected tenant for the purposes of this Act and his rights as such protected tenant shall be recorded in the Record of Rights, unless his landlord has within the said period made an application to the Mamlatdar within whose jurisdiction the land is situated for a declaration that the tenant is not a protected tenant.

(2) Where an application under sub-section (1) has been made and the Mamlatdar refuses to make such declaration and the Mamlatdar's decision is not set aside by the Collector in appeal under sub-section (3) of section 13

A or by the Provincial Government under section 28; the tenant shall be deemed to be a protected tenant for the purposes of this Act and his rights as such protected tenant shall be recorded in the Record of Rights."

B In 1948 the Bombay Tenancy Act, 1939 was repealed and another Act, that is, the Bombay Tenancy and Agricultural Lands Act, 1948 came into being. Section 4 of this new Act is the same as s. 2A of the Act of 1939 with the only addition of a clause. It reads:

C "4. A person lawfully cultivating and land belonging to an other 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

D (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

E (c) a mortgagee in possession.

F Explanation I. - A person shall not be deemed to be a tenant under this section if such person has been on an application made by the owner of the land as provided under section 2A of the Bombay Tenancy Act, 1939, declared by a competent authority not to be a tenant.

G Explanation II.— Where any land is cultivated by a widow or a minor or a person who is subject to physical or mental disability or a serving member of the armed forces through a tenant then notwithstanding anything contained in Explanation I to clause (6) of section 2, such tenant shall be deemed to be a tenant within the meaning of this section."

H It is thus obvious that there were only two conditions in order to attract the provisions of s. 2A(1) of the Bombay Tenancy Act, 1939. But in the corresponding s. 4 of the Bombay Tenancy and Agricultural Lands Act of 1948 one more condition was added in addition to the old two conditions as provided in s. 2A(1) of the

Bombay Tenancy Act, 1939 and that additional condition excludes the mortgagee in possession from acquiring the status of a 'deemed tenant' within the meaning of s. 4. If the cases in hand were to be governed by the Bombay Tenancy and Agricultural Lands Act, 1948, the mortgagees in possession would be out of the purview of s. 4 of that Act as mortgagees in possession have been excluded from being 'deemed tenants'. As the Act of 1948 has no retrospective effect the suits giving rise to the aforesaid appeals will be governed by the Act of 1939.

The contention raised on behalf of the appellants is that the mortgagees-appellants became 'deemed tenants' within the meaning of s. 2A of the Act of 1939 and could not be evicted from the land in suit. For the respondent, on the other hand, the contention was that the mortgagees have never been treated to be tenants and it will be against the uniform established view of law and this is why the mistake was realised by the legislature and a mortgagee in possession was excluded from being a 'deemed tenant' in the Act of 1948. It is admitted case of the parties that no application had been made by the mortgagor within one year of the coming into force of the Bombay Tenancy (Amendment) Act, 1946 for a declaration that the mortgagees in possession were not the tenants of the disputed land as contemplated by s. 2A.

At one time there seemed to be a cleavage of judicial opinion on the construction of s. 2A of the Act of 1939. The Gujarat High Court gave a literal construction to the provisions of s. 2A(1) and held that the mortgagees would become 'deemed tenants' in terms of s. 2A. The Bombay High Court and the High Court of Mysore took a contrary view. It will be advantageous to refer to these cases in some detail.

In *Salman Raje v. Madhavsang Banesang & Ors.*⁽¹⁾ the mortgage was made in 1943 and the mortgagee came in possession pursuant to the mortgage and the parties were, therefore, governed by the Bombay Tenancy Act of 1939, which was applied to the district of Ahmedabad on and from April 1946. A Division Bench consisting of Hon'ble Mr. Justice J.M. Shelat and Hon'ble Mr. Justice P.N. Bhagwati, as they then were, after discussing the various decisions held :

"There is, and can be no doubt that the petitioner was cultivating the land belonging to another person, i.e., the

(1) 4 Guj. L.R. 817

opponents and he was doing so lawfully as the usufructuary mortgage executed in his favour entitled him to its possession. The petitioner also would not fall in either of the two excepted categories. *Prima facie*, therefore, he was entitled to the benefit of ses. 2A and 3A of the Act. It is also clear from the language used in sec. 2A that there were only two classes of persons whom the legislature excluded from the benefit of sec. 2A, viz. :

- (1) the members of the owner's family, and
- (2) his servants and hired labourers.

Obviously, a mortgagee in possession was not included in these two categories and was, therefore, not excluded from the benefit of sec. 2A though the legislature must have been aware of the fact that there would be mortgagees cultivating lands belonging to mortgagors.

Section 3A of the 1939 Act then provides that a tenant on expiry of one year from the date of the coming into force of the Amendment Act XXVI of 1946 was to be deemed to be a protected tenant and his rights as such protected tenant shall be recorded in the record of rights unless his landlord has within the said period made an application to the 'Mamlatdar for a declaration that the tenant is not a protected tenant.'

The Bombay High Court in *Dinkar Bhagwant Salekar v. Babaji Mahamulkar*(¹) on the other hand held that a mortgagee was not excluded from the benefits of s. 2A(1) due to an oversight by the legislature while enacting s. 2A and that oversight was repaired when subsequently s. 4 of the Act of 1948 was enacted.

Again a Full Bench of the Bombay High Court in *Jasvantrao Tricumlal v. Bai Jiwi*(²) had the occasion to consider the same question. It also took the view that there was a lacuna in s. 2A of the 1939 Act in the sense that the mortgagee and his tenant were through mistake not excluded from the scope of s. 2A(1) and that lacuna, was removed while enacting s. 4 of the Act of 1948. The

(1) 59 Bom. L.R. 101

(2) 59 Bom. L.R. 168

insertion of clause (c) in s. 4 in the Act of 1948 was taken by the Full Bench to be a pointer to the fact that the mortgagees in possession were never intended to be treated as statutory tenants.

In *Ishwara Bhau Sawant v. Pandurang Vasudeo Karmarkar*⁽¹⁾ a Division Bench while construing s. 2A of the Act of 1939 observed :

“The words used in s. 2A are undoubtedly wide. One of the presumptions in law is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside these limits the law remains undisturbed. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act. If therefore, it is possible, we must so construe s. 2A as to avoid general provisions of law in regard to mortgagees.”

In *Shankar Kalyan Kulkarni & Ors. v. Basappa Sidramappa Kolar & Ors.*⁽²⁾ a Division Bench of the Mysore High Court took a similar view, and observed :

“We are of the opinion that a mortgagee in possession did not become a deemed tenant under s. 2A of the 1939 Act. Although a mortgagee in possession is a person lawfully cultivating the land belonging to his mortgagor, he could not merely for that reason become a deemed tenant under s. 2A for the reason that we should not understand the provisions of that section as resulting in the transmutation of a mortgagee in possession to a deemed tenant.”

A mortgagee in possession is a person who lends money to the mortgagor who mortgages his land to the mortgagee and delivers possession of it to him to secure repayment of the sum of money borrowed by the mortgagor from the mortgagee. That mortgage creates the relationship of debtor and creditor between the mortgagor and the mortgagee and it is that relationship which subsists between

(1) 67 Bom. L.R. 558.

(2) (1969) 2 Mys. L.J. 77.

A them during the period when the mortgagee is in possession of the property.

B The provisions of s. 76 of the Transfer of Property Act regulate the rights and liabilities of the mortgagee in possession. It could not have been the intention of the legislature that these incidents of a mortgagee with possession should stand displaced in consequence of the provisions which s. 2A of the 1939 Act incorporate. If they did stand superseded in that way, the mortgagee would cease to be a creditor and the mortgagor would no longer be the debtor and the mortgagee could not demand or recover the mortgage debt due to him by the mortgagor."

C The *Salman Raje's* case (supra) of the Gujarat High Court which had taken a contrary view itself came up for scrutiny before the Gujarat High Court in *Patel Ambalal Manilal & Ors. v. Desai Jagdishchandra Naginlal & Ors.*⁽¹⁾ and a learned Single Judge of that High Court relying on a decision of this Court in *Sidram Narsappa Kamble v. Sholapur Borough Municipality & Anr.*⁽²⁾ observed :

E "It appears, with great respect to the learned Judges who decided the case of *Salman Raje* (supra) that, in that case, full effect has not been given to the words "save as expressly provided in this Act" appearing in sec. 89(2)(b) of the 1948 Act and in view of the decision of the Supreme Court in the case of *S.N. Kamble* (supra), the decision of this Court in the case of *Salman Raje* cannot be considered to be a good law. It should further be remembered that, mortgagee in possession was specifically excluded from the category of deemed tenant by sec. 4(c) of the 1948 Act in order to remove the anomalies created by sec. 2A of the 1939 Act so far as mortgagee in possession is concerned and hence, it is not likely that the legislature would have intended to protect any right of a mortgagee in possession to be included in the category of a deemed tenant under sec. 2A of the 1939 Act, after sec. 4(c) of the 1948 Act containing the provision to the contrary was enacted."

H (1) 17 Guj. L.R. 578
(2) [1966] 1 SCR 618

This Court in *S.N. Kamble's* case (supra) had an occasion to consider the impact of the saving section 89(2)(b) of the Act of 1948, and held :

"...but the effect of the express provision contained in s. 88(1)(a) clearly is that s. 31 must be treated as non-existent so far as lands held on lease from a local authority are concerned and in effect therefore s. 88(1)(a) must be held to say that there will be no protection under the 1948 Act for protected tenants under the 1939 Act so far as lands held on lease from a local authority are concerned. It was not necessary that the express provision should in so many words say that there will be no protected tenants after the 1948 Act came into force with respect to land held on lease from a local authority. The intention from the express words of s. 88(1) is clearly the same and therefore there is no difficulty in holding that there is an express provision in the 1948 Act which lays down that there will be no protected tenant of lands held on lease from a local authority. In view of this express provision contained in s. 88(1)(a), the appellants cannot claim the benefit of s. 31 ; nor can it be said that his interest as protected tenant is saved by s. 89(2) (b). This in our opinion is the plain effect of the provisions contained in s. 31, s. 88 and s. 89(2)(b) of the 1948 Act."

In view of the aforesaid decision of this Court it cannot be argued for a moment that a mortgagee in possession becomes a deemed tenant under s. 2A of the Act of 1939 on the strength of the saving provision in s. 89(2)(b) of the Act of 1948. The contention of the appellants that they became deemed tenants under s. 2A of the Act of 1939 has no force and cannot be accepted.

The appellants can, however, still succeed on the ground that it was open to the plaintiff-respondent to file an application for declaration before the Mamlatdar that the defendants were not tenants, within one year of the coming into force of the Amendment Act of 1946 as provided in ss. 2A and 3A of the Act of 1939. But he did not choose to do so and, therefore, he lost whatever right he had. There is yet another ground why the plaintiff-

A respondent could not evict the defendants. A relief for actual possession from the defendants who claimed to be protected tenants could be granted only by the revenue court and not by the civil court. The plaintiff-respondent, therefore, on the basis of the decree for redemption can get only a symbolic possession and not actual physical possession for the land in dispute.

B For the foregoing discussion the appeals must succeed. They are accordingly allowed and the judgment and decrees of the High Court are set aside and that of the first appellate court is restored but on a slightly different ground. In the circumstances of the case the parties shall bear their own costs.

C
A.P.J.

Appeals allowed.