

PETITIONER:
ISHVERLAL THAKORELAL ALMAULA

Vs.

RESPONDENT:
MOTIBHAI NAGJIBHAI

DATE OF JUDGMENT:
10/08/1965

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
WANCHOO, K.N.
MUDHOLKAR, J.R.

CITATION:
1966 AIR 459 1966 SCR (1) 367
CITATOR INFO :
RF 1977 SC 915 (8)
RF 1979 SC 653 (15)
R 1985 SC 582 (31)
RF 1989 SC 558 (11)
R 1989 SC2240 (12)

ACT:
Bombay Tenancy and Agricultural Lands Act 67 of 1948-Proviso to s. 43C-Introduced by Bombay Act 13 of 1956-Whether protects tenants in suits filed after enactment of Bombay Act 33 of 1952--ss. 70 and 85-jurisdiction of Civil Courts-Scope of-Proviso-If a substantive provision.

HEADNOTE:
In June 1939, the appellant granted tenancy of certain lands for agricultural purposes, at first to the respondent's father, and later to the respondent. The tenancy was continued from year to year under fresh agreements. After serving a notice on the respondent in November 1955 to deliver vacant possession of the lands in March 31, 1956, the appellant filed a suit for ejectment. The trial court decreed the appellant's claim, but in appeal the District Judge reversed this decision -on the ground that under the proviso to s. 43C, of the Bombay Tenancy and Agricultural Lands Act 67 of 1948, the respondent was a protected tenant within the meaning of that Act, read with the Bombay Tenancy Act, 1939; and that the civil court had no jurisdiction to grant a decree for possession of the land in dispute. An appeal to the High Court was dismissed.

In the appeal to this Court,
HELD : (per Shah and Wanchoo, JJ.)

(i) The proviso to s. 43C efforts protection to the tenant if the tenant had the protection of the Act of 1948 as originally enacted, notwithstanding that the protection was taken away by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952. Protection of the proviso to s. 43C must be given to the tenant even in cases where it is claimed in a suit filed before the amending Act of 1956 was enacted, if the suit is not finally disposed of. [376 G-H]
Patel Maganbhai Jethabhai v. Somabhai Sursang, (1958) 60 Bom. L.R. 1383, approved.

The proper function of a proviso is to except or qualify something enacted in the substantive clause, which but for the proviso would be within that clause. But the question is one of interpretation of the proviso; there is no rule that the proviso must always be restricted to the ambit of the main enactment and it may at times amount to a substantive provision. [373 F, G]

(ii) The order passed by the District Judge dismissing the suit could not be sustained.

Under s. 85A, introduced into Act 67 of 1948 by Act 13 of 1956, even in a suit properly instituted in the civil court, if any issue arises which is required to be decided by the revenue court, such issue shall be referred for trial to that court, and the suit shall be disposed of in the light of that decision. The District Judge should have referred the questions relating to the tenancy and its determination which arose in the suit, to be

3 68

tried by the Mamlatdar as a revenue court and should not have proceeded to dispose of the suit. [378 C-D, H]

Pandurang Hari v. Shanker Maruti, 62 Bom. L.R. 873 and Kalicharan Bhajanlal Bhayya v. Rai Mahalaxmi and Anr., 4 Guj. L.R. 145, considered.

(per Mudholkar, J. dissenting) The benefit of the proviso to s. 43C would be available only to a person who is or claims to be a tenant or protected tenant under the Act. Under s. 70, the question whether or not a person is a protected tenant is to be determined by the Mamlatdar acting as a revenue court and by virtue of s. 85(1) no civil court has jurisdiction to consider such a claim. No sooner such a claim is made before a civil court, it must stay its hands and refer the question to the Mamlatdar, who has exclusive jurisdiction ;to adjudicate on the facts in issue between the parties as well as to determine the effect of the various provisions of law bearing on the point. [379 F-380 C]

It is not open to this court to examine for itself the various enactments, construe the provisions, and state its conclusions as to their applicability to the present case. The jurisdiction to do any of these things in an appeal of this kind is barred by the combined operation of ss. 70(b) and 85(1). [381 C]

Paika Dasaru Bhangle v. Rajeshwar Balaji Awari, (1958) Bom. L.R. 8 (F.B.), referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 210 of 1963. Appeal by special leave from the judgment and order dated April 30, 1959 of the Bombay High Court in second appeal No. 439 of 1959.

S. T. Desai, S. N. Andley, Mohinder Narain, Rameshwar Nath and P. L. Vohra, for the appellants.

S. S. Shukla, for the respondent.

The Judgment of Wanchoo and Shah, JJ. was delivered by Shah, J. Mudholkar, J. delivered a dissenting Opinion.

Shah, J. On June 18, 1939, Ishverlal Almaula-hereinafter called 'the appellant'--granted for agricultural purposes tenancy rights in land bearing Survey Nos. 52 & 158 at Kanbivaga in the town of Broach to Nagjibhai, father of the respondent, and since that date the land continued to remain in the possession of Nagjibhai and after his death of his son Motibhai By letter dated November 2, 1955 the appellant terminated the tenancy and called upon the respondent to

deliver vacant possession of the land on March 31, 1956, and filed on April 4, 1956 Suit No. 180 of 1956 in the Court of the Civil Judge, Senior Division, at Broach for a decree in ejectment against the respondent and for mesne profits. The Civil Judge decreed the appellant's claim. In appeal the District Judge, Broach reversed the decree of the Trial Court and dismissed the suit. He held that in view of the

369

proviso to s. 43C incorporated in the Bombay Tenancy and Agricultural Lands Act 67 of 1948 by Bombay Act 13 of 1956, the respondent continued by virtue of the amendment by Act 13 of 1956 to remain a tenant, and the Civil Court had no jurisdiction to grant a decree for possession of the land in dispute. In reaching that conclusion the learned Judge followed the decision of the Bombay High Court in *Patel Maganbhai Jethrbhai v. Sonzabhai Sursang*. (1) A second appeal to the High Court of Bombay was dismissed summarily. With special leave, the appellant has appealed to this Court. Counsel for the appellant raised two contentions in support of the appeal :

(1) That the rights of the respondent in the land conferred or recognised by virtue of Bombay Act 67 of 1948 were extinguished on the enactment of Bombay Act 33 of 1952, and by the amendments made by Act 13 of 1956 (which was brought into force during the pendency of the suit) (those rights were not restored to the respondent so as to prejudice the appellant's claim to evict him; and

(2) that the Civil Court was competent in the suit filed by the appellant, to grant a decree for possession of the land held by the respondent.

Facts which have a bearing on the question raised in this appeal and the relevant statutory provisions may be briefly set out. The land in dispute is situate within the limits of the Broach Borough Municipality. Nagjibhai-father of the respondent and after his death the respondent were tenants of the land since June 1939., the tenancy being continued year after year under fresh agreements. Notice calling upon the respondent to vacate and deliver possession of the land on March 31, 1956 was given in terms of s. 84 of the Bombay Land Revenue Code, 1879. The Bombay Tenancy Act 29 of 1939 was applied on April 11, 1946 to the area in which the land is situate, and the name of Nagjibhai was entered in the Record of Rights as a protected tenant under the Bombay Tenancy Act 29 of 1939 as amended by Bombay Act 26 of 1946. By the Bombay Tenancy and Agricultural Lands Act 67 of 1948, which was brought into force on December 28, 1948, the Bombay Tenancy Act 29 of 1939 stood repealed, subject to the -reservation that ss. 3, 3A and 4 of the

(1) (1958) 60 Bom. L. R. 1383.

370

repealed Act as modified by the Schedule to the repealing Act remained operative. The status of the respondent under the Bombay Tenancy Act 29 of 1939 remained, even after the repeal of that Act, protected by virtue of s. 31 of Act 67 of 1948 as originally enacted.

A tenant was defined in Act 67 of 1948 as meaning an agriculturist who holds land on lease and includes a person who is deemed to be a tenant under the provisions of the Act [s. 2(18)]. "Land" was defined by s. 2(8) as "land which is used for agricultural purposes, and includes" amongst others sites of farm buildings and sites of dwelling houses occupied by agriculturists. Section 5 of the Act provided

that no tenancy of any land shall be for a period of less than ten years, and that no tenancy shall be terminated before the expiry of the period of ten years except on the grounds mentioned in s. 14. Section 14 provided that :

"(1) Notwithstanding any agreement, usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be terminated unless such tenant"

has done acts or committed defaults specified in cls. (a) to (e). It may be sufficient to state that under s. 14 a notice calling upon the tenant to vacate and deliver possession of the land demised on the expiry of the contractual period of the annual tenancy does not operate to determine the tenancy. By sub-s. (2) of s. 29 it was enacted that a landlord shall not obtain possession of land held by a tenant except under an order of the Mamlatdar. Chapter III dealt with the special rights and privileges of protected tenants. By s. 32 it was provided that notwithstanding anything (to the) contrary in any law, usage or contract, a protected tenant shall at any time be entitled to purchase from the landlord the land held by him as a protected tenant. Section 34 prescribed certain other restrictions upon the landlord's right to determine a protected tenancy. The first sub-section gave liberty to a landlord to determine a protected tenancy notwithstanding anything contained in s. 14, by giving one year's notice in writing, if the landlord bona fide required the land, (1) for cultivating personally, or (2) for any non-agricultural use of his own purpose. The Act also provided a special forum for determination of questions required to be settled, decided or dealt with by the Act.

371

By s. 70 the duties of the Mamlatdar were specified. The section, in so far as it is material, provided :

"For the purposes of this Act, the following shall be the duties and functions to be performed by the Mamlatdar-

(a)

(b) to decide whether a person is a tenant or a protected tenant;"

Section 85 provided by its first subsection

"No Civil Court shall have jurisdiction to settle, decide, or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Bombay Revenue Tribunal in appeal or revision or the Provincial Government in exercise of their powers of control,"

and for the purpose of this section, a civil court includes a Mamlatdar's Court constituted under the Mamlatdars' Courts Act, 1906. Therefore, by Act 67 of 1948 the rights of protected tenants acquired under the Bombay Tenancy Act, 1939, were, notwithstanding the repeal of that Act, preserved, a tenancy agreement was to be for a period of not less than ten years, and the tenancy could not be determined before the expiry of the period otherwise than for reasons set out in s. 14, and possession of land demised to a tenant could not be obtained otherwise than by an order of the Revenue Court under s. 29 (2). A landlord could determine a protected tenancy on the grounds mentioned in s. 34, but a protected tenant had a right to purchase the land occupied by him. The jurisdiction of the Civil Court "to deal with or decide any question which is by or under the Act required -to be dealt with, settled or decided by" the Revenue Court

was excluded and the Revenue Courts were invested with exclusive jurisdiction for the purpose of the Act to decide several questions including the question whether a person was a tenant or a protected tenant.

When Bombay Act 67 of 1948 was brought into force in the town of Broach, the respondent acquired rights which a tenant could claim under that Act and his rights flowing from the status of a protected tenant remained expressly preserved. But the legislature thereafter enacted Bombay Act 33 of 1952 with effect from January 12, 1953 and by the amendment to s. 88 (which

372

excluded lands in certain areas and of specified descriptions from the operation of ss. 1 to 87 of the Bombay Act 67 of 1948) lands situate within all municipal boroughs constituted under Act 18 of 1925 ceased to be governed by Act 67 of 1948. Taking advantage of the amendment by Bombay Act 33 of 1952 the appellant purported to terminate as from March 31, 1956 the tenancy by a notice in accordance with s. 84 of the Bombay Land Revenue Code, 1879, and commenced an action in the Civil Court for a decree for possession. During the pendency of the action, S. 88 was again amended by Act 13 of 1956. The Legislature by that Act repealed cl. (c) of S. 88 as it stood modified by Act 33 of 1952 and restricted the exemption from the operation of the Act to lands belonging to the Government and certain other lands. The effect of the amendment was to restore to tenants of lands within certain municipal boroughs (such lands not falling within the description of lands described in s. 88 as amended and ss. 88A to 88C as inserted) the protection of the Bombay Tenancy and Agricultural Lands Act 67 of 1948 as originally enacted. It is common ground that the land with which we are concerned in this appeal is not of the description in ss. 88 and 88A to 88C of the Act as amended by Act 13 of 1956.

The Legislature also enacted by Act 13 of 1956 s. 43C which by the proviso sought to restore with retrospective effect the rights which had been previously acquired under the Bombay Tenancy and Agricultural Lands Act 67 of 1948 on or after December 28, 1948, notwithstanding that the Bombay Act 33 of 1952 had been made applicable to the area in which the land is situate. Section 43C provided:

"Nothing in sections 32 to 32R (both inclusive) and 43 shall apply to lands in the areas within the limits of-

- (a) Greater Bombay,
- (b) a municipal corporation constituted under the Bombay Provincial Municipal Corporation Act, 1949,
- (c) a municipal borough constituted under the Bombay Municipal Boroughs Act, 1925,
- (d) a municipal district constituted under the Bombay District Municipal Act, 1901,
- (e) a cantonment, or

373

.lm15

(f) any area included in a Town Planning Schedule under the Bombay Town Planning Act, 1954 :

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 Act has been made applicable to the area in which

such land is situate."

The decision in this appeal must primarily depend upon the meaning and effect of the proviso to s. 43C. The enactment of the proviso, it may be observed, illustrates how clumsy drafting obscures the meaning of a statute. The proviso appears to be entirely out of place in the scheme of the substantive part of s. 43C, which excludes from the operation of ss. 32 to 32R and 43, lands in the areas specified in cls. (a) to (f), and cl. (c) specifies one of such areas as "a municipal borough constituted under the Bombay Municipal Boroughs Act, 1925". Sections 32 to 32R as inserted by Act 13 of 1956 deal with the purchase of lands held by tenants on April 11, 1957, and to related matters and s. 43 imposes restrictions on the transfer of lands purchased by virtue of the right reserved under ss. 32, 32F or 32-0 or sold under ss. 32-P or 64 of the Act.

The proper function of a proviso is to except or qualify something enacted in the substantive clause, which but for the proviso would be within that clause. It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the section would have included the subject-matter of the proviso. But the question is one of interpretation of the proviso : and there is no rule that the proviso must always be restricted to the ambit of the main enactment. Occasionally in a statute a proviso is unrelated to the subject-matter of the preceding section, or contains matters extraneous to that section, and it may have then to be interpreted as a substantive provision, dealing independently with the matter specified therein, and not as qualifying the main or the preceding section.

By the substantive clause of s. 43C the tenants do not acquire in respect of lands described therein rights conferred by ss. 32 to 32R : that part of s. 43C is therefore in the nature of a qualification or an exception, and functions as a proviso to ss. 32 to

37 4

32R. The proviso to s. 43C goes on, not to carve out an exception or to impose a qualification to the exclusion prescribed by the main enactment, but deals with a matter which is unrelated thereto. In tern-is it seeks to protect rights acquired or arising not under ss. 32 to 32R (which were added by Act 13 of 1956) but under the principal Act 67 of 1948 on or after December 281, 1948, and those rights are protected not from the operation of the substantive part of s. 43C, but from the operation of Act 33 of 1952, or of "the Amending Act of 1955". It may be recalled that by Act 33 of 1952, the Act ceased to apply to land within the municipal boroughs, but the intention disclosed by the proviso to s. 43C was to declare that all rights acquired by persons as tenants under the principal Act were to continue to remain available to them in respect of lands within the Municipal Boroughs as if Act 33 of 1952 were never enacted. The "Amending Act of 1955" is no other than Act 13 of 1956 [see the definition of "permanent tenant" in s. 2 (10A) added to the principal Act and s. 1(1) of Act 13 of 1956]. The Legislature has by referring to the "Amending Act of 1955" sought also to protect, save as expressly provided in s. 43D, the rights acquired under Act 67 of 1948, notwithstanding the amendments made by Act 13 of 1956. By s. 48 of Act 13 of 1956, the scheme of exemption from the operation of the Act of certain provisions thereof was extensively amended in respect of different classes of land. Section 88 of Act 67 of 1948 as originally enacted substituted by ss. 88, 88A, 88B, 88C & 88D. But this modified scheme of exemption and other provisions of the Act

were by virtue of the proviso to s. 43C not to affect the rights of tenants acquired on or after December 281. 1948 under Act 67 of 1948, same as expressly provided by s. 43D. Counsel for the appellant, however urged that even if the proviso to s. 43C be read as dealing substantively with matters specified therein, it does not come to the aid of the respondent, because at the date when Act 13 of 1956 was enacted, the tenancy of the respondent stood determined according to law, as it then applied to the land, and the respondent had ceased to be a tenant. In the absence of express enactment to the contrary, said counsel, the rights of the appellant to obtain possession of the land according to the law prevailing, from a person who was at the date of the suit not a tenant, could not be deemed to be restricted by the enactment of Act 13 of 1956. In support of this contention, counsel strongly relied upon s. 89(2)(b) of Act 67 of 1948 which provided:

375

"But nothing in this Act or any repeal effected thereby-

(a)

(b) shall save as expressly provided in this Act, affect or be deemed to affect,

(i) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(ii) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act, and any such proceedings shall be continued and disposed of, as if this Act was not passed."

In our view sub-s. (2) of s. 89 which incorporates, with some variations, the provisions found in s. 7 of the Bombay General Clauses Act 1 of 1904, relating to the operation of provisions which repeal statutes, has no relevance in considering the effect of the amendments made by Act 13 of 1956. Sub-section (2) of s. 89 in terms protects (save as expressly provided in the Act) right, title, interest, obligation or liability acquired, accrued or incurred "before the commencement of this Act" i.e. Act 67 of 1948, and it also protects legal proceedings or remedies in respect of any such right, title, interest, obligation or liability or anything done or suffered "before the commencement of this Act". The appellant does not seek to enforce a right acquired before the Act 67 of 1948 was enacted, and a suit instituted for a decree for possession of lands pursuant to a determination of tenancy by a notice in 1956 is not a suit in respect of a right or title acquired or accrued "before the commencement of this Act" within the meaning of s. 89(2). The argument of counsel is based on the assumption that the expression commencement of this Act means commencement of Act 13 of 1956, but for that assumption there is no warrant in the language of the statute.

The alternative contention of counsel for the appellant that by virtue of s. 7 of the Bombay General Clauses Act 1 of 1904 also legal proceedings to enforce rights acquired before Act 13 of 1956 was passed were saved, has no force. By s. 7 of the General Clauses Act the repeal of an enactment shall not inter alia affect any right, privilege, or liability acquired, accrued or incurred under any enactment so repealed or affect any investigation. legal

proceeding or remedy in respect of any such right,

376

privilege, obligation, liability etc. and any such investigation, legal proceeding or remedy may be instituted or continued or enforced as if the repealing Act had not been passed. Act 13 of 1956 may in so far as it seeks to substitute the new sections 88 and 88A to 88D for the old section 88 be regarded as a repealing enactment. Section 7 of the Bombay General Clauses Act, however, applies only if a different intention does not appear, and a different intention clearly appears from the terms of the proviso to s. 43C which state that the rights acquired by a person as a tenant under Act 67 of 1948 on or after December 28, 1948 are not to be deemed affected by Act 33 of 1952. The proviso therefore by express enactment saves the rights acquired under Act 67 of 1948 before Act 33 of 1952 was enacted.

The respondent became on the enactment of Act 67 of 1948 entitled as a tenant to the diverse rights conferred by that Act. The right to claim that every contractual tenancy is statutorily extended for a period of ten years, the right to claim that the tenancy may not be determined otherwise than in circumstances mentioned in s. 14, and in case of protected tenants subject to restrict jobs imposed by s. 34, the right not to be deprived of possession otherwise than by an order under s. 29(2), were some of those rights vested in the respondent before Act 33 of 1952 was enacted. These and other rights were restored to the tenants retrospectively from the date on which Act 33 of 1952 was enacted by virtue of the express provision contained in the proviso to s. 43C. The Legislature having restored the rights originally granted under Act 67 of 1948 with retrospective operation from the date on which Act 33 of 1952 was enacted, a person sued, before Act 13 of 1956 was brought into force, could in a pending suit set up the defence that he is entitled to the rights of a re. ant or a protected tenant.

In Patel Maganbhai Jethabhai's case(x) the Bombay High Court held that the proviso to s. 43C affords protection to the tenant if the tenant had the protection of the Act of 1948 as originally enacted, notwithstanding that the protection was taken away by the Bombay Tenancy and Agricultural Lands (Amendments) Act, 1952. The Bombay High Court also held that the protection of the proviso to s. 43C must be given to the tenant even in cases where it is claimed in a suit filed before the amendment was enacted, if the suit is not finally disposed of. We agree with the Bombay High Court on both the questions decided in Patel Maganbhai Jethabhai's case. (1).

(1) (1958) 60 Born. L.R. 1383.

37 7

But the order passed by the District Judge dismissing the suit, cannot be sustained. The learned District Judge passed the order of dismissal of the suit, presumably because a similar order was passed in Patel Maganbhai Jethabhai's case.(1) It was assumed in Patel Maganbhai Jethabhai's case(1) that the Mamlatdar in whose Court the suit was instituted was competent to decide the various issues relating to the rights claimed by the tenant. It is not clear from the judgment in Patel Maganbhai Jethabhai's case(1) whether the suit was instituted in the Court of the Mamlatdar exercising his power under s. 5 of the Mamlatdars' Courts Act 2 of 1906. By s. 85 of Act 67 of 1948 a Mamlatdar's Court constituted under Act 2 of 1906 is a Civil Court, whereas a Mamlatdar exercising powers under s. 29(2) is a Revenue Court. In the present case, the suit was

properly entertained by the Civil Court but since the enactment of Act 13 of 1956 the Civil Court could not try certain issues arising therein, because those issues were triable by virtue of s. 70 of Act 67 of 1948 exclusively by the Revenue Court. There is, however, nothing in Act 67 of 1948 which prevents continuation of the suit already instituted. In such a suit the issues exclusively triable by the Revenue Court by the combined operation of ss. 70 & 85 will have to be tried by the Mamlatdar as a Revenue Court, and a decree in ejectment against a tenant may, since the enactment of Act 13 of 1956, not be made by the Civil Court. The proper procedure in such a case is that the Civil Court should refer to the Revenue Court all such issues as are triable exclusively by that Court by virtue of the combined operation of ss. 70 & 85. The Civil Court may then pass such decree or order as is consistent with the adjudication of the Revenue Court. If the Revenue Court is of the view that the relation of landlord and tenant subsisted and the tenancy had been duly determined in the manner provided by s. 14 or by s. 34 if the tenant is a protected tenant, it may be necessary to obtain from the Revenue Court in an appropriate proceeding an order under s. 29(2).

It may be pertinent in this connection to refer to s. 85A which was added by Act 13 of 1956, The section, insofar as it is material, provided :

"(1) If any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as the "competent authority") the

(1) [1958] 60 Bom. L.R. 1383.

3 7 8

Civil Court shall stay the suit and refer such issues to such competent authority for determination.

(2) On receipt of such reference from the Civil Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

Explanation.-For purpose of this section a Civil Court shall include any Mamlatdar's Court constituted under the Mamlatdars' Courts Act, 1906."

Whatever may have been the position before Act 13 of 1956, the Legislature has clearly expressed its intention that even in a suit properly instituted in the Civil Court, if any issue arises which is required to be decided by the Revenue Court, the issue shall be referred for trial to that Court, and the suit shall be disposed of in the light of that decision. The Legislature has therefore clearly expressed itself that issues required under Act 67 of 1948 to be decided by a Revenue Court, even if arising in a civil suit must be decided by the Revenue Court and not by the Civil Court. The view expressed by the Bombay High Court in Pandurang Hari v. Shanker Maruti(1) and by the Gujarat High Court in Kalicharan Bhaianlal Bhayya v. Bai Mahalaxmi widow of Trikamlal & Another, (2) that a suit properly instituted in the Civil Court before Act 13 of 1956 is not liable to be dismissed merely because the rights acquired by tenants

under Act 67 of 1948 are retrospectively restored is correct, but we are unable to agree with the Bombay and the Gujarat High Courts that the Civil Court is competent to adjudicate upon the issues which are by Act 67 of 1948 required to be decided by the Revenue Court.

The finding recorded by the District Judge that the Civil Court had no jurisdiction to hear the suit and the ultimate order passed by him dismissing the plaintiff's suit are therefore not strictly accurate. If the appellant desired that the questions relating to the tenancy and its determination, which arose in the suit be tried by the Mamlatdar as a Revenue Court, which that authority alone was competent to decide, the District Judge should have referred to the Revenue Court those questions for determination and should not have proceeded to dispose of the suit. We accordingly set aside the decree passed by the High Court and the

(1) 62 Bom. L. R. 873.

(2) 4 Guj, L. R. 145.

37 9

District Court and direct that the District Court do restore the appeal to its original number and do proceed according to law.

It appears that before the District Court the appellant had conceded that the suit may in view of the judgment of the Bombay High Court in Patel Maganbhai Jethabhai's case(1) be dismissed, and he requested the District Court not to pass an order for costs against him. In the circumstances of the case, we direct the appellant's legal representatives to pay the costs of this appeal to the respondent. The costs in the District Court will abide the event.

Mudholkar, J. The facts as well as the two points raised in the argument before us appear in the judgment prepared by my brother Shah and need not be repeated. I agree with him that the District Court was in error in allowing the appeal and dismissing the present appellant's suit for possession of the land in suit. In that suit the appellant's case was that he had terminated the respondent's tenancy by giving him an appropriate notice to quit. The substantial plea of the respondent was that his tenancy was governed by the Bombay Tenancy and Agricultural Lands Act, 1948 as it stood on the date of suit and that the combined effect of ss. 70 and 85 of that Act was to deprive the civil court of its jurisdiction to entertain the suit.

In the arguments before us reliance was placed on his behalf in particular on the proviso to s. 43C which was added by amendment Act 13 of 1956. The learned counsel on the other side had claimed the benefit of the provisions of s. 89(2)(h) of the Act which seeks to preserve certain rights, titles etc., and exempts them from the operation of the Act. The benefit of the proviso to s. 43C of the Act would be available only to a person who is or claims to be a tenant or protected tenant under the Act. That in turn would depend upon the effect of the various amendments to the Act made after its enactment in 1948 till the date of suit, including the effect of s. 89(2)(h) of the Act. Section 70 of the Act, however, provides that one of the duties to be performed by the Mamlatdar (who acts as a revenue court) is to decide whether a person is a tenant or a protected tenant. Obviously this must mean a claim to be a tenant or a protected tenant under the Act. Section 85 (1) provides :

"No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with

(1)[1958] 60 Bom. L.R. 1383.

380

by the Mamlatdar or Tribunal, a Manager, the Collector or the Maharashtra Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of control."

It would be seen from the two aforesaid provisions that no sooner such a claim is made before a Civil Court it must stay its hands and refer that question to the Mamlatdar, acting as a revenue court for his decision [see Paika Dasaru Bhonglee v. Rajeshwar Balaji Awari(1)]. In order to answer it, the Mamlatdar will have to adjudicate on the facts in issue between the parties as well as to determine the effect of the various provisions of law bearing on the point. He gets exclusive jurisdiction to do so by the combined operation of the two provisions aforesaid in view of the fact that a person claims to be a tenant or protected tenant. If the Mamlatdar finds that he is a tenant or a protected tenant he has to send his finding to the Civil Court which has to decide the suit in the light of that finding. If, on the other hand, his finding is to the contrary, the civil court will have to decide the suit on the basis that the person does not possess the status claimed by him. Initially, therefore, the matter has to be decided by the Mamlatdar and subject to the result of any appeal or revision under the Act his decision will be final. I would, however, make it clear that when I say this I am not considering whether finality attaches to a decision of the Mamlatdar as to a jurisdictional fact.

The question required by the Act to be decided by the Mamlatdar may be one of fact only or as is the case in the appeal before us, a mixed question of fact and law. The civil court before which the suit was brought raised the following issues bearing upon it

(2) Whether the provisions of Bombay Tenancy and Agricultural Lands Act would be applicable to the suit Survey Numbers ?

(3) Whether this Court has no jurisdiction to entertain suit in view of section 85 of the Bombay Tenancy and Agricultural Lands Act ?

(5) Whether defendant proves that he is a permanent tenant of the suit land

(1) [1958] Bom. L.R. 8(F.B.)

381

The first and third of these had to be decided by the Mamlatdar and the second by the Civil Court in the light of the findings of the Mamlatdar on the other two issues. The limitations placed on the jurisdiction of the Civil Court would necessarily extend to the entire hierarchy of courts, including this Court before which the decision of the Civil Court can be challenged in appeal. It is in the light of this legal position that I hold that the District Court could not dismiss the appellant's suit. What this Court can, however, do is only to set aside the judgment of the District Court and remand the suit to the Civil Court with the direction that issues Nos. 2 and 5 be remitted to the Mamlatdar for his findings. It is not open to this Court to examine for itself the various enactments, construe the provisions and state its conclusions as to their applicability to the case before us. The jurisdiction to do any of these things in an appeal of the kind before us is, in my view, barred by the combined operation of ss. 70(b) and 85(1) of the Act.

I would, therefore, allow the appeal, set aside the judgment of all the courts below and remit the suit to the court of

first instance with the direction that it should remit issues 2 and 5 to the Mamlatdar for decision and upon receiving his findings, decide the suit on the basis of his findings. I would further direct that costs so far incurred shall be costs in the suit and shall abide the final decision of the lis.

ORDER

In accordance with the opinion of the majority the decree passed by the High Court and the District Court is set aside and the appeal remanded to the District Court with the direction that it do restore the appeal to its original number and do proceed according to law. Appellant's legal representatives will pay the costs of this appeal to the respondent. Costs in the District Court will abide the event.

Sup.CI/65---10

382