APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Gokhale.

1955 Sept. 6

GODAVARIBAI JAYARAM ZOPE, PETITIONER *v.* KASHIRAM KAUTIK FALAK AND OTHERS, RESPONDENTS.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948) ss. 34, 37, 38, 39, 63—Landlord obtaining possession of land on ground of personal cultivation—Landlord exchanging the land for another land—Transferee cultivating the land personally—Whether tenant entitled to be restored to possession—Bar of transfer to non-agriculturists under s. 63, effect of.

A landlord obtained possession of his land from his tenant under s. 34 of the Bombay Tenancy and Agricultural Lands Act, 1948, on the ground that he *bona fide* required it for personal cultivation. He then exchanged it for another land. The tenant made an application under s. 39 of the Act to be restored to possession of the land on the ground that the landlord had failed to use the land for the purpose for which he had obtained possession. On the question whether the tenant was entitled to possession even when the transferee was cultivating the land personally,

Held, (*i*) that the landlord having obtained possession of the land on the representation that he required the land *bona fide* for his personal cultivation he was bound under s. 37 of the Act to carry out that representation and on his failure to do so the tenant was entitled to be restored to possession even by the transferee who cultivated the land personally, and (*ii*) that s. 63 of the Act which barred transfers of lands to non-agriculturists had not the effect of validating transfers to agriculturists which were prohibited under other provisions of the Act.

Special Civil Application under art. 227 of the Constitution of India.

The facts are sufficiently set out in the Judgment.

R. B. Kotwal, for the Petitioner.

G. S. Raisinghani, for Respondent No. 1.

Gajendragadkar J.—This is an application for the issue of a writ under art. 227 of the Constitution of India and it raises an interesting question as to the effect of the provisions contained in s. 37 of the Bombay Tenancy and Agricultural Lands Act, 1948. The land in question is S. No. 322/1. It originally belonged to Shankar Bhavsar. Shankar Bhavsar gave notice to his tenant under s. 34 of the Act. Subsequent to the notice he obtained possession of the land from the tenant on the ground that he required the said land *bona fide* for his personal cultivation. The order in favour of the landlord was passed on July 30, 1951. Thereafter the landlord exchanged this land for another land. Godavaribai w/o Jayaram Zope gave a land of her own to the landlord and obtained the present land in lieu of it for herself. The tenant then moved the Mamlatdar under s. 37 of the Act. He alleged that since the landlord had ceased to cultivate the land personally an order should be passed against the

*Special Civil Application No. 1382 of 1955.

landlord directing him to restore possession of the land to the tenant. This application was made under s. 39 of the Act. The Mamlatdar did not accept the contention of the tenant and dismissed his application. On appeal, the tenant's plea prevailed. The District Deputy Collector held that the landlord had failed to comply with his undertaking that he wanted to cultivate the land personally and that s. 37 could, therefore be invoked by the tenant. On this view an order was passed for the restoration of the land to the tenant. This order was challenged by Godavaribai by preferring a revisional application to the Revenue Tribunal. The Revenue Tribunal, however, concurred with the view taken by the appellate authority and dismissed the revisional application. It is against this order that the present application has been filed by Mr. Kotwal.

The material facts are not in dispute. It is common ground that the land originally belonged to Shankar Bhavsar and that he obtained possession of the land under s. 34 of the Act on the ground that he *bona fide* wanted to cultivate the land personally. It is also common ground that within about a year after the landlord obtained possession of the land he exchanged this land with Godavaribai. It is not disputed that Godavaribai is personally cultivating the land herself. On these facts the question which has been raised by Mr. Kotwal for our decision in the present application is, whether the Revenue Tribunal was justified in allowing the tenant to invoke the provisions of s. 37, sub-s. (*1*) of the Act in his favour. Mr. Kotwal contends that his client, being a transferee from the original landlord, has no doubt stepped into his shoes and he concedes that if it was shown that his client herself was not cultivating the land personally it would be open to the tenant to invoke the provisions of s. 37 of the Act. So long as the original landlord or his successor-in-interest is cultivating the land personally, the provisions of s. 37, sub-s. (*1*) cannot be availed of by the tenant. In support of his argument Mr. Kotwal has relied upon the provisions of s. 63 of the Act and he contends that there is nothing in the provisions of s. 63 which imposes upon the landlord any disability in the matter of selling, gifting, exchanging or leasing the land in question.

In assessing the value of these contentions it would be material to examine the scheme of the material provisions of the Act. The rights of protected tenants in respect of agricultural lands have been safeguarded by the Act in several particulars. Section 34, however, provides for the determination of a protected tenancy. Under this section it is open to the landlord to determine the protected tenancy of his tenant by giving him one year's notice in writing stating therein the reasons for such determination. Section 34, sub-s. (*1*), authorises the landlord to determine the tenancy of the protected tenant for two reasons.

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He may determine the tenancy if he *bona fide* requires the land for cultivating personally. He may likewise determine the said tenancy if he *bona fide* requires the land for any non-agricultural use for his own purpose. There is a further provision contained in this section which must be considered. The right given to the landlord to determine the protected tenancy cannot be exercised by him at the date on which the notice is given or at the date on which the notice expires the landlord has been cultivating personally other lands, admeasuring 50 acres or more in area. In other words, if the landlord is cultivating personally agricultural lands admeasuring 50 acres or more, he cannot avail himeslf of the right given to landlords in general for determining the protected tenancy under s. 34, sub-s. (*1*). It would be noticed that the landlord has to satisfy the Revenue Court that he does not cultivate personally other lands admeasuring 50 acres or more, and that he wants the land for either of the two purposes mentioned in s. 34, sub-s. (*1*). It is only when the Revenue Court is satisfied that he is otherwise not in possession of lands admeasuring 50 acres or more for personal cultivation that the protected tenant's rights are allowed to be determined. It is true that this section refers to the determination of protected tenancy. But the determination of the permanent tenant's rights, for which provision has been made in s. 34, sub-s. (*1*), can in one sense be described as a suspension of the tenant's rights. Section 37 provides virtually for the revival of the said rights. If it appears that after obtaining possession of the land from the protected tenant the landlord fails to use the land for any of the purposes specified in the notice given by the landlord under sub-s. (*1*) of s. 34 within one year from the date on which he took possession of the land or that the landlord has ceased to use it at any time for any of the aforesaid purposes within 12 years from the said date, then the landlord is required forthwith to restore possession of the land to the tenant whose tenancy had been determined by him. This provision indicates that when the landlord represents to the Revenue Court that he wants possession of his agricultural land from his protected tenant on the ground that he *bona fide* needs the said land for personal cultivation, it is required of him that he must begin to use the land for personal cultivation within one year from the date of dispossession of the tenant and he must continue to use the said land for personal cultivation for 12 years thereafter. Failure to comply with either of these two conditions entitles the tenant to claim back possession of the land. It is true that s. 37 provides that it is open to the tenant to give up this right. If, for instance, the tenant refuses in writing to accept the tenancy on the same terms and conditions, it would be open to the landlord to continue in possession of the said land, despite the fact that he may

have ceased to use the land for any of the purposes mentioned by him in his notice given under s. 34, sub-s. (*1*). Sub-section (*2*) of s. 37 provides that when possession of the land is restored to the tenant under sub-s. (*1*) of s. 37, he shall, subject to the provisions of this Act, hold such land on the same terms and conditions on which he held it at the time his tenancy was terminated. It is because of the provisions contained in sub-s. (*2*) of s. 37 that it would be possible to describe the determination of the protected tenancy under s. 34 as amounting to suspension. Sub-section (*3*) of s. 37 lays down that if the landlord fails to restore possession of the land as provided in sub-s. (*3*), he shall be liable to pay such compensation to the tenant as may be determined by the Mamlatdar for the loss suffered by the tenant on account of eviction. Section 39 provides for an application which can be made by the tenant for restoration of possession of the land under the provisions of s. 37 of the Act. Now, if one reads ss. 34 and 37 together, there appears to be no doubt as to what the object of the Legislature was in enacting these provisions. Though the effect of the general provisions of the Act is to protect the rights of protected tenants, Legislature conceded to the landlord the right to determine protected tenancy in two specified cases, subject to the proviso which I have already indicated. Legislature appears to have taken the view that if the landlord *bona fide* requires his own agricultural land for cultivating it personally or for any non-agricultural use for his own purpose, his superior right as landlord should be allowed to be effective, and the protected tenant's rights must submit to the said superior right of the landlord. But the determination of the protected tenant's rights is allowed to be brought about on the assumption that the requirement set out by the landlord in his notice in *bona fide,* and that postulates that the landlord honestly and in truth wants to cultivate the land personally. Legislature has therefore provided an additional safeguard in the interests of the protected tenant, by requiring the landlord to begin using the land for the purpose mentioned by him in his notice within one year from the date when he obtained possession and to continue to use the land for the said purpose for as many as 12 years. So long as the 12 years mentioned in s. 37, sub-s. (*1*), have not expired, the tenant is entitled to require the landlord to carry out the representation made by him in his notice, and if it appears that the landlord is not carrying out the object mentioned by him in his notice the tenant is given the right to claim back possession of the land. It is thus the representation made by the landlord that he wants the land *bona fide* for his own personal purpose, which is the sole basis for determining the protected tenancy.

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If that is the true position, then it would be difficult to press into service s. 63 of the Act in the manner suggested by Mr. Kotwal. It is true that s. 63 purports to bar transfers to non-agriculturists. But the section begins with the clause, which cannot be ignored, viz. "Save as provided in this Act." The section says :

"Save as, provided in this Act, (*a*) no sale....., gift, exchange or lease of any land or interest therein, or (*b*) no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee, shall be valid in favour of a person who is not an agriculturist."

The prohibition is against the transfer of agricultural lands in favour of a non-agriculturist. But the prohibition is without prejudice to the other provisions contained in the Act itself. If the effect of the provisions contained in s. 37 is to require the landlord to cultivate the land personally for 12 years, after the date on which he obtains possession, then it would be difficult to accept the argument that the landlord can immediately after obtaining possession gift the land to somebody or exchange the land with the land of somebody else or even lease it to a new tenant. According to Mr. Kotwal, it would be competent to the landlord who has obtained possession of the land under s. 34 to lease the land to some other tenant straightway. Mr. Kotwal concedes that if the transfer in question is fraudulent, it may be a different matter. But on his agrument, if the landlord feels that he cannot personally cultivate the land any longer he may lease out the land to some other tenant. The case of a lease emphasises effectively how the provisions of s. 37 would be completely frustrated, if Mr. Kotwal's argument under s. 63 were to prevail. A landlord can obtain possession of his land from a protected tenant on the representation that he wants to cultivate the land personally and then he may proceed to lease it out to some other tenant. In our opinion, this cannot be the true position under s. 63 of the Act. What is true of the lease is equally true of the gift. If the landlord represents to the tenant in his notice that he *bona fide* needs the land for either of the two purposes personally, s. 37 binds him to that representation and requires him to remain faithful to that representation and carry it out for the 12 years prescribed under s. 37, sub-s. (*1*).

There is another point which is relevant in this connection. In the present case, the landlord obtained possession of the land because he satisfied the Revenue Court that he wanted the land for personal cultivation and that he was not in possession of other agricultural lands which were under his cultivation and which admeasured 50 acres or more. It is not unlikely that the transferee may not satisfy either or both of these conditions. If the transferee is already in possession of more than 50

acres of land and is cultivating them personally, on Mr. Kotwal's argument he would be entitled to remain in possession of the additional land purchased by him or obtained by him in exchange or gift, even though one of the requirements of s. 34 cannot be said to be true about him. In other words, if the contention raised by Mr. Kotwal is accepted, it would easily lead to the circumvention of the beneficial and important provisions of s. 34. Mr. Kotwal has argued that if the word 'landlord' is not construed as including his successor-in-interest, it may lead to the anomaly that if the landlord dies his sons or his other heirs may be called upon to give back possession of the land to the original protected tenant. We are not impressed by this argument. Section 38 of the Act seems to provide for circumstances in which the heirs of the deceased landlord can be said to be in personal cultivation. Besides, the definition of the expression "to cultivate personally" includes cultivation by the labour of any member of one's family. If a landlord obtains possession of agricultural land from his protected tenant on the ground that he needs it *bona fide* for his personal cultivation and he dies thereafter, it would not be difficult to hold that the heir of the landlord steps into the shoes of the original landlord, and if he is personally cultivating the land he could not be called upon to deliver the land back to the tenant on the ground that the original landlord who obtained an order for possession has died. In our opinion, it would not be difficult to draw a distinction between titles which devolve by succession and titles which devolve by transfers, as contemplated by s. 63 of the Act. We must, therefore, hold that the Tribunal was right in coming to the conclusion that the tenant was entitled to an order for possession of the land under s. 37 of the Act.

Mr. Kotwal has, however, urged another argument in support of his contention that the order of the Tribunal should be revised by us under art. 227 of the Constitution of India. Mr. Kotwal contends that the transfer by which the present petitioner has come into possession of the land is invalid, the transferee cannot be said to have stepped into the shoes of the transferor and would be regarded as a trespasser. This point was not raised before the Tribunal and even if there was any substance in the point, that itself would not justify our issuing a writ as claimed by Mr. Kotwal. But, apart from this consideration, the answer to Mr. Kotwal's plea is to be found in the provisions contained in ss. 84 and 85 of the Act. Under s. 84, any person unauthorisedly occupying or wrongfully in possession of any land can be subjected to the process of summary eviction. This section deals with three classes of cases and it authorises the Collector to summarily evict persons falling in the said three classes of cases. Therefore, in our opinion, on the last

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contention raised by Mr. Kotwal, it cannot be held that the order passed by the Revenue Tribunal suffers from a patent infirmity on the question of jurisdiction.

The result is, the application fails and the rule is discharged with costs.

Application dismissed.

K. B. S.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

1955
Sept. 22

THE COMMISSIONER OF INCOME-TAX ACT/EXCESS PROFITS TAX, BOMBAY CITY I, BOMBAY, APPLICANT *v.* LATE SIR HOMI MEHTA BY THE EXECUTORS OF HIS ESTATE, RESPONDENT.*

Indian Income-tax Act (XI of 1922), s. 4—Sale of shares by individuals to themselves constituted into private limited Company—For purposes of such transfer such shares valued at current market price—Such market value being higher than their cost price—Whether difference between valuation price and cost price was profit accruing to transferer and liable to tax?

H. M., assessee, who was holding certain shares jointly with his sons transferred them to a newly formed private limited Company of which he and his sons were the only shareholders and got in lieu thereof shares of such Company. The shares for the purpose of such transfer were valued at Rs. 40,97,000 which was the market value of the shares at the date of the transfer, though the cost price of the shares was Rs. 30,45,017 only. The Taxing Department held Rs. 10,51,983 being the difference between the valuation price and the cost price of shares liable to tax in the hands of H. M. as profits accruing to him on such sale. On appeal to the Income-Tax Appellate Tribunal, the Tribunal held that no profit accrued to the assessee on the transfer of shares to the Company. On reference,

Held, that the result of the formation of the private limited Company and the so-called transfer of the shares to such Company was that the shares instead of being held by H. M. and his sons jointly in their individual capacity were held by those very persons constituted into a private limited Company. Thus in effect H. M. and his sons as individuals sold the shares to themselves constituting a legal entity and taking the form of a limited Company. And where the sale is by vendors to themselves, there can be no profit subject to tax.

Held, further, that the valuation put on the shares was a mere book-entry whereby no real profits from the commercial point of view accrued to the assessee. And the mere fact that the shares which were transferred had a market value at the date of the transfer higher than their cost price did not make the assessee liable to tax on the difference.

Held, therefore, that on the transfer of the shares no income liable to tax accrued to the assessee.

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*Income-tax Reference No. 12 of 1955.