

PETITIONER:
PATHAN MURTAZAKHAN DADAMKHAN AND ORS.

Vs.

RESPONDENT:
PATHAN PIRKHAN AMDUMIYAN (DEAD) BY LRS.

DATE OF JUDGMENT 23/03/1993

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
SAHAI, R.M. (J)

CITATION:
1993 AIR 1750 1993 SCR (2) 578
1993 SCC Supl. (2) 518 JT 1993 (3) 615
1993 SCALE (2) 399

ACT:
Code of Civil Procedure, 1908.
Section 100-Second appeal-Raising of fresh plea during-
Permissibility of.
Section 9-Civil Courts-Bar of jurisdiction.
Bombay Tenancy Act, 1939. Sections 24, 85-A.

HEADNOTE:
The appellants' predecessor was inducted as an usufructuary mortgagee of certain fields. On the expiry of redemption period the respondents filed a suit for redemption which was decreed subject to payment of damages for improvements. On appeal, the District Court confirmed the redemption decree but set aside the decree for damages. In second appeal, the appellants raised a new plea: that they were deemed tenants by operation of Section 2-A of the Bombay Tenancy Act, 1939. It was also contended on their behalf that Section 85-A of the Act ousted the jurisdiction of the Civil Court to decide the dispute of tenancy rights in pending suit. Rejecting both the contentions the High Court confirmed the decree of the appellate court. Against the judgment of the High Court an appeal was filed in this Court. Dismissing the appeal, this Court,
HELD: 1. The plea based on Section 2-A was sought to be raised for the first time in second appeal before the High Court. It was neither raised in the pleadings nor argued either before the trial Court or the appellate court. Therefore, the High Court rightly did not permit the appellants to raise the plea of a deemed tenancy as the said claim needs investigation based on factual foundation which was lacking. Consequently, the question whether under Section 85-A the Civil Court had jurisdiction or not need not be gone into. [580 D-E, 579 F]
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Salman Raje v. Madhavsang Benesang I.L.R. 1963 Guj. 722, cited.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1890 of 1974.

From the Judgment and Order dated 6.8.1973 of the Gujarat High Court in Second Appeal No.98 of 1973.

M.V. Goswami for the Appellants.

S.K. Dholakia and P. Narasimhan for the Respondents.

The following Order of the Court was delivered:

This appeal under Article 136 is against the judgment of the High Court of Gujarat in Second Appeal No.98 of 1973 dated August 6, 1973. The appellants' predecessor was inducted in Field Nos.439 and 676 as, an usufructuary mortgagee in the year 1945. On expiry of the period of redemption prescribed therein, that is, 25 years, the suit for redemption was filed in 1970 by the respondents. The trial court decreed the suit subject to payment of damages for improvements. On appeal, the District Court confirmed the decree for redemption but set aside the decree for damages. In second appeal, the High Court confirmed the decree of the appellate court. Thus this appeal.

In the High Court, the appellants sought two contentions, namely, by operation of Section 2-A which was brought by way of amendment of Section 48 to the Bombay Tenancy Act, 1939, the mortgagee became a deemed tenant. It was not permitted to argue as is not a pure question of law but is a mixed question of law and fact which need investigation of facts. It was neither raised in the pleadings nor argued either before the trial court or the appellate court. Therefore, the question raised in the second appeal for the first time was disallowed. The second question namely, the jurisdiction of the civil court to declare the tenancy rights by operation of the Amendment Act 5/73 which brought Section 85-A on statute with retrospective effect. It ousted the jurisdiction of the civil court to decide the dispute of tenancy rights in pending suit. This contention too was negatived as when the Amendment Act came into force, the second appeal was pending and therefore the High Court held that the civil court was not ousted to exercise the jurisdiction and to refer the matter to the Revenue Court for jurisdiction for adjudication whether the appellants

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were or were not deemed tenants. The same contention was reiterated before us. Placing reliance on a Division Bench judgment of the Gujarat High Court in *Salman Raje v. Madhavsang Benesang*, reported in ILR 1963 Guj.722, Shri M.V. Goswami, the learned counsel for the appellants contended that by operation of Section 2-A, the appellants are deemed tenants. Once the appellants are deemed tenants, the Revenue Court has to decide that issue. The second appeal is a continuation on the suit and therefore, the High Court is not right in rejecting the claims of the appellants. It is not necessary to express any opinion on the correctness of the judgment of the Division Bench of the Gujarat High Court. Suffice it to say that the appellants had not specifically pleaded that the appellants are deemed tenants by operation of Section 2-A of the Act. What was pleaded in the written statement was that initially the appellants' predecessor was continuing as cultivating tenant. But by virtue of the mortgage, their tenancy right merged in the right as usufructuary mortgagee. On redemption pre-existing tenancy rights get revived. But that plea was not pursued. A new plea based on Section 2-A was sought to be raised for the first time in the High Court. The High Court rightly did not permit the appellants to raise the plea of a deemed tenancy as the said claim needs investigation based on factual foundation which was lacking. Once the right of tenancy is not permitted to be raised, the question of construction of Section 85-A whether the Civil Court had

jurisdiction or not is an academic issue. Accordingly, we are not going into that question. The learned counsel for the appellants also contended that the appellants are entitled to the improvements. The High Court did not go into that question as the same was not canvassed and the decree of the appellate court is quite right. We cannot go into that question which is accordingly rejected. The appeal, is accordingly dismissed but in the circumstances without costs.

T.N.A.

Appeal dismissed.

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JUDIS