
(1966) 04 BOM CK 0010

In the Bombay High Court

Case No : S. A. No. 669 of 1960 (with Second Appeal No. 762 of 1960)

Balkisan Gambhirshet Agarwal

APPELLANT

Vs

Tukaram Shahadu Mali

RESPONDENT

Date of Decision : 19-04-1966

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 14, 15, 2(18), 29, 29(2)
Specific Relief Act, 1963 — Section 9

Citation : (1967) MhLj 51

Hon'ble Judges : D.V. Patel, J

Bench : Single Bench

Advocate : G.N. Vaidya in S. A. No. 669 of 1960 and K.J. Abhyankar in Second Appeal No. 762 of 1960, G.N. Vaidya in Second Appeal No. 762 of 1960, for the Appellant; K.J. Abhyankar in S. A. No. 669 of 1960 and G.N. Vaidya in Second Appeal No. 762 of 1960, for the Respondent

Judgement

D.V. Patel, J.—These two are cross-appeals and arise out of a suit filed by the plaintiff for mesne profits in respect of survey No. 587 measuring 15 acres, 36 gunthas and assessed at Rs. 30-5-0 at Raver. The short facts leading to this suit are as below:

2. The plaintiff is the owner of the above land. It was governed by the Bombay, Tenancy and Agricultural Lands Act, 1948. The plaintiff served a notice terminating the tenancy of defendant No. 1, who was a tenant, u/s 34 of the, said Act as from March 31, 1955. As defendant No. 1 did not surrender the land, he made an application to the Mamlatdar as required by section 29 of the, said Act. This application was dismissed by the Mamlatdar on October 5, 1955. The plaintiff appealed to the Prant Officer who made an order in eviction in his favour on February 29, 1956. Defendant No. 1 went in revision before the Revenue Tribunal and obtained stay of the execution of the order passed by the Prant; Officer. He furnished security for mesne profits for two years before the Revenue Tribunal and the surety was defendant No. 2. The Tribunal on July 13, 1956, remanded the proceedings to the Prant Officer for decision. The Prant Officer

after hearing the parties on September 12, 1956, made an order in favour of the plaintiff. Defendant No. 1's revisional application to the Revenue Tribunal failed and his further application to this Court also failed. Ultimately, the plaintiff obtained possession in April 1957.

3. Thereafter the plaintiff instituted the present suit for mesne profits for the years 1955-56 and 1956-57 on September 20, 1957. As to the mesne profits of 1955-56 he restricted the claim to Rs. 1,600 as he had not sufficient Court-fee to pay, but for 1956-57 he claimed the full amount of Rs. 2,000. Defendant No. 1 resisted the suit contending that he continued to be in possession till the plaintiff's tenancy appeal No. 286 of 1955 was finally decided as a tenant, and that the plaintiff was entitled only to the rent. He contended that for the year 1955-56 he was bound to pay only one-sixth share in the produce and regarding 1956-57, five times the assessment. The trial Court decreed the claim of the plaintiff fully, while in the District Court, it was modified. The District Court held that the net income of the land could only be Rs. 1,070 per year. The District Court awarded a sum of Rs. 2,140 for the two years in dispute. Dissatisfied with this order, the plaintiff has filed second appeal No. 669 of 1960 and the defendants have filed second appeal No. 762 of 1960.

4. The first question that falls to be decided is what compensation or mesne profits the plaintiff is entitled to receive from defendant No. 1 i. e. whether the whole net profit that the defendant received from the land or merely the amount of the rent which the defendant was liable to pay as a tenant. Mr. Vaidya contends, on the one hand, that the position of defendant No. 1 even under the Tenancy Act is no better than under the Transfer of Property Act and he would, therefore, be liable to pay the mesne profits or the profits which he has made out of the land. Mr. Abhyankar, on the other hand contends that the relationship of landlord and tenant continued until the order of the Tribunal and, therefore, his only liability is the amount of rent.

5. I must make it clear that when I am deciding this question, I am deciding it only with reference to the Tenancy Act that was in force before its amendment in 1956, which has made some changes in some of the relevant sections. Section 3 of the Tenancy and Agricultural Lands Act applies the provisions of the Transfer of Property Act in so far as they are not inconsistent with the provisions of the Act to the tenancies and leases of lands to which the present Act applies. Relying on this, Mr. Vaidya contends that it is now well-settled that when a decree for possession is passed against a tenant who is holding over the property in suit an order for mesne profits is made on the ground that he has wrongfully received the income of the property, he says the same principle should apply to a matter which arises under the Tenancy Act. The question has been discussed in somewhat great details by Page J. in *Sundermull Vs. Ladhuram Kaluram*, , regarding cases falling under the Transfer of Property Act. After referring to the common law principles, the learned Judge held that the landlord was entitled to claim damages against the tenant holding over either for breach of contract or

for trespass. To the same effect are the decisions in *Baliramgiri v. Vasudeo* ILR (1896) 22 Bom. 348 and *Gulam Mohiuddin Narmavala Vs. Dayabhai Chimanlal*, . The question is how far this principle must apply to the case under review.

6. Mr. Abhyankar contends that the relationship does not end until actually an order for possession is made under the Tenancy Act, and if that is so, he says, mesne profits can be ordered only from the date on which order for possession is made by the appropriate authority. Section 2(18) defines a "tenant" to mean a person who holds land on lease and includes a person who is deemed to be a tenant u/s 4, amongst others. Section 4 provides that a person who lawfully cultivates any land belonging to another person shall be deemed to be a tenant barring certain exceptions. He further relies on section 29(2) which requires that no landlord shall obtain possession of any land except under an order of the Mamlatdar and for which purpose he is required to make an application in the prescribed form. It is argued that inasmuch as the landlord is not entitled to recover possession otherwise than by an order of the Mamlatdar, the relationship must be deemed to continue until such order is made.

7. He relies in this connection upon the decision in *K.K. Verma and Another Vs. Union of India and Another*, and the decision in *Ramchandra Anant Joshi and Others Vs. Janardan Tulshiram Ghuge and Others*, So far as the first case is concerned, the matter does not really touch the point at all. The appellant before the High Court had pleaded for a writ challenging the order of the appropriate authority for eviction made against the petitioner under the Government Premises (Eviction) Act, 1950 While dealing with this case, the Court considered the question whether the petitioner could be regarded as a trespasser, and while doing so it observed (p 316).

Therefore, as far as the Indian law is concerned, an erstwhile tenant can never become a trespasser. It may or may not. be that in English law in certain circumstances he can become a trespasser and it does seem that the landlord can enter the premises and deprive the erstwhile tenant of his possession, but in India a landlord can only eject his erstwhile tenant by recourse to law and by obtaining a decree for ejectment. Therefore, when we are construing the expression "unauthorised person", we must assume that the Legislature knew the distinction that was drawn in law between a trespasser and an erstwhile tenant, and, therefore, what we have to decide is whether in using the expression "unauthorised person" the Legislature was only contemplating "trespassers" in the sense in which that word is understood in Indian law or was also contemplating an erstwhile tenant who ceased to be a tenant by reason of the termination of his tenancy.

In the second case, it appears that the landlord had given a notice terminating his tenancy under the above Act and during the time that proceedings were pending served second notice as required under the amended Act terminating his tenancy u/s 14. and the question that was raised was whether having once terminated the tenancy, second notice was competent. It is observed by the

learned Chief Justice that under the Tenancy Act, even after his tenancy has been determined by a notice given by his landlord, the tenant has a legal right to continue in possession, until the Mamlatdar has made an order for possession being restored to the landlord. During the intervening period, the tenant has an estate in possession, of which he can only be deprived by an order of the Mamlatdar, the ground being that a landlord cannot say for certain whether his application for possession based on the termination of the tenancy by him will be granted by the Mamlatdar. It was, therefore, held that a second notice was competent, because the landlord had obtained a second ground for terminating the tenancy. This, however, does not solve the difficult problem.

8. Now, section 29 makes an order of the Mamlatdar the terminus quo. The landlord is, therefore, entitled to possession after an order of the Mamlatdar for delivery of possession. True, the order is subject to an appeal and may be also to a revisional application, and thereafter to a writ petition. But then the same could be said regarding a suit where a decree is made in favour of a landlord and against his tenant and also a further appeal thereafter under ordinary law. Ordinarily, whenever a right is determined upon by a Court, it relates back to the suit and it is only under certain limited circumstances that a Court is entitled to take into account subsequent events which modify the earlier order. In the Act as it stood originally, if a tenant wanted to surrender possession of property, he could do so u/s 15 and such surrender was required to be verified by the Mamlatdar. Section 34 which was then applicable laid down certain conditions subject to which the landlord would be entitled to resume possession. The position does not materially differ from the position existing between a landlord and a tenant under the ordinary law operating in India, inasmuch as even under ordinary law, a landlord cannot obtain possession otherwise than in due course of law even after the termination of the tenancy. If he does so, the tenant is entitled to sue u/s 9 of the Specific Relief Act and recover possession. In order to enforce his right to recover possession or his right to re-entry, the landlord must file a suit against the tenant if he cannot take possession peacefully with the consent of the tenant. But then there is a significant difference between the recovery of possession in ordinary law and recovery of possession under the Tenancy Act. Sub-section (4) of section 29 provides that any person taking possession of any land except in accordance with sub-section (1) or sub-section (2), as the case may be, shall be liable to forfeiture of crops, if any, grown in the land, in addition to payment of costs as may be directed by the Mamlatdar and also to the penalty prescribed in section 81. It is obvious, therefore, that the landlord, even if the tenant is willing to deliver possession directly, cannot obtain possession otherwise than by order of the Mamlatdar. No doubt, a surrender could be effected, but then it seems difficult to import an obligation on the tenant merely because the landlord gives a notice terminating the tenancy to, of his own accord, make an application u/s 15 for surrendering the land to the landlord. Having regard to the terms of sub-sections of section 29, it appears to me that what was intended was there should be an order of the Mamlatdar for

delivery of possession. No doubt, the difficulty would arise if the Mamlatdar refuses possession in which case the landlord has to file an appeal. But then since the terminus a quo is the Mamlatdar's order, the Collector in appeal does nothing but that what the Mamlatdar ought to have done and, in my view, therefore, when an order of Mamlatdar refusing to deliver possession either on appeal or revision or a further application to the High Court is made, it must relate back to the date of the Mamlatdar's order refusing to deliver possession, and, that being so, in effect, therefore, the order must be deemed to have been made when the Mamlatdar made his earliest order. This view will not create any difficulty even in a case where the Mamlatdar has directed possession to be delivered and his order is subsequently revised in appeal or revision, because even there also it would be the order the Mamlatdar ought to have made. In my view, therefore, from the date that the Mamlatdar made his first order, on October 5, 1955, the defendant's possession must be regarded as unauthorised and it is from this date that the plaintiff would be entitled to mesne profits. Inasmuch as the agricultural season could not have come to end on that date, the plaintiff would have been entitled to the mesne profits for the years 1955-56 and 1956-57.

[The rest of the judgment is not material to this report.]