
(1973) 07 BOM CK 0004

In the Bombay High Court

Case No : Special Civil Application No. 703 of 1970

Kashiprasad Ramanarayan Agrawal

APPELLANT

Vs

Usmankhan Gulabkhan

RESPONDENT

Date of Decision : 06-07-1973

Acts Referred:

Bombay Tenancy And Agricultural Lands Act, 1958 — Section 106, 30(1), 36(2)

Citation : AIR 1974 Bom 76 : (1973) MhLj 925

Hon'ble Judges : Masodkar, J

Bench : Single Bench

Advocate : J.N. Chandurkar, for the Appellant; R.N. and R.R. Deshpande, for the Respondent

Judgement

Masodkar, J.—This is a petition by the land-holder complaining against the orders made by the revenue authorities by which the prayer of the land-holder to put him in possession has been negated.

2. The respondent Usmankhan, being the tenant, was proceeded against by the land-holder after giving notice u/s 19 of the Bombay Tenancy and Agricultural Lands (Vidarbha region) Act, (hereinafter referred to as the act), in that he had not paid the lease money for the year 1960-61. The registered notice was served and in spite of that, the lease-money payment was not forthcoming and, therefore, an application was filed on 9-4-1962 against. Usmankhan which is an application u/s 36 of the Act. In this application a specific prayer was made that possession of the property be handed over to the land-holder in accordance with law. The cause for application was, determination of the tenancy for non-payment of the lease-money.

3. A notice was issued to the tenant and, in reply, the tenant stated that he be given time till the season for the payment of the lease-money. He also gave the reason to the effect that there had been failure of crops in that year. After hearing the parties, on December 24 1962. Tahsildar passed an order, which is referable to the provisions of Section 30 (1) of the Act. The operative part of the

order reads as under:-

"applicant had given a notice to the non-applicant on 1-4-1961 which was acknowledged on 7-4-61 by the non-applicant. Still he did not pay the lease-money.

I, therefore, order that the non-applicant should pay the lease-money within three months from this date failing which his lease shall be terminated."

It appears, after this order was made, in the month of January 1963, the landlord filed a suit for recovery of lease money for three years including the relevant year which was the subject-matter of the proceedings mentioned here in a above. A pursis was filed on 25-2-1963 in the civil court and a decree was passed on the basis of that pursis directing the defendant to pay to the plaintiff Rs. 800/- together with costs of suit and future interest on Rs. 700/- at 4% per annum from the date of suit till satisfaction; the defendant shall bear his costs. It appears further than on 9-1-1964, 1-3-1964 and 8-4-1967 Rs. 150/- each were paid towards that decretal amount and the certified copy of the civil suit register shows that some installments were also granted by the court.

4. As stated earlier, no further steps appear to have been taken after the period indicated was over under the order dated 24-12-1962. However, the landlord filed an application on 9-3-1966 purporting to move in execution and styling the same as an application u/s 106 (2) of the Act. In that he stated that his right to possession has arisen because of the order made on 24-12-1962 in the proceedings filed by him upon a notice u/s 19 of the Act. It was further averred by him that the non-applicant tenant did not pay the lease-money as per the order of the court within the period of three months and the lease stands determined and, therefore, the applicant was entitled to possession of the suit field.

5. Along with this, he also filed a copy of the earlier order. When the notice was issued to the tenant, he filed a written statement raising several pleas, including the tenability of the application u/s 106 (2) of the Act inter alia, he has raised a plea about the validity of the earlier application filed by the landlord and further raised the plea that the proceedings themselves were void. It was further stated that the order made on 24-12-1962 was without jurisdiction. On the merits, a plea was raised that there had been a tender by sending the lease-money, by money-orders and further, because of the consent decree passed in suit, being civil Suit No. 16 of 1963, which was passed within three months" period from the passing of the earlier order dated 24-12-1962 the order was complied with. It was further contended that, because of taking a consent decree. The applicant land-holder had waived his right to get the possession of the land.

6. Thereafter some evidence appears to have been taken and the trial Court rejected the claim of the landlord, finding that filling of the suit and taking the consent decree amounted to waiver of the right of recovery of lease-money. In the appeal the Special Deputy collector was of the view that only because a

decree is passed by the civil court which included the amount of lease-money for the year 1960-61, the landlord has lost the right to enforce the order dated the right to enforce the order dated 24-12-1962. He further cursorily referred also to the fact that the tenant had sent some money-orders.

7. Against this order, the present petition is filed, for the proceedings were treated all the while as one being u/s 106 and there being no further remedy available against the orders in execution. Thus both the courts by the impugned orders have refused to execute the earlier order made on 24-12-1962.

8. Now, naturally therefore, in this court some arguments were advanced on both sides as to the exact nature of the proceedings and the nature of the application made by the landlord to the authorities.

9. The scheme of the provisions of this Act clearly indicates that the authorities below have misconceived the proceedings, because they were so styled by the landlord to be one u/s 106 of the Act. It must be remembered that no party need suffer at law only for the fault of mentioning a wrong section or invoking an inappropriate provision. this rule is not only based on equity but is essence of justice.

10. Section 19 permits termination of tenancy by the mode and manner indicated therein. If there is a failure by a tenant to pay lease-money as contemplated by Section 19 (1) (I) (a), then the landlord is enabled to give notice of termination. Such a notice was given to amply clear as far as the present proceedings are concerned. That notice appears to have been dispatched on 1-4-1961 and proceedings initiated on 9-4-1962. These proceedings are on the footing that landlord has exercised his right of determining the tenancy by giving a notice as contemplated by Section 19 of the Act and would be referable ultimately to the provisions of Section 36 (2) of the Act, for that is the provision which permits a landlord to have an order for obtaining the possession of the land. Thus, the application made by the landlord was for possession of land u/s 36 (2) of the Act. When such an application is made wherein the ground for termination of tenancy is non-payment of rent, the power is conferred by Section 30 of the Act upon the Tahsildar to make certain orders. Sub-section (1) of Section 30 reads as under:-

"30. (1) where any tenancy of any land held by any tenant is terminated for non-payment of rent and the landlord files any proceeding to eject the tenant, the Tahsildar shall call upon the tenant to tender to the landlord the rent in arrears, together with the costs of the proceedings, within three months from the date of the order, and if the tenant complies with such order, the Tahsildar shall, in lieu of making an order for ejectment, pass an order directing that the tenancy had not been terminated and the tenancy had not been terminated and thereupon the tenant shall hold the land as if the tenancy had not been terminated;

Provided that if the Tahsildar is satisfied that in consequence of total or partial failure or crops or similar calamity the tenant has been unable to pay the rent

due, the Tahsildar may for reasons to be recorded in writing, direct that the arrears of rent together with the costs of the proceedings if awarded, shall be paid within one year from the date of the order and that if before the expiry of the said period, the tenant fails to pay the tenancy shall be deemed to be terminated and the tenant shall be liable to be evicted".

It is clear that the relief, the Tahsildar can give to the tenant, is against the earlier forfeiture of the tenancy occasioned upon the notice of termination of the tenancy. That is very much the object for which the power is conferred. Whenever such a landlord files the proceedings in ejectment thereby seeking possession u/s 36 (2), the Tahsildar is enabled to direct the tenant to tender to the landlord rent in arrears along with costs within three months from the date of the order. If such an order is complied with, naturally in lieu of an ejectment directing delivery of possession, Tahsildar is enabled further to find and order that tenant continues to be the tenant. If this happens the forfeiture effected is lifted and tenancy does not come to an end.

11. Now the operative part upon which the controversy rests is the latter part of the sub-section which enables the Tahsildar "in lieu of making an order for ejectment", to "pass an order directing that the tenancy had not been terminated". That is conditioned and qualified by the words, "if the tenant complies with such order". So, in a proceeding initiated like the present one, with reference to Section 19 and Section 36 of the Act, the scheme of Section 30 clearly shows two stages of the making of the order; first will take in the antecedent stage of proceedings wherein Tahsildar may satisfy himself of the proper termination of tenancy on the ground of non-payment of rent and may further find what were the arrears for which the tenancy has been determined. That enquiry may also involve an adjudication as to the validity of the notice, factum of arrears, its non-payment and the right of landlord to determine the tenancy. Having ascertained this, the Tahsildar is enjoined to give three months" time to the tenant to tender to the landlord the rent thus found in arrears.

12. This antecedent enquiry is also contemplated to a case falling under the proviso to sub-section (1) of Section 30. It is the function of this proviso to lay down a procedure different from the one indicated by the operative part of sub-section (1). If a tenant subjected to forfeiture for non-payment of rent satisfies the Tahsildar that he was unable to pay the rent because of total or partial failure of crops or similar such calamities, then Tahsildar is enabled to make an order directing that the arrears of rent together with costs of the proceedings, if awarded, should be paid by the tenant within a period of one year from the date of the order. Reading of the proviso together with the operative part of sub-section (1) indicates that there has to be an antecedent enquiry before either such an order is made under the operative part or wherever the proviso applies, under the proviso. Having made this order under the operative part 3 months time is granted to the tenant to comply with that order i.e., by tendering to the landlord the rent in arrears with the cost of the proceedings. Under the proviso,

one year's period is granted from the date of the order to make such payment to the landlord. In either case, the matter is not concluded at the end of the period and something remains to be done as is clear from the latter part of the operative part of sub-section (1) or even the latter part of the proviso.

13. By that part Tahsildar is enabled to make certain orders. Under the operative part of sub-section (1) if there is evidence that the tenant had complied with the earlier order, Tahsildar will make an order that the tenancy had not been terminated and upon this the tenant will be entitled to hold the land as if the tenancy had not been terminated. If on the other hand the tenant failed to comply with the order, it is implicit that the Tahsildar will direct ejectment of the tenant holding that the tenancy had been terminated. Even under the latter part of the proviso the same said second stage is indicated. If the tenant fails to pay before the period of one year has expired, the proviso says that the tenancy shall be deemed to be terminated and tenant shall be liable to be evicted. In other words, the order will have to be made by the Tahsildar for eviction of the tenant. Before making this order both under the operative part and the proviso, it is plain that tenant can satisfy the Tahsildar that he has complied with the order made upon the first antecedent stage by the Tahsildar.

This appears to be the plain scheme of Section 30 and there is no difficulty of interpretation.

14. What type of defence would be available to a tenant who failed to comply with the order by actual tender must rest with the controversy between the parties and the ultimate satisfaction of the Tahsildar in that regard. As indicated in the above analysis, it is an order which directed payment to be made by the tenant to the landlord; and such an order has to be complied. The tender if lease-money may be by several devices that may accord with the parties. Even the landlord may waive his right, for it is ultimately his choice to forfeit the tenancy. Even in a given case the parties may agree to adjust the arrears in some other manner and thus the order may be said to have been complied. But these are all the matters of fact to be dealt with by the Tahsildar at the second stage whenever an issue arises upon the plea of the defaulting party.

15. Now what has happened in this case is, the proceeding halted at the first and at the antecedent stage only, in that the Tahsildar made an order on 24-12-1962 acting under sub-section (1), main part, holding that there was a proper notice and further directing the tenant to pay the lease-money to the landlord within the period of three months and stating that, failing that, the lease shall be terminated. Whether this order was complied with or not, could alone be found after the period of three months was over and after considering the plea if any of the parties with respect to such compliance by the tenant. No doubt that the tenant was enjoined to comply with the order failing which certain penal result is indicated. However, unless he had full opportunity to show that he had complied with the order, no order in ejectment can straightway be made. It follows that for this purpose the enquiry originally initiated upon an application u/s 36 must be

kept pending till the second stage is enquired into and finally decided as indicated earlier. It is perfectly possible that after the first order as can be conceived, the parties may not stand by those proceedings and there would be no need to make an order for possession. Applying these tests the present order which is passed on December 24, 1962 cannot be treated as a final and conclusive order which can lead to an execution u/s 106 of the Act.

16. That is, however, not the end of this matter. It is well-known principle that whenever statute directs the making of a final order and that is not so made because of the misconception of the provisions under which the parties were belabouring, the authority like the one i.e., the Tahsildar, does not become functus officio. In this case the first application itself was for possession. That had not been finally disposed of, Only a preliminary order, which I have said at the antecedent stage had been made: the final order which could along direct ejectment had not been made: nor there had been any enquiry about the compliance of the earlier order by the tenant.

17. The instant application filed by the landlord, therefore, can only be treated as a continuation of the proceedings initiated by the earlier application. Merely because it is independently registered, that does not make any difference in principle. If the contents of the application are read, it is clear that the landlord was putting a grievance that the earlier order had not been complied with and therefore he was entitled to get possession. To this the reply was that the order was complied with and no possession can be ordered. Section 106 therefore could not have been invoked nor applied as is done by the authority and on the short ground the petitioner is entitled to succeed, though he himself has to blame for invoking that provision before the concerned authorities.

18. Now best course would be to direct the Tahsildar to treat this application as one in the original file and as initiated by the landlord in the second stage as contemplated by sub-section (1) of Section 30 of the Act. As the matter has not been viewed from this angle, it is clear that the authorities have not applied their mind either to the provisions of law or its effect on the rights of the parties.

19. The matter will not have to be decided on the basis that there is an order made by Tahsildar on December 24, 1962 directing the tenant to pay lease money within a period of 3 months from that date. Whether as required by sub-section (1) of Section 30 the tenant has complied or not will be the only issue to be decided by the Tahsildar. The tenant has raised several issues including the question of jurisdiction. He has further pleaded that he sent the amount of lease money by money-orders. That question being in reply and as such a defence will have to be considered and gone into, so as to find out whether any proper tender was made to the landlord within the period prescribed by the order. What is the effect of the consent decree and whether it operates as a waiver or not, is another issue which is raised upon the plea of the tenant. For that evidence will have to be taken, for waiver has to be established like any other fact as it involves conscious giving away of the right by a party entitled to earlier benefit.

There is further plea by the tenant that the order of December 24, 1962 could not have been made as he had become the owner. That would also have to be considered during the enquiry.

20. In the result, therefore, the present petition is allowed and the orders made by the authorities produced at Annexures I and II are set aside.

21. Tahsildar, Amravati is directed to decide the matter in the light of the above observations and find out whether an order in ejectment should be made or in lieu thereof an order directing that the tenancy handout been terminated should be passed. The entitlement of the landlord to possess the property would depend on such an order.

22. Though the petition thus succeeds, under the circumstances, there will be no orders as to costs.

23. Petition allowed