

(2004) 10 BOM CK 0036
In the Bombay High Court
Case No : Writ Petition No. 2796 of 1991

Rajnikant Harlal Shah

APPELLANT

Vs

Rafiullabeg Ismailbeg and Others

RESPONDENT

Date of Decision : 27-10-2004

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 106(2), 106(3), 111, 117, 12
Mamlatdars Court Act, 1906 — Section 21

Citation : (2005) 2 BomCR 764

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : B.S. Deshpande, for the Appellant; K.V. Sirpurkar, for Respondent Nos. 1, 2, 3 and 5, for the Respondent

Judgement

Dharmadhikari B.P., J.—The petitioner-landlord challenges the orders dated 13-3-1989, 30-7-1990 and 23-1-1991 passed by the lower authorities rejecting his application for executing the oral order passed in his favour for restoration of possession. The necessary facts in this respect can be briefly stated as under :

The petitioner is the owner of field survey No. 60, area 10 acres 39 gunthas of village Kolasa, Taluqa Balapur, District Akola. He initiated proceedings by filing an application against the original tenant Ismailbeg u/s 19 read with Sections 30 and 36(2) of Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (hereinafter referred to as the Tenancy Act) and sought termination of tenancy and for possession of these fields, Ismailbeg expired and present respondents is his legal heir. The proceedings were ultimately decided in favour of the petitioner by this Court on 28-1-1976 in Writ Petition No 1802 of 1973. The petitioner thereafter moved application u/s 106(2) of Tenancy Act read with Section 21 of the Mamlatdars' Courts Act, 1906, for executing this order and for putting him in possession. The application was opposed by the present respondents on the ground that the petitioner has to first take recourse to application u/s 36(2) of the Tenancy Act and merely on the basis of order dated

28-1-1976, he could not have sought restoration of possession. The Tahsildar, Balapur, upheld this objection of respondents and rejected the application of petitioner on 13-3-1989. It was a common order passed by the said Tahsildar in proceedings initiated by the petitioner against the present respondents and also other tenants. This order was challenged by the petitioner in appeal before Sub-Divisional Officer, Balapur and the Sub-Divisional Officer, Balapur again took the same view and dismissed the appeal on 30-7-1990. Thereafter, the petitioner challenged both these orders by filing revision u/s 111 of the Tenancy Act before the Maharashtra Revenue Tribunal, but the Maharashtra Revenue Tribunal held that the revision was not tenable and rejected it summarily on 23-1-1990 by placing reliance upon the judgment of this Court in the case of Ramrao Bajad Vs. Dharmal Sansthan Varchapari Marimay Sansthan of Gaiwadi, . All these three orders are challenged by the landlord in the present petition.

2. I have heard Shri Deshpande learned Counsel for the petitioner and Smt. Sirpurkar, learned Counsel for the respondents.

3. Shri Deshpande, learned Counsel for the petitioner argued that the application for execution moved by him has been rejected by the lower authorities on wrong and erroneous ground that he is first required to approach Tahsildar as contemplated u/s 36(2) of the Tenancy Act. He contends that the other reason given by the said authorities is that Section 36(2) provides for a limitation two years and the authorities have held that a right to file proceedings accrued to the petitioner on 28-1-1976 but he filed the proceedings before the Tahsildar in the year 1988 and hence it was beyond two years and hence misconceived. He contends that the entire reasoning given by the authorities is contrary to the facts available on record. He points out that the original application filed by him was not an application filed u/s 19 read with Section 30 of the Tenancy Act but it was application moved u/s 36(2) of the Tenancy Act in view of the breaches falling u/s 19 read with Section 30 of the Tenancy Act. He, therefore, says that after having secured an u/s 36(2) of the Tenancy Act on 21-8-1976, he moved the authorities for executing that order and for recovering the possession from respondents. He points out that Section 106(2) of the Tenancy Act provides for the machinery for executing those orders and as per that Section, the recourse to Section 21 of the Mamlatdar's Courts Act is required to be taken. He points out that once an application is filed before the Tahsildar for execution to give effect thereto by issuing appropriate order to his subordinates to place this petitioner into possession.

4. As against this Smt. Sirpurkar, learned Counsel for the respondents states that there is nothing on record to show that the earlier proceedings filed by the petitioner were u/s 36(2) of the Tenancy Act. He points out that proceedings as stated by the petitioner himself were only u/s 19 read with Section 30 of the Tenancy Act and hence on 28-1-1976 when this High Court allowed his Writ Petition, cause of action accrued in his favour and within two years thereof he should have filed an application u/s 36(2) of Tenancy Act for recovery of

possession. She contends that as no such steps were taken within two years and application has been filed practically after 12 years, orders passed by the lower authorities are just and proper.

5. After having heard the parties provisions of Sections 19, 30 and 36 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 should be scrutinised. Section 19 provides for contingencies in which the tenancy of an agricultural tenant can be terminated. The said section reads as under :

"Section 19. Termination of tenancy. - (1) Notwithstanding any agreement, usage, decree or order of Court of law, the tenancy of any land held by a tenant shall not be terminated-

(1) unless such tenant -

(a) (i) has failed to pay in any year, before the 31st day of March of that year, the rent if such land for that year, or

(ii) if an application for the determination of reasonable rent is pending before the Tahsildar u/s 12, has failed to deposit within thirty days from the aforesaid date with the tahsildar, a sum equal to the amount of rent which he would have been liable to pay for that year if no such application had been made, or

(iii) in case the reasonable rent determined u/s 12 is higher than the sum deposited by him has failed to pay the balance due from him within two months from the date of the decision of the Tahsildar.

(b) has done any act which is destructive or permanently injurious to the land:

(c) has sub-divided the land in contravention of Section 33;

(d) has sub-let (or assigned) the land or failed to cultivate it personally; or

(e) has used such land for a purpose other than agricultural (or allied pursuits); and

(ii) unless the landlord has given three months notice in writing informing the tenant of his decision to terminate the tenancy and the particulars of the ground for such determination and within that period the tenant has failed to remedy the breach for which the tenancy is liable to be terminated.

(2) Notwithstanding anything contained in Sub-section (1), the tenancy of any land held by a tenant who is a widower or a minor or who is subject to physical or mental disability or who is a serving member of the armed force shall not be liable to be terminated under the said sub-section only on the ground that such land has been sub-let on behalf of the said tenant."

It is to be noticed that thus, failure to pay rent before 31st day of March is one of the grounds on which the landlord can terminate the tenancy of the tenant. However, the said section does not provide for any form and also no procedure is prescribed under which landlord can move an application u/s 19 of the Tenancy

Act.

Section 30 of the Tenancy Act reads as under:

"30. Relief against termination of tenancy for non-payment of rent. - (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 proceeding, 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 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 of 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 said arrears of rent and costs, the tenancy shall be deemed to be terminated and the tenant shall be liable to be evicted.

(2) Nothing in this section shall apply to any tenant whose tenancy has been terminated for non-payment of rent, if such tenant has failed for any three years to pay rent and the landlord has given intimation the tenant to that effect within a period of three months on each default."

From the perusal of this section it is apparent that when the landlord terminates the tenancy of a tenant for non payment of rent and files proceedings for his ejectment, the Tahsildar is duty bound to give option to the tenant to tender to such landlord rent in arrears together with the costs of the proceedings, within three months from the date of the ejectment order and if the tenant complies with such order, the Tahsildar can in lieu of making an order of ejectment, pass an order directing that the tenancy has not been terminated and thereupon the tenant shall continue to hold the land. Thus, again, this section does not provide for any form and also does not contemplate making of any application by the landlord.

Section 36 of the Tenancy Act reads as under :

"Section 36. Procedure of taking possession. - (1) A tenant or an agricultural labourer or artisan entitled to possession of any land or dwelling house or site used for any allied pursuit under any of the provisions of this Act or as a result of eviction in contravention of Sub-section (2) may apply in writing for such possession to the Tahsildar. The application shall be made in such form as may be prescribed and within a period of (three years) from the date on which the right to obtain possession of the lands, dwelling house of site is deemed to have

accrued to the tenant, agricultural labourer or artisan, as the case may be.

(2) Save as otherwise provided in Sub-section (3-a), no landlord shall obtain possession of any land, dwelling house or site used for any allied pursuit held by a tenant except under an order of the Tahsildar, For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land, dwelling house or site, as the case may be, is deemed to have accrued to him.

(3) On receipt of an application under Sub-section (1) or (2), the Tahsildar shall after holding an inquiry, pass such order thereon as he deemed fit:

Provided that where an application under Sub-section (2) is made by a landlord in pursuance of the right conferred on him u/s 38, the Tahsildar may first decide as preliminary issue, whether the conditions specified in Clauses (c) and (d) of Sub-section (3) and Clauses (b), (c) and (d) of Sub-section (4) of that section are satisfied. If the Tahsildar finds that any of the said conditions are not satisfied, he shall reject the application forthwith.

(3-a) Where a landlord proceeds for termination of the tenancy under Sub-section (1) of Section 57-B, then notwithstanding anything contained in this Act, the application for possession of the land shall be made to the Collector, who shall, after holding an inquiry in the prescribed manner, pass such order thereon as he deems fit.

(4) Any person taking possession of any land, dwelling house or sit used by allied pursuit except in accordance with the provisions of Sub-sections (1), (2) or as the case may be (3-a) shall be liable to forfeiture or crops, if any, growing in the land in addition to payment of costs as may be directed by the Tahsildar or by the Collector and also to the penalty prescribed in Section 117."

It will be seen that the provisions of Section 36(2) provide for a form and also a procedure to be adopted by landlords when he wants to obtain possession of land. As per sub-section, the landlord has to make an application in prescribed form and within a period of two years from the date on which the right to obtain possession of the land, dwelling house or site, as the case may be, is deemed to have accrued to the landlord.

6. It is thus clear that when any breach as contemplated u/s 19 of the Tenancy Act is committed by the tenant, the right to obtain possession accrues in favour of the landlord and the landlord can within a period of two years thereof move an application u/s 36(2) before the Tahsildar. It is further clear that in such proceedings if it is only on account of failure of tenant to pay rent, the Tahsildar has to give an option to such tenant to deposit entire amount of arrears of rent along with cost as contemplated by Section 30. Thus, Section 30 of the Tenancy Act is only a procedural section and the procedure on those lines is required to be adopted by the Tahsildar while taking cognizance of application moved by the landlord u/s 36(2) of the Tenancy Act. It is thus clear that there cannot be any

independent application u/s 19 read with Section 30 of the Tenancy Act. The arguments of the learned Counsel for the petitioner on these lines, therefore, cannot be sustained.

7. The perusal of records of the lower authorities reveal that the petitioner has in his application filed u/s 21 of the Mamlatdar's Courts Act before the tahsildar on 27-1-1988 specifically pointed out that he filed earlier proceedings for termination of tenancy of Ismailbeg and for possession of property u/s 19 read with Sections 30 and 36 of the Tenancy Act. Further, it appears that a preliminary objection under these proceedings was raised on behalf of the present respondents by pointing out that the application is pre-mature because the petitioner- landlord has not taken recourse to the provision of Section 36. To this objection, the landlord has filed a reply on 21-2-1989 and in it, he has specifically pointed out that the limitation prescribed for application u/s 36 of the Tenancy Act as no application to the facts of the present case as the order u/s 36 is already secured by him. It is thus clear that the lower authorities have acted under a misconception that the order dated 28-1-1976 passed by this Court was not an order u/s 36(2) of the Tenancy Act.

8. It is borne out from the record that said order passed by this Court was in proceedings u/s 36(2) of the Tenancy Act itself. It is, however, clear that reasoning given by the lower authorities that petitioner should approach tahsildar as required by Section 36(2) of the Tenancy Act to take possession is incorrect. In view of the provisions of Tenancy Act, such application u/s 36(2) of the Tenancy Act should also be moved within two years from the date of accruing of cause of action in his favour. The lower authorities should have seen that no cause of action has accrued in favour of the petitioner on 28-1-1976. They should have noticed that the order dated 28-1-1976 was the order passed by this Court in proceedings initiated by the landlord u/s 36(2) of the Tenancy Act and therefore, it was the order directing the authorities to restore possession of land to the petitioner. In this background, provisions of Section 106(2) of the Tenancy Act needs to be seen. As per Sub-section (2) of Section 106, an order of the Tahsildar awarding possession or restoration of possession is to be executed in the manner provided in Section 21 of the Mamlatdar's Courts Act, 1906, as if it was the decision of the Tahsildar.

9. Section 21 of the Mamlatdar's Courts Act, 1906, states that where the decision of Mamlatdar is for awarding possession, the Mamlatdar should give effect thereto by issuing such orders to the village Officers or to any subordinate under his control. Placing reliance upon a judgment in the case of Balaji Khanduji Patil v. Kushaba Ramji Patil, reported at (XXX) Bom. Series 415, Shri Deshpande, learned Counsel for the petitioner states that u/s 21 of the Mamlatdar's Courts Act, the duty of village Officer to give effect to order is absolute and no limitation is prescribed therefore and Limitation Act is not at all attracted. Perusal of Section 21 of Mamlatdar's Courts Act clearly reveals that said section uses word "shall" and thus the Tahsildar executing the order of possession is left with no

discretion but to issue appropriate order of restoration of possession to his subordinate and no limitation is prescribed thereof. Here, the lower authorities have imported the limitation of two years as prescribed u/s 36 of the Tenancy Act under the presumption that the petitioner is yet to obtain that order under that section. They were executing the order of Section 36(2) of the Tenancy Act and there is no limitation coming into picture for that purpose. Provisions of Section 106(3) of the Tenancy Act states that any order or decision of the Tahsildar in execution proceedings conducted under Sub-section (2) shall, subject to appeal to the Collector, be final. Thus, here the order passed by the Tahsildar on 13-3-1989 u/s 106(2) of the Tenancy Act is subject to appeal and said appeal has been decided by the Sub-Divisional Officer, Balapur on 30-6-1990. Thus, after this decision by the Appellate Authority, the order became final and there was no scope for filing any revision before the Maharashtra Revenue Tribunal u/s 111 of the Tenancy Act, Thus, the order dated 23-1-1991 passed by the Maharashtra Revenue Tribunal summarily dismissing the Revision Application No. Ten. A7/1991 is just and proper and does not call for any interference.

10. Thus, for the reasons stated above, writ petition is partly allowed. The order dated 13-3-1989 passed by the Tahsildar, Balapur in R.C. No. TNC-21-Kolasa-1/88-89 and the appellate order dated 30-7-1990 passed by the Sub-Divisional Officer in case No. TNC-107/Kolasa/I/89-90 are hereby quashed and set aside. The Tahsildar, Balapur, is directed to issue appropriate orders to his subordinates and to place the petitioner in possession of lands by taking possession thereof from present respondents. The appropriate action in this respect should be taken by the Tahsildar within a period of three months from the date of receipt of this order by him.

11. Rule is made absolute in above terms. There shall be no order as to costs.