
(1972) 04 BOM CK 0014

In the Bombay High Court

Case No : Appeal No. 135 of 1965

Suryakant Ramchandra Mudake

APPELLANT

Vs

Shivlinga Vishwanath Ghongade

RESPONDENT

Date of Decision : 12-04-1972

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29, 78(2)

Citation : AIR 1973 Bom 252 : (1973) 75 BOMLR 58

Hon'ble Judges : Malvankar, J

Bench : Single Bench

Advocate : H.H. Lalit, for U.R. Lalit, for the Appellant; M.B. Kadam, for the Respondent

Judgement

1. The appellant-plaintiff filed Regular civil Suit no. 675 of 1962 out of which the present appeal arises, for mesne profits in respect of half of the land Survey No. 247/1 situate in village of Mardi in Taluka North Sholapur of Sholapur District, for the years from 1957-58 to 1961-62. The plaintiff alleged that he had filed Tenancy Case No. 288 of 1957 against the respondent-defendant, who was his tenant in respect of the whole of the land Survey No. 247/1, for possession on the ground that he required the land bona fide for personal cultivation. The notice terminating the tenancy was issued with effect from 31st December 1956 and thereafter he filed the application u/s 31 of the Bombay Tenancy and Agricultural Lands Act 1948 (hereinafter called "the Act") for possession. The Mamlatdar dismissed the application on 31st August 1957. The plaintiff then went in appeal to the Deputy Collector and the Deputy Collector in appeal ordered delivery of possession of half of the suit land, that is to say, 5 acres and 17 1/2 gunthas, on 7th June 1958. The defendant then went in revision to the Revenue Tribunal. The Tribunal confirmed the order of the Deputy Collector on 14th October 1960. It appears that thereafter the defendant filed Special Civil Application under Article 227 of the Constitution of India in this Court. But we do not know from the record nor either of the learned Counsel could state, whether that application was summarily dismissed or was dismissed after hearing the

parties on both the sides. We also do not know from the record when the Special Civil Application was filed in this Court and on which date it was imposed of. Thereafter the plaintiff obtained possession of the land on 21st January 1962. The plaintiff, therefore, contended that since the tenancy was terminated till he obtained possession the possession of the defendant was wrongful and, therefore, he was entitled to the mesne profits for the whole of this period from 1957-58 to 1961-62. The defence was that the suit was not maintainable because the possession of the defendant who was a statutory tenant after the termination of the tenancy could not be said to be wrongful, and that all that he was liable to pay to the plaintiff even after the termination of the tenancy was rent which he paid till the end of the year 1961-62. As regards the quantum of mesne profits, the defendant contended that the claim was excessive. Lastly he also claimed compensatory costs.

2. The learned trial Judge, relying on *K.K. Verma and Another Vs. Union of India and Another*, came to the conclusion that the defendant could not be held to be a trespasser and that his possession being juridical the plaintiff was not entitled to mesne profits. He, therefore, dismissed the suit with costs. The plaintiff then went in appeal to the District Court in Civil Appeal No. 615 of 1963. The learned appellate Judge also took the view that in view of the provisions of Section 31 read with Sections 29 and 73 of the Act and the decision in *K.K. Verma and Another Vs. Union of India and Another*, the possession of the defendant could not be said to be wrongful and, therefore, the plaintiff was not entitled to mesne profits. The learned appellate Judge, therefore, confirmed the decree of the trial Court and dismissed the appeal with costs. Being aggrieved by this judgment and decree, the plaintiff has come in second appeal to this Court.

3. Now, the learned Counsel Mr. J. R. Lalit, appearing on behalf of the appellant-plaintiff has relied upon *Balkissan v. Tukaram* (1966) 68 BomLR 874, and has argued that though he has claimed mesne profits from the date of termination of the tenancy, in view of the decision of this Court, the possession of the defendant became wrongful from the date of the order of the Mamlatdar passed u/s 29 (2) of the Act and, therefore it is from this date that the plaintiff would be entitled to mesne profits. I have already pointed out that in the instant case, the application of the plaintiff for possession u/s 31 read with Section 29 (2) of the Act was dismissed by the Mamlatdar and that order was set aside by the Deputy Collector in appeal and it was the Deputy Collector who ordered delivery of possession u/s 29 920 read with Section 78(1) of the Act. It could, therefore, have been argued that inasmuch as the order of delivery of possession was passed by the Deputy Collector setting aside the order of dismissal of the application by the Mamlatdar under S. 29 (2) read with Section 78 (1) of the Act, the possession of the defendant became wrongful from that date that is to say, from 7th June 1958. But the learned Counsel Mr. Lalit has drawn my attention to the observations made by this Court in the aforesaid decision at p. 877. These observations run thus : -

"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 the 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 revised in appeal or revision, because even there also it would be the order the Mamlatdar ought to have made"

It is because of these observations of this Court that the learned Counsel Mr. Lalit has argued that the plaintiff in this case is entitled to the mesne profits from the date of the order of dismissal of the application passed by the Mamlatdar on 31st August 1957.

4. The learned Counsel Mr. Kadam appearing on behalf of the respondent-defendant, has, however, argued that in view of the observations of their Lordships of the Supreme Court in *Patel Chunibhai Dajibhai etc. Vs. Narayanrao Khanderao Jambekar and Another*, *Venkatesh Narahar Katti Vs. Haji Saheb Khadir Saheb Mulla and Another*, and observations of this Court in Full Bench decisions in *Ramchandra Anant Joshi and Others Vs. Janardan Tulshiram Ghuge and Others*, & *Vasant Hariba Londhe Vs. Jagannath Eamghandra Kulkarni*, the decision in (1966) 68 BomLR 874 cannot be said to be good law. In this connection he has also drawn my attention to the observations of this Court in First Appeal No. 458 of 1962 decide don 18-101962 (Bom). However, it must be noticed here that the judgment in First Appeal No. 458 of 1962 is not recorded by this Court after hearing the parties on both the sides. The Division Bench of this Court which disposed of that appeal has done so summarily and the observations made by this Court in that case are in the judgment recorded while dismissing the appeal summarily. Now, before I proceed to discuss the decisions relied upon by the learned Counsel Mr. Kadam, I think it would be worthwhile to notice that the learned Judge who decided the case in (1966) 68 Bom LR 874, and took the view that the possession of a tenant becomes wrongful from the date of the order of the Mamlatdar whether the application made by the landlord u/s 31 read with Section 29 (2) of the Act is granted the Report that "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 possession." Realising, however, that in cases where the Mamlatdar dismisses the application for possession made by the landlord u/s 31 read with Section 29 (2) of the Act, there would be no order of the Mamlatdar for delivery of possession, he has tried to get over the difficulty by observing that "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, therefore, when the order of

Mamlatdar refusing to delivery 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, the order must be deemed to have been made when the Mamlatdar made his earliest order." With respect, apart from the observations of the Supreme Court the observations of the Supreme Court and the Full Bench decisions of this Court cited by the learned Counsel Mr. Kadam. I think it is difficult to agree with this view.

5. Section 29 (2) of the Act which is relevant here, says that save as otherwise provided in sub-section (3A), no landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar, and for obtaining such an order he is required to make an application in the prescribed form. It cannot be disputed that obviously in each and every case in which a landlord makes an application u/s 31 read with Section 29 (2) of the Act the Mamlatdar may not pass an order for delivery of possession. In cases in which such an order is passed by the Mamlatdar, it may be possible to argue that when the order for delivery of possession is passed by the Mamlatdar the date of that order is a terminus a quo for ascertaining from which date wrongful possession starts. But when the Mamlatdar dismisses such an application made by a landlord and in appeal by the landlord, the appellate authority or the revising authority passes an order for delivery of possession, it is difficult to agree that the order is still the order of the Mamlatdar. If the words used in section 29 (2) of the Act are to be construed literally, then unless in every case the Mamlatdar passes an order for delivery of possession, it would not be possible to contend that the date of the order of delivery of possession passed by the Mamlatdar is the terminus a quo for the purpose of deciding the date from which wrongful possession starts. But surely such an interpretation cannot be put on Section 29 (2) for the obvious reason that the Mamlatdar who can pass an order for delivery of possession u/s 29 (2) of the Act, has also jurisdiction to dismiss the application. If that is so, it would be difficult to hold in such a case that order for delivery of possession passed by the appellate authority or revising authority would relate back to the order of the Mamlatdar. The learned Judge who decided the case cited above has, therefore, resorted to the theory of "relation back". But his attention was not drawn to the provisions of Sections 73 and 78 of the Act. If these sections are read along with Section 29 (2), then I think that the position becomes quite clear and it is not necessary to resort to the theory of "relation back."

6. Section 73 of the Act provides for execution of orders for restoring possession passed by the Mamlatdars and Section 73 (2), which is relevant here, says that an order of the Mamlatdar awarding possession or restoring possession shall be executed in the manner provided in Section 21 of the Mamlatdars' Courts Act, 1906, as if it was the decision of the Mamlatdar under the said Act. But Section 78 (2) of the Act also provides for the execution of the orders of the appellate authority and revising authority inasmuch as it says that such orders shall be

executed in the manner provided for the execution of the orders of the Mamlatdar u/s 73. One thing therefore, is certain that in a case where the application made by the landlord u/s 31 read with Section 29 (2) of the Act is dismissed and the appellate authority sets aside that order and passes an order for delivery of possession, or the appellate authority confirms the order and the revising authority sets it aside then the order for delivery of possession, which is to be executed is not the order of the Mamlatdar but the order of the appellate authority or that of the revising authority, as the case may be. In other words, for the purpose of execution of the appellate authority and revising authority the order passed by the Mamlatdar is treated to have merged in the order of the appellate authority or revising authority as the case may be, and no longer in existence. It that is so, it would not be possible in such cases to treat the order of the Mamlatdar as a terminus a quo by resorting to the theory of "relation back." There is also another aspect. It is not only the Mamlatdar who is authorised to pass the order for delivery possession u/s 29 (2) of the Act, but such an order can be passed even by the appellate authority if the Mamlatdar dismiss the application of the landlord, or by the revising authority viz. Maharashtra Revenue Tribunal, if the appellate authority also refuses to pass the order for delivery of possession because Section 78 (1) which provides for orders in appeal or revision says that the Collector in appeal and the Maharashtra Revenue Tribunal in appeal u/s 75 may confirm, modify and rescind the order in appeal, or revision or its execution or may pass such other order as may seem legal and just in accordance with the provisions of the Act. That being so, if in an application filed by a landlord u/s 31 read with Section 29 (2) of the Act, the Mamlatdar dismisses the application, then the Deputy Collector in appeal can order delivery of possession u/s 29 (2) read with Section 78 (1) of the Act. If the Deputy Collector also refuses to order delivery of possession and confirms the order of the Mamlatdar dismissing such application the Maharashtra Revenue Tribunal as a revising authority can pass an order for delivery of possession u/s 29 (2) read with Section 78 (1) of the Act. It is not disputed before me that in such cases against the order of the Mamlatdar, appeal to the Collector (Deputy Collector) is provided u/s 74 and revision to the Maharashtra Revenue Tribunal u/s 76 of the Act. In my opinion, therefore, when an appellate authority or revising authority passes an order for delivery of possession in such cases, it is an order passed u/s 29 (2) read with Section 78 (1) of the Act and, therefore it is still an order u/s 29 (2) of the Act. There may be cases in which the Mamlatdar passes an order for delivery of possession and the tenant goes in appeal to the appellate authority, and the appellate authority confirms the order passed by the Mamlatdar or the appellate authority may set aside that order and dismiss the application and the landlord may approach the revising authority in revision and the revising authority may set aside the order of the appellate authority and may restore the order passed by the Mamlatdar. Even in such cases, the order which would be executable would be the order of the appellate authority or of the revising authority, as the case may be, and therefore, in my opinion, though the original order for delivery of possession is passed by the Mamlatdar u/s 29 (2) of

the Act, the ultimate order to be executed being the order of the final authority either appellate or revising the order for delivery of possession u/s 29 (2) would be the order of such final authority either appellate or revising and not the order of the Mamlatdar, because Section 78 (2) necessarily implies that in all such cases the executable order is the order of the final authority either appellate or revising. If that is so, it is difficult to understand how in such cases the order of the Mamlatdar can be treated to be a terminus a quo for the purpose of determining the date when wrongful possession starts. It is no doubt true that Section 29 (2) specifically refers to the word "Mamlatdar". But that is obviously because Section 29 (2) requires such an application to be made to the Mamlatdar and to no other authority. But if Section 78 (1) empowers the appellate authority and also the revising authority to pass the order for delivery of possession u/s 29 (2) of the Act, then merely because the word "Mamlatdar" is used in Section 29 (2), it is not possible to hold that therefore the order of the Mamlatdar should be the terminus a quo. In fact, as I have already pointed out in all such cases, the order passed by the final authority for delivery of possession, whether on confirmation of the order passed by the lower authority would be an order u/s 29 (2) read with Section 78 (1) of the Act and, therefore, it would still be an order u/s 29 (2) of the Act. It seems to me therefore that in an application filed by the landlord u/s 31 read with Section 29 (2) of the Act, the terminus a quo would be the final order, whether it is passed by the Mamlatdar or by the appellate authority or by the revising authority and whether it is passed on confirmation or after setting aside the order of the lower authority.

7. Now, turning to the decisions relied upon by the learned counsel Mr. Kadam, the first such is the decision reported in Venkatesh Narahar Katti Vs. Haji Saheb Khadir Saheb Mulla and Another, . In that case the appellant was the landlord and respondent No. 1 was the tenant of certain lands. Respondent No.1 defaulted in payment of rent for the years 1951-52, 1953-54 and 1954-55. On 8th December 1956, the appellant served on respondent No.1 three months' notice in writing u/s 14 (1) (b) of the Act terminating the tenancy on the ground of default in payment of rent. On 24th June 1957, the appellant filed an application u/s 29 (2) read with Section 14 (1) of the Act for possession of the land. The Tahsildar, Bijapur allowed the application and directed possession of the land to be delivered to the appellant, this order was affirmed on appeal by the Assistant Commissioner, Bijapur. On revision the Mysore Revenue Appellate Tribunal set aside the order of the first two tribunals and dismissed the application. A petition by the appellant under Art. 227 of the Constitution of India, was summarily rejected by the Mysore High Court. The appellant then filed appeal to the Supreme Court by Special leave. While deciding the question whether the application was filed within two years' period of limitation prescribed by Section 29 (2) of the Act. Their Lordships observed thus in para 5 at page 1087 : -

"Between the date of the termination of the tenancy and the date of the order for possession u/s 29 (2), the tenant continues to be in lawful possession of the land

and is liable to pay rent and not mesne profits."

These observations clearly show that until an order for delivery of possession is passed u/s 29 (2) of the Act, the possession of the tenant is lawful and, therefore till that order is passed, he is liable to pay rent only. The necessary implication being, he is liable to pay mesne profits only from the date of the order u/s 29 (2) of the Act, because his possession becomes wrongful only since that date. It is material to note here that in the aforesaid observations. Their Lordships do not confine the date of the order passed u/s 29 (2) of the Act to the date of the order passed by the Mamlatdar under that Section. I have already pointed out that such an order u/s 29 (2) can be passed even by an appellate authority or by revising authority u/s 29 (2) read with Section 78 (1) of the Act. If that is so, in my opinion, there is some force in the argument advanced on behalf of the respondent that the terminus a quo in such cases would be the order u/s 29 (2) of the Act whether it is passed by the appellate authority by the revising authority. The learned Counsel Mr. Lalit drew my attention to the first sentence in paragraph 5 at page 1087 which reads thus : -

"In spite of the termination of the tenancy, the landlord has no right to obtain possession of the land without an order of the Mamlatdar under S. 29 (2)."

In my opinion, these observations do not show that their Lordships whereas contemplating the order of the Mamlatdar u/s 29 (2) of the Act for pointing out the terminus a quo for the lawful possession of a tenant in such cases. It must be remembered that their Lordships were considering the question of limitation u/s 29 (2) and, therefore, in the aforesaid observations relied upon by the learned Counsel Mr. Lalit, they were only referring to Section 29 (2) of the Act. I, therefore, do not think that these observations support the appellant to show that while making the aforesaid observations, their Lordships were laying down the order of the Mamlatdar passed u/s 29 (2) of the Act as the terminus a quo for the lawful possession of a tenant. I am, therefore, inclined to think that the aforesaid observations, by which I am respectfully bound definitely show that the possession of a tenant in such cases is lawful till the date of the order passed u/s 29 (2) of the Act, whether or not that order is passed by the Mamlatdar or by the Deputy Collector in appeal or by the Tribunal in revision.

Thursday, 13th April 1972.

8. The next decision, to which my attention is drawn by the learned Counsel for the respondent, is Patel Chunibhai Dajibhai etc. Vs. Narayanrao Khanderao Jambekar and Another, . In that case, the appellants were tenants against whom orders for ejectment had been passed at the instance of a certain amendment of Section 32 of the Act these orders were illegal and had rightly been set aside by the Collector u/s 76A of the Act. The questions, therefore, which arose in that appeal depended on the interpretation of these two sections. While interpreting Section 32 of the Act in paragraph 19 at page 1465. Their Lordships of the Supreme Court have observed thus : -

"If an application either u/s 29 read with Section 31 or u/s 29 read with Section 14 was pending on April 1, 1957, the tenant would become a purchaser on the "the postponed date" that is to say, when the application would be finally rejected. But if the application be finally allowed, the tenant would not become the purchaser. The expression "an application" in the proviso means not only an application u/s 31 but also an application u/s 29 read with Section 14."

Relying on the words "when the application would be finally rejected. But if the application be finally allowed" in the aforesaid observations, it is argued that in a case where an application is made by a landlord u/s 31 read with Section 29 (2) of the Act after terminating the tenancy, the tenant continues to being lawful possession as a tenant till the application of the landlord is finally rejected or is finally allowed. In other words, according to the learned Counsel, these observations do not show that in such a case a tenant would be in lawful possession as a tenant only till the date of the order passed by the Mamlatdar u/s 29 (2). The learned Counsel has also pointed out other observations in support of his argument from paragraphs 21 at page 1465 where the observations are : -

"It is true that on July 10, 1957, the other application u/s 29 read with Section 31 was pending, and consequently the appellant was still a tenant and had not become the purchaser."

These observations also show that in an application filed by the landlord u/s 31 read with Section 29 (2) of the Act, the tenant continues to be a tenant till the application is finally rejected. That is so. But the learned Counsel Mr. Lalit has argued that these observations are made in connection with the interpretation of Section 32 of the Act which is a special provision protecting the rights of such tenants who could not become the owners of the tillers" day, that is to say, on 1st April 1957, because of the pending proceedings either u/s 31 read with Section 29 (2) or u/s 14 read with Section 29 (2) of the Act. According to him, therefore, these observations do not help the respondent to show that he continued to be a tenant in lawful possession even after the date of the order passed by the Mamlatdar. I think that though these observations were made by their Lordships while interpreting Section 32 of the Act, still it must not be forgotten that they were made with reference to the application u/s 31 read with Section 29 (2) or u/s 14 read with Section 29 (2) of the Act filed by landlords before 1st April 1957, the possession of a tenant would be lawful till such applications are finally rejected. There is nothing to indicate in this decision that whether an application u/s 31 read with Section 29 (2) of the Act is ultimately granted or rejected, the order of the final authority must relate back to the order of the Mamlatdar. In fact, if such a position is accepted, the very purpose of Section 32 of the Act which enables a tenant to become an owner on the termination of the proceeding u/s 31, would be defeated, because in such an event, if the final order of rejection is to relate back to the order of the Mamlatdar, with the result that after the passing of the order of the Mamlatdar, his possession becomes wrongful, there may be cases in which such an order

being passed by the Mamlatdar before 1st April 1957, the tenant would not be able to claim title u/s 32 on 1st April 1957, he being not a tenant in lawful possession on that day in such cases. It is true that this decision does not indicate as to what is to happen if the application made by a landlord u/s 31 read with Section 29 (2) of the Act is finally granted. But the fact cannot be gainsaid that in view of the interpretation put on Section 32, at any rate, in cases of such applications which are finally rejected, there is no scope for the application of the theory of "relation back."

9. Coming to the Full Bench decisions of this Court the first one relied upon by the learned Counsel Mr. Kadam is reported in (1962) 64 Bom LR 635. In that case, the landlords after giving notice to their tenant before December 31, 1956, u/s 31 of the Act - terminating his tenancy, subsequently, before March 31, 1957, made an application for obtaining possession of the land. During the pendency of this application, the landlords on July 17, 1958, gave another notice to the tenant u/s 14 of the Act terminating his tenancy and on December 11, 1958, they made an application u/s 29 read with Section 14 of the Act for obtaining possession of the lands. The landlords did not belong to the categories mentioned in Section 31 (3) of the Act. On the questions (1) whether the landlords' application for possession u/s 29 read with Section 14 of the Act was tenable on the ground that the landlords, having once terminated the tenancy u/s 31 of the Act, were not entitled to terminate the tenancy again on any of the grounds mentioned in Section 14 of the Act and (2) whether the landlords' application u/s 29 read with Section 14 of the Act was not tenable on the ground that it was filed after March 31, 1957, this Court held that the application for possession made by the landlords u/s 29 read with Section 14 of the Act was not untenable merely on the ground that they had previously terminated the tenancy by a notice given by them u/s 31 of the Act. The court also held that the application u/s 14 read with Section 29 (2) of the Act was not maintainable, the same being filed after 1st April 1957 - the Tillers' day. Mr. Kadam here again has relied upon the following observations made by the Court at page 641 : -

"Under the ordinary law, if a tenant continues in possession after his tenancy has been determined, his possession is protected by law and he cannot be ousted except in due course of law, but he had no right to possession after the termination of tenancy. Under the Tenancy Act, however, 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. 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. Consequently, if during the above period i.e. the period between the termination of the tenancy by a notice given by the landlord and the disposal of the application for possession made to the Mamlatdar by the landlord. (Underling is mine), another ground for taking back possession of the land under the

provisions of the Tenancy Act becomes available to the landlord, there is no reason why he should not be able to terminate the tenancy and apply for possession on that ground also."

It is necessary to notice that in that case at the time when the landlords gave another notice on 17th July 1958 u/s n14 of the Act informing the tenant of their decision to terminate the tenancy on the ground of defaults in the payment of rent, the Mamlatdar had long ago disposed of the application of the landlords u/s 31 read with Section 29 (2) of the Act and appeal was pending before the district Deputy Collector. It was during the pendency of this appeal that the second notice was given by the landlords. The learned Counsel Mr. Kadam has pointed out from the aforesaid observations that according to these observations, the landlord would be entitled to terminate the tenancy by giving a second notice if another ground for taking back possession under the Act becomes available to him between the termination of the tenancy by the first notice and the disposal of the application for possession made to the Mamlatdar by him. In other words, the argument is that for giving second notice terminating the tenancy, the tenant must be a tenant after the first notice terminating the tenancy is given either u/s 31 or u/s 14 read with Section 29 (2) of the Act. If, therefore such a second notice can be given by the landlord between the termination of the tenancy by the first notice and the disposal of the application made to the Mamlatdar, the tenant is a tenant in lawful possession after the first notice terminating the tenancy is given to him till the disposal of such application made to the Mamlatdar. The observations do not show that the order of the Mamlatdar would be a terminus a quo for determining the nature of possession. They indicate that the final disposal of the application, whether it is by the Mamlatdar or by the appellate authority or by the revising authority, would be a terminus a quo. If that is so, the possession of the tenant would be lawful since after the first termination of tenancy till the application made to the Mamlatdar u/s 31 read with Section 29 of the Act is finally disposed of. The learned counsel Mr. Lalit has, however, relied upon the first part of the aforesaid observations where the learned Chief Justice who delivered the judgment of the Court has said that "under the Tenancy Act, however, 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." It is true that these observations suggest that in such cases the tenant has a legal right to continue in possession until the Mamlatdar has made an order for possession being restored to the landlord and the tenant has an estate in possession which can only be deprived by an order of the Mamlatdar. But I am inclined to think that these observations only reproduce the words of Section 29 (2) of the Act. These observations are not intended to lay down that the tenant has a legal right to continue in possession only until the date of the order of the Mamlatdar and not thereafter, whether or not the application made by the

landlord is taken up to the Tribunal and is finally disposed of by that authority. In fact, the subsequent observations, to which I have already made a reference and which are relied upon by the learned counsel Mr. Kadam, embody the opinion of the Court regarding the nature of the possession of the tenant after termination of tenancy till the application u/s 31 read with Section 29 (2) of the Act is finally pointed out, in that case second notice was given terminating the tenancy after the date of the order passed by the Mamlatdar and if the interpretation put upon these observations by the learned counsel Mr. Lalit is correct, then second notice terminating the tenancy u/s 14 would not have been tenable, because according to the interpretation the Mamlatdar is a terminus a quo which puts an end to the lawful possession of the tenant and his possession thereafter becomes wrongful. It is not the case of the appellant in this appeal that the terminus a quo in such application for determining the nature of possession of the tenant is the order of the Mamlatdar if such an application is granted, and the order of the final authority if such an application is rejected, because in this connection the learned counsel Mr. Lalit relied on the observations of the learned Judge in (1966) 68 BomLR 874, which read thus :-

"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."

The appellant's contention, therefore, is whether an application u/s 31 read with Section 29 (2) of the Act is finally rejected or granted, the terminus a quo is the order of the Mamlatdar on the basis of the theory of "relation back". The observations of the Full Bench decision quoted above appear to me to be in conflict with the observations in the Full Bench decision in Ramchandra Anant Joshi and Others Vs. Janardan Tulshiram Ghuge and Others, support the contention of the respondent that the terminus a quo in such cases for determining the nature of possession of the tenant would be the final order disposing of the application made u/s 31 read with Section 29 (2) of the Act.

10. Another Full Bench decision, to which my attention is drawn by the learned counsel Mr. Kadam is Vasant Hariba Londhe Vs. Jagannath Eamghandra Kulkarni, . In that case, respondent No.1 who was the landlord of a field gave notice to his tenant on March 18, 1955, terminating his tenancy u/s 29 read with Section 34 of the Act, on the ground that the bona fide required the land for his personal cultivation. On May 10, 1956, the landlord put in his application u/s 34 read with Section 29 of the Act for possession of the land and the Mamlatdar on October 8, 1956, ordered that possession should be delivered. The landlord took possession on April 21, 1957, and after cultivating the land personally for over three years, he sold the land to respondent No. 2 on August 8, 1960, giving him possession on that date. In the meantime, the tenant having died before the sale-deed was executed, his son, the applicant, filed an application on September 26, 1960, u/s 37 read with Section 39 for possession on the ground that as the

landlord who had acquired the land for his personal cultivation had ceased to cultivate it personally, the land should be restored to him. This application was allowed by the Mamlatdar who awarded possession, but on appeal by the landlord the District Deputy Collector and the Maharashtra Revenue Tribunal held that the tenant was not entitled to get possession of the land on the grounds (1) that as the landlord had taken possession on April 21, 1957, i.e. prior to February 9, 1961, when the Amending Act, Mah, Act IX of 1961, came into force, the words "or Section 34 of this Act as it stood immediately before the commencement of the Amending Act of 1956", in Section 37 (1) of the Act could not be read retrospectively, (2) that the applicant had no right to apply u/s 37 because he was not a tenant, inasmuch as the original tenant being merely a statutory tenant his right quo tenant was a personal right which could not be inherited by and passed on to the applicant and 93) that respondent No.2 who was a transferee from the landlord was included within the definition of "Landlord" and the applicant, therefore had no right to apply u/s 37 so long as the transferee continued to cultivate the land for the remaining part of 12 years period mentioned in Section 31 or old Section 34. This Court held that on the landlord exercising the right to take possession for his personal cultivation the tenancy was not terminated but pro tanto suspended or held in abeyance and, therefore, the question regarding the retrospective applicability of the amendments made by Mah, Act IX of 1961 did not arise for consideration, and the landlord on ceasing to use the land for his personal cultivation should forthwith restore the land to the applicant u/s 37. While delivering the judgment, the Court has held : -

"Thus though Section 34 (or the new Section 31) speaks of termination of tenancy there is in fact no immediate termination of tenancy in the sense of the cessation of the relationship of landlord and tenant. Until 12 years of the landlord's personal cultivation have elapsed the so-called termination is merely provisions and conditional. It is conditional upon the landlord continuing to make good his representation in the notice and continuing to cultivate personally for his bona fide requirements. Till then the landlord is bound to fulfill that condition upon which alone he is given the right of possession and cultivation. It is a provisional termination because until the expiry of 12 years of such cultivation by the landlord, the tenant's right to be restored to possession on the same terms and conditions continues. Till then though the tenant has lost possession his right to take the land back on the same terms and conditions survives and to that extent the termination of the tenancy is conditional and provisional."

The learned counsel Mr. Kadam has particularly relied upon the following observations at page 23 : -

"Thus though Section 34 (or the new Section 31) speaks of termination of tenancy, there is in fact no immediate termination of tenancy in the sense of the cessation of the relationship of landlord and tenant."

and again at page 25 where the learned Chief Justice was delivered the judgment

has observed thus : -

"If as we have shown the true effect of the exercise of the landlord's right to take his tenant's land for his bona fide need for personal cultivation, is that the tenancy is not terminated in the sense that the relationship of landlord and tenant is put an end to, but the true effect is only that the tenancy is pro tanto suspended and is capable of revival, then it is completely immaterial whether the original application of the landlord was u/s 31 or Section 34, because no matter under what section he had applied upon the landlord ceasing to use the land for the purpose specified in his notice, he must forthwith restore the land to the tenant u/s 37."

and again he has also drawn my attention to the following observations at page 24 :-

"Referring to the right of the landlord to terminate the tenancy on the ground that the landlord requires the land for personal cultivation, the Division Bench in Rajaram's case described it by saying "..... it was not absolute termination of the tenancy" and that "the tenancy is terminated provisionally". In Godavaribai's case, the Division bench described as a suspension of the tenant's rights." In both cases, however, this Court held that the tenancy can be revived, in other words, that it is never completely put an end to."

Relying on these observations, the learned counsel Mr. Kadam has argued that therefore the order of the Mamlatdar on an application u/s n31 read with Section 29 (2) of the Act cannot be treated to be a terminus a quo. It is no doubt true that in (1969) 71 Bom LR 12, this Court was considering the case u/s 37 read with Section 39 of the Act and it is possible to say that for the purposes of those sections this Court held that the tenancy is to be treated to have been suspended and not completely put an end to. But nevertheless, one this is certain that in an application u/s 31 read with Section 29 (2) of the Act, the order of the Mamlatdar cannot be the terminus a quo for the purpose of ascertaining the nature of possession. The tenant's possession would continue to be lawful in such cases even after the order passed by the Mamlatdar u/s 29 (2) of the Act.

11. Lastly, my attention is drawn by the learned counsel Mr. Kadam to the judgment of the Division Bench of this Court in First Appeal No. 458 of 1962 which was summarily dismissed on 18-10-1962.. The learned Judge, who delivered the judgment in (1966) 68 Bom LR 874 cited above, was a party to this judgment and in fact the judgment summarily dismissing the appeal was delivered by him. In that case also, the suit was for mesne profits. The property in respect of which mesne profits were claimed was an agricultural land in (to?) which the Act applied. The Court observed : "The ordinary rule, therefore, that the defendant or judgment-debtor becomes a trespasser from the date of suit does not apply to such a case. The plaintiff, therefore, would be entitled to mesne profits from 3rd September, 1958 only, when the final judgment of the Tribunal was made, since it is the judgment that terminates the tenancy under

the Tenancy Act." It is true that this was the judgment delivered while summarily dismissing the appeal and, therefore the Court had no advantage of hearing the other side. Even then the observations made by the Division Bench of this Court in that judgment, which I have quoted above, are certainly entitled to weight and these observations are quite consistent with the view which I have discussed above.

12. I am, therefore, of the opinion that the view expressed by the learned Judge in *Balkishan v. Tukaram*, (1966) 68 BomLR 874, is not consistent with the observations of the Supreme Court and the Full bench decisions of this Court quoted above. The correct view consistent with the observations of the Supreme Court and this Court in Full Bench decisions cited above would be that if an application u/s n31 read with Section 29(2) of the Act is filed by a landlord after terminating the tenancy the possession of the tenant becomes wrongful and the landlord becomes entitled to mesne profits from the date of the final disposal of such application u/s 29 (2), whether the disposal is by the Mamlatdar u/s 29 (2) or by the appellate authority or by the revising authority u/s 78 (1) read with Section 29 (2) of the Act.

13. It is not necessary for me to go into the question in this case whether this terminus a quo can be further taken upto the order of the high Court in case the final order of the Tribunal is challenged under Article 227 of the Constitution of India, because in the instant case we have no material on the record to show whether a Special Civil Application filed in this Court under Article 227 of the Constitution of India was dismissed summarily or was disposed of after hearing the parties on both the sides. It is not disputed before me that if such an application is summarily dismissed, the order of the Tribunal would be the final order.

14. I have already pointed out that in the instant cases the Tribunal disposed of the application of the landlord on 14th October, 1960 and the landlord-plaintiff obtained possession on 21st January, 1962. In the view I have taken, therefore, he would be entitled to the mesne profits for 1960-61 and part of the year 1961-62. Unfortunately, neither the trial Court nor the first appellate Court has recorded a finding on the quantum of mesne profits which the plaintiff may be entitled to every year in case he succeeds. According to the plaintiff-appellant, he is entitled to the mesne profits at a rate of Rs. 400/- per year, in support of which claim he has examined himself, while the defendant-respondent has said in his evidence that the plaintiff would be entitled to only Rs. 180/- per year. I was considering at one stage whether the suit should be remanded back to the lower Court for recording a finding. But considering the fact that ultimately the plaintiff would be entitled to mesne profits only for a year and half. I do not think that any useful purpose would be served remanding the suit for that purpose only. Moreover, whatever the parties on both the sides want to say on the question of quantum of mesne profits has already been said by them in their evidence. Likewise, whatever evidence they wanted to produce in support of their

respective cases has already been produced by them. I have, therefore, come to the conclusion that instead of remanding the suit to the trial Court and asking for the parties to have another round of litigation, it would be better to consider the evidence here and arrive at the rate of quantum of mesne profits on the basis of the evidence on the record. It appears from the evidence that the land in dispute is 5 acres and 17 1/2 gunthas and it grows jowar. It is assessed at Rs. 6-11-0. The annual rent for the land is Rs. 51/-. According to the plaintiff, the whole of the land yields 15 to 20 bags of jowar and 3000 bundles of fodder. The rate of jowar is Rs. 40/- per bag and that of fodder Rs. 200/- per 1000. He has, therefore, claimed Rs. 400/- per year for half of the land which is now in dispute. In his cross-examination, the defendant put his case only and obtained denial. The defendant, on the other hand said in his evidence that the whole of the land yields 8 bags of jowar and 1200 bundles of fodder. In his cross-examination, the plaintiff has not even put his case to him. He was cross-examined only regarding the rate of jowar and a reply was that the rate was Rs. 30/- to Rs. 40/- per bag. Considering this evidence and the assessment of the land and rent, I think that Rs. 300/- would be the annual profits of the land. Admittedly, the plaintiff has received rent both for the years 1960-61 and 1961-62. However he would be entitled to the profits at Rs. 300/- for the year 1960-62. Deducting Rs. 100/- on account of the rent for the years 1960-61 and 1961-62, the plaintiff would be entitled to Rs. 350/-. The plaintiff therefore, would be entitled to a decree on account of mesne profits for Rs. 350/-.

15. The result, therefore, is that the appeal is partially allowed. The decree passed by the trial Court as confirmed by the lower appellate Court is hereby set aside, and the following decree is passed : -

16. The defendant do pay Rs. 350 to the plaintiff on account of mesne profits with future interest of 4 per cent, per annum from the date of the suit till realisation and proportionate costs throughout.

17. Order accordingly.