

(1968) 03 BOM CK 0032

In the Bombay High Court

Case No : Special Civil Application No. 767 of 1965

Vasant Hariba Londhe

APPELLANT

Vs

Jagannath Eamghandra Kulkarni

RESPONDENT

Date of Decision : 25-03-1968

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 37

Citation : (1969) 71 BOMLR 12 : (1969) MhLj 249

Hon'ble Judges : S.P. Kotval, C.J.;Tuhapurkar, J;Mody, J

Bench : Full Bench

Final Decision : Allowed

Judgement

S.P. Kotval, C.J.—This petition has been referred to a Full Bench because it involves consideration of the provisions of Section 37 of the Bombay Tenancy and Agricultural Lands Act as amended and because the Division Bench before whom it came up for hearing considered that there was a conflict of decisions between Khandubhai Gulabbhai v. Maganlal Ranchhodji (1958) Special Civil Application No. 2517 of 1958, decided by Chainani Actg. C.J. and Shelat J., on October 25, 1958 (Unrep.) and Kisan Sampat Bonge v. Dhondy Ramchandra (1961) Special Civil Application No. 309 of 1961, decided by Patel and Chandrachud JJ., on July 14, 1961 (Unrep.) on the one hand and the decisions in Bajaram Sakharam Pattil v. Ganpati Shripati Kadam (1957) Special Civil Application No. 2189 of 1957, decided by Dixit and Badkas JJ., on November 22, 1957 (Unrep.) and Suryakant Bhanudas Jadhav v. Ganpat Shankar Rajmane (1962) Special Civil Application No. 1063 of 1961, decided by Tambe and Chandrachud JJ., on January 16, 1962 (Unrep.). The case had initially come up before Mr. Justice Chandrachud sitting singly and in view of the importance of the point involved and the conflict of decisions he had referred it to a Division Bench. The Division Bench in its turn felt that some of the earlier decisions of the Division Bench would have to be reconsidered and, therefore, has referred it to a Full Bench.

2. The brief facts upon which the; questions involved in this Special Civil

Application arise are as follows:

3. Vasant the petitioner before us is the son of the protected tenant of a field situated in village Lavung, taluka Malsiras in district Sholapur, having an area of 2 acres and 19 gunthas. Respondent No. 1 Kulkarni was the landlord of this field and after taking possession of the field on the ground that he required it for his personal cultivation, he transferred the field to respondent No. 2 Khandagale. The proceeding's commenced with the landlord giving notice to terminate the tenancy of the petitioner on March 18, 1955, u/s 2*9 read with Section 34 on the ground that he bona fide required the land for his personal cultivation.

4. On May 10, 1956, the landlord put in his application u/s 34 read with Section 29 of the Tenancy Act as it then existed prior to the amendments thereof in 1956 and 1961. Before this application could be considered the Amending Act XIII of 1956 came into force on August 1, 1956. We will presently deal with the amendments thus made. The proceeding which the landlord had commenced u/s 29 read with the old Section 34, however, continued and on October 8, 1956, the Mamlatdar ordered that possession should be delivered to the landlord u/s 34. The landlord took actual physical possession of the land on April 21, 1957. After taking possession he cultivated the land personally for over three years and then on August 8, 1960, he sold the said land for a sum of Rs. 5,000 to respondent No. 2 Khandagale and gave him possession on that date. The present application u/s 37 of the Act read with Section 39 was filed not by the original tenant who had by that date passed away, but by the son of the tenant who is the petitioner. He applied for possession u/s 37 on the ground that the landlord who had acquired the land for his personal cultivation had ceased to cultivate it personally and, therefore, the land should be restored to the tenant u/s 37. After this application was filed the Act came to be further amended on February 9, 1961 by Section 19 of Act IX of 1961. On July 24, 1962, the Mamlatdar decided the application of the tenant (the son of the former tenant) and awarded possession to him.

5. When the landlord had applied for possession on May 10, 1956, u/s 29 read with Section 34 of the Tenancy Act, the unamended Section 34 was in operation, but soon after, on August 1, 1956, the Amending Act XIII of 1956 came into force. The Amending Act inter alia deleted Section 34 and with some modifications re-enacted it as Section 31. At the same time an amendment was made in Section 37, Sub-section (1) by substituting the words "under Section 31" for the words "under Section 34". The new Section 31 substantially reproduced the provisions of the old Section 34. One of the points which was raised before the Revenue Authorities arises out of this amendment. The contention raised is that though Section 31 was substituted for the old Section 34, it is really Section 37 which gives the right to the tenant to have the land restored to him on the ground that the landlord has failed to cultivate the land personally, but Section 37 as it stood amended after the 1956 amendment merely referred to the new Section 31 and not the old Section 34 and that,

therefore, the tenant who had applied under the old Section 34 could not avail of Section 37 as amended because there was no reference in that section any longer to the provisions of the old Section 34. This omission to refer to the old Section 34 in the amended Section 37 was subsequently made good by the Maharashtra Act IX of 1961. The omission was pointed out in one of the decisions of this Court in *Khandubhai Gulabbhai v. Maganlal Ranchhodji* by Chief Justice Chainani and Mr. Justice Shelat. It was conceded on all hands by counsel before us that the subsequent amendment of the Act by Act IX of 1961 on February 9, 1961, was in consequence of this decision. By Section 19 of the Amending- Act of 1961 after the words "under Section 31" in Sub-section (1) of Section 37 the following words were added by way of amendment "33B or Section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956". One of the contentions before us has been that these words which were added in 1961 do not on the language used apply retrospectively notwithstanding that presumably that may have been the intention of the Legislature. The present "list" was commenced on September 26, 1960, during the time between the passing of the Amending Act XIII of 1956 which came into force on August 1, 1956, and the Amending Act IX of 1961 which came into force on February 9, 1961. On September 26, 1960, Section 37 applied only in cases where the landlord had made an application u/s 31 and did not apply to a case where the landlord had originally applied under the old Section 34. Moreover, the original application was filed only u/s 34.

6. The Mamlatdar allowed the application and awarded possession to the petitioner, the tenant. In appeals the District Deputy Collector and the Maharashtra Revenue Tribunal have both held that Section 37 as amended by Act IX of 1961 was not retrospective in operation. Therefore the words "or Section 34 of this Act as it stood immediately before the commencement of the Amending Act of 1956" cannot apply to a case such as we have here, where possession was taken prior to February 9, 1961, when the Amending Act IX of 1961 came into force and the said words were first introduced into Section 37. In concurring to this decision they relied upon the decision of this Court in *Kisan Sampat Bonge v. Dhondy Ramchandra*.

7. Secondly, the District Deputy Collector and the Maharashtra Revenue Tribunal also held that the petitioner had no right u/s 37 because he was not the tenant. As we have already stated the original tenant was Hariba Appa Londhe, the father of the petitioner. He died before the actual sale-deed was executed by the landlord in favour of respondent No. 2 on August 8, 1960. Both the authorities, therefore, held that Hariba being merely a statutory tenant and not a contractual tenant his right qua tenant was a personal right which could not be inherited and pass to his son the petitioner. Therefore, the petitioner would have no locus standi to apply u/s 37 at all.

8. The Maharashtra Revenue Tribunal added a third point against the petitioner. The Tribunal virtually held that a transferee from an erstwhile landlord is included

within the definition of "landlord". Therefore u/s 31 (or the old Section 34) after a transfer, the transferee would be the landlord and if the transferee continues to cultivate the field for the remaining part of the 12 year period mentioned in Section 31 (or the old Section 34) the tenant would have no right to apply u/s 37 for the transfer would not interrupt the landlord's personal cultivation for the 12 year period mentioned in Section 31 (old Section 34), The tenant would thus still be holding under the transferee who would thus be the "landlord". On this point the Tribunal followed a decision of the Mysore High "Court in C.B. Vadakappanawar v. S.R. Karadgi (1964) 43 MLJ 284.

9. Now all these findings have been contested by Mr. Raja Bhonsale who appears on behalf of the petitioner, the son of the former tenant. He urged that the amendment made in Section 37 by Act IX of 1961 by adding the words "or Section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956" is an amendment which operates with retrospective effect and, therefore, the present case would be covered by Section 37, Although the landlord had taken possession of the land for personal cultivation after the 1956 Act, that is to say, after the words "section 34" in Section 37 were dropped and the words "section 31" substituted or in other words during the time between August 1, 1956 and February 9, 1961, when Section 34 did not find mention in Section 37-still by virtue of the 1961 Amendment Act the landlord must be deemed to have taken possession u/s 34 because that amendment was retrospective. In this respect he relied upon a decision of this Court in Suryakant Bhanudas Jadhav v. Ganpat Shankar Rajmane which in terms holds that the intendment of the 1961 Amendment was to make Section 37 retrospective in operation. He has also referred to the decision of this Court in Khandubhai Gulabbhai v. Maganlal Banchhodji which was prior to the 1961 amendment of the Act and in which the lacuna was pointed out that though Section 31 was referred to after the amendment, the old Section 34 was not so referred. Alternatively Mr. Raja Bhonsale lease relied upon the decision of a Division Bench in Rajaram Sakharam Pattil v. Ganpati Shripati Kadam.

10. As regards the second point decided against the petitioner, namely, that the petitioner had no right to apply u/s 37 because he was not the tenant, Mr. Raja Bhonsale has relied upon the provisions of Section 40 to show that even an heir becomes a tenant and can take the advantage of Section 37.

11. As regards the third point that; Section 37 does not apply in the present case because the landlord had transferred his field to respondent No. 2 and Section 37 could not be availed of against the transferee, Mr. Bhonsale has referred to the provisions of Sections 63 and 64 of the Tenancy Act and has urged that the decision of the Mysore High "Court on which reliance was placed by the Revenue Tribunal must be held to be incorrect. He argued that to include the transferee in the definition of landlord would virtually make the provisions of Sections 34, 37 and 39 nugatory and has pointed out how they would become impossible of application in certain cases.

12. After arguments had proceeded for some time and counsel for the petitioner had concluded his arguments we permitted Mr. R. G. Samant, a senior advocate of this Court to intervene *amicus curiae* because we felt that the questions involved in the reference were of considerable importance. Mr. Samant on his part relied upon the view taken in *Rajaram Sakharam Pattil v, Ganpati Shripati Kadam* and also referred us to an earlier decision of a Division Bench in *Godavaribai Vs. Kashiram Kautik Falak and Others*, . The way in which Mr. Samant put the provisions of Sections 34, 37 and 39 was as follows:-

13. He pointed out that no doubt Section 14 of the Act bars the termination of the tenancy except in stated cases and that "notwithstanding any law, agreement or usage, or the decree or order of a Court...." and no doubt also the old Section 34 as well as the new Section 31 both speak of the termination of the tenancy but if one scrutinises the provisions of those sections in the light of the provisions of Section 37 and Section 39, the termination of tenancy referred to in Sections 34, 37 and 39 is not a final termination of the tenancy in the sense that the landlord has put an end to the tenancy for all time, but he urged that those sections only show that the landlord gets the right of personal cultivation subject to certain conditions and only provisionally and he is entitled to retain the land for personal cultivation only so long as he observes those conditions until the period of 12 years expired. Thus the so-called "termination of tenancy" referred to in Sections 34, 37 and 39 is only a provisional and a conditional termination and that expression in relation to the right of the landlord for personal cultivation cannot have the same meaning as the expression "termination of tenancy" or equivalent words in Section 14. He supported his arguments by reference to the two decisions immediately referred to above. In the light of this construction of Sections 34, 37 and 39 canvassed by Mr. Samant he urged that really no question arises for consideration in this Special Civil Application whether, Section 37 and its provisions, before or after the amendment of 1961 would be retrospective in operation. No question of retrospectively could arise, he urged, because the tenancy continues and is only pro tanto over-shadowed by the statutory right given to the landlord to take and hold possession so long as his need for personal cultivation endures.

14. This point raised by Mr. Samant and by Mr. Raja Bhonsale in the same form is by far the most substantial point in this case and as we have shown if that point succeeds, then it would be unnecessary to consider most of the other contentions.

15. Section 34 as it stood after its amendment by the Bombay Act XXXIII of 1952 was as follows:

34. (1) Notwithstanding anything contained in Section 14, a landlord may terminate the tenancy of a protected tenant by giving him one year's notice in writing, stating then in the reasons for such termination, if the landlord bona fide requires the land for any of the following purposes, namely :-

(1) for cultivating personally, or

(2) for any non-agricultural use for his own purpose.

(2) Nothing in Sub-section (1) shall entitle the landlord,-

(a) to terminate the tenancy of a protected tenant, if the landlord at the date on which the notice is given or at the date on which the notice expires has been cultivating personally other land fifty acres or more in area :

Provided that if the land which is being cultivated personally is less than fifty acres, the right of the landlord to terminate the tenancy of the protected tenant and to take possession of the land leased to him shall be limited to such area as will be sufficient to make up the area of the land which he has been cultivating personally to the extent of fifty acres :

(b) to terminate the tenancy of a protected tenant, if such tenant has become a member of a co-operative farming society so long as such tenant remains such member ; or

(c) to terminate the tenancy of a protected tenant on the ground that the landlord requires the land for cultivating it personally, unless the income by the cultivation of such land will be the main source of the income of the landlord for his maintenance.

(2-A) If the landlord bona fide requires the land for any of the purposes specified in Sub-section (1) then his right to terminate the tenancy shall be subject to the following conditions, namely :-

(1) The land held by the protected tenant on lease stands in the record of rights in the name of the landlord on the first day of January 1952 as the superior holder.

(2) If the land held by the landlord is in area equal to the agricultural holding or less, the landlord shall be entitled to terminate the tenancy of the protected tenant in respect of the entire area of such land.

(3) If the land held by the landlord is more than the agricultural holding in area, the right of the landlord to terminate the tenancy of the protected tenant shall be limited to an area which shall, after such termination, leave with the tenant half the area if the land leased.

(4) The tenancy in respect of the land left with the protected tenant after termination under this section shall not at any time be liable to be terminated on the ground that the landlord bona fide requires the said land for any of the purposes specified in Sub-section (1),

Explanation :-The "agricultural holding" shall mean sixteen acres of jirayat land or four acres of irrigated of paddy or rice land, or lands greater or less in area than the aforesaid areas in the same proportion :

Provided that the- State Government may by general or special order direct that the limits of the agricultural holding specified in this section shall for any local area or tract be varied, if the State Government is satisfied that such variation is necessary or expedient in the interest of either the landlord or the tenant or for ensuring the full and efficient use of land for agriculture.

(3) If under Sub-section (2) or (2A) the tenancy of a protected tenant is terminated of a part of the land leased to him, the rent shall be apportioned in the prescribed manner in proportion to the area of the land left with the protected tenant.

(4) Nothing in Clause (a) of Sub-section (2) or in Sub-section (2A) shall authorize the termination of the tenancy in such a manner as will result in contravention of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, or in making any part of the land leased a fragment within the meaning of the said Act.

By the Bombay Act XIII of 1956 Section 34 was omitted from the Bombay Tenancy and Agricultural Lands Act and the subject of termination of tenancy for personal cultivation and non-agricultural use were relegated to a separate chapter i.e. Chapter 3 and the several provisions of Section 34 were split up and re-enacted in Sections 31 and 31A to 31D. The operative part of Section 31 with which we are concerned was as follows:

31. (1) Notwithstanding anything contained in sections 14 and 30 but subject to sections 81A to 31D (both inclusive), a landlord may, after giving notice and making an application for possession as provided in Sub-section (2), terminate the tenancy of any land (except a permanent tenancy), if the landlord bona fide requires the land for any of the following purposes :-

(a) for cultivating personally, or

(b) for any non-agricultural purpose.

(2) The notice required to be given under Sub-section (1) shall be in writing, shall state the purpose for which the landlord requires the land and shall be served on the tenant on or before the 81st day of December 1956. A copy of such notice shall, at the same time, be sent to the Mamlatdar. An application for possession u/s 29 shall be made to the Mamlatdar on or before the 81st day of March, 1957.

Since Section 34 was thus split up into several sections in Chapter III Part I consequential amendments had to be made in Section 37. The original Section 37 provided as follows:

37. (1) If after the landlord takes possession of the land after the termination of the tenancy u/s 84, he fails to use it for any of the purposes specified in the notice given under Sub-section (2) of Section 34 within one year from the date on which he took possession or ceases to use it at any time for any of the

aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him, unless he has obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof.

(2) After the tenant has recovered possession under Sub-section (1) he shall, subject to the provisions of this Act, held such land on the same terms and conditions on which he held it at the time his tenancy was terminated.

(3) If the landlord has failed to restore possession of the land to the tenant as provided in Sub-section (1) he shall be liable to pay such compensation to the tenant as may be determined by the Mamlatdar for the loss suffered by the tenant on account of eviction.

In 1956 the words "under Section 34" in the first sentence of Sub-section (1) were dropped and the words "under Section 31" were substituted. Curiously enough in making this amendment the Legislature lost sight of the fact that there may be several proceedings commenced under the old Section 34 which had to be provided for and that in numerous cases the landlord had also taken possession under the old Section 34. What was to happen in such cases was not indicated in Section 37(7) after its amendment of 1956. Such a case actually arose before this Court in *Khandubhai Gulabbhai v. Maganlal Ranchhodji* where the landlord had taken possession under the old Section 34 and then transferred the land to another person. On the tenant applying u/s 37 it was held that as the landlord has taken possession from him u/s 34 of the Act as it stood prior to the amendment in 1956, Section 37 as amended had no application to the facts of the case as it only referred to the new Section 31 and not to the old Section 34. This Court was constrained to uphold that objection and the tenant's application u/s 37 failed. In that case this Court also had occasion to remark upon that lacuna in Section 37 after its amendment of 1956 and so it appears that this section came to be further amended by Section 19 of Act IX of 1961, and the only amendment thereby effected was that the following words were added after the words "under Section 31".

33B or Section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956.

16. Now the provisions of Sections 34, 37 and 39 as they stood before the 1956 amendment were clear. By Section 14 the termination of tenancy was completely prohibited except to the extent stated in that section. The section begins with the non-obstante clause "Notwithstanding any law, agreement or usage, or the decree or order of a Court, the tenancy of any land shall not be terminated--(a) unless...." The mandate of the law was categorical and clear that the general rule is that a tenancy cannot be terminated. We are not here concerned with the

exceptions mentioned in the section such as failure to pay rent, sub-letting, failure by the tenant to cultivate personally, destruction or permanent injury to the tenement or diverting land to a non-agricultural use etc. Section 14 has substantially remained the same in all the subsequent Acts so far as this mandate is concerned.

17. The right of the landlord to ask for possession of his land back in case he needs it for his personal cultivation was also recognised by the Tenancy Acts throughout (See Section 7 of the Act of 1939; Section 34 of the Act of 1948; Section 31 of the Act of 1948 after its amendments in 1956 and 1961) and though not referred to in Section 14 clearly constitutes partially an exception to the general rule laid down in Section 14.

18. The Legislature, however, treated this exception to the general rule that a tenancy cannot be terminated in a separate section or sections and after the 1956 amendment in a separate chapter and not as one of the exceptions to Section 14. That was because the Legislature intended to demarcate with meticulous care the extent of the landlord's right to take back the land for personal cultivation and secondly because it intended anxiously to safeguard the tenant against a possible abuse of that right by the landlord and ensure to the tenant the right to get back the land in such a case and continue his tenancy. The relevant provisions are to be found in Section 7 of the 1939 Act and in Sections 34, 37 and 39 of the Act of 1948 before its amendment and in Sections 31, 37 and 39 after its amendments in 1956 and 1961.

19. In *Khandubhai Gulabbhai v. Maganlal Ranchhodji* this Court had occasion to consider Section 37 as it stood after the 1956 amendment but prior to the 1961 amendment but they pointed out that Section 37 as it stood after the 1956 amendment merely referred to Section 31 of the Act and not to Section 34 and that, therefore, the application made by the tenant to recover possession on the landlord's failure to cultivate personally in cases where the landlord had applied under the old Section 34 would not be governed by Section 37 as it then stood. It was expressly urged before that Division Bench that the law could not have intended that the tenants from whom possession had been obtained before the Act was amended in 1956, should lose their rights to have the lands restored to them. This point commended itself to the Division Bench but they were still unable to decide it in favour of the tenant in that case for reasons which they stated as follows:

It has however been urged that the reference to Section 31 in the new Act should be regarded as a reference to the corresponding Section 84 as it stood before the amendment in 1956... u/s 37, as it stood before its amendment, it was possible for a tenant to have the land restored to him, if the landlord used it for any purpose not specified in the notice given by him by which he had terminated the tenancy. The same right continues to be enjoyed by the tenants u/s 37 of the Act as amended. It is, therefore, urged by Mr. Samant that the Legislature could not have intended that the tenants, from whom possession had

been obtained before the Act was amended in 1956, should lose this right of having lands restored to them. There is considerable force in this argument. But assuming that that was the intention of the Legislature, the difficulty, which we find, is that the Legislature has not given effect to it in the provisions which it has enacted... The tenancy of appellant No. 1 was not terminated u/s 31, Consequently no relief could be granted to him u/s 37.

A reference was made before that Division Bench to Section 89(2) of the Act but the Division Bench pointed out that that section was not applicable because it "has application only to rights acquired before the commencement of the Act in 1948 and to legal proceedings instituted before that date, There is no corresponding saving provision in the Amending- Act of 1956."

20. One of the questions raised before us is whether in spite of this history of the section and in spite of the amendment being expressly made pursuant to the Division Bench judgment in *Khandubhai Gulabbhai v. Maganlal Banchhodji* has the Legislature achieved its object of making a retrospective amendment by the words used? In the present case the landlord had applied u/s 34 prior to the amendment of the Act in 1956, but he took possession on April 21, 1957, after the 1956 amendment. The tenant's application u/s 37 was made on September 26, 1960, and then came the addition of the above words including Section 34 in Section 37 by Act IX of 1961. Thus the tenant's application was made between August 1, 1956 and February 9, 1961-the period during which reference to Section 34 in Section 37 was absent. The point raised is whether the subsequent amendment in 1961 and the addition of the words "or Section 33 or Section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956"" have made good the lacuna.

21. In *Suryakant Bhanudas Jadhav v. Ganpat Sakharam Rajmane & Division Bench* of this Court has held that the amendment was retrospective in operation but that view has again been strongly challenged before us and it has been urged that there is absolutely nothing¹ in the wording of the section as amended to suggest that the words "or Section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956" have retrospective effect.

22. In our opinion, most of these contentions will answer themselves if once certain fundamental concepts underlying the conferment on the landlord of the right to take back the possession of his land for his personal cultivation and the corresponding right of the tenant to insist that he shall retain the possession only for his need for personal cultivation are correctly grasped.

23. The Bombay Tenancy Act, 1939 (Act No. XXIX of 1939) was passed with the declared object of providing "for the protection of tenants of agricultural lands in the Province of Bombay..," With this object it introduced for the first time Section 7 which contains provisions limiting the landlord's right to determine protected tenancies on the ground that the landlord needs his land for personal cultivation. The provisions, of Section 7 were substantially similar to the provisions of the re-

enacted Sections 34, 37 and 39 when the Act LXVTI of 1948 was passed. Later as we have said by the Amending Act XIII of 1956 Section 31 was substituted for Section 34 and corresponding changes were made in Sections 37 and 39.

24. Now Section 14 of the Tenancy Act, 1948 (corresponding to Section 5(2) of the Tenancy Act of 1939) also stated in sweeping terms "Notwithstanding any law, agreement or usage, or the decree or order of a Court, the tenancy of any land shall not be terminated-unless..." and then Clause (a) lays down five exceptions to the rule-all constituting some default or other on the part of the tenant e.g. failure to pay rent; act destructive or permanently injurious to the tenement; sub-dividing, sub-letting or assigning; failure to cultivate personally (not the personal cultivation referred to in Section 31 or Section 34) ; using land for non agricultural pursuits. Clause (b) merely prescribed a condition precedent to the initiation of action, namely the giving of a notice. What is of importance to note is that Section 31 (or old Section 34), Section 37 or Section 39 dealing with the landlord's right to take possession for personal cultivation are not referred to in Section 14. In other words, the landlord's right to take back possession for personal cultivation is not treated as an exception to the general rule laid down in Section 14 that the tenancy of any land shall not be terminated. On the contrary, that right was relegated to separate sections and now also to separate chapter and we shall show presently that this was done for a very good reason.

25. No doubt both the old Section 34 before the 1956 amendment and the new Section 31 begin with the words "Notwithstanding anything contained in Section 14..." but that does not show that the provisions of Section 34 (or new Section 31) are treated as an exception to the rule in Section 14. Those words only mean that in case there is some conflict with Section 14, the provisions of Section 34 must prevail. Short of a conflict, Section 14 continues to prevail.

26. On the date on which the tenancy of the petitioner's father was terminated, i.e. on March 18, 1956 (one year after the notice dated March 18, 1955) it was the old Section 34 which was in force and Sub-section (1) of that section gave the right to the landlord to terminate the tenancy of a protected tenant by giving- him one year's notice on. two grounds namely (1) if the landlord bona fide requires the land for cultivating it personally or (2) for any non-agricultural use for his own purpose. Sub-section (2) laid down a stringent condition to the exercise of this right, which was substantially that the landlord could not get by the exercise of this right more than 50 acres taking into account the land already held by him. With the other conditions we are not here concerned.

27. Now the expression used in this section is "terminate the tenancy" and reading it by itself it does give the impression that when the landlord exercises this right and gives a valid notice the tenancy is put an end to. It is on the basis of this expression (the same expression as used in Section 14) that the argument has been repeatedly advanced that on the expiry of the one year's notice the tenancy ends; the relationship of landlord and tenant is completely severed and the tenancy comes to an end. This has important repercussions

when we come to apply Section 37 because as we have said Section 37 after its amendment in 1956 referred only to Section 31 and not to the old Section 34 which was substituted by Section 31. If the tenancy is completely put an end to, then it could with some force be argued that unless a new right comes into being u/s 31 the tenant cannot avail himself of the amended Section 37 because that section refers only to Section 31 and not to Section 34, whereas the landlord had in fact given notice and terminated the tenancy in this case only u/s 34.

28. But it seems to us that though Section 34 uses the words "a landlord may terminate the tenancy of a protected tenant" the expression "terminate the tenancy" is not used in the sense in which it is used in Section 14 viz. to put an end to the relationship of landlord and tenant altogether. The clue to this expression in Section 34 (or Section 31) is to be found in the provisions of Section 37.

29. Sections 37 and 31 are complementary to Section 34. Just as the Legislature has given to the landlord a right to take possession for personal cultivation, if certain conditions are fulfilled, It has recognised a corresponding right in the tenant to have possession restored to him in the event of the landlord breaking any of the conditions on which he was allowed to take possession, The conditions which the landlord has to fulfil are several but the principal ones are that he must give notice and he must prove either (a) that he bona fide requires the land "for cultivating it personally or (b) that he bona fide requires it for non-agricultural use for his own purpose; (c) that he is not cultivating more than 50 acres both when the notice is given and when the notice expires and (d) where he takes the land for personal cultivation the landlord's income from cultivation will be the main source of income for his maintenance. The section clearly shows that the right to take the land for personal cultivation is only a right to possession and nothing more and secondly it is conditioned by and commensurate with the need for his personal maintenance. Though the section uses the words "to terminate the tenancy" in fact only possession is granted to the landlord and the tenant's title qua the tenant is not made to pass until the expiry of 12 years.

30. This is further made clear by Section 37 which gives the corresponding right to the tenant in the following words

...the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him, unless he has obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof.

The section thus provides that the landlord shall forthwith restore possession of the land to the tenant if he fails to use it for any of the purposes specified in the notice within one year after he takes possession or if he ceases to use it at any

time for any of the purposes specified in the notice within 12 years from the date on which he took such possession. This is a duty cast upon the landlord to act suo motu, He is not to wait for any proceedings to be taken by the tenant to enforce his corresponding rights. Sub-section (3) of Section 37 penalises the landlord if he fails in that duty. He is required to pay to the tenant such compensation as may be determined by the Mamlatdar for the loss suffered by the tenant "on account of eviction". Thus the duty of the landlord to restore possession and the right of the tenant to get back the land are backed and enforced by the sanctions imposed by Sub-section (2). The only exceptions to the landlord's obligation to fulfil his duty are (1) unless the landlord has obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or (2) unless the landlord has offered him in writing to give possession of the land on the same terms and conditions and the tenant has failed to accept the offer within three months of its receipt.

31. Though as we have said, Section 34 speaks of terminating the tenancy which would normally imply that the relationship of landlord and tenant is put an end to, Section 37 which is the complimentary provision conferring on the tenant his right to take back possession even after the termination of the tenancy u/s 34 (or Section 31), throughout speaks of "the landlord" and "the tenant" clearly showing that despite the exercise by the landlord of his right u/s 34, the tenant still is and continues to be the tenant, and the landlord his landlord.

32. Section 37 contemplates a position as it exists after the termination of tenancy u/s 34 by the opening words "" If after the landlord takes possession of the land after termination of the tenancy u/s 34" (italics are ours), yet in that very context it says "...the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him" (again the italics are ours). The very expression here used "the tenant whose tenancy was terminated" would in the normal parlance of law be paradoxical for if a tenancy is terminated there cannot be a tenant any longer, yet this Act with all the desire to assist the tenant at every stage writ large upon its face, speaks of a "tenant whose tenancy is terminated". This is only u/s 34. The only way to make any sense out of the provisions of Sections 34, 37 and 39, therefore, is to hold that although the draftsman used the expression "terminate the tenancy" in Section 34 he did not imply a permanent severance of the relationship of landlord and tenant, but only a provisional suspension or eclipsing of the tenant's rights pro tanto. It is a conditional termination depending upon the landlord strictly fulfilling the representations made by him in the statutory notice to be given under the section.

33. Secondly Sub-section (2) of Section 37 also gives the same indication. Although the tenancy is terminated u/s 34 it says that the "tenant" on getting back possession u/s 37(1) shall hold the land "on the same terms and conditions on which he held it at the time his tenancy was terminated". Once again it refers to the tenant as a tenant and not as the ex-tenant, showing that the tenancy of

the tenant is not put an end to.

34. Reading these provisions together it is clear that the paramount intention of the law is that a tenancy shall not be terminated except for certain grave defaults on the part of the tenant. These are carefully stated in the Act. The termination of the tenancy even on these grave defaults is rigidly controlled and at every stage before the tenant can be visited with the consequences of his defaults the law provides that he is to be warned and given a locus poenitentiae. In making these provisions for termination of the tenancy on the ground of the tenant's default this law hardly takes into account the rights of the landlord or his need for subsistence out of the land. The only place where the law takes into account the need of the landlord is where it provides for his right to take back possession of the land from the tenant for his personal cultivation, but there again the right is merely conditional and provisional until 12 years of personal cultivation have elapsed. The landlord has first to give notice before December 31, 1956, stating why he wants the land back. He is limited to one of two grounds only. He has to state whether he needs the land bona fide for his personal cultivation or for any non-agricultural purpose. Next he has to apply for possession and prove his bona fide need on the ground mentioned in the notice. After he gets possession he does not become the full owner at once. He has to commence personal cultivation within one year and continue to cultivate personally for 12 years or use it for the purpose stated. If during any part of that time his need is no longer there and if the ground on which he was given possession ceases to exist he is statutorily bound to restore possession to the tenant forthwith unless the tenant refuses to accept the tenancy or being offered the tenancy on the old terms and conditions fails to accept it.

35. 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 provisional 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 fulfil 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.

36. We now turn to consider some of the decided cases which were referred to and which support this construction of Section 34 (or Section 31) and Section 37 of the Act. The first and most important of them is the unreported decision in *Rajaram Sakharam Patil v. Ganpati Shripati Kadam*. In that case the facts were that the Mamlatdar had passed an order in favour of the landlord on April 7,

1947, on the ground that the landlord bona fide required the land for his personal cultivation. The landlord took possession of the land on April 24, 1949. Between these dates the landlord had sold the land to one Rajaram and soon after the landlord took possession, he actually handed over possession to Rajaram in pursuance of the sale deed. The date on which possession was thus actually given to Rajaram was not known, but on possession being given to the transferee the tenant applied for restoration of possession u/s 37 read with Section 39. The transferee Rajaram was made a party in that application and the revenue authorities concurrently decided in favour of the tenant and ordered him to be restored to possession of the land. The transferee petitioned this Court and it was urged inter alia on his behalf that he (the transferee) had become the landlord of the tenant and he (the transferee) also needed the land for his personal cultivation his need being identical with the need of the original landlord, and whatever obligation the landlord had to discharge under the law, were being discharged by the transferee, therefore, the tenant could not get back the land. It will be noticed that it was the same contention which Mr. Vaidya has raised in answer to Mr. Samant's submissions. Mr. Justice Badkas who delivered the judgment on behalf of the Division Bench held that:

In this connection, it is forgotten that the present application of the tenant is based on the order in favour of the previous landlord passed u/s 29 after the tenancy was terminated u/s 34. The tenancy of the tenant was terminated by the then landlord on express ground that he required the land for his bona fide personal cultivation. This plea of personal cultivation on the part of the landlord involved inquiring into various facts, such as his bona fide requirement, the extent of the land possessed by him and the income which he might have had from other sources. On consideration of these facts, the landlord was given the privilege of terminating the tenancy of the tenant. The law wanted to satisfy the conflicting claims of a landlord and a tenant as regards need for land. The need of the landlord was held to be superior to that of the tenant on proof of certain facts. It is on proof of those facts that the landlord was entitled to claim back possession of the land after terminating the tenancy... Therefore, when, as found in this case, the landlord transferred possession of the land to the petitioner, he committed a breach in that he ceased to personally cultivate the land. Section 37, therefore, came into play and the tenant was entitled to claim back possession of the land. The Act nowhere provides that in case the original landlord transferred the land to any other person, the personal requirement of the latter for cultivation of the land shall be enquired in the proceedings taken u/s 37 and u/s 39 of the Act. The original order passed u/s 29 is always subject to sections 37 and 39 of the Act. The sections 37 and 39 can be enforced when the landlord is found to have transferred possession of the land to any other person. Therefore, the petitioner cannot contend that he needed the land for his personal cultivation, and, therefore, the tenant cannot resort to Section 37 and Section 39 of the Act. There is no identity whatever between the condition of the first landlord and the second landlord, now the transferee. Condition!! may differ. The

tenancy was terminated by the original landlord but this termination was subject to the right of the tenant given to him under sections 87 and 89. In other words, it was not absolute termination of the tenancy. If Section 29 is read along with sections 37 and 39, one can say that the tenancy is terminated provisionally and it can revive in case the landlord fails to comply with the requirements which are made obligatory on his part in the matter of his personal cultivation as enacted in Section 37. Therefore, as found in this case, the landlord having ceased to cultivate the land personally, the tenancy of the tenant should revive and he becomes entitled to possession of the land.

37. In the light of what we have said above, these findings of the Division Bench and their observations on the general effect of Sections 34 (or Section 31), 37 and 39, in our opinion, correctly set forth the position in law as it emerges on a proper reading of those sections together.

38. A similar view has been expressed in an earlier Division Bench case—*Godavaribai Jayaram v. Kashiram*. Referring to the old Section 34 the Division Bench observed in that case (pp. 1113 and 1114) :

...It is true that this section refers to the determination of protected tenancy. But the determination of the permanent (sic-protected) tenant's rights, for which provision has been made in Section 34, Sub-section (1), can in one sense be described as a suspension of the tenant's rights. Section 37 provides virtually for the revival of the said rights... It is because of the provisions contained in Sub-section (2) of Section 37 that it would be possible to describe the determination of the protected tenancy u/s 34 as amounting to suspension.

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 *Bajaram'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 the termination by saying "the determination...can in one sense be 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.

39. Having stated what is in our opinion the correct reading of Section 29 read with Section 34 (now Section 31) and Sections 37 and 39, we turn to examine the other contentions advanced in this case. First as; to the argument regarding retrospective applicability of the amendments made by Act IX of 1961 which came into force on February 9, 1961. As we have pointed out, when the tenancy Act was amended in 1956 the change made was to re-enact Section 34 as Section 31 and to substitute reference to Section 31 instead of Section 34 in Section 37. But it was pointed out in *Khandubhai Gulabbhai v. Maganlal Banchhodji* that after amendment Section 37 could not apply to cases where the application of the landlord for personal cultivation was under old Section 34, because Section 37 no longer referred to Section 34 but only to Section 31. Upon

the view which we have taken that on the landlord exercising the right to take possession for his personal cultivation the tenancy is not terminated but only pro tanto suspended or held in abeyance this point does not really arise for consideration, but it was argued before the Division Bench in Khanditbhai's case that "the reference to Section 31 in the new Act should be regarded as a reference to the corresponding Section 34 as it stood before the amendment in 1956" but that contention was not accepted, the Division Bench observing that though there was considerable force in the argument and assuming that that was the intention of the Legislature "the difficulty, which we find is that the Legislature has not given effect to it in the provisions which it has enacted". The Division Bench held in that case that upon Section 37 as it stood after the Amending Act of 1956 (and before its amendment in 1961) "the tenancy of the appellant No. 1 was not terminated u/s 31. "Consequently no relief could be granted to him u/s 37."

40. Though we have referred to the decision in Khandubhai Gulabbhai v. Maganlal Ranchhodji, we must not be understood to be approving of it. In fact upon the view we have taken as to the true effect of Section 2"D read with Section 34 (or new Section 31) and Sections 37 and 39, that case must be held to be incorrectly decided. 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.

41. Unfortunately when Khandubhai's case was argued the point of view which has prevailed with us was not put forward, nor were the earlier decisions in Rajaram Sakharan Patil v. Ganpati Shripati Kadam or in Godavaribai Jayaram v. Kashiram brought to the notice of that Division Bench and so the Division Bench held that upon the terms of Section 37 as it then stood referring as it did only to Section 31, no relief could be given to the tenant u/s 37 where the original application of the landlord was only u/s 34.

42. We have, however, referred to that decision here at some length because it serves to explain the changes made in Section 37 by Act IX of 1961 by the addition of the words "... or Section 34 of this Act as it stood immediately before the commencement of the Amending¹ Act, 1956". It was conceded by counsel appearing for all the parties that the 1961 amendment of Section 37 was made directly in consequence of the decision in Khandubhai Gulabbhai v. Maganlal Banchhodji and it appears to be so. The Legislative draftsman without examining the problem afresh, without considering the earlier decisions in Rajaram Sakharan Patil v. Ganpati Shripati Kadam or in Godavaribai Jayaram v.

Kashiram, simply accepted the decision in Khandubhai's case and attempted to rectify the error pointed out. If the correct position had been grasped he would have seen that Khandubhai's case was not argued upon the correct basis and so came to be incorrectly decided and that the amendment of 1961 was unnecessary because the tenancy was never finally put an end to and was capable of revival and so there was no need to refer specifically to the old Section 34 in Section 37.

43. We may in this connection also invite attention to the amendment of Section 37 of this Act made so far as the State of Gujarat is¹ concerned by Section 15(1) of Gujarat Act XVI of 1960 to overcome a similar difficulty which must have been pointed out. Sub-section (4) of Section 37 of that Act after its amendment in 1960 runs as follows:

(4) Where before the commencement of the Amending Act, 1955, a landlord in accordance with the provisions of this Act as then in force has terminated the tenancy of any land by giving notice to the tenant that he required the land for cultivating personally or for any non-agricultural purpose and has taken possession: of the land, whether before or after such commencement, then if he fails to use the land for the purpose specified in the notice within one year from the date on which he took possession or ceases to use it for the purpose specified in the notice at any time within twelve years from the date on which he took possession, the foregoing provisions of this section shall, notwithstanding any decree or order of a court or tribunal, apply to such failure or cessation, as the case may be, as if there had been a termination of the tenancy u/s 31.

(5) Where a failure or cessation referred to in Sub-section (4) has taken place before the date of the coming into force of the Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960, the liability of the landlord under Sub-section (1) to restore possession of the land to the tenant shall commence from that date.

The comprehensive nature of this amendment is quite in contrast to the amendment of the Bombay Act by Act IX of 1961. The mere addition of words "or Section 34 of this Act as it stood immediately before the commencement of the Amending- Act, 1956" does not remove the lacuna pointed out by the judgment of the Division Bench in Khandubhai's case. If at all one had to be made, it could have followed the language of the Gujarat Act, However, as we have shown upon the correct view of the provisions of Section 34 (or Section 31) read with Sections 37 and 39 there was neither a lacuna nor was an amendment necessary.

44. In the light of what we have said then, what should be the meaning we should attach to the words added ins. 37 by the 1961 amendment "or Section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956". It is a cardinal rule of construction of statutes that unless it is absolutely necessary, we cannot hold that any words in a statute are redundant

or unnecessary. In the present case also, we are not compelled to hold that these words are redundant or unnecessary, but for that reason we cannot also hold that they constitute a condition precedent to the applicability of Section 37 as argued on behalf of the landlord and the transferee before us. "We would rather hold, therefore, that the words added by the 1961 amendment of Section 37 are only descriptive of the nature of the proceeding mentioned and do not constitute so to say a sine qua non for the applicability of Section 37. That in our opinion seems to be the only way we can, consistent with the view which we have taken, give effect to these words.

45. Upon the view we have taken also no question survives of considering whether the said words added to Section 37 by the 1961 amendment have retrospective effect or not, for as we have shown the tenancy is not finally terminated but is only provisionally terminated subject to a condition and can revive on the non-fulfilment of the condition on which the landlord took possession for his personal cultivation. Section 37, therefore, does not confer any new right but the tenant's right would spring into action the moment the conditions mentioned in Section 34 notice were breached and it is, therefore, unnecessary to consider whether Section 37 after its amendment is retrospective or not in so far as it refers back to Section 34.

46. In fairness to Mr. Raja Bhonsale who appeared on behalf of the tenant, it must be said that he has referred to the decision of the Division Bench in *Suryakant Bhanudas Jadhav v. Ganpat Shankar Rajmane* wherein the Division Bench has held that the addition of the said words in Section 37 by the Amending Act of 1961 has retrospective effect. The Division Bench in that case upon consideration of the amended section pointedly remarked "Nowhere in the Amending Act it has been stated in clear terms that the changes effected by Section 19 of the Amending Act would have retrospective effect", but nevertheless they held the provisions of the amended Section 37 as having retrospective effect and in doing so they took into account the legislative history of the section to the effect that the amendment was brought on directly as a result of the decision in *Khandubhai's* case and to the general intendment of the tenancy legislation. Taking into account these factors the Division Bench held "the construction of giving it retrospective operation arises by necessary and distinct implication having regard to the dominant intention of the Legislature! seen throughout". It has been contended by Mr. Vaidya appearing on behalf of both the landlord and the transferee in this case and with considerable force that since the words of the statute do not at all indicate retrospective operation and that there is no necessary or distinct implication either, the statute cannot be held to be retrospective in operation in spite of the amendment. We have already said that upon the view we have taken it is unnecessary to go into the question of retrospective operation at all. We may say, however, that we do not endorse the view that the 1961 amendment of Section 37 has retrospective effect but upon the view we have taken the actual decision in *Suryakant Bhanudas Jadhav v. Ganpat, Shankar Rajmane* must be held to be a correct decision though for

quite different reasons.

47. There remains to be considered one more decision which was referred to on behalf of the landlord namely the decision in *Kisan Sampat Bonge v. Dhondy Ramchandra*. That decision merely followed the decision in *Khandubhai's* case. It was specifically urged by counsel on behalf of the tenant that the latter decision required consideration, but the plea was negatived. For the same reasons¹ that we have given when dealing with *Khandubhai's* case we must hold that the decision in *Kisan Sampat Bonge v. Dhondy Ramchandra* was incorrect.

48. In *Kisan Sampat Bonge v. Dhondy Ramchandra*, the tenant's application, for possession u/s 37, was also held to be barred under the provisions of Section 29 and the Division Bench upholding that view held that the application would be governed by the provisions of Section 29. The Division Bench held:

The difficulty, however, which Mr. Bhokariker has to face is that if Mr. Bhokariker were to make an application to-day in pursuance of the amended provision, (they were referring to Section 37 as amended by Act 9 of 1961) such an application would be barred by time. The cause of action for obtaining possession accrued to the tenant on the 16th of December 1957, being the date on which the landlord sold the land to opponent No. 2. u/s 29, Sub-section (1) of the Tenancy Act, an application for possession has to be made by the tenant within a period of two years from the date on which the cause of action accrues to him. The limitation for filing such an application would, therefore, expire on the 16th December 1959, In our opinion, therefore, the amendment, which came into force on the 9th February 1961, cannot avail Mr. Bhokariker's client.

49. In making these remarks the provisions of Section 39 of the Act were lost sight of. Section 39 is a provision which is complementary to the provisions of Section 34 (or new Section 31) and Section 37 of the Act. It gives specifically a remedy to the tenant to apply for recovery of possession, "If at any time the tenant makes an application to the Mamlatdar and satisfies him that the landlord has failed to comply within a reasonable time with the provisions of Section 37...". Section 29, however, is a general section which lays down the procedure for taking possession of the land by a tenant or an agricultural labourer or artisan and prescribes the procedure to be followed and also prescribes that the application shall be made within a period of two years from the date on which the right to obtain possession or dwelling house is deemed to have accrued to the tenant, agricultural labourer or artisan, as the case may be. We have already shown when discussing the nature of the right of the landlord to take possession of his tenant's land for personal cultivation that it is a peculiar and special right, and in conferring tin; remedy of taking back possession upon the tenant also it has been treated as a peculiar and special right, because the tenant's right to take possession where the landlord has previously taken possession on the ground of personal cultivation is specially conferred upon the tenant by Section 39. We do not think that where such a special provision is made for a special case, Section 29 would be attracted. We do not think, therefore, that Section 29

would at all come into the picture where the tenant applies for restoration of the land u/s 37.

50. Much the same view was taken in the earlier decision in *Rajaram Sakharam Patil v. Ganpati Shripati Kadam*, where Badkas J. giving the judgment on behalf of the Division Bench made the following observations on the comparative applicability of Sections 29 and 39:

Therefore, so far as these two provisions are concerned, there is no bar of limitation against the tenant for obtaining the relief for which he has filed this application. It cannot be said that this application filed by the tenant u/s 39 is an application u/s 29 of the Act. Section 89 is a special provision enacted to be given effect to under a particular set of facts. Section 29 is a provision made for purposes other than those contemplated by Section 87 read with Section 39. When the tenant is given a right to apply any time and such time extends even for a period of 12 years because the landlord has not fulfilled the obligation of personal cultivation for a period of 18 years, it will be incongruous to bring in any period of limitation contained in Section 29 for being read with Section 37 or Section 39. We, therefore, hold that so far as this application is concerned, it cannot be said that it was filed beyond limitation.

In our opinion this would be the correct view to take of the provisions of the two Sections 29 and 39. In Section 39 advisedly there is no period of limitation laid down because Section 39 is complementary to Section 37, and the tenant's right to have the possession restored to him of the land taken by the landlord for personal cultivation continues at least for 12 years after possession has been taken, by the landlord. Because of that provision, advisedly no provisions of limitation were laid down. That is not the case with Section 29. Section 29 is a general provision and must give way to the provisions of Section 39 which is a special provision for obtaining possession by a tenant in cases where Section 37 applied. Even in *Suryakant Bhanudas Jadhav v. Ganpat Shankar Rajmane* the Division Bench supported their view in the alternative by pointing out that there is no period of limitation prescribed by an application u/s 39 and, therefore, the tenant would be entitled to apply for restoration of possession of the land at any time. The remarks in *Kisan Sampat Bonge v. Dhondy Ramchandra* to which we have referred, therefore, do not commend themselves to us.

51. Then we turn to the other contentions raised in this case. The first of these contentions has been that the petitioner is only the son of the former tenant. He was not the tenant at the time when the landlord applied for possession. When the tenant died, the petitioner could not become a tenant nor being the heir of the deceased tenant could he apply for possession u/s 37 read with Section 39. The Tribunal has accepted this contention on the strength of a decision of this Court in *Bai Jamna v. Bai Dhani* (1958) 61 Bom. L.R. 419 and on the basis of a decision of the Gujarat High Court in *Thakorelal v. Gujarat Revenue Tribunal* AIR [1064] Guj 188. Mr. Vaidya has relied on both the decisions.

52. In the decision in Bai Jamna v. Bai Dhani this Court was not concerned with the provisions of Section 31 or the old Section 34 or Sections 37 and 39, but they were considering generally the nature of the tenancy as created by Section 5(7) of the Act and after discussing the nature of the tenant's right, under that Act they came to the conclusion that those rights were the creation of a statute and that, therefore, the tenancy rights of such a statutory tenant u/s 5(7) are not heritable rights. The same reasoning has been applied by the Tribunal to the right of the tenant u/s 37 to have the possession of the land restored to him upon the non-fulfilment of the conditions by the landlord on which he took possession of the land for personal cultivation. Now it seems to us that there is little analogy between the tenancy right as created by the Bombay Tenancy Act having regard to the provisions of Section 5(7) and the rights given to the tenant u/s 37, but apart from the provisions of Section 37, there is a specific provision in the Tenancy Act contained in Section 40 of the Act which answers the point raised, Section 40(7) provides that where a tenant other than a permanent tenant dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy. It will be noticed that prior to the amendment of the Tenancy Act by the Bombay Act XIII of 1956 this section was worded thus "If a protected tenant dies, the landlord shall offer to continue the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death to the heir or heirs of the deceased tenant..." The expression used in the old Section 40 was "offer to continue the tenancy" and there was no indication whatever as to what was to happen if the offer was not made but by the amendment made by the Amending Act XIII of 1956, Sub-section (1) was wholly re-cast and now there is no question of the landlord merely making an offer to the tenant to continue the tenancy on the same terms and conditions, but on the other hand, the section provides that "the landlord shall be deemed to have continued the tenancy on the same terms and conditions". The amendment, therefore, meets precisely the argument that is here advanced that the heir succeeding to the erstwhile tenant does not continue as a tenant on the same terms and conditions. Besides, the new section introduced a fiction by the use of the words "deemed to have continued the tenancy" and therefore, whatever may have been the position prior to the amendment, Section 40 as it now stands after the Amending Act XIII of 1956 automatically confers - on the heir a tenancy on the same terms and conditions as were applicable to the deceased tenant. In the face of this clear provision of the law we do not think that the general observation made in Bai Jamna v. Bai Dhani, as to the nature of the tenancy created u/s 5, can any longer be accepted. In fact in Bai Jamna v. Bai Dhani, the Division Bench was considering only the rights conferred on the tenant u/s 5 as it stood before the Amending Act of 1956. When the Act XIII of 1956 came into force, the specific provision of Section 40 having come into force, we do not think that the principle laid down in Bai Jamna v. Bai Dhani would apply. So far as the Gujarat case is concerned, on the date on which the death of Laskaria took place

Section 40 as it now stands was not in force and all that was contended in that case was that Section 40 after its amendment in 1956 applied retrospectively. The contention as stated by the Division Bench at pages 185-86 is to be found in para. 4 as follows:

...The right of Laskaria as a deemed tenant u/s 4 was, argued Mr. G.P. Vyas, a personal right which came to an end on his death and unless there was some provision of law which provided for passing on of such right to the heirs, such right could not be inherited by the heirs. Mr. G. P. Vyas conceded that there was such provision of law in Section 40 as amended by Bombay Act XIII of 1956 but contended that it had no application since it was not in force at the date of death of Laskaria. Section 40 which was in force at the date of death of Laskaria was the unamended Section prior to its amendment by Bombay Act XIII of 1950 and provided for the devolution of the right of a deemed tenant u/s 4 on his death...

Therefore, once again the Gujarat case was on a par with the decision in *Bai Jamna v. Bai Dhani* in so far as the amended Section 40 was not in force on the date on which the death of the tenant took place. We are not concerned with the question whether Section 40 as amended applies retrospectively or not. The death of the tenant in the present case took place before August 8, 1960, when the sale-deed was executed by the landlord in favour of opponent No. 2 though the tenant was alive on the date on which possession was taken by the landlord on April 21, 1957. By that time the new Section 40 had come into "force and so far as the new Section 40 is concerned, there is no doubt left that the son as the heir would be deemed a tenant. Neither of the cases referred to would apply upon the facts of the present case. We cannot accept the contention advanced in the face of the clear provisions of Section 40 as amended by Act XIII of 1956.

53. The next contention is that since the landlord has transferred the land by sale to respondent No. 2, the application u/s 37 cannot lie against such a transfer. The sheet-anchor of this contention is the decision of the Mysore High Court in *C. B. Vadakappanawar v. B. Karadgi*. The Mysore High Court referred to the use of the word "landlord" in Section 37 and proceeded to construe it in the light of the provisions of Section 2(75) of the Act which defines "tenant":

A tenant means a person who holds land on lease and. Include-(a) a person who is deemed to be a tenant u/s 4 ; (b) a person who is a protected tenant; and (c) a person who is a permanent tenant; and the word "landlord" shall be construed accordingly.

No doubt as remarked by the Division Bench of the Mysore High Court the definition of "landlord" is somewhat enigmatic. They, therefore, held that it should be construed in a broad sense and stated the ordinary meaning which that word conveyed in the English language as "A lord or owner of land; the person who lets land to a tenant; a person of whom another person holds any tenement". They held that the word "landlord" in Section 37 meant the owner of the property at the relevant time and that would include the person to whom

such landlord has transferred his rights.

54. Now it seems¹ to us that this construction placed upon the word "landlord" considered in the context of the provisions of Section 37 would render nugatory the entire provisions conferring upon the tenant a right to have the possession of his land restored to him if the landlord fails to cultivate personally. If the construction placed upon the word "landlord" by the Mysore High Court were to be accepted the landlord would have an absolute right of transfer immediately and without restrictions after he gets back possession. The right which a landlord has to take back the land for personal cultivation u/s 34 (or the new Section 31) is a personal right and if one may use the expression, is subject to the conditions of defeasance mentioned in Section 37. These conditions require that the landlord, who has obtained possession on grounds stated in his notice u/s 34, must commence using the land for any of the purposes" specified in the notice within one year of his obtaining possession and must continue to use it for the said purpose for 12 years, and if default is made in complying with either of these conditions the landlord has to restore possession of the land to the tenant. Upon a voluntary transfer of the land, of which the landlord has obtained possession u/s 34 (or the new Section 31), a breach of the condition relating to personal cultivation on the part of such landlord is implicit and the conditions of defeasance contained in Section 37 become immediately operative. To hold that the word "landlord" in Section 37 means the owner of the land at the relevant point of time would amount to defeating the provisions as to defeasance contained in Section 37 and ignoring altogether the breach of the condition relating to personal cultivation on the part of the original landlord. Besides, by the time the tenant applies for restoration of possession there may have been diverse transfers and in such a case the tenant's right to have the land restored to him would be defeated if the ultimate transferee is shown to be cultivating the land personally, notwithstanding the fact that none of the intermediate transferees may have personally cultivated it.

55. We do not think that such a position was ever envisaged when the provisions of Sections 34, 37 and 39 were enacted. We would, therefore, construe the word "landlord" as used in Section 34, 37 and 39 as referring to the landlord in whose favour the order for possession u/s 34 (or the new Section 31) has been passed and not a voluntary transferee from such landlord (we say nothing about involuntary transfers here). In this connection we may also refer to the provisions of Section 64 of the Act which place a restriction upon the right of the landlord selling his land. The construction placed upon the word "landlord" in Sections 34 and 37 in the judgment of the Mysore High Court runs counter to these provisions also. we are unable to accept the view expressed in the judgment of the Mysore High Court. In our opinion, the word "landlord" as used in Section 34 (new Section 31) and Sections 37 and 39 must in the context in which it is used and in the context of the right of personal cultivation be held to be the landlord who gives notice and obtains possession for his personal cultivation.

56. For these reasons, we allow the petition and make the rule absolute. We set aside the order passed by the Tribunal and the District Deputy Collector and confirm the order passed by the Mamlatdar.

57. Finally we must express our appreciation of the assistance we have received from Mr. R. G. Samant who appeared amicus curiae and whose arguments threw much light upon the proper construction of several, provisions of the Tenancy Act.