Madhao Vs Mah. Revenue Tribunal, Nagpur and others

Court: Bombay High Court

Date of Decision: Sept. 12, 1969

Acts Referred: Bombay Tenancy and Agricultural Lands Act, 1948 â€" Section 14, 15, 15(1), 29, 29(1) Transfer of Property Act, 1882 â€" Section 53A

Citation: (1970) MhLj 991

Hon'ble Judges: S. P. Kotval C, J; D. B. Padhye, J; B. N. Deshmukh, J

Bench: Full Bench

Advocate: B. A. Udhoji, P. S. and M. B. Badiye, for the Appellant; J. N. Chandurkar, For respondent No. 3, Respondents Nos. 1, 2 and 3 were not represented, for the Respondent

Final Decision: Dismissed

Judgement

S. P. Kotval, C. J.

1. The short question that arises in this reference is whether it is essential for a landlord to obtain an order for possession of a field in regard to

which a tenant has terminated his tenancy by surrendering his interest in favour of the landlord and the surrender has been verified u/s 20 of the

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958. The petitioner is the landlord. Sampat the respondent No. 3 was his

tenant, and the respondent No. 4 is a transferee from the petitioner after he took the alleged surrender. The field involved is survey No. 15/1 of

Wakf Khurd in Chikhali taluq of Buldana district, Sampat the respondent No. 3 became the tenant of the petitioner sometime in the year 1951-52,

On 4-8-1960, however, Sampat executed a surrender deed in respect of this field u/s 20 of the new Tenancy Act. In the document, it is recited

that the tenant was surrendering all his rights without consideration and that he had handed over possession of the field with the standing crops on

the date of the Document. The tenant himself also made an application u/s 20 of the new Tenancy Act for verification of the surrender. That is

Revenue Case No. 5/59(4) /60-61. An order was passed verifying the surrender and holding that it was voluntary and in accordance with the

provisions of section 20. The Naib-Tahsildar also held an inquiry necessary u/s 21 (2) of the Act and came to the conclusion that the landlord did

not possess land exceeding three family holdings, Accordingly, he ordered that necessary entries should be made. It must be noted at this stage

that no separate order granting possession to the landlord was passed.

2. On 24-5-1961 the tenant applied for restoration of possession. That is Revenue Case No. 28/59(6) of 1960-61. In those proceedings the

tenant admitted that he was examined at the time of the verification of the surrender before the Naib-Tahsildar and that he had then stated that the

surrender deed was voluntarily executed by him. It appears also that on 30-4-1962 the tenant made a statement before the Naib-Tahsildar that he

did not wish to proceed with the case, and therefore the Naib-Tahsildar ordered that the proceedings should be filed.

3. Only four days after this order was passed, on 3-5-1962 the tenant again applied for possession of his field to the Naib-Tahsildar. That was

Revenue Case No. 1 /59 (10-G) of 1962-63. The tenant simply alleged that the surrender deed had been obtained by fraud and that the

petitioner-landlord had sold half his suit land to the respondent No. 4 only, but that the tenant had been dispossessed in contravention of the

provisions of the new Tenancy Act and he was therefore entitled to be restored to possession. In reply, the landlord naturally relied upon the

previous proceedings verifying the surrender and holding that it was voluntary, as also the second proceeding wherein the tenant having asked for

possession, had stated that he did not desire to proceed with the case. This proceeding had a chequered history and ultimately came to be

remanded by an order of the Special Deputy Collector dated 15-9-1964 setting aside the previous orders of the Naib-Tahsildar.

4. After remand, the Tenancy Naib-Tahsildar held that the previous application which the tenant had made and the orders which were passed

thereon bound the tenant. He had also admitted that he had executed the surrender deed willingly and therefore the order passed in Revenue Case

No. 28/59(6) of 1960-61 operated as res judicata and the tenant''s rights had thus been extinguished from the date of the execution of the

surrender deed. The tenant appealed to the Special Deputy Collector and by his order dated 28-8-1965 the Special Deputy Collector held that

the Naib-Tahsildar was in error in applying the principles of res judicata to revenue proceedings. He pointed out that the landlord had not obtained

an order for possession as required by sub-section (2) of section 36 of the new Tenancy Act and therefore was not entitled to remain in

possession. He set aside the surrender and ordered that the field should be given in the possession of the tenant. The landlord appealed to the

Maharashtra Revenue Tribunal and, by its order dated 12-8-1966, the Tribunal has confirmed the findings of the Special Deputy Collector on both

the points. As regards the surrender, the Tribunal held :

""Even if a surrender is held to be voluntary and valid, it is incumbent on the landlord to obtain possession of the surrendered land under orders of

the Tahsildar.....

.....Invariably, in all cases of surrender there is a mention about delivery of possession of land to the landlord. Verification of surrender u/s 20

merely establishes the nature of the surrender i. e. whether it is voluntary or otherwise but such verification does not exempt the landlord from the

liability to apply for possession u/s 36 (2), new Tenancy Act.

Since the landlord had not applied for possession, the Tribunal held that his entry into the field would be unauthorised and possession should be

restored to the tenant.

5. The landlord has now come up by way of this special civil application and prays for the quashing of the orders of the Tribunal and the Special

Deputy Collector. He also prays that he should be ordered to be put in possession, When the matter came before the learned single Judge, Mr.

Justice Abhyankar, he felt that on the point arising in this special civil application, there was a conflict in several of the decisions of this Court and

therefore referred it to a Division Bench. The Division Bench has by its order dated 12-2-1969 referred it to a Full Bench in view of the fact that

some of the cases upon which there arises a conflict were decisions of Division Benches. In the present case, the position upon the facts is clear. A

surrender of his interest as a tenant was made by the respondent in favour of the petitioner. That surrender came before the Revenue Authorities,

and in due course, was verified by the Naib-Tahsildar as a valid surrender and an order was passed in favour of the landlord on 12-9-1960 u/s 20

of the new Tenancy Act. Nonetheless, the surrender and the orders pertaining to its verification have now been held to be infructuous and the

surrender held not binding upon the tenant, because no separate order for possession was passed in favour of the landlord at any time. The

question then resolves itself to this: In spite of a surrender being held valid and in spite of an order u/s 20 being obtained holding the surrender

valid, can the landlord get possession of the field without obtaining an order u/s 36 (2) of the new Tenancy Act?

6. Section 20 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act merely says : ""A tenant may terminate the tenancy at any

time by surrendering his interest as a tenant in favour of the landlord :"". There is a proviso with which we are really not concerned, requiring that a

surrender must be in writing and be verified.

7. Section 20 does not refer at all to the question of possession, but possession is separately dealt with in section 36 which purports to lay down

the procedure for taking possession, and sub-sections (1) and (2) of section 36 are important for the purpose of the point before us. (We quote

only the relevant portions) :

36. (1) A tenant... entitled to possession of any land..... as a result of eviction in contravention of sub-section (2) may apply in writing for such

possession to the Tahsildar.....

(2).....no landlord shall obtain possession of any land..... held by a tenant except under an order of the Tahsildar. For obtaining such order he

shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the

land.... is deemed to have accrued to him.

8. Based upon these provisions of the law the contention on behalf of the landlord has been that all that section 20 prescribes is that a tenant may

terminate the tenancy at any time by surrendering his interest as a tenant in favour of the landlord, subject only to the proviso that such surrender

shall be verified before the Tahsildar in the prescribed manner, and the manner is prescribed by rule II of the Bombay Tenancy and Agricultural

Lands (Vidarbha Region) Rules, 1959. In the instant case these steps were undoubtedly taken by the landlord and an order was obtained in his

favour holding that the surrender was voluntary and duly verified by the Naib Tahsildar. If so, it is urged that by the very terms of section 20, the

tenancy of the tenant terminated, and if it terminated, the relationship of landlord and tenant came to an end once and for all and he ceased to be a

tenant, It is in this context therefore that the applicability of section 36 should be viewed, and if so viewed, section 36 would be inapplicable to

such a case at all because section 36 throughout speaks of taking possession of land from the possession of the tenant. In terms therefore the

section only applies to a person who is a tenant and not to a person who has ceased to be a tenant by surrender or otherwise. It would be an

unwarranted extension of section 36 to hold that it applies to an ex-tenant.

9. On behalf of the tenant, this position is disputed. It is urged that even though a surrender may have been held to be voluntary and verified by the

Revenue Authorities, that would not absolve the landlord when he comes to take possession of the land surrendered from obtaining an order as

prescribed by section 36 (2). Section 36 (2) lays down a categorical rule that no landlord shall obtain possession of any land held by a tenant

except under an order of the Tahsildar. It was submitted that section 36 is plenary and overrides section 20 and that in every case where

possession is to be obtained from a tenant, the provisions of sub-section (2) of section 36 must be complied with.

10. These are the rival contentions and before we go to the authorities and notice the apparent conflict arising from certain statements in some of

them, it is necessary to examine the position as it emerges upon the provisions of the Act itself. The Act, in the first place, makes a clear-cut

distinction between ""tenancy"" and ""tenant"" in sub-sections (31) and (32) of section 2. ""Tenancy"", according to sub-section (31) of section 2, means

the relationship of landlord and tenant; and ""tenant"", according to sub-section (32), means ""a person who holds land on lease and includes-

(a) a person who is deemed to be a tenant under sections 6, 7 or 8.

(b) a person who is a protected lessee or occupancy tenant and the word ''landlord'' shall be construed accordingly.

Of course, these definitions are subject to the overriding clause in section 2 ""unless the context requires otherwise"". We shall have to examine when

we turn to section 36 whether the context requires an interpretation other than the one contained in the definition. The same distinction between the

concept of a ""tenant"" in contradistinction to the concept of a ""tenancy"" is made in section 20, when it is provided that a tenant may terminate the

tenancy at any time by surrendering his interest as a tenant in favour of the landlord. This section, read in the light of the definitions, thus shows that

tenancy under the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act is merely limited to the relationship of landlord and tenant,

contractual or otherwise. But the idea is not co-terminus with the concept of a tenant because many more persons than those only who have

established a relationship of landlord and tenant in fact or in law are, by the definition, included as tenants : as for instance, a person who is deemed

to be a tenant under sections 6, 7 or 8. A mere glance at these sections shows that the Act has indicated that a person who is merely in

possession-lawful of course-is also a tenant, which is quite alien to the concept of a lease or a tenancy under the general law or the Transfer of

Property Act. The Act was intended, as its preamble shows, to regulate and impose restrictions on the transfer of agricultural lands and was

generally for the protection of the tiller of the soil, that is to say, a person in possession or cultivation. Therefore, not only the definition, but as we

shall presently show, various other provisions of the Act treat the protection of possession as of special importance and a person in lawful

possession is regarded as a tenant under the Act. That is why the word ""tenancy"" has been defined, some what differently from the word ""tenant"".

""Tenancy"" means the relationship of landlord and tenant, but a person in possession may have no relation with the landlord in a given case, but he

would nonetheless be called a tenant. It is in the context of these definitions that we have to examine the provisions of section 20 and section 36.

11. All that section 20 says is that the tenancy is terminated upon the tenant surrendering his interest as a tenant in favour of the landlord. We have

already shown that the definition includes in the word ""tenant"" a person who is in lawful possession or cultivation. Such a person would by the mere

fact of possession be a tenant but he would thereby enter into a statutory relationship with the landlord, and all that section 20 says is that by any

act of surrender on his part it is that statutory relationship which is put an end to. But the section does not say that he will cease to be a tenant.

Indeed, he cannot cease to be a tenant so long as he continues in possession, because being in lawful possession he is deemed to be a tenant.

Section 20 does not speak of possession at all. Therefore, in the case of a deemed tenant, section 20 cannot possibly have the result of making the

tenant cease to be a tenant unless an order taking away his possession is also passed. Without making any provision as regards the essential

ingredient in the definition of tenant viz. possession, we cannot accept that section 20 alters the position of a tenant qua tenant. We will show a little

later that the same is the position in regard to various other provisions of the Act which regulate the relationship of landlord and tenant, but none of

these provisions, while regulating the relationship, make any provision for possession. The subject of possession is relegated to a separate section

and dealt with as an exclusive subject, and that is in section 36, and so we turn to consider its provisions.

12. Reading section 36 it is clear from the language of sub-section (1) that it is subject to sub-section (2). The scheme of the section shows that

really it is sub-section (2) which lays down the general rule which governs the provisions of sub-section (1). Sub-section (1) gives the right to a

tenant entitled to the possession of any land ""as a result of eviction in contravention of sub-section (2)"" to apply in writing for such possession to the

Tahsildar, and sub-section (2) categorically lays down the general rule that no landlord shall obtain possession of any land held by a tenant except

under an order of the Tahsildar. In the light of what we have said above we may note that in the entire context of possession the Word ""tenancy"" is

not used in section 36 but throughout the reference is only to ""tenant"". The concept of possession haÃ¯Â¿Â½ relevance only to the definition of ""tenant

because it includes ""deemed tenants"". Thus reading sub-sections (1) and (2) together, it is clear that no landlord can ever obtain possession of a

tenant"s land without an order granting him possession passed by the Tahsildar and the tenant is given the right where his possession is thus taken

away to apply in writing for such possession to the Tahsildar. We can see no reason why, if possession is thus taken away because a tenant has

surrendered his tenancy, the provisions of section 36 would not be attracted.

13. It was urged that under the provisions of section 20, if a surrender is once held voluntary and an order is passed that it is verified as required

by the proviso to section 20, then the tenancy is terminated and necessarily the effect of it is that whoever was holding the land ceases to be a

tenant, and therefore possession can be taken from him. We are unable to accept this contention. Sub-section (1) of section 36 is subject to the

provisions of Subsection (2) because of the use of the words ""as a result of eviction in contravention of sub-section (2)"" in sub-section (1). The

opening clause of sub-section (2) of section 36 ""no landlord shall obtain possession of any land .... held by a tenant except under an order of the

Tahsildar"" uses the expression ""tenant"". It thus shows that even though the requirements of section 20 may be fulfilled, still the surrender, even if

verified and even if possession is delivered under the surrender, would result in the tenant continuing as a tenant unless an order u/s 36 is passed.

14. A difficulty is created by the use of the words ""terminate the tenancy"" in section 20. It is argued that if the tenancy is terminated, then there can

be no tenant and therefore section 36 would not apply. The effect of sub-section (2) of section 36 cannot be to keep either the rights of a tenant or

the tenancy alive when it is once terminated. In other words, what is contended is that when the word ""tenant"" is used, it cannot mean ex-tenant.

15. We have already explained the distinction which the definitions make between ""tenancy"", that is, the relationship of landlord and tenant, and

tenant"" which also includes a person in lawful possession or cultivation. If this distinction is borne in mind, the provisions of sub-section (2) of

section 36 become clear. Whether or not the tenancy is terminated as laid down by section 20, the tenant''s right does not end unless an order of

possession is passed in favour of the landlord. In other words though his tenancy may be terminated by a valid surrender, he does not become an

ex-tenant unless an order u/s 36 is passed.

16. We may in this respect say one thing, namely, that the provisions of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act,

1958, are not entirely in pari materia with section 29 of the Bombay Tenancy and Agricultural Lands Act, 1948. In sub-section (1) of section 29 of

the Bombay Act of 1948, the words ""or as a result of eviction in contravention of subsection (2)"" do not find place. So far as the Vidarbha Act is

concerned, the matter is put beyond doubt by the express use of these words. We however do not wish to imply by emphasising this difference in

the language that under the Act as applicable to Western Maharashtra, the omission of these words would necessarily result in a contrary

conclusion. It would be a matter of construction of that Act (and we shall show presently that it has been similarly construed in the several cases).

But since a question has arisen under the Vidarbha Act, we simply make it clear that by the use of these express words in sub-section (1) of

section 36, the matter is put beyond any controversy. The result therefore is that under no circumstances can a surrender, even if verified and even

if actual possession is given to the landlord, destroy or determine the rights of the tenant qua tenant, unless an order for possession is passed under

sub-section (2) of section 36,

17. A consideration of other provisions of the Act would also lead to a similar conclusion. Section 10, sub-section (1), speaks of restoration of

possession of tenants dispossessed after 1st January 1953 under certain circumstances and it says that a person who held land as a tenant and who

has subsequently been dispossessed by a surrender of tenancy before the commencement of this Act may apply to the Tahsildar for the restoration

of his tenancy on the same terms and conditions on which he held the land before such surrender. Here again, though the tenancy is surrendered

and possession delivered, the sub section refers to the person who has so surrendered his land as a tenant, and in the same breath says that he may

apply for restoration of his tenancy. In other words, even though his tenancy is at an end and even though he has been dispossessed he still

continues to be a tenant. The same distinction is found made in section 19 (1) (II) which prescribes that notwithstanding any agreement, usage,

decree or order of a Court of law, the tenancy of any land held by a tenant shall not be terminated on account of certain defaults ""unless the

landlord has given three months'' notice in writing informing the tenant of his decision to terminate the tenancy and the particulars of the ground for

such termination and within that period the tenant has failed to remedy the breach for which the tenancy is liable to be terminated"". Here again,

despite the contemplated termination of the tenancy by the decision of the landlord, the Act uses the word ""tenant"" for the person who has the use

and enjoyment of the land. Section 29 provides for relief against termination of tenancy in certain cases and it says, ""Where any tenancy of any land

held by any tenant is terminated.... .(for certain reasons), no proceeding for ejectment against such tenant shall lie unless and until the landlord has

served on the tenant a notice in writing specifying the act.. .. and the tenant fails within a period of one year from the service of notice"" to rectify his

error. The opening words ""where any tenancy is terminated"" are categorical and contemplate a position where the tenancy is terminated and yet the

Act continues to regard the person who was using and enjoying the land as a tenant despite the termination of the tenancy. This again highlights the

same distinction. Similarly, section 30 makes the same distinction and though it speaks of the termination of the tenancy for non-payment of rent

under certain conditions, it speaks of the person whose tenancy is thus terminated as a tenant and gives him an opportunity to remedy the lapse on

his part. The same distinction is to be found in the provisions of section 36 (3a) read with section 57B (2). Under subsection (1) of section 57B,

the landlord is given the right to terminate the tenancy upon the grounds mentioned in sub-section (2) by serving a notice and sub-section (1) of

section 57-B speaks of terminating the tenancy by the landlord, and sub-section (2) further prescribes that an application for possession under

sub-section (3A) of section 36 shall be made to the Collector. The inquiry on the application for possession of the land is to be made by the

Collector but under the provisions of sub-section (2) of section 36 which again speaks of the person whose tenancy has been terminated as a

tenant.

18. The provisions of section 20 read with the provisions of section 36 (1) and (2) therefore show that although the tenancy of a tenant may be

terminated by a valid surrender by the tenant surrendering his interest as a tenant in favour of the landlord, and although the surrender may be

verified as required by the proviso to section 20 by the Tahsildar and possession may be with the landlord, still the person who was in enjoyment

of the land continues as a tenant until an order for possession is made in favour of the landlord. Although possession may have been given pursuant

to a surrender by a tenant, the Act still regards the delivery of possession and the surrender as the acts of a tenant, though there may be a

considerable time-lag between the execution of the surrender deed and the delivery of possession. The tenant, despite the time-lag, surrenders

possession as a tenant, and therefore the provisions of subsection (2) would apply. The landlord must therefore obtain an order for possession in

his favour even though a valid and verified surrender may have been made in his favour and he may be in possession thereof.

19. A consideration of several decided cases also leads to the same conclusion, though it must be said that some views have been expressed to the

contrary. A decision of this Court (Division Bench at Bombay) in Special Civil Application No. 3699 of 1958 dated 29-7-1959 was referred to,

but that is a case which rather supports the view which we have taken, because in that case an actual order for possession was passed in favour of

the landlord as Can be seen from the following finding of the Division Bench;

The previous tenancy of the petitioner, however, came to an end when the Tenancy Aval Karkun passed an order on 17th June 1952 that the

tenancy of the petitioner stood terminated and that the landlord should be allowed to retain possession of the land. The petitioner"s rights as a

tenant under the old contract of tenancy therefore came to an end, when this order was made by the Aval Karkun. Thereafter he could become a

tenant only if there was a fresh lease.

With respect, this view is the correct view, because in that case the order granting possession to the landlord had actually been passed. The case

only illustrates another small point which we would here emphasis, namely, that the order for possession need not necessarily be a separate order

passed by taking proceedings u/s 36. Even if a valid order is passed at the time of the verification giving possession to the landlord, in our opinion,

the requirements of sub-section (2) of section 36 would be fulfilled. Sub-section (2) does not say that that order shall be passed by a separate

application u/s 36 (2). It simply says that ""no landlord shall obtain possession of any land.... held by a tenant except under an order of the

Tahsildar"". Of course, a period of limitation is prescribed under sub-section (2) as well as the requirement that an application should be made but it

does not say that that application cannot be made at the same time that the surrender is verified.

20. The case strongly relied upon on behalf of the tenant is a decision of a single Judge of this Court in Appeal No. 45 of 1952 decided on 29-9-

1953 (at Bombay). The facts in that case were peculiar. The tenants had sur rendered the lands to the plaintiff-landlord on 1-5-1947 and since that

date the landlord was in possession of those lands. The defendants moved the Tenancy Aval Karkun praying for possession and obtained an order

that they should be restored to possession. The landlord filed a suit for injunction against the defendants who were the tenants for restraining them

from taking possession of the suit fields, alleging that the order of the Tenancy Aval Karkun was obtained behind their back when they were not

parties to that proceeding and in collusion with him. The case fell to be considered under the provisions of the then operative Bombay Tenancy

Act, 1939. The provisions of section 24 of that Act were not exactly in the same terms as section 36 as it now stands but sub-section (1A) of

section 24 did provide that no landlord shall obtain possession of any land held by a tenant except under an order of the Mamlatdar, which is the

identical language of sub-section (2) of section 36. The learned Judge observed that having regard to the provisions of the Act, there was no

justification for the assumption made that a protected tenant has more extensive rights than those of an ordinary tenant. He further observed :

It is true that the Legislature has not made any provision expressly providing for a surrender being made by a protected tenant as in the case of an

ordinary tenant u/s 23.

But that was because the Legislature had merely conferred a privilege or protection upon the tenant and the Legislature did not compel anyone to

accept the status of a protected tenant. From these provisions the learned Judge inferred that if the protected tenant does not desire to avail himself

of that protection, he is entitled to forego the protection conferred upon him by the Legislature. He therefore held that sub-section (1) (a) of section

34 of the Bombay Tenancy Act of 1939 only contemplates cases in which there is some conflict or some resistance on the part of a tenant against

an attempt to obtain possession by a landlord. But where, the relation of landlord and tenant is terminated by agreement at the date when

possession is obtained, an application under sub-section (1) (a) of section 34 was not necessary.

21. This case undoubtedly supports the contention on behalf of the landlord before us. But there are differences. The provisions of sub-sections (1)

and (2) of section 36 refer to all tenants and make no special reference to protected tenants. Therefore, to that extent, the basis of the reasoning in

Appeal No. 45 of 1952 is taken away. Apart from that, the language of subsections (1) and (2) of section 36 makes no reference nor any

suggestion that the consent of the tenant can justify the taking of possession from him, without an order of the Tahsildar. Indeed, were we to so

hold, We would in a large measure be qualifying section 36 and affect the very object and purpose of this section and several other provisions of

the Tenancy Act. The whole idea behind the provisions of the Tenancy Act was to safeguard the tenant and his possession so long as he was in

lawful cultivation despite his consent to surrender his interest. It is well known that the tenancy is ill educated and gullible and many do not

understand the effect of consent, and these provisions were enacted for their protection. We must therefore give effect to the language of section

36 as it stands and its plain language does not justify reading into it any such limitation that the consent of the tenant would justify the obtaining of

possession without an order of the Tahsildar. We are unable to accept the reasoning in Appeal No. 45 of 1952.

22. Indeed, in a subsequent decision given under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, as applicable to the

Bombay Region, the same Judge sitting in a Division Bench in Special Civil Application No. 773 of 1959 decided on 1-10-1959 took a contrary

view. After referring to the first sentence of section 29 (2) of the Bombay Tenancy and Agricultural Lands Act, 1948, which is identical with the

first sentence of section 36 (2) of the Vidarbha Act, the Division Bench held:

Mr. Vaidya argued that the words "obtain possession" imply the securing of possession without the consent of the tenant. These words, according

to him, do not apply to a case where the tenant has surrendered possession willingly and in pursuance of an agreement. We are unable to accept

this argument. The words "obtain possession" are wide enough to cover the case of securing possession by consent of the parties.

They concluded the discussion by holding:

Section 29 (2) of the Act makes it clear that the landlord is not entitled to get possession of the lands except under an order of the Mamlatdar.

And a little later, in the next paragraph :

The provisions of section 29 of that Act are special provisions relating to the modes in which the landlord will be entitled to claim possession from

the tenant... The provisions of section 53A of the transfer of Property Act are of general character and must be deemed to have been overridden

by the special Act, viz., the Tenancy Act, 1948.

The above observation was made because of a contention of counsel that the doctrine of part performance u/s 53A of the Transfer of Property

Act would at least govern the case and permit the landlord to obtain possession which he had taken under a wrong surrender. With respect, this

case in our opinion, took the correct view of the provisions of the Tenancy Act, and by that decision, the decision in Appeal No. 45 of 1952 must

also be deemed to be impliedly overruled.

23. A decision of another Division Bench in Special Civil Application No. 30 of 1962 decided on 18-10-1962 (at Bombay) was referred to in the

arguments before us. That case however does not throw much light upon the point before us because it is distinguishable upon its own facts. In that

case, the surrender took place on 23-3-1957 and an application for possession was made. An order was passed thereon granting possession to

the landlord on 30-5-1957. The contention on behalf of the tenant was that by virtue of section 32 of the Bombay Tenancy and Agricultural Lands

Act, 1948, the land vested in the tenant on the Tillers" Day, namely, 1-4-1957. The Tillers" Day in that case fell between the date of the surrender

and the date on which the order for possession was passed. It was therefore contended that the tenant had become the owner on 1-4-1957 and

no order for possession could therefore be passed in favour of the landlord. The Division Bench resolved the difficulty created by these facts by

holding that the order for possession related back to the date of the surrender and it must therefore be held that the surrender which took place

prior to the Tillers" Day was a valid surrender. The facts here are entirely different. Under the circumstances, we do not think that that case can be

of much use in deciding the point before us.

24. An earlier decision of this Court in Trambaklal v. Shankarbhai 62 Bom L R 261 throws a flood of light upon the provisions with which we are

concerned. After considering the provisions of section 15 (1) read with section 29 (2) of the Bombay Act of 1948, which are substantially the

same as section 20 and section 36 (2) of the Vidarbha Act, the Division Bench held in that case (see page 264) :

A proceeding u/s 29 (2) for restoration of possession by a tenant means that such surrender or relinquishment has not resulted is the loss of

tenancy rights by the tenant. Such a proceeding also implies that the tenant retains his tenancy rights in the leased land until the surrender is verified

and recognised u/s 15 by the Mamlatdar and possession of the land is obtained by the landlord u/s 29 (2) of the Act.

And a little later, in the next paragraph:

So long as surrender is not verified and recognised u/s 15 and so long as a tenant still retains the right to restoration of possession u/s 29(1), there

would be no cessation of tenancy rights and therefore no acquisition or transfer of land by the landlord.

With respect, the decision taken in that case was the correct decision, though as we have shown, we would prefer to express it somewhat

differently. When section 20 speaks of the termination of the tenancy by a tenant surrendering his interest, it seems to us that it would be difficult to

hold on the basis of section 36 (1) and (2) that the tenancy still subsists. That would be doing some violence to the language of section 20. We

would rather say therefore that though the tenancy is terminated by surrender u/s 20, the tenant still continues as a tenant and an order for

possession in favour of the landlord would be necessary before he ceases to be a tenant.

25. That this is the correct view is also suggested by the observations of the Supreme Court in a recent decision in Venkatesh v. Hajisaheb 1966

Mh. L J 436. Upon a consideration of section 14 (1) [which deals with the termination of tenancy for certain defaults of a tenant] read with section

29 (2), the Supreme Court held in paragraph 6 at page 438 as follows : -

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 u/s 29(2).

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 see Ramchardra Anant v. Janardan 1962 N L J 700. Thus, on the termination

of the tenancy, the right to obtain possession of the land though in reality not accrued to the landlord, is, by a legal fiction, deemed to have accrued

to him so that he may immediately apply u/s 29 (2) for an order for possession.

The Supreme Court referred to the decision in Ramchandra Anant''s case, In that case, during the pendency of an application u/s 31 of the

Bombay Tenancy and Agricultural Lands Act, 1948, by the landlord for terminating the tenancy on the ground that he needed the land bona fide

for his persona! cultivation, the landlord gave another notice to the tenant u/s 14 determining the tenancy on the ground that a default had taken

place in the payment of rent and he applied u/s 29 for possession on the ground of default. The tenant contended that the second application for

possession was not maintainable as the tenancy having once been terminated u/s 31, the landlord could not terminate the tenancy again u/s 14. It

was held that the second application for possession u/s 29 read with section 14 was maintainable and that even after the landlord terminated the

tenancy by giving a notice u/s 31, it was open to him to give another notice intimating his intention to terminate the tenancy u/s 14 and to approach

the Tenancy Court for possession. This decision could only have been given upon the assumption that the tenant qua tenant continued to be tenant

of the land despite the notice terminating the tenancy. Incidentally, the Full Bench also observed at page 702:

A landlord cannot, therefore, obtain possession of the land from his tenant, even if the tenant is willing to hand over possession to him. He has to

approach the Mamlatdar for the purpose. 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 has no right to possession after the termination of

tenancy. Under the Tenancy Act, however, even after hs tenancy has been determined by a notice given by his landlord, the tenant has a legal Tight

to continue in possession until the Mamlatdar has made an order for possession being restored to the landlord

With respect, we accept this as the correct position upon the provisions of section 36 of the Vidarbha Act.

26. Another decision of the Supreme Court in Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim, also supports the view which we have

expressed above upon the peculiar definition of ""tenant"" in the Tenancy Act and its effect so far as section 29 (2) of the Bombay Act of 1948 is

concerned. At page 1322 in para graph 6 the Supreme Court observed :

The Act of 1948, it is undisputed, seeks to encompass (in) (sic) its beneficent provisions not only tenants who held land for purpose of cultivation

under contracts from the owners but persons who are deemed to be tenants also Counsel for the appellants submits that tenancy postulates a

relation based on contract between the owner of land, and the person in occupation of the land, and there can be no tenancy without the consent

or authority of the owner to the occupation of that land. But the Act has by section 2 (18) [in the Vidarbha Act section 2 (32)] devised a special

definition of tenant and included therein persons who are not contractual tenants It would therefore be difficult to assume in construing section 4

(section 6 of the Vidarbha Act) that the person who claims the status of a deemed tenant must be cultivating land with the consent or authority of

the owner. The relevant condition imposed by the statute is only that the person claiming the status of a deemed tenant must be cultivating land

''lawfully'': It is not the condition that he must cultivate land with the consent of or under authority derived from the owner. To import such a

condition is to rewrite the section, and destroy its practical utility. A person who derives his right to cultivate land from the owners would normally

be a contractual tenant and he will obviously not be a ''deemed tenant''.

As regards the provisions of section 29, the Supreme Court remarked :

But the Legislature has expressly prohibited, by section 29 (2) of the Act, landlords from obtaining possession of any lands otherwise than under

an order of the Mamlatdar.

27. Two other decisions of single Judges of this Court were referred to :-One is the decision in Special Civil Application No. 1041 of 1965

decided on 3-10-1966 and the other a decision in Special Civil Application No. 746 of 1964 decided on 15-11-1965. Both these cases are not

of much assistance upon the point before us, for Special Civil Application No. 1041 of 1965 was concerned with the provisions of section 21 (5)

of the Act, and so far as Special Civil Application No. 746 of 1964, is concerned the case is distinguishable, on the facts. Even in that case

however the learned single Judge has, in Considering the provisions of section 36 (2), held :

I am, therefore, of opinion that even if a landlord (tenant) (sic) is willing to surrender the possession of the land, the possession must be obtained

by the landlord under an order of the Tahsildar as laid down in section 36 (2) of the Bombay Tenancy Act is concerned."" (sic)

28. Thus, a consideration of the provisions of section 20 and section 36 (1) and (2) and of the several authorities to which we have referred above

leads to the following conclusions :

(1) That section 36 (2) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, is plenary and controls section 20. Thus,

without an order of possession of the Tahsildar, a tenant does not cease to be a tenant even though he has handed over possession of the land he

held as a tenant and even though the surrender is verified under the proviso to section 20 read with rule 11.

(II) That the consent or willingness of the tenant to surrender is irrelevant and does not affect the operation of the above rule.

(III) That an order for possession need not necessarily be passed upon a separate application u/s 36. It is sufficient if such an order is passed at the

time when the surrender comes up for verification u/s 20.

29. Upon the view which we have taken, the petition must be dismissed, but having regard to the fact that a disputed question of law had arisen,

we make no order as to costs. Petition dismissed.