**(1960) 06 BOM CK 0015**

**Bombay High Court**

**Case No:** Civil Revision Application No. 205 of 1958

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| Pandurang Hari Jadhav | | APPELLANT |
| | Vs | |
| Shankar Maruti Todkar | | RESPONDENT |

**Date of Decision:** June 30, 1960

**Acts Referred:**

- Bombay Tenancy and Agricultural Lands Act, 1948 - Section 43C

**Citation:** (1960) 62 BOMLR 873

**Hon'ble Judges:** Naik, J

**Bench:** Single Bench

**Judgement**

Naik, J.

This revision application raises an interesting question under the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Act of 1948). In truth, it presents one more riddle demanding solution from this Court, The circumstances giving rise to this application may be briefly stated as follows: Survey Nos. 49/2 and 32/3, which belong to the petitioner, are situated within the limits of the Municipal Borough, Kolhapur. Opponent No. 1 took those lands on lease in 1954 for a period of eleven months. Again on May 24, 1955, he passed another rent note for a further period of eleven months in favour of the petitioner. On December 9, 1955, the petitioner gave a notice terminating the tenancy and calling upon the opponents to vacate the lands with effect from March 31, 1956. It may be mentioned that opponent No. 2 was a sub-tenant of opponent No. 1. On April 10, 1956, the petitioner (who will hereafter he called the plaintiff) filed a suit against the opponents (who will hereafter be called the defendants) for eviction and arrears of rent. The amount of rent claimed was Rs. 840.

2. It was contended by the defendants that the civil Court had no jurisdiction to grant the reliefs claimed by the plaintiff. As regards the arrears of rent, they stated that the civil Court could not award the claim unless reasonable rent was settled by the Mamlatdar. On the basis of these contentions, preliminary issues were framed

by the trial Judge, who came to the conclusion that the civil Court has no jurisdiction to try the suit. At the same time, somewhat inconsistently, the trial Court referred the issue relating to reasonable rent to the Mamlatdar for a finding. It is against that order that the plaintiff has come up in revision.

3. The main point for our consideration in this application, is what is the effect of Section 43C and the proviso to that section, which were inserted by Act No. XIII of 1956, in the Act of 1948, and which amendment came into force on August 1, 1956, that is to say, pending the suit. A brief legislative history in this respect will be necessary to appreciate the correct legal position. The Act of 1948 came into force on December 28, 1948. Section 88(7)(c) of that Act provided that the foregoing provisions of the Act were not applicable in respect of lands situated within the limits of the five municipal boroughs named therein. Thereafter, in 1952 that section was amended by Act No. XXXIII of 1952, which came into force on April 12, 1952. Under the amendment, the scope of Section 88(7)(c) was enlarged by providing that nothing contained in the foregoing provisions of the Act was applicable to the lands situated within the municipal limits of all municipal boroughs. Then came the Amending Act No. XIII of 1956, under which the Act of 1948 received extensive amendments and additions. By that Amending Act, Section 88(7)(c) came to be deleted and a new provision was incorporated as Section 43C along with a proviso. That section runs thus:

Nothing in Sections 32 to 32R (both inclusive) and 43 shall apply to lands in the areas within the limits of-

(a) Greater Bombay,

(b) a municipal corporation constituted under the Bombay Provincial Municipal Corporations Act, 1949,

(c) a municipal borough constituted under the Bombay Municipal Boroughs Act, 1925,

(d) a municipal district constituted under the Bombay District Municipal Act, 1901,

(e) a cantonment, or

(f) any area included in a Town Planning Scheme under the Bombay Town Planning Act, 1954:

Provided that, if any person has acquired any right as a tenant under this Act on or after the 28th December 1948, the said right shall not be deemed to have been affected by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952, or (save as expressly provided in Section 43D), by the Amending Act, 1955, notwithstanding the fact that either of the said Acts has been made applicable to the area in which such land is situate.

4. The effect of the aforesaid proviso was recently considered by a Full Bench of this Court in Patel Maganbhai Jethabhai Vs. Somabhai Sursang, , F.B. It was held in that case that the proviso to Section 43C of the Bombay Tenancy and Agricultural Lands Act, 1948, affords protection to the tenant, if the tenant had the protection under the Act, notwithstanding the fact that that protection was taken away by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952. That protection must be given to the tenant even though the protection is claimed after a suit for ejectment was filed against him and the protection is afforded by the proviso which was enacted after the suit was instituted. It was also held

that the right of the opponent as a tenant under the Act of 1948, was, by a legal fiction introduced by the proviso to Section 43C, continued and was not affected by the Amending Act of 1952.

It was further held

that the proviso to Section 43C was applicable to the case, as there was no final judgment against the opponent in the sense that the judgment given by the Mamlatdar was subject to revision, and the revisional Court was bound to take notice of the change in law effected by the proviso.

5. The effect of Section 88(1)(c) introduced by Act No. XXXIII of 1952 was that, so-far as the lands situated within the limits of the municipal boroughs were concerned, the provisions of the Act of 1948 did not apply and that the tenures were governed by the general law. Now, the result of Section 43C of the Act of 1948 as interpreted by the Full Bench is that, so far as the rights and liabilities between the landlord and the tenant were concerned, the Act No. XXXIII of 1952 may be treated as if it was never brought into operation and the tenant would continue to enjoy the protection given to him by the Act of 1948 before its amendment in 1952.

6. The main argument advanced by Mr. Paranjape, for the petitioner, is that although the tenant can claim the rights which he had acquired under the Act of 1948 and which were held in abeyance for a time by the Act of 1952. but which were resuscitated with retrospective effect by the Amending Act No. XIII of 1956, that claim will not affect the jurisdiction of the civil Court before whom a suit was already instituted by the landlord. In this connection he pointed out that in the Full Bench case cited above, it was conceded that the notice to quit was not a proper notice and the tenancy could not have been terminated by the landlord. It appears that the notice to terminate the tenancy in that case was given on the basis of the general law under the Transfer of Property Act and inasmuch as the provisions of the Act of 1948 were held applicable as ''a result of legal fiction, the landlord''s right to terminate the tenancy under the general law was no longer in existence. The suit, there fore, filed on that basis could not survive. Mr. Paranjape contended that in the present case, the notice to terminate the tenancy is based on the grounds, which are available to the plaintiff under the provisions of Section 14 of the Act of 1948.

The grounds for termination urged by the plaintiff are two: (1) that defendant No. 1 has sub-leased one of the two lands in favour of defendant No. 2 and (2) that defendant No. 1 has failed to cultivate the other piece of land personally. If we turn to Section 14, Sub-section (1)(a), we will find that the first ground is covered by Sub-clause (iii) and the second ground by Sub-clause (iv). Even if, therefore, the rights of the tenant flow from the provisions of the Act of 1948, still the tenancy is liable to be terminated. The only question which remains for consideration is about the forum. Section 29 of the Act of 1948 in effect lays down that a tenant who is entitled to possession of any land or dwelling house may apply in writing to the Mamlatdar for securing possession of the same. Similarly, the landlord shall not obtain possession from a tenant except under an order of the Mamlatdar. Mr. Paranjape''s argument, in short, was that so far as the right of either the landlord or tenant to approach the Mamlatdar is concerned, it is not a substantive right; that the suit was properly instituted in the civil Court during the period when the Act No. XXXIII of 1952 was in force and that the proviso to Section 43C would not affect the jurisdiction of the civil Court to continue the trial of the suit properly instituted before it. It is clear from the decision in the Full Bench case that so far as the rights of the parties are concerned they are governed by the provisions of the Act and in the language of the learned Chief Justice in that case ''the judgment will have to be moulded in accordance with the law which was recently enacted''. The point to he considered is whether this principle applies even in respect of Section 29 of the Act of 1948. If Mr. Paranjape''s argument is correct, then the civil. Court will have jurisdiction to continue the suit, but, at the same time it will have to apply the provisions of Section 14 and all other relevant provisions of the Act of 1943 in. that respect and cannot proceed on the basis of the general law enacted in the Transfer of Property Act. In other words, that means that the civil Court will examine whether the grounds on which the tenancy was purported to he terminated are valid under the provisions of Section 14 of the Act. But, that is on the assumption that the civil Court continues to have the jurisdiction.

7. In order to arrive at a correct conclusion on this point, it is necessary to consider carefully the words used in the proviso to Section 43C of the Act of 1948. The relevant words are: "the said right shall not be deemed to have been affected by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1952". In other words, the short question before us is, whether this right includes or embraces the right of the tenant to demand that the case be heard by a particular forum, Mr. Gupte, for the opponents, contended that here is a special (enactment under which a special tribunal has been created. The main object of the Act is to provide protection to the tenant and the Legislature in their wisdom felt that this protection would best be afforded by the specially constituted tribunal. He, therefore, argued that the right to demand that the parties should approach the specially constituted tribunal is in the nature of a substantive right and would be covered by the expression "the said right" in the proviso to Section 43C of the Act of 1948. On the other hand, Mr.

Paranjape argued that the right to approach a particular forum is a procedural right and it is a well-established principle that nobody can have a vested right in procedure. In my opinion a general distinction between a substantive right and a procedural right will not help us in solving the problem. We will have to examine the provisions of the Act of 1948 and try to find out as to which of those sections can be said to confer rights upon the tenant, which have been preserved by the proviso to Section 43C of the Act of 1948. Broadly speaking, these provisions can be divided into two categories. In the first category will fall those provisions, under which a right, pure "and simple, is conferred upon a tenant, which exists in its own right and which requires no help from any tribunal for its crystallization. The second category will embrace those rights which require the assistance of a tribunal or Court for their enforcement or for their crystallization. If we take for instance two sections viz., Sections 14 and 29 of the Act of 1948, the distinction noted above will be clearly recognised. Section 29 lays down that a landlord as alto a tenant must approach the Mamlatdar for the purpose of seeking possession of an agricultural land. Mr. Paranjape doubted whether this could be considered to be a right at all. But, I have no doubt in my mind that the right conferred by Section 29 is a right and may be protected under the proviso to Section 43C under certain circumstances. Section 14 relates to the mode of termination of tenancy. It lays down a specific manner in regard to the termination of the tenancy of an agricultural land. The right conferred by Section 14 exists in its own right and, in that sense, is a vested right. So far as the right conferred by Section 29 of the Act of 1948 is concerned, although the right may have accrued it is possible that its enforcement has not taken place and the crystallization of that right will begin from the day when an action is instituted for its enforcement. If a right has accrued lander an existing Act but its enforcement is postponed and in between the Act is repealed and a new Act intervenes, then the right would obviously be lost, because its enforcement will have to be sought in the forum created by the new Act. Here, we have an exactly contrary case. The tenancy, according to the plaintiff, was duly terminated-whether it was rightly terminated is, of course, a moot question and will have to be decided by a proper tribunal-and a suit was instituted in a competent Court for the enforcement of the right accrued to him. Now, it is difficult to hold that, if the tenancy is properly terminated or is held to have been properly terminated, the Court, which was competent when the suit was instituted, would cease to have jurisdiction to try the suit. It is possible for the Legislature to provide that although a suit is instituted in a competent Court that Court would cease to have jurisdiction on the passing of the subsequent legislation and that recourse must be had to the new forum constituted under the latter Act. But, we require very clear and unambiguous words for arriving at such startling result. The general words used in the proviso to Section 43C that the right of the tenant will not be affected will not, in my opinion, be sufficient to divest the Court of the jurisdiction in respect of a suit, which was already instituted before it.

8. In this connection we may refer to the provisions of Section 89 of the Act of 1948. Section 89 introduces the usual saving clause and provides:-

(1) The enactment specified in Schedule I is hereby repealed to the extent mentioned in the fourth column thereof.

(2) But nothing in this Act or any repeal effected thereby-

(a) shall affect the amendments made in Section 59 of the Bombay Land Revenue Code, 1879, or Sections 6 and 9 of the Khoti [Settlement Act, 1880;

(b) shall, save as expressly provided in this Act, affect or be deemed to affect,

(i) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(ii) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act, -and any such proceedings shall be continued and disposed of, as if this Act was not passed.

The important clause is Clause (b) of Sub-section (2) and the words "save as expressly provided in this Act" are significant. Now, so far as the rights of the tenant are concerned, it is expressly provided that they are saved with retrospective effect by the proviso to Section 43C of the Act of 1948. But, so far as the proceeding already instituted is concerned, there is no express provision in the Act of 1948. In this background, let us analyse the wording of Sub-clause (ii) of Clause (b) of Sub-section (2) cited above. It will be clear that there is difference in the language employed in the Sub-clause (ii) and the language employed in Section 7(e) o the Bombay General Clauses Act. u/s 7(e) of the latter Act, if a right has accrued before the repeal or the amendment of the provision under which it had accrued, then the enforcement of that right can be made even after the repeal or amendment. This is clear from the words "legal proceedings or remedy may be instituted, continued or enforced" occurring in Section 7(e) of the General Clauses Act. The word "instituted" occurring in the above section is important. The word "instituted" has not been used in Sub-clause (ii) of Sub-section (2)(b) of Section 89 of the Act of 1948. The only words used therein are "proceedings shall be continued and disposed of". This distinction was emphasized by Mr. Justice Gajendragadkar in Dhondi Tukaram v. Dadoo Piraji (1952) 55 Bom. L. Rule 663 and the observations at page 669 are relevant for the purpose of our discussion. They are as follows:
...Bui on the other hand, if the Legislature has expressly provided that pending proceedings in respect of a right which had accrued to the landlord to evict a trespasser or a tenant whose tenancy has been duly determined should be continued and disposed of as if this Act has not been passed, we must give effect to that provision. Section 82(2)(b)(ii) unambiguously lays down that any legal proceeding in respect of rights mentioned in Section 89(2)(b)(i) shall be continued

and disposed of as if this Act was not passed. It would be noticed that what are saved are only pending proceedings. In other words, if a proceeding is instituted subsequent to the commencement of the Act, it would be governed by this Act notwithstanding the fact that the right itself had accrued to the party prior to the Act. In this connection it would be pertinent to point out that the last clause of Section 89(2) differs in one material particular from Section 7 of the Bombay General Clauses Act. Section 7 of the General Clauses Act deals with the effect of repeal, and, broadly stated, it provides, inter alia, that the repeal of an Act would not affect a right which had vested in a party under the repealed Act and it safeguards any legal proceedings which the party may institute in assertion of the said right." What is necessary to be noted is that u/s 89(2)(b)(ii) a legal proceeding in respect of any right is to be continued and disposed of as if the Act of 1948 was not passed. If the words "the said right" used in the proviso to Section 43C of the Act of 1948 are interpreted to cover institution of proceeding or the right to institute proceeding, then obviously there would arise a conflict between that proviso and the provisions of Section 89(2)(6)(n) of the Act of 1948. The only way to reconcile the provisions of Section 89(2)(b)(ii) with the provisions of Section 43C, is to make a distinction between a right, which does not require the help of a tribunal or a Court for its crystallization and a right which essentially accrues after the proceedings are instituted and to say that the former are covered by the words "said right" in the proviso to Section 430, but not the latter.

9. In this connection, I may refer to a passage at p. 431 in the judgment of the Privy Council in Abbott v. Minister for Lands [1895] A.C. 425 cited with approval in the Full Bench decision in Maganbhai Jethabhai Fatal v. Somabhai, which is as follows;-

It may be, as Windeyer J. observes, that the power to take advantage of an enactment may without impropriety be termed a ''right''. But the question is whether it is a ''right accrued'' within the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words ''obligations incurred or imposed''. They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a ''right accrued'' within the meaning of the enactment.

The view taken by me receives further support from the provisions of Section 29 of the Act of 1948. Section 29 lays down a period of two years for making an application to the Mamlatdar for possession from the date on which the right to obtain possession of the land or dwelling house is deemed to have accrued to the landlord. Let us assume that the landlord has filed a suit in the civil Court, as has been done in this case, but as a result of the new enactment, the Court is held to

have no jurisdiction, then in the absence of power having been given to the former Court to transfer the proceedings to the newly constituted Court, the landlord''s remedy may be completely lost. There is no provision, whatsoever, in the Act of 1948, which empowers the civil Court to transfer the proceedings, which have been duly instituted in that Court to the Mamlatdar. Nor is there a provision which enables the civil Court to return the plaint for presentation to the proper Court. My attention was drawn to a decision in Dhondi Tukaram v. Dadoo Piraji in, which it was held that whenever an issue arises before the civil Court, which under the statute is required to be decided by the Mamlatdar, then that issue may be referred to the Mamlatdar and the suit may be kept pending till the return of the finding from the Mamlatdar. It was pointed out that this view was taken when there was no provision, which enabled the Court to do so. In my view, the analogy will not hold good. In Dhondi Tukaram v. Dadoo Piraji all that was done was that the suit was kept pending till the return of the finding from the Mamlatdar. There was no challenge to the jurisdiction of the Court. An incidental issue which could not be tried by the civil Court and which the Mamlatdar alone was competent to try, was referred to him. Recourse was had to this step with a view to save the jurisdiction of the civil Court. I do not think that it would be competent to the civil Court to transfer the suit to the Mamlatdar in the absence of any specific provision and unless that is done, the difficulty of limitation may come in, at any rate, in some cases.

10. Mr. Gupte then pointed out that in the case, which was decided by the Full Bench, the suit was filed under the Mamlatdar''s Courts Act before the coming into operation of the Act No. XXXIII of 1952. That proceeding was, therefore, competently instituted in that Court. He further pointed out that inspite of this fact, the Full Bench held that the suit was not maintainable in view of the new provisions incorporated by the Act No. XIII of 1956. He, therefore, argued that the question, which is now raised in these proceedings, must be deemed to have been decided by necessary implication in the Full Bench case. I am unable to accept this line of reasoning. It appears that the Full Bench directed the dismissal of the suit before the Mamlatdar under the Mamlatdar''s Courts Act, because the ground on which the suit was based viz., the termination of the tenancy, could not survive, as the tenancy could not be terminated under the ordinary law. As stated above, in the present case, it is contended for the plaintiff that the tenancy has been terminated under the provisions of Section 14 of the Act of 1948 and that that is the issue, which needs to be gone into at the final hearing.

11. Mr. Paranjape then drew my attention to a new provision viz., Section 43A, which was also introduced by the Amending Act No. XIII of 1956. Section 43A, in effect, provides that the provisions of Sections 4B, 14 and 31, among others shall not apply to leases of land granted for the cultivation of sugarcane or the growing of fruits or flowers or for the breeding of livestock. He pointed out that the rent notes specifically mentioned that the lands were taken on lease for preparing ''gur''. He also pointed out that even the trial Court has framed an issue on this point and

referred it along with the other issue to the Mamlatdar. Mr. Gupte contended that this case was never pleaded and, therefore, the trial Court was wrong in framing an issue in that respect. He also pointed out that the rent notes are not before this Court and his instructions were that the recitals of the rent notes did not show that the lands ware taken for growing sugarcane. Apart from these aspects of the matter, the point for consideration is, whether the plaintiff can avail himself of the provisions of Section 43A of the Act of 1948 in respect of a cause of action, which accrued before the coming into operation of the Act No. XIII of 1956, and a suit instituted on that basis before that date. Obviously, the provisions of Section 43A are prospective and there is nothing in the Act to indicate that they have retrospective effect, so as to affect pending proceedings. If the plaintiff claims any right on the basis of Section 43A, he is at liberty to institute a fresh proceeding in that respect.

12. There remains, finally, the question regarding the arrears of rent. The arrears of rent had accrued due before the coming into operation of Act No. XIII of 1956. Reliance was placed on the provisions of Section 70(me) of the Act of 1948, which lays down that one of the duties and functions to be performed by the Mamlatdar is to direct the payment of rent determined under the Act or the arrears thereof. There was no similar provision in the Act before its amendment. It was consistently held by this Court that the civil Court has jurisdiction to award a decree in respect of arrears of rent. The provision contained in Section 70(me) is restricted to a case where the rent has been determined under the Act, that is to say, under the amended Act. That in itself is sufficient to show that this provision is prospective and cannot be applied to the rent, which accrued due, before the amendment. No rent could be determined under the provisions of the Act of 1948 as amended in 1956 before the amendment was brought into force. I do not, therefore, think that the jurisdiction of the civil Court in that respect is taken away. Of course, the case will have to be sent back to the Mamlatdar for determining the reasonable rent. Mr. Paranjape contended that Section 12 of the Act of 1948, which empowered the Mamlatdar to determine the reasonable rent, has been repealed by the Act No. XIII of 1956, and, therefore, the Mamlatdar has no power to determine the reasonable rent under that section. I am unable to accept this contention. The arrears of rent had become due before the coming into operation of Act No. XII of 1956. At that time, Section 12 was in force. Even under the new Act, the Mamlatdar has power to determine the rent, though he will have to deter-mine the same by applying the provisions of the new Act. Whatever that may be, there is no inherent want of jurisdiction in the Mamlatdar for determining reasonable rent. In my opinion, therefore, the Mamlatdar is entitled to apply the provisions of the repealed Section 12 for the purpose of determining the reasonable rent, so far as the arrears which accrued due before the coming into force of Act No. XIII of 1956, are concerned.

13. The result, therefore, is that the application partly succeeds. The suit will be continued before the civil Court for granting relief both in respect of the arrears of

rent as also for the recovery of possession of the lands. Only the first issue framed by the trial Court regarding the reasonableness of rent should be referred to the Mamlatdar and after his finding is received the trial Court should proceed to dispose of the suit in accordance with law. No order as to costs.