(1970) 02 BOM CK 0043

Bombay High Court

Case No: Spl. C. Application No. 683 of 1968

Kamlesh and another		APPELLANT
	Vs	
Sukudeo		RESPONDENT

Date of Decision: Feb. 25, 1970

Acts Referred:

- Bombay Tenancy and Agricultural Lands Act, 1948 - Section 14, 14(1), 25, 25(1), 25(1)
- Constitution of India, 1950 - Article 227
- Transfer of Property Act, 1882 - Section 114

Citation: (1971) MhLj 537

Hon'ble Judges: M.N. Chandurkar, J

Bench: Single Bench

Advocate: K.H. Deshpande, for the Appellant; G.P. Kalele, for the Respondent

Judgement

M.N. Chandurkar, J.

An important question which arises in this case and has been very elaborately argued is whether a Tahsildar in the exercise of the powers u/s 30 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereafter referred to as the Tenancy Act, can make an order directing the tenant to pay arrears of rent which had fallen due before the Tenancy Act came into force. The petitioners are the landlords of survey number 37/1, area 7 acres 34 gunthas, situated at Chandur, taluq and district Akola. This field originally belonged to Bhikaji the grand-father of the petitioners and devolved on them by virtue of a will made by Bhikaji, who died on 21-8-1957. It is not disputed that the petitioners had a right to recover lease money in respect of the years 1954-55, 1955-56 and 1956-57. They had served a notice on 30-11-1959 purporting to be one u/s 19 of the Tenancy Act terminating the tenancy of the respondent-tenant in case he failed to pay Rs. 480 as lease money. No steps for obtaining possession consequent on this termination were taken, but the petitioners later gave another notice on 6-6-1960 calling upon the respondent to pay an amount of Rs. 72 as lease money for the year 1959-60. As this amount was

not paid during the statutory period of 3 months the petitioners filed a proceeding for ejectment against the respondent. The Tenancy Tahsildar held that the respondent had failed to pay lease money for the years 1958-59, 1959-60 and 1960-61 but that the petitioners were not entitled to recover lease money for the years 1954-55 to 1956 57 which he determined at Rs. 72 per year, because, according to the Tahsildar, the right to recover this amount was barred by limitation. The Tahsildar then passed an order directing the respondent to pay the arrears of 3 years, that is, 1957-58, 1958-59 and 1959-60, within a period of one year.

2. The petitioners filed an appeal against this order. The appellate authority dismissed the appeal. The petitioners then filed a revision application before the Maharashtra Revenue Tribunal The Maharashtra Revenue Tribunal held that the petitioners were entitled to recover the amount of lease money for the years 1954-55 to 1956-57, and therefore, made an order that an amount of Rs. 216 on account of arrears of rent for 3 years should be paid within 3 months from the date of the order. Since the nature of this, order has been a matter of controversy of the parties it is necessary to reproduce the operative part of this order, which is as follows:

''For the aforesaid reasons I allow the revision application for the arrears of rent for these three years and direct that the non-applicant shall pay Rs. 216 for the arrears of rent for the three years, i.e., 1954-55, 1955-56 and 1956-57 within three months from the date of this order failing which his tenancy shall be liable to be terminated.

This order was passed on 2-9-1963. The respondent had claimed before the Additional Tahsildar that he had sent a money order which was received by the post office at Deori on 3-12-1963, that is, after the expiry of the period of 3 months granted by the Maharashtra Revenue Tribunal and the Additional Tahsildar, therefore, held that there was no proper tender of the amount of rent on or before 2-12-1963, and consequently, the respondent was liable to be ejected from the land. An appeal against this order filed by the respondent was rejected and the Revenue Tribunal also rejected the application for revision filed by the respondent. The respondent had then filed a petition being Special Civil Application No. 906 of 1965 in this Court and it was contended in that petition that there was a proper tender of the rent as directed by the Tribunal and that the Revenue authorities had no power to terminate the tenancy in respect of the arrears of lease money due for the period prior to the coming into force of the Tenancy Act. This Court, however, without disturbing the finding that the amount as ordered by the Tribunal by its order, dated 2-9- 963 was not paid or tendered within the prescribed period of 3 months remanded the revision application to the Maharashtra Revenue Tribunal "for giving a fresh hearing to the parties with respect to what would be the proper consequential order which can be passed in accordance with law on the facts of the present case." It appears that it was contended in that petition that even though the tenant had failed to pay arrears as ordered by the Maharashtra Revenue Tribunal an

order for possession could not be made in favour of the petitioners.

3. When the revision application was re-heard by the Maharashtra Revenue Tribunal, the Tribunal took the view that the order passed on 2-9-1963 was without jurisdiction and that the respondent could not be evicted for non-compliance with that order. This view was taken on the basis of a decision of this Court in Shantabai v. Maharashtra Revenue Tribmal Special Civil Application No. 544 of 1963, decided on 13th January 1965. The Maharashtra Revenue Tribunal, therefore, allowed the revision application filed by the respondent and rejected the application of the petitioners for possession. It is this order which the petitioners are now challenging in this petition.

4. It is contended by the learned counsel appearing on behalf of the petitioners that the Maharashtra Revenue Tribunal has misapprehended the nature of the order passed by the same Tribunal on 2nd September 1963. According to the learned counsel for the petitioners the order passed on 2nd September 1963 was not one directing termination of tenancy for non-payment of rent for the years prior to the coming into force of the Tenancy Act, but that it was in substance an order made u/s 30 of the Tenancy Act which had the effect of modifying the order made by the Tahsildar who had directed the tenant to pay arrears of rent only with respect to 3 years. The learned counsel contends that the decision of the Maharashtra Revenue Tribunal dated 2nd September 1963 does not fall within the rule laid down in Shantabai''s case.

It is, however, vehemently contended by the learned counsel on behalf of the respondent-tenant that the order passed by the Maharashtra Revenue Tribunal on 2nd September 1963 in terms directs that the tenancy of the respondent washable to be terminated in case he failed to pay arrears of rent for the 3 years specified therein and as such the orders squarely fall within the rule laid down in Shantabai''s case and the Tribunal was, therefore, justified in holding that such an order for termination of the tenancy was without jurisdiction. It is contended on behalf of the respondent that the petitioners wanted to terminate the lease of the respondent for nonpayment of lease money for the years prior to the coming into force of the Tenancy Act and that they were not entitled to do so having regard to the decision in Shantabai''s case. The learned counsel has referred to two other decisions of this Court in which Shantabai''s case was followed. These were Umeshchandra Sundarsa Jain v. Maharashtra Revenue Tribunal and another Special Civil Application No. 258 of 1964, decided on 23rd April 1965 and Sitaram v. Maharashtra Revenue Tribunal and others Special Civil Application No. 1051 of 1956 decided on 19th July 1968.

5. In order to decide the rival contentions which have been vehemently argued, before referring to the provisions of the Tenancy Act, it is necessary to refer to the decision in Shantabai''s case. In that case the landlord had obtained a decree from the Civil Court against a tenant for arrears of lease-money for the years 1955-56 and 1956-57. The tenant was also in arrears of lease-money for the year 1957-58 for

which also a decree was obtained from the Civil Court. The tenant continued to be in arrears of lease-money for the years 1958-59 and 1959-60 and a notice u/s 19(1)(I)(a)(i) of the Tenancy Act was issued by the landlady. This notice called upon the tenant to pay the arrears of the amount due under the decrees together with cost and also rent of the field for the year 1950-59. As the tenant did not pay the amounts demanded in spite of this notice an application for possession was filed on 6th March 1961. The Tahsildar passed an order that the tenant shall pay all the arrears of rent to the landlady failing which his tenancy will stand terminated. This order called upon the tenant to pay the amounts in respect of which the landlady had already obtained decrees. The tenant appealed against this order and the appellate authority after recalculating the amounts due in respect of the periods for the years 1955-56 to 1959-60 called upon the tenant again to make the payment within the period of 30 days. The landlady filed a revision application against this order and the Tribunal remanded the matter to the Tahsildar for a fresh decision according to law. The Tribunal''s order was then challenged by the landlady by a petition in this Court and while disposing of this petition this Court observed that the liability by way of arrears of lease-money had merged into the decrees passed by the Civil Court and that under the provisions of section 19 of the Tenancy Act there was no right in the landlord to determine the tenancy of a tenant for non-payment of rent in respect of the period in dispute inclusive of the year 1957-58. The decision with regard to the right of the landlord u/s 19 was stated thus in the judgment:

It is thus clear that so far as termination of the tenancy for non-payment of rent is concerned, the landlord is entitled to issue a notice u/s 19 of the new Tenancy Act in respect of the years 1958-59 and onwards, and not with respect to anterior period. The notice given by the petitioner in this case undoubtedly calls upon the respondent to pay arrears for the years for which she had already obtained decrees and also the arrears of the years 1958-59 and 1959-60. If the notice given is valid so far as its result of terminating the tenancy for non-payment of rent is concerned, it was only in respect of non-payment for the years 1958-59 and 1959-60. Thus, the question that will fall for consideration before the Naib-Tahsildar will be whether the respondent was in arrears of rent for the years 1958-59 and 1959-60, and if he is found to be in arrears to fix the time according to law for payment of those arrears. After that time is fixed, the tenant''s liability for payment of the arrears for these two years will arise and the legal consequence for non-payment within the time allowed in such an order by the Naib-Tahsildar will follow.

Thus the order of remand was not interfered with. It is true that in view of this decision which has not been departed from so far in this Court the petitioners were not entitled to terminate the lease of the respondent in respect of the arrears of lease-money for the years prior to the coming into force of the Tenancy Act.

6. The crucial question, however, which falls for determination, in this case is whether the petitioners have in fact terminated the lease for nonpayment of arrears of rent for the years prior to the coming into force of the Tenancy Act or whether the order passed by the Tribunal on 2nd September 1963 was in effect and in substance an order passed in a proceeding properly instituted after proper and legal termination of tenancy in the exercise of the powers u/s 30 of the Tenancy Act. If what has been done by the petitioners was to terminate the tenancy for non-payment of arrears of rent for the periods prior to coming into force of the Tenancy Act there would really be no case for interference with the order passed by the Maharashtra Revenue Tribunal. As already stated, the rival contentions of the learned counsel are really based on the manner in which the Tribunal has worded its order passed on 2nd September 1963. According to the learned counsel for the petitioners, this order has the effect of modifying the earlier order of the Tahsildar, dated 28th March 1962, by which he directed payment of the Arrears of rent for the years 1957-58, 1958-59 and 1960-61, while according to the learned counsel for the respondent it is in effect an order directing the tenancy of the respondent to be terminated for non-payment of arrears of rent for the years 1954-55 to 1956-57. I have already stated that the petitioners hail taken no steps for obtaining possession consequent on termination of tenancy by their notice dated 30th November 1959. Indeed, now in view of the decision in Shantabai''s case this notice would be ineffective because the notice which was given on 30th November 1959 purported to terminate the tenancy for non-payment of lease-money for the years 1954-55 to 1957-58. The second notice, however, which was issued on 6th June 1960 terminating the tenancy of the respondent for non-payment of rent for the year 1959-60, was perfectly legal and operative notice. It is on the basis of the termination of tenancy by this notice that the proceeding for eviction and for obtaining possession from the respondent was initiated by the landlords.

7. When this application for possession came before the Additional Tahsildar the manner in which the Tahsildar bad to deal with this application was regulated by the provisions of section 36(3) and section 30 of the Tenancy Act. u/s 36(3) he had to make an enquiry in which it was competent for him to go into the question of legality of the notice, but if no effective challenge could be made to the notice issued on 6th June 1960 and there was an effective termination of tenancy by this notice, then the Tahsildar had to exercise his statutory power u/s 30 of the Tenancy Act to give time to the tenant to pay arrears of rent within the statutory period of 3 months. No controversy seems to be now possible on the question that the termination consequent on which a claim for possession is made by the landlord is brought about by the notice u/s 19 and that section 30 of the Tenancy Act does not deal with any power of the Tahsildar to make any order as to termination of tenancy. If any authority for this proposition necessary it is to be found in the decision of the Supreme Court in Rajaram v. Aba Maruti 1962 NLJ 256 in which the Supreme Court was dealing with the provisions of sections 14 (1), 25 (1) and 29 (3) of

the 1948 Tenancy Act which correspond respectively to the provisions of sections 19 (1), 30 (1) and 36 (3) of the 1958 Tenancy Act. Referring to the scheme of sections 14 and 25 of the 1948 Tenancy Act their Lordships of the Supreme Court observed in paragraph 7 of the judgment as under:

Under section 14 on the default in payment of a year''s rent occurring, the landlord may, if he so chooses, bring the tenancy to an end by giving the prescribed notice. If the tenancy is terminated, the tenant has, of course, no right to hold the land. The landlord would then be entitled to recover possession of the land from him. In view, however of section 29(2), the landlord cannot do so except by an application made to a Mamlatdar for the purpose. Now when such an application is made in a case where the tenant has been in default for not more than two years, section 25(1) would have to be applied and the Mamlatdar would have to give the tenant a chance to pay up and thereby annul the termination of the tenancy brought about u/s 14.

Same is the position u/s 19 of the 1958 Tenancy Act. The termination of tenancy is brought about by a notice u/s 19, but there is a bar to obtain possession by the landlord created by section 36 (2) of the Tenancy Act and he has, therefore, to approach the Tahsildar for ejecting the tenant. It is in such a proceeding for ejectment that the Tahsildar exercises his statutory power u/s 30 with a view to grant a relief to the tenant against termination of tenancy. This position is also made clear by the opening words of section 30 of the Tenancy Act which are as follows:

30(1). Where any tenancy of any land held by any tenant is terminated for nonpayment of rent and the landlord 6Ies any proceeding to eject the tenant, the Tahsildar shall call upon the tenant to tender to the landlord the rent in arrears..

If this is then the true nature of the proceedings and the powers of the Tahsildar, it is difficult to accept the contention that the order of the Maharashtra Revenue Tribunal passed on 2nd September 1963 had the effect of termination of tenancy of the respondent for non-payment of arrears of rent for the period prior to the coming into force of the Act. The order of the Tribunal is unfortunately improperly worded, but merely because the Tribunal in its order, dated 2nd September 1963, has stated that otherwise the tenancy will be liable to be terminated it cannot have the effect of over-riding the statutory right which the petitioners had already exercised by giving the notice dated 6th June 1960.

8. If the different stages through which this application made by the landlords for possession had passed are looked at, it is clear that they have throughout made a grievance of the fact that they were entitled to possession because the tenancy of the tenant had been validity terminated by the notice, dated 6th June 1960 and when after the order directing the tenant to pay only arrears in respect of 3 years was made by the Tahsildar they challenged that order by an appeal and by a

revision application before the Tribunal they were agitating denial of their right to possession, because, according to them, the Naib-Tahsildar should have made an order directing the tenant to pay the entire arrears due up to the date of the order of the Naib-Tahsildar. It is in the light of these facts that the order of the Maharashtra Revenue Tribunal, dated 2nd September 1963, must be read and the only irresistible conclusion which is possible in the instant case is that the Tribunal has modified the order passed by the Tahsildar and had called upon the tenant to pay additional arrears though no doubt those arrears related to the period prior to the coming into force of the Tenancy Act.

9. It is at this stage that it is contended by the learned counsel for the respondent that even assuming that the power which the Tribunal was exercising was the power of the Tahsildar u/s 30, it was not open to it to do so in respect of the arrears of lease-money for the period prior to the coming into force of the Tenancy Act. The argument is that the respondent was a protected lessee prior to coming into force of the Tenancy Act and that he was liable to pay lease-money and since lease-money cannot be said to be synonymous with ''rent'' as the term is used not only in section 2 (26) but also in section 30 of the Tenancy Act, the power u/s 30 to direct the tenant to pay arrears of rent could not be exercised in respect of lease money due for the period prior to coming into force of the Tenancy Act. Another limb of the same argument is that where the legislature wanted to incorporate in the Tenancy Act rights of the parties under different enactments a specific reference has been made to those enactments and a reference is made to section 5 of the Tenancy Act in which certain provisions of the Transfer of Property Act are made applicable to the leases governed by the Tenancy Act and it is, therefore, contended that in the absence of any reference to the provisions of Berar Regulation of Agricultural Leases Act in the Tenancy Act or in the absence of any specific reference to the lease money or the right to recover lease money in the Tenancy Act the power u/s 30 cannot be so exercised as to indirectly convert the proceeding for ejectment into a proceeding for recovery of arrears of lease money which were due under the Leases Act, and therefore, the provisions as they are must alone be given effect to. If the order passed by the Maharashtra Revenue Tribunal on 2-9-1963 falls within the jurisdiction of the Tenancy authority u/s 30 of the Tenancy Act, then that order could not be said to be without jurisdiction and that order would fall u/s 30 (1) of the Tenancy Act if power could be spelt out under that provision which could enable the Tahsildar or the appellate authority or the revisional authority exercising power under that section to direct payment of arrears to the landlord in respect of the period before the coming into force of the Tenancy Act. It cannot be disputed that the power u/s 30 can be so exercised as to call upon the tenant to tender the landlord the rent in arrears.

10. While it cannot be seriously disputed that the phrase "rent in arrears" includes arrears after the coming into force of the Tenancy Act, the question which is required to be decided for the purposes of the present case is whether these words

take within their sweep the arrears for the period prior to the coming into force of the Tenancy Act. The words "rent of arrears" are not in any way qualified and, given their natural meaning, these words will obviously include rent which has not been paid by the tenant to the landlord. But what the learned Counsel for the respondent contends is that the lease money which was not paid by the protected lessee to the landlord cannot be said to be rent within the meaning of the word as it is used in the Tenancy Act and a reference is made to the definition of rent in section 2(26) of the Tenancy Act, but before a reference is made to that definition it is necessary to refer to the object of section 30(1). The object of section 30(1) is to give relief against termination of tenancy for non-payment of rent and the principle embodied in that section is the same principle as is embodied in section 114 of the Transfer of Property Act. But it cannot also be lost sight of that while u/s 114 of the Transfer of Property Act a discretionary power is vested in Court, u/s 30 of the Tenancy Act the exercise of this power is obligatory on the Tahsildar and even the period during which the tenant called upon to pay the arrears of rent is statutorily prescribed by the provisions of section 30 of the Tenancy Act itself. If the object of the provisions of section 30(1) therefore is that the tenant has to be relieved against termination of tenancy for non-payment of rent, then in the absence of any qualifying words to the pharse "rent in arrears" I fail to see why arrears prior to the coming into force of the Tenancy Act should be excluded from the sweep of this pharse. Apart from the fact that I shall presently show that the word "rent" could also include lease money payable by the protected lessee, section 2 which is the definition section itself starts with the words "unless the context requires otherwise" and the scheme of section 30(1), therefore, cannot fee left out of consideration while considering the meaning of the words "rent in arrears". Consistently a view has been taken that this phrase includes arrears after the date of the notice, that is, arrears up to date of making of the order and it is not possible for me to find any reason why if there was a liability of the protected lessee who became tenant under the Tenancy Act which remained undischarged why the tenant who wanted to continue in possession could not be put to terms by directing him to pay arrears even in respect of the period before the coming into force of the Tenancy Act.

11. The words used in section 114 of the Transfer of Property Act were "rent in arrears". Apart from the principle which is contained in these two provisions, namely, section 30 of the Tenancy Act and section 114 of the Transfer of Property Act, even the phraseology used in them is also the same. It may not be out of place to refer to the view which has been taken with regard to section 114 of the Transfer of Property Act that the words "rent in arrears" include arrears the recovery of which has become barred by limitation. In Gurpur Vaman Pai v. Venkatu AIR 1936 Madras 116 it has been, held that the words "arrears of rent" are wide enough to cover a rent which is even barred by limitation. This decision was later followed by a Division Bench of the same Court in Janab Vellathi v. 8mt. K. Kadervel Thayammal AIR 1958 Mad 232 in which the Division Bench held that when granting the extraordinary

relief against forfeiture the Court has jurisdiction to decree time-barred arrears also where it is fully warranted by considerations of justice, equity and good conscience under which the relief against forfeiture is granted. A reference may also be made to a decision of the Calcutta High Court in Dhurrumtolla Properties Ltd. Vs. Dhunbai Peroshaw Sorabjee, in which the Calcutta High Court observed:

The argument that the words mean the rent claimed in the suit and not rent which had accrued due since the determination of the tenancy by the notice to quit, up to the date when the application for ejectment is heard is not acceptable.

The word "rent" is defined in section 2(26) of the Tenancy Act as follows:

2 (26) ''rent'' means any consideration, in money or kind or both, paid or payable by a tenant on account of the use or occupation of the land held by him but shall not include the rendering of any personal service or labour.

The contention that this definition cannot be extended to cover lease money due under the provisions of the Leases Act cannot be accepted. It is true that the provisions of the Leases Act used the word lease money and "lease money" was defined in section 2(i) of the Leases Act as meaning anything that is payable to a landholder in money or kind by a lessee for the right to use land. It must be appreciated that the Leases Act was in force only in the four districts of Berar and the other four districts which are also now governed by the provisions of the Tenancy Act were then governed by the provisions of Madhya Pradesh Land Revenue Code, 1954. Chapter XIV of that enactment dealt with tenants and the provisions of that Chapter dealt with the liability of the occupancy tenants to pay rent used the word rent as is clear from the provisions of sections 173 and 178 of that Code. With regard to other tenants also the word used was ''rent'' as will be clear from the provisions of sections 181, 182 and 183 of that Code. Section 181 raised a Resumption that if rent was due, every payment by a tenant to the tenure-holder shall, unless the tenant otherwise agreed in writing, be presumed to be a payment on account of the rent. Section 182 had cast an obligation on the tenure-holder to ''"give a written receipt for the amount of rent at the time when such amount is received by him". Section 183 provided for a penalty if the tenure-holder "fails to give a receipt as required by section 182 or receives by way of rent any amount in excess of the rent payable under the Code". The definition of rent in section 2(26) of the Tenancy Act defines rent as any consideration which was paid or payable by the tenant on account of use or occupation of the land held by him and it obviously has the same meaning as it had under the aforementioned provisions. The word "tenant" is defined in section 2(32) of the Tenancy Act and it includes a person who holds land on lease and includes a person who is a protected lessee. If a protected lessee is included in the definition of a tenant, the definition of rent with reference to the protected lessee would then read as "rent means any consideration in money or kind or both paid or payable by a protected lessee on account of use or occupation of land held by him.....". Having regard to the nature

of the definition of rent in section 2(26) of the Tenancy Act, therefore, which is intended to refer to a consideration paid on account of use or occupation of the land it will also cover the concept of lease money as contemplated by the provisions of Leases Act. Even, therefore, taking this view of the matter the arrears of lease money which is nothing else but rent payable by the protected lessee but were not paid and were, therefore, in arrears could be ordered to be paid by the tenant in the exercise of the jurisdiction u/s 30 of the Tenancy Act. I have already taken the view that the effect of the order of the Tribunal was nothing more than modifying the order of the Tahsildar with a further direction that additional amount which was due on account of arrears up to date should also be paid by the tenant and if that was the nature of the older passed on 2-9-1963 it is difficult to say that that order was without jurisdiction.

12. It is then contended that this Court should not interfere with the order of the Tribunal in the exercise of its discretionary powers under Article 227 of the Constitution of India, because the tenant has bona fide made an attempt to pay off the arrears as ordered by the Maharashtra Revenue Tribunal by the order, dated 2-9-1963. It is not possible to accept this submission. Even this Court has confirmed the finding on the earlier occasion when the matter came to be placed before this Court that the amount was not tendered during the statutory period of 3 months granted by the Maharashtra Revenue Tribunal. It is difficult to appreciate how a question of bona fides really becomes material. The fact remains that it has now been decided that there has been no tender within three months of the order of the Maharashtra Revenue Tribunal and on failure of the tenant to so tender the amount he has deprived himself of the relief which he was entitled to in view of section 30 of the Tenancy Act. There is, therefore, hardly any discretion left with the tenancy authorities and the only order that could follow would be an order for possession. If that was the nature of the right which had accrued in favour of the landlord and if the landlord has been deprived of that right by the Revenue Tribunal by the impugned order on a misapprehension of the nature of the order passed by the Tribunal on the earlier occasion that error must be corrected.

13. The result, therefore, is that the impugned order passed by the Maharashtra Revenue Tribunal on 4th March 1968 is quashed and the orders passed by the Special Deputy Collector and the Additional Tahsildar are restored. As the impugned order has now been quashed the landlords would be entitled to be restored to possession, as I am now informed that the tenant is now in possession.

14. In the circumstances of the case there will be no order as to costs.