

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

LETTERS PATENT APPEAL NO. 40 OF 2003
IN
WRIT PETITION NO. 4203 OF 2001

Aba S/o Bapu Dange,
Died through his LRs.

1. Jalindar S/o Vaijnath Dange,
Age:30 Years, Occu: Agriculture,
R/o Village: Wadji, Tq: Kallam,
Dist: Osmanabad.
2. Tatya S/o Ganu Jugdar,
Died through his LRs.
- (2a) Ranga S/o Tatya Jugdar,
Age:50 Years, Occu: Agril.,
R/o Village: Wadji, Taluka
Kallam, Dist: Osmanabad.
- (2b) Narayan S/o Tatya Jugdar,
Age:45 Years, Occu: Agril.,
R/o Village: Wadji, Taluka,
Kallam, Dist: Osmanabad.
3. Babu S/o Madhu Dange,
Age: 86 Years., Occu: Agril.,
R/o Village: Wadji, Taluka:
Kallam, Dist: Osmanabad.
4. Dagdu S/o Daji Morale,
died through his LRs.
- (4a) Atmaram S/o Dagdu Morale
Age:70 Years, Occu: Agril.,
R/o Village: Wadji, Taluka:
Kallam, Dist: Osmanabad.
- (4b) Shamrao S/o Dagdu Morale
Died through L.Rs
- 4b(i) Mathurabai W/o Shyamrao Morale
Age:70 Years, Occu: Agriculture.

4b(ii) Narayan S/o Shyamrao Morale
Age:47 Years, Occu: Agriculture

4b(iii) Shriram S/o Shyamrao Morale
Age:45 Years, Occu: Agriculture

4b(iv) Manohar S/o Shyamrao Morale
Age:35 Years, Occu: Agriculture

All R/o Village Wadji, Tq. Washi,
Dist. Osmanabad.

(4c) Shankar S/o Dagdu Morale,
Age: 65 Years, Occu: Agril.,
R/o Village; Wadji, Taluka:
Kallam, Dist: Osmanabad.

5. Yamunabai W/o Rama Jugdar,
died through her LR's.

(5a) Bhagwan S/o Balbhim Jugdar
Age: 65 Years, Occu: Agril.,
R/o Village: Wadji, Taluka:
Kallam, Dist. Osmanabad.

(5b) Pandurang S/o Sarjerao Jugdar
Age:40 Years, Occu: Agril.,
R/o Village: Wadji, Taluka:
Kallam, Dist. Osmanabad.

6. Nana S/o Gopal Jadhawar,
died through his LR's:

(6a) Sudam S/o Nana Jadhawar,
Age:70 Years, Occu: Agril.,
R/o Village: Wadji, Taluka:
Kallam, Dist: Osmanabad.

7. Keru S/o Bhiva Jugdar,
died through his LR.

(7a) Trimbak S/o Keru Jugdar,
Age:45 Years, Occu: Agril.,
R/o Village: Wadji, Taluka:
Kallam, Dist: Osmanabad.

...Appellants.

Versus

- 1) Vishwanath Bhaurao Morale
died through L.R.s
- 1-a) Baysakubai Vishwanath Morale
Age:75 Years, Occu: Household
- 1-b) Manik Vishwanath Morale
Age:47 Years, Occu: Agril.,
- 1-c) Vinayak Vishwanath Morale
Age:47 Years, Occu: Agril.,
- 1-d) Chandrakant Vishwanath Morale
Age:38 Years, Occu: Agri.

All r/o Village Wadji Tq. Kallam
Dist. O'bad.

2. Prayagabai w/o Bhaurao Morale,
died through her LR:
- (2a) Subhash S/o Changdeo Morale,
Age:Major, Occu: Agril.,
R/o Village: Wadji, Tq: Kallam.,
Dist: Osmanabad.
3. Sitabai W/o Bhaurao Morale,
died through her LR.
- (3a) Mahadeo S/o Uttam Morale,
Age:Major, Occu: Agril., R/o
Village: Wadji, Tq: Kallam,
Dist: Osmanabad.
4. The State of Maharashtra
Through the Collector,
Osmanabd.

....Respondents.

Mr. V.D. Salunke, Advocate for petitioners.

Mrs. M.A. Kulkarni, Advocate for respondent Nos. 1C & 1D

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.**

RESERVED ON :29/01/2018
PRONOUNCED ON : 09/02/2018

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed to challenge the decision given by the learned Single Judge of this Court in Writ Petition No. 4203/2001. The said writ petition was filed by the appellants to challenge the decision of Maharashtra Revenue Tribunal, ('M.R.T.' for short) Aurangabad given in case bearing No. 59/B/2000/TNC. The said revision was filed by present appellants to challenge the decision given by Deputy Collector Aurangabad in Appeal bearing No. TNC App.116-1973. This appeal was filed by the present appellants to challenge the decision of Tahsildar in a proceeding which was filed by Vishwanath Morale, respondent No. 1 under the provision of section 37 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as 'Hyderabad Tenancy Act' for short). Both the sides are heard.

2) The learned counsel for respondent No. 1 submitted that the appeal itself is not maintainable in view of clause 15 of Letters Patent and in view of the fact that the writ petition was filed by the present appellants against the decision of M.R.T., Tribunal, over which this Court has power of superintendence. The learned counsel for respondent placed reliance on the observations made by this

Court (Division Bench) in the case reported as **1965 Mh.L.J. 426 [Jagannath Vs. Gulabrao]** and also subsequent orders made by this Court in various matters. The learned counsel for respondent submitted that right from the year 1965, this Court has consistently held that writ petition filed against the order of M.R.T. needs to be treated as petition under Article 227 of Constitution of India and when learned Single Judge decides such petition, it needs to be presumed that the order was made by the learned Single Judge in exercise of power of superintendence and so, letters patent appeal does not lie. The learned counsel for appellants placed reliance on the observations made by full bench of this Court in two cases reported as **AIR 1994 BOMBAY 141 [Jagdish Balwantrao Abhyankar and Ors. Vs. State of Maharashtra and Ors.]** and **2011 (2) Mh.L.J. 916 [Advani Oerlikon Ltd. Vs. Machindra Govind Makasare and Ors.]**.

3) The Full Bench of this Court in case of **Jagdish** cited supra has laid down that when a proceeding is filed under Article 226 of the Constitution of India against the order of Court or Tribunal, this Court cannot treat it as one under Article 227, merely because Court or Tribunal, whose order is assailed, is subject to the power of superintendence of this Court. It is laid down that in some cases same subject can be considered under Articles 226 and 227 of

Constitution of India. In second case, of **Adwani** cited supra, the Full Bench of this Court has made following observations :-

"20. Upon this discussion, we now proceed to answer the question formulated in the order of reference:

Re: 1 : It is not a correct proposition in law that this Court cannot correct jurisdictional errors or errors resulting in miscarriage of justice committed by authorities which are subordinate to it by invoking powers under Article 226 of the Constitution.

Re: 2 : It is not a correct proposition in law that jurisdictional errors or errors resulting in miscarriage of justice committed by subordinate Courts/Tribunals can only be corrected by this Court in exercise of powers under Article 227 of the Constitution. The writ of certiorari can be issued under Article 226 of the Constitution where the subordinate Court or Tribunal commits an error of jurisdiction. Where the subordinate Court or Tribunal acts without jurisdiction or in excess of it or fails to exercise jurisdiction, that error of jurisdiction can be corrected Moreover when the Court or tribunal has acted illegally or improperly such as in breach of the principles of natural justice the writ of certiorari is available under Article 226.

Re: 3 : Where the facts justify the invocation of either Article 226 or Article 227 of the Constitution to correct

a jurisdictional error or an error resulting in a miscarriage of justice committed by authorities subordinate to this Court, there is no reason or justification to deprive a party of the right to invoke the constitutional remedy under Article 226 of the Constitution.

Re: 4 : It is open to the Court while dealing with a petition filed under Articles 226 and/or 227 of the Constitution or a Letters Patent Appeal under Clause 15 of the Letters Patent arising from the judgment in such a petition to determine whether the facts justify the party in filing the petition under Article 226 and/or 227 of the Constitution.

Re : 5 : The cause title, the averments and prayers in the petition can be taken into account while deciding whether the petition is one under Article 226 and/or 227 of the Constitution.

Re : 6 : If the petitioner elects to invoke Article 226 and/or 227 of the Constitution and the facts justify such invocation, a Letters Patent Appeal against the order of the learned Single Judge would be maintainable even though the Single Judge has purported to exercise jurisdiction only under Article 227 of the Constitution. The fact that the learned Single Judge has adverted only to the provisions of Article 227 of the Constitution would not bar the maintainability of such an appeal. The true test is

whether the facts justify the invocation of Articles 226 and 227 and this has to be determined on the facts of each case having due regard to (i) the nature of the jurisdiction invoked; (ii) the averments contained in the petition; (iii) the reliefs sought; and (iv) the true nature of the principal order passed by the Single Judge. The true nature of the order passed by the Single Judge has to be determined on the basis of the principal character of the relief granted. The fact that an ancillary direction has been issued under Article 227 of the Constitution would not dilute the character of an order as one with reference to Article 226. What has to be ascertained is the true nature of the order passed by the Single Judge and not what provision is mentioned while exercising this power.

Re : 7 : Where a petition is filed under Articles 226 and 227 of the Constitution and the facts justify the filing of such a petition, it is not lawful for the Court to hold that jurisdictional errors or errors resulting in a miscarriage of justice committed by the subordinate Courts or Tribunals can be corrected only by exercising powers under Article 227 (and that the mentioning of Article 226 is redundant), thus depriving the party of a right of appeal under Clause 15 of the Letters Patent.

Re : 8 : When a petition is filed under Articles 226 and 227 of the Constitution and the facts justify the filing of such a petition, it is not open to the Court to hold that Article 226 need not have been invoked, on the

ground that Article 227 is clothed with the power to grant the same relief thus depriving the party of a right to elect or choose a remedy.

Re : 9 : In a situation where a petition is filed under Article 227 of the Constitution and judgment is rendered in favour of the Petitioner, recourse to an appeal under Clause 15 of the Letters Patent is not barred to the Respondent merely on the ground that the petition was under Article 227. In *State of Madhya Pradesh vs. Visan Kumar Shiv Charanlal* (supra), the appeal before the Division Bench was filed by the Respondent to the proceedings before the Single Judge in a petition which had been instituted under Article 227. Accepting submission that a nomenclature is of no consequence and it is the nature of the reliefs sought and the controversy involved which determine which Article is applicable, the Supreme Court held that the appeal before the Division Bench was maintainable. A similar position arose in the decision of the Supreme Court in *M.M.T.C. vs. Commissioner of Commercial Tax* (supra). The Division Bench of the High Court had held that since the petition before the Single Judge was under Article 227 of the Constitution, an appeal at the behest of the Respondent to the petition was not maintainable. The Supreme Court held that the High Court was not justified in holding that the Letters Patent Appeal was not maintainable since the High Court did not consider the nature of the controversy and the prayers involved in the Writ

Petition.

21. Consequently, when a petition which is filed before the Single Judge invokes Article 227 of the Constitution and a decision is rendered in favour of the Petitioner, it is open to the Respondent to demonstrate before the Division Bench in appeal that the nature of the controversy, the averments contained in the petition, the reliefs sought and the principal character of the order of the learned Single Judge would support the maintainability of the appeal on the ground that the facts justify the invocation of both Articles 226 and 227 of the Constitution. Whether that is so will be determined by the Division Bench on the circumstances of each case."

4) In view of the answers given by the Full Bench of this Court quoted above and also law laid down by Apex Court which is referred by the Full Bench, this Court is expected to ascertain the nature of controversy, the averments in petition which was pending before the learned Single Judge of this Court. The proceeding before M.R.T. was filed under section 91 of Hyderabad Tendency Act. The provision of section 91 which is about the availability of revision runs as under :-

"91. (1) Notwithstanding anything contained in the Bombay Revenue Tribunal Act, 1939, an application for

revision may be made to the Bombay Revenue Tribunal constituted under the said Act against any order passed on appeal or under section 90B by the Collector on the following grounds only: -

(a) that the order of the Collector was contrary to law :

(b) that the Collector failed to determine some material issue of law; or

(c) that there was a substantial defect in following the procedure provided by this Act, which was resulted in the miscarriage of justice.

(2) In deciding applications under this section the Bombay Revenue Tribunal shall follow the procedure which may be prescribed by rules made by the State Government under this Act after consultation with the Bombay Revenue Tribunal."

In this regard provision of section 92 of Hyderabad Tenancy Act can also be seen which runs as under :-

"92. As authority exercising appellate or revisional jurisdiction under this Act shall pass such order consistent with this Act, whether by way of confirmation, recession or modification of the order under appeal or revision as appears to it to be just."

5) The aforesaid provisions of Hyderabad Tenancy Act and the other provisions of this Act show that in dispute of present nature, the inquiry as provided under the Act needs to be made by

Tahsildar and then against the decision of Tahsildar, there is appeal available which can be filed before Collector. The decision of the Collector can be challenged in revision under section 91 of the Act. The learned counsel for appellants argued that the appeal was decided by Sub Divisional Officer and not by Deputy Collector and this point ought to have been considered by M.R.T. There is no force in this submission as the Deputy Collector was working as Sub Divisional Officer and to him on the request made by the present appellants, the matter was transferred. In section 2 (cd), the definition of 'Collector' is given and Deputy Collector performing the duty and exercising the powers of the Collector under Hyderabad Land Revenue Code is included in the definition of 'Collector'. The record also shows that Deputy Collector decided the appeal. There is no need to discuss this point more.

6) The provisions of Hyderabad Tenancy Act show that the revisional jurisdiction of the Tribunal under section 91 is limited by the section itself. The finding of the fact of the authorities like Tahsildar and Collector is not expected to be interfered with. It can be said that if some material was not considered, error is committed in law, if there was error on the face of the record, then the M.R.T. could have interfered in the decision of the Collector given in the appeal.

7) The learned counsel for appellants submitted that when the appellant was declared as protected tenant and appellant had become deemed purchaser under Hyderabad Tenancy Act, it was not open to the authority like Tahsildar to reopen the matter and to take the decision by using the provision of section 37 of Hyderabad Tenancy Act. This Court has carefully gone through the relevant record. The record shows that in the year 1956 itself the application was filed by Vishwanath Morale before Tahsildar after attaining majority and prayer was made to declare that present appellant was not protected tenant. The provisions of Hyderabad Tenancy Act show that for getting the benefit of the provisions and particularly for getting declaration as protected tenant, the conditions laid down in section 34 of that Act need to be fulfilled. Those conditions cannot be fulfilled by the present appellants as there is no record whatsoever with the appellants to satisfy those conditions. The persons, who are not covered by section 34 can make an application under section 37 of the same Act and that application needs to be made after one year from the date of commencement of the Act and it should be made within one year from the date of attaining majority by the minor if minor is the land holder. After that Tahsildar is expected to make inquiry and decide the matter. Admittedly, no such proceeding was filed by tenant. It is not disputed that Civil

Court has declared that Vishwanath was adopted by Laxibai, widow of original owner Bhaurao in or about year 1942 and when Hyderabad Tenancy Act came in force, Vishwanath was minor. Though this circumstance was there, there was declaration made in favour of appellant that appellant was protected tenant. It appears that some record was created in or about year 1955 when Amended Act of 1955 came in to force by the present appellant with the help of other two widows of Bhaurao like Prayagbai and Sitabai. They lost their battle in Civil Court where they had contended that Vishwanath was not legally adopted by Laxmibai. It appears that for some time the names of Prayagbai and Sitabai were on revenue record as persons in possession and on that basis they created some record in favour of appellants. Due to that the appellants could get the declaration of aforesaid nature. In view of the provisions of Hyderabad Tenancy Act already quoted, the declaration made in favour of the appellants was not legal and it was void. On the basis of facts and aforesaid circumstances, Tahsildar gave decision that appellants' predecessor was not tenant under Hyderabad Tenancy Act, there was no question of giving declaration in his favour as protected tenant and certificate issued in their favour in the year 1992 is void. Thus, on merits, the appellants have no case.

8) It appears that the lands in dispute were under the

supervision of the Government for some time and only due to some interim orders made by this Court, the lands were given in possession of the appellants. The suit was filed for relief of possession by Vishwanath and the said suit is also decreed in his favour. A Civil Court has also held that as the successor of Bhaurao, Vishwanath is entitled to get the possession of the lands. When the appellants have failed to prove that they were protected tenants under Hyderabad Tenancy Act and as the two widows of Bhaurao had no authority to induct the appellants as tenant, the appellants cannot protect the possession which is given due to order made by this Court.

9) The aforesaid factual aspect and position of law are considered by Tahsildar, the first inquiring authority and also by Collector, the appellate authority and there are concurrent findings of these authorities in favour of Vishwanath. There is also decision of Civil Court in favour of Vishwanath. These circumstances are considered by M.R.T. The M.R.T. was exercising only revisional power which is mentioned in section 91 of the Hyderabad Tenancy Act and after considering the aforesaid record, the orders made by the authorities are conformed by M.R.T. and the revision is dismissed.

10) The aforesaid circumstances show that before the

learned Single Judge of this Court the decision of M.R.T. was challenged and the decision was given within the scope of provision of section 91 of Hyderabad Tenancy Act. There was no jurisdictional error and there is nothing on the record to show that some material was not considered either by the Tahsildar or by the first appellate authority. Thus, the facts do not justify invocation of Article 226 of Constitution of India. In view of these circumstances, in the present matter, it needs to be presumed that the learned Single Judge has considered the matter under Article 227 of the Constitution of India, though in the petition appellants had mentioned Articles 226 also of Constitution of India. For these reasons, this Court holds that L.P.A. itself is not tenable. In the result, the appeal stands dismissed.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

ssc/