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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

LETTERS PATENT APPEAL NO.90 OF 2013 IN
WRIT PETITION NO.221 OF 1990

WITH

CIVIL APPLICATION NO.4768 OF 2012 WITH
CIVIL APPLICATION NO.7251 OF 2013

1. Ramesh s/o Vithal Mane
Age 39 years, Occu. Agriculture
R/o Mahapur, Tq. Latur,
District Latur.
 2. Satish s/o Vithal Mane,
Age 48 years, Occu. Agriculture,
R/o Mahapur, Tq. Latur,
District Latur.
 3. Vithal s/o Hanumant Mane,
Age 59 years, Occu. Agriculture,
R/o Mahapur, Tq. Latur,
District Latur.
 4. Shardabai Vithal Mane,
Age 55 years, Occu. Agriculture,
R/o Mahapur, Tq. Latur,
District Latur.
- ... APPELLANTS

VERSUS

1. Gurling s/o Mahadeo Bhavare,
Age 70 years, Occu. Service,
R/o Khori Galli, Latur,
Tq. Latur, Dist. Latur.
2. Yeshodabai s/o Vishwanath Gurav,
Age 50 years, Occu. Household,
R/o Mahapur, Tq. Latur,
District Latur.

((2))

3. Shevantabai Bandu Gurav,
(since deceased, through her
Legal Heirs:)
- 3A) Yeshodabai w/o Vishwanath Gurav,
Age 50 years, Occu. Agriculture,
R/o Mahapur, Tq. Latur,
District Latur.
- 3B) Hirkanbai d/o Bandu Gurav
Age 40 years, Occu. Agriculture
R/o Mahapur, Tq. Latur,
District Latur.
- 3C) Pushpa d/o Bandu Gurav
Age 39 years, Occu. Agriculture,
R/o Mahapur, Tq. Latur,
District Latur.
4. Kashinath s/o Bandu Gurav,
Age 52 years, Occu. Agriculture,
R/o Mahapur, Tq. Latur,
District Latur.

... RESPONDENTS

.....
Shri S.S. Manale, Advocate holding for
Shri V.D. Salunke, Advocate for appellants
Shri S.B. Bhapkar, Advocate for respondent No.1

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

DATED : 28th FEBRUARY, 2018.

JUDGMENT (PER SUNIL K. KOTWAL, J.) :

1. This Letters Patent Appeal is directed challenging the decision given by learned Single Judge of this Court, dated 12.3.2012 in Writ Petition No.221/1990, confirming the order of Member of Maharashtra Revenue Tribunal, Aurangabad

(hereinafter referred as MRT), dated 26.10.1989 in Revision Petition No.26/B/88/L, confirming the order of Deputy Collector, Land Reforms, Latur, dated 8.3.1988 in File No.87/TNC/A/ 45 and the order dated 31.7.1987, passed by the Additional Tahsildar, Latur in File No.1985/TLC-WS-8-6 CR under Section 8 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter referred as the Hyderabad Tenancy Act for short).

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 **Jagannath Vs. Gulabrao [1965 Mh.L.J. 426]** 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 **Jagdish Balwantrao Abhyankar and Ors. Vs. State of Maharashtra and Ors. [AIR 1994 Bombay 141] and Advani Oerlikon Ltd. Vs. Machindra Govind Makasare and Ors. [2011 (2) Mh.L.J. 916]**.

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 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.

6. Learned counsel for the appellants submitted that, the disputed land being joint family property of original land owners, Vishwanath who was one of the co-sharer, cannot

execute Batai Patra dated 13.4.1970 on behalf of all co-sharers. He placed reliance on **Dwarkanath and another Vs. Narayan Dhond [1989 Mh.L.J. 689]**, wherein it is held that, "Wife having undivided two third share in the suit land could not create lease in respect of entire suit land unless she had authority from her step sons to create lease."

7. At the outset, we must observe that, the above authority is distinguishable on facts for the simple reason that in the case hand, Vishwanath being Karta of the joint family, had every legal right to create lease of the entire land as a Manager of the joint family.

8. Next objection raised by learned counsel for the appellant is that, the document of lease dated 13.4.1970 styled as "Batai Patra" is not lease deed but it is unregistered mortgage deed. He placed reliance on **Santa Kumari Vs. Laxmi** reported in **[AIR 2000 SC 3009]**. However, this case is also distinguishable for the reason that in the case before Apex Court, on the date of execution of sale deed of the disputed land, separate agreement for reconveyance was executed. In the circumstances, the document was stated as 'mortgage' by conditional sale.

9. However, in the case at hand, as per terms of the

"Batai Patra", Vishwanath Bandu Gurav received amount of Rs.1000/- and for that consideration, he delivered the possession of disputed land to respondent No.1 and respondent No.1 was allowed to cultivate that land for the period of next five years and the expenditure for cultivation were to be equally shared by Vishwanath and respondent No.1. The note below this document indicates that, if this amount of Rs.1000/- is not refunded by Vishwanath within five years, then the respondent No.1 would be allowed to continue with cultivating possession for the next five years. Thus, it can be said that, there are two probable interpretations of this document, first indicating that it is lease deed and second, it is unregistered mortgage deed. While deciding Writ Petition, this Court is not expected to disturb the concurrent findings of three authorities i.e. Additional Tahsildar, Deputy Collector, Land Reforms and Member, MRT that this document is deed of tenancy. Therefore, in view of law settled by Full Bench of this Court and Apex Court, Batai Patra cannot be interpreted as document of mortgage deed.

10. In this Letters Patent Appeal, respondent No.1 has filed copies of depositions recorded before Additional Tahsildar. Learned Advocate for the appellants tried to point out certain admissions given by respondent No.1 in his cross-examination. However, this proceeding being Letters Patent Appeal, re-

appreciation of the evidence is not permissible.

11. Learned Advocate for the appellants submitted that, only on the basis of pencil entry in record of rights, tenancy rights cannot be created. He placed reliance on **Vaijnath & others Vs. ahadeo Mote** reported in **[2010(5) Bom.C.R. 860]**, wherein learned Single Judge of this Court held that, "Tenancy cannot be proved by mere entry in revenue record".

12. However, this authority is distinguishable on facts for the simple reason that in the case at hand, the respondent No.1 has filed original Batai Patra, entry in the revenue record since 1970 till 1980 showing possession of respondent No.1 as tenant over the suit land before Tahsildar. In addition to this, respondent No.1 has led his oral evidence as well as examined attesting witnesses on Batai Patra. Considering this all documentary as well as oral evidence on record, learned Additional Tahsildar recorded finding of fact that, respondent No.1 is in possession of the suit land as tenant. Accordingly, declaration under Section 8 of Hyderabad Tenancy Act was given by Tahsildar.

13. The learned Single Judge considered the concurrent findings recorded by the authorities referred above that the respondent No.1 is tenant in the suit land. The genuineness and

legality of Batai Patra was accepted even in revisional jurisdiction by learned Member of MRT.

14. Though learned counsel for appellants submitted that the Member, MRT did not consider the documents placed on record, the order of Member, MRT indicates that the Batai Patra was seen by learned Member of the MRT at page No.189 in the file of Tahsil Office. The learned Single Judge also considered the Batai Patra, the entries in revenue record in cultivation column of 7/12 extract covering for the year 1970-71, which continued till the year 1980. In the year 1980-81, the concerned Talathi has entered name of legal representatives of Vishwanath Gurav in the column of cultivation without any order from competent authority, which made the respondent No.1 to file an appeal before the Deputy Collector for correction of entry made in the column of cultivation and he got stay to the entry in the name of land owner. Thereafter there is no entry recorded to as to who is in possession of the said property.

15. The learned Single Judge has considered the three judgments referred above and the observation of learned Member of MRT. Learned Single Judge did not find any error in the orders impugned.

16. The above said circumstances show that, before the

learned Single Judge of this Court, the decision of MRT was challenged and the decision was given within scope of provisions of Section 91 of the Hyderabad Tenancy Act. There was no jurisdictional error and there is nothing on record to show that some material was not considered either by Tahsildar or by first appellate authority. The facts do not justify invocation of Article 226 of the 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 have mentioned Articles 226 and 227 of the Constitution of India.

17. For these reasons, this Court holds that, Letters Patent Appeal itself is not tenable. In the result, the appeal stands dismissed. In view of dismissal of the Letters Patent Appeal, pending Civil Applications are disposed of.

18. Learned counsel for the appellants prayed for grant of continuation of interim protection granted by this Court for a period of six weeks. Learned counsel for respondents opposed this prayer. The interim protection granted by this Court is continued for a period of six weeks from the date of this order.