

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

LETTERS PATENT APPEAL NO. 22 OF 2008
IN
WRIT PETITION NO. 2724 OF 2006

1. Smt. Madanbai w/o Kishanlal Lodha
Age : 77 years, Occu : Agri.,
R/o Erandwane, Pune,
Tq. & Dist. Pune
2. Kishanlal S/o Fatechand Lodha
Age : 81 years, Occu : Agri.,
R/o Erandwane, Pune,
Tq. & Dist. Pune .. **Died**

Through their Power of Attorney Holder :-

Subhash S/o Kishanlal Lodha
Age : 60 years, occu : Business,
R/o 38/25, Prabhat Road,
Pune, Tq. & Dist. Pune

Kishanlal S/o Fatechand Lodha (Deceased)
Through his legal heirs,

- 2-a) Subhash Kishanlal Lodha
Age 71 years, Occu : Business
- 2-b) Prakash Kishanlal Lodha
Age 61 years, Occu : Business,
Both R/o Erandwane, Pune
Tq & Dist. Pune
- 2-c) Late Sunita Prakash Abad (Deceased)
Through her Legal heirs
- 2-d) Ajay Prakash Aad
Age 38 years, Occu : Nil
R/o 45, Avalon Meadows Lane,
East Amherst NY 14051 USA

2-e) Anjali Moulson
Age 34 years, Occu Household,
R/o 127 Niagara Trail,
Georgetown Ontario L7GOA6,
Canada

2-f) Prakash Laxmichand Aad,
Age 71 years,
Occu. R/o 20 Pickard Avenue,
Ancaster, Ontario, L9K1T3,
Canada,
Now R/o C/o. Erandwane, Pune
Tq & Dist. Pune

.. Appellants
(Orig. Petitioners)

Versus

1] Bhanudas S/o Ranga Ingale
Age : 81 years, Occu : Agri.,
R/o Shelka-Dhanora, Tq. Kallam,
Dist. Osmanabad
Through Power of Attorney Holder:-
Smt. Indubai W/o Subrao Waghmare,
Age : 35 years, Occu : Agri.,
R/o Shelka-Dhanora, Tq. Kallam,
Dist. Osmanabad .. **Died**

Bhanudas S/o Ranga Ingale (Dead)
Through his Legal heirs

1(A) Parimala W/o Bhanudas Ingale,
Age : 70 years, Occu : Household,
R/o Shelka Khanora, Tq. Kallam,
Dist. Osmanabad

[Respondent nos. 1(B) to 1(E) are
legal heirs of respondent no.1(A).
Pursis filed as per Order
dated 31-10-2018]

1(B) Sharda Sitaram Jadhav,
Age : 50 years, Occu : Household,
R/o At Post Govindpur, Tq. Kallam,
Dist. Osmanabad

- 1(C) Indubai Subhanrao Waghmare,
Age : 35 years, Occu : Household,
R/o At Post Ratnapur, Tq. Washi,
Dist. Osmanabad
- 1(D) Nandubai Sandipan Salve,
Age : 45 years, Occu : Household,
R/o Hasegaon (Kes), Tq. Kallam,
Dist. Osmanabad
- 1(E) Dadarao S/o Bhanudas Ingale,
Age : 40 years, Occu : Agri.,
R/o Shelka Dhanora, Tq. Kallam,
Dist. Osmanabad
2. The Tahsildar,
Kallam, Tq. Kallam,
Dist. Osmanabad
3. The Deputy Collector
(Land Reforms),
Osmanabad, Tq. & Dist. Osmanabad
4. The Divisional Commissioner,
Aurangabad Division,
Aurangabad

.. Respondents

WITH
CIVIL APPLICATION NO. 1563 OF 2008 IN
LETTERS PATENT APPEAL NO. 22 OF 2008
(Smt. Madanbai W/o Kishanlal Lodha and anr. Vs. Bhanudas S/o
Ranga Ingale (Died) Through LRs. and others)

WITH
CIVIL APPLICATION NO. 4977 OF 2019 IN
LETTERS PATENT APPEAL NO. 22 OF 2008
(Smt. Madanbai W/o Kishanlal Lodha and anr. Vs. Bhanudas S/o
Ranga Ingale (Died) Through LRs. and others)

WITH
LETTERS PATENT APPEAL NO. 23 OF 2008 IN
WRIT PETITION NO. 2725 OF 2006

1. Smt. Madanbai w/o Kishanlal Lodha
Age : 77 years, Occu : Agri.,

R/o Erandwane, Pune,
Tq. & Dist. Pune

2. Kishanlal S/o Fatechand Lodha
Age : 81 years, Occu : Agri.,
R/o Erandwane, Pune,
Tq. & Dist. Pune .. **Died**

Through their Power of Attorney Holder :-

Subhash S/o Kishanlal Lodha
Age : 60 years, occu : Business,
R/o 38/25, Prabhat Road,
Pune, Tq. & Dist. Pune

Kishanlal S/o Fatechand Lodha (Deceased)
Through his legal heirs,

2-a) Subhash Kishanlal Lodha
Age 71 years, Occu : Business

2-b) Prakash Kishanlal Lodha
Age 61 years, Occu : Business,
Both R/o Erandwane, Pune
Tq & Dist. Pune

2-c) Late Sunita Prakash Abad (Deceased)
Through here Legal heirs

2-d) Ajay Prakash Aad
Age 38 years, Occu : Nil
R/o 45, Avalon Meadows Lane,
East Amherst NY 14051 USA

2-e) Anjali Moulson
Age 34 years, Occu Household,
R/o 127 Niagara Trail,
Georgetown Ontario L7GOA6,
Canada

2-f) Prakash Laxmichand Aad,
Age 71 years,
Occu. R/o 20 Pickard Avenue,
Ancaster, Ontario, L9K1T3,
Canada,

Now R/o C/o. Erandwane, Pune
Tq & Dist. Pune

.. Appellants
(Orig. Petitioners)

Versus

- 1] Bhanudas S/o Ranga Ingale
Age : 81 years, Occu : Agri.,
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Dist. Osmanabad
- 1(B) Sharda Sitaram Jadhav,
Age : 50 years, Occu : Household,
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Age : 45 years, Occu : Household,
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- 1(E) Dadarao S/o Bhanudas Ingale,
Age : 40 years, Occu : Agri.,
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Dist. Osmanabad

2. The Tahsildar,
Kallam, Tq. Kallam,
Dist. Osmanabad
3. The Deputy Collector
(Land Reforms),
Osmanabad, Tq. & Dist. Osmanabad
4. The Divisional Commissioner,
Aurangabad Division,
Aurangabad

.. Respondents

WITH
CIVIL APPLICATION NO. 1565 OF 2008 IN
LETTERS PATENT APPEAL NO. 23 OF 2008
(Smt. Madanbai W/o Kishanlal Lodha and others
Vs.
Bhanudas S/o Ranga Ingale (Died) Through LR. and others)

WITH
CIVIL APPLICATION NO. 4978 OF 2019 IN
LETTERS PATENT APPEAL NO. 23 OF 2008
(Smt. Madanbai W/o Kishanlal Lodha and others
Vs.
Bhanudas S/o Ranga Ingale (Died) Through LR. and others)

...
Mr. R.N. Dhorde, Senior Advocate i/b. Mr. R.L. Kute, Advocate for
appellants in both Letters Patent Appeals and for applicants in
Civil Applications

Mr. S.S. Dande, AGP for respondents no. 2 to 4

Mr. V.D. Salunke, Advocate for respondents no. 1A to 1E in both
Letters Patent Appeals

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CORAM : SUNIL P. DESHMUKH &
R.G. AVACHAT, JJ.
DATE : 18-04-2019

JUDGMENT (PER – SUNIL P. DESHMUKH, J.) :

1. These two letters patent appeals take exception to common order dated 22-01-2008 passed by learned single judge of this court in writ petitions bearing no. 2724 of 2006 and 2725 of 2006. The writ petitions were preferred by present appellants against decisions of revisional and appellate authority. Revision, it appears that, had been in respect of proceedings for certificate under section 38E of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (for short "The HTAL Act", 1950) whereas appeal had been in respect of proceedings pursuant to section 98 of said Act.

2. The proceedings in letters patent appeals concern 7 *Hectare, 77 Are* area of land from survey no. 34 situated at Shelka-Dhanora, Taluka – Kallam, District – Osmanabad. The letters patent appeals were admitted and are coming up for final hearing.

3. Succinct narration of events would be pertinent to facilitate appreciation of matters.

Respondent no. 1 claims to be a protected tenant of land survey no. 34 (now bearing *Gut* no. 72) and appellants claim that respondent no. 1 had around 1952 orally surrendered his

tenancy of land survey no. 34. After respondent no. 1, one Shivram Sakharam Sawase had been tenant.

4. Aforesaid Shivram Sawase had not asserted his claim over aforesaid land and the appellants had been owners of the aforesaid land.

A civil suit bearing no. 173 of 1952 for partition of properties, *inter-alia*, aforesaid land had been instituted and aforesaid land had been given to share of appellants and had been standing in the name of appellant no. 1. They had all along been in possession.

During proceedings under Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (hereinafter "Ceiling Act") it had been considered that appellants as owners were in possession of aforesaid land and it had been considered to be a surplus holding. In revision therefrom, it was found that said holding is not surplus and an order came to be passed accordingly on 11-02-1975.

Subsequently, amended Ceiling Act was enforced and the appellants were considered to be surplus land holders to the extent of 9 Acre 36 Guntha from aforesaid land survey no. 34. Accordingly, the authorities had taken over possession of said

area of 9 *Acre 36 Guntha* around 1982 and had disbursed same to various persons.

5. It was in June, 1999, proceedings purporting to be pursuant to section 38E of the HTAL Act were filed by respondent no. 1, contending, it had been realized that he is protected tenant of the land. Respondent no. 2 – tahsildar had allowed said application on 30-07-1999 declaring respondent no. 1 as owner.

Appellants had preferred an appeal before deputy collector contending the order had been passed without hearing them and he had remanded the matter for fresh hearing.

After remand, tahsildar had rejected the application of respondent no. 1. Respondent no. 1 had preferred appeal to deputy collector against order of tahsildar. Deputy collector had allowed the appeal holding that respondent no.1 is entitled to declaration under section 38E of the HTAL Act, to the extent of 7 *Hectare* and 77 *Are* land from survey no. 34.

Appellants, had preferred revision. It was before the commissioner according to amendment to Maharashtra Land Revenue Code, 1966 (hereinafter “MLR Code”) assigning revisions to the commissioner. The commissioner had dismissed the revision and, thus, writ petition bearing no. 2724 of 2006 had

been preferred in High Court. Learned single judge had dismissed the writ petition and letters patent appeal no. 22 of 2008 has been preferred.

6. One other proceeding started taking place after tahsildar had allowed application on 31-07-1999, declaring respondent no. 1 – Bhanudas Ranga Ingale as owner under section 38E and while on 21-03-2000 appeal therefrom preferred by present appellants had been allowed setting aside order dated 31-07-1999 and remanding the matter for granting opportunity to appellants.

On 14-09-2000, said Bhanudas Ranga Ingale had filed an application for eviction of appellants pursuant to section 98 of HTAL Act. In said proceeding, on 09-01-2001, deputy collector had passed order observing that there is forcible dispossession of Bhanudas under the land transfer and illegal partition and there is no limitation for action pursuant to section 98 and Bhanudas through power of attorney is entitled to possession. Appeal therefrom before maharashtra revenue tribunal, objection to order of deputy collector, *inter-alia*, about want of proper opportunity to appellants had failed under order of tribunal dated 21-02-2002. Writ petition bearing no. 891 of 2002 preferred by appellants had been disposed by high court remanding matter to

deputy collector for proper opportunity to appellants.

On remand, the deputy collector had granted the application of respondent – Bhanudas Ranga Ingale under order dated 26-10-2004 directing restoration of possession to respondent no. 1.

In the meantime, as referred to above earlier jurisdiction of maharashtra revenue tribunal came to be assigned to the commissioner and in view of the same, appellants had preferred appeal before respondent no. 4 – commissioner.

Commissioner had dismissed the appeal taking into account order dated 15-02-2006 passed by him in revision preferred by appellants referred to in foregoing proceedings pursuant to section 38E.

Against aforesaid order of the commissioner, petitioner had preferred writ petition no. 2725 of 2006 which had been dismissed by learned single judge and, as such, letters patent appeal no. 23 of 2008 has been preferred.

7. Mr. R.N. Dhorde, learned Senior Advocate appearing with Mr. R.L. Kute, Advocate for appellants, at the outset, submits that learned Single Judge had been oblivious of that section 19 of the HTAL Act had been amended in the period subsequent to

surrender of tenancy by respondent no. 1. While surrender of tenancy had taken place around 1952, the procedure under amendment was not a prescript. He submits that there are lot of surrounding and attending circumstances and conduct of respondent no. 1 postulates surrender of tenancy and said fact cannot be backed out on. Learned senior counsel submits that the procedure prescribed under amended provisions was not applicable and would not have any hold onto the facts and circumstances and the legal position as had been prevailing when the surrender, in-fact, had taken place.

He submits, nothing turns on the tenancy register as it had lost out on efficacy. The facts and conduct of respondent no. 1 is vindication of surrender of tenancy. Lot of other events have occurred in the intervening period. The land suffered tenancy of other person who opted out of asserting rights over the same and the land had fallen in the absolute ownership of appellants. The same has been treated accordingly by the concerned and all. Thereafter, land ceiling proceedings were suffered by the appellants. Some part of the land had, in-fact, been taken over by the State authorities for disbursement considering the land to be surplus in the holding of appellants. For 40 years, no right had been asserted or even a semblance of

claim made by respondent no. 1. All of a sudden, from nowhere in 1999, proceedings were initiated and without taking into account impact and effect of long passage of duration and the events in the interregnum, creation of rights and obligations during the period, on cursory consideration of the matter, the authorities had purportedly decided the same in favour of respondent no. 1.

8. He submits that from 1952 onwards after surrender of tenancy, all along the relevant record revenue or otherwise, has been showing appellants to be owners of property, nor ownership of appellants had been disputed till 1999. Claim in 1999 after 1952 for the first time by itself is depiction of that such an action is nothing short of an attempt to exhume surrendered rights. He submits that it is unnatural that resurrection of a dead thing would be possible in any way applying any rationale or any reason. Permanently lost rights can not be allowed to disturb and dis-concert owners and long and established prevailing disposition of the property.

9. Learned senior advocate submits that delay is extraordinary and unreasonable and without any plausible explanation being there and inaction for over 40 years would not be able to sustain the claim.

The counsel relies on a decision of supreme court in the case of *“Ram Chand and others Vs. Union of India and others”* reported in (1994) 1 Supreme Court Cases 44. He particularly points out placitum 'A'.

He refers to that, in said case, while section 11-A had been inserted under amendment in 1984 to the Land Acquisition Act and award of compensation was made prior to the coming into force of the amending Act, the amended provisions were considered not to be applicable to already declared award. Amendment to section 19 to HTAL Act has been of 1954. Surrender being long before enforcement amendment, amended section 19 would hardly be of any assistance to respondent no. 1.

He submits that it has been specifically referred to therein that where there is no time limit specified, power should be exercised within reasonable time, so is the case in respect of claim it ought to be asserted in reasonable time and an assertion would not have any impact after inordinately long period.

10. He also refers to and relies on judgment of supreme court in the case of *“State of Punjab and others Vs. Bhatinda District Cooperative Milk Producers Union Ltd.”* reported in (2007) 11 Supreme Court Cases 363. For same purpose, he also refers to and relies on

judgment of supreme court in the case of “*Santoshkumar Shivgonda Patil and others Vs. Balasaheb Tukaram Shevale and others*” reported in (2009) 9 Supreme Court Cases 352 and decision in the case of “*Joint Collector Ranga Reddy District and another Vs. D. Narsing Rao and others*” reported in (2015) 3 Supreme Court Cases 695.

He refers to paragraphs no. 10 and 12 from the case of “*Santoshkumar*” (supra) to consider that reasonable period can at the most be stretched to three years. He submits, having regard to observations therein, it is trite to say that while no period has been prescribed, statutory authority must exercise its jurisdiction within reasonable period. Exercise of power after 40 years is plainly an abuse of process of law in facts and circumstances of the case.

11. Mr. Dhorde, particularly emphasizes the case of “*Sita Sahu and others Vs. State of Jharkhand and others*” reported in (2004) 8 Supreme Court Cases 340, comes quite close to present situation on facts, wherein he submits under tenancy and land laws, lapse of 40 years has been considered certainly not to be a reasonable time for exercise of powers, even if it is not hedged in by a period of limitation and accordingly, the authorities ought not to have exercised their powers under the HTAL Act. He refers to head note 'A' of the same reading, thus,

“ A. Tenancy and land laws – Chota Nagpur Tenancy Act, 1908 [(Bengal Act 6 of 1908) as amended by Bihar Act 25 of 1947] – Ss. 71-A and 46 – Power under S. 71-A to restore possession to members of the Scheduled Tribes over land alleged to have been unlawfully transferred – Exercise of – Limitation Act, 1963 – Art. 65 (as amended by Bihar Scheduled Areas Regulation, 1969, Regn. 4 & Sch.) - Applicability – Expiry of period of limitation (30 years) prescribed by the 1963 Act, held, is not a bar to the exercise of said power – But, that power cannot be exercised after an unreasonable long period of time during which third-party interests might have come into effect – land in question originally recorded in the names of K, B and J (ancestors of G belonging to Scheduled Tribe) – K and B, after death of J, surrendering tenancy pertaining to the said land to the landlord on 7-2-1938 – Soon thereafter i.e. on 25-2-1938, the landlord settling the said land on the appellants – Appellants in possession of the land and cultivating it – In 1978, G filing application under S. 71-A for restoration of the land in question on the ground that the appellants acquired the land fraudulently – Special Officer allowing the said application – S. 46 prohibiting transfer by a member of a Scheduled Tribe without the sanction of the Deputy Commissioner, not in existence in 1938 – No contravention of any other provisions of the Act – Even assuming that transfer was fraudulent, held, lapse of 40 years not a reasonable time for exercise of power under S. 71-A - On facts, Special Officer erred in allowing the restoration application – Limitation – Limitation Act, 1963 – Art. 65 (as amended by Bihar Scheduled Areas Regulation, 1969, Regn. 4 and Sch.) ”

and submits, lapse of 40 years is not a reasonable period for exercise of powers under the statute.

He submits that in said case while the unduly long delay had operated against the claimants negating their demands, by analogy, rationale in the same would apply and ought to apply on all fours in present matter.

12. He refers to the case of “*Ibrahimpatnam Taluk Vyavasaya Coolie Sangham Vs. K. Suresh Reddy and others*” reported in (2003) 7

Supreme Court Cases 667 wherein it has been observed in paragraph no. 9, thus,

“ 9. Even before the division Bench of High Court in the writ appeals, the appellants did not contend that the suo motu power could be exercised even after the long delay of 13-15 years because of the fraudulent acts of the non-official respondents. The focus of attention before the Division Bench was only on the language of sub-section (4) of the Section 15-B of the Act as to whether the suo motu power could be exercised at any time strictly sticking to the language of that sub-section or it could be exercised within reasonable time. In the absence of necessary and sufficient particulars pleaded as regards fraud and the date or period of discovery of fraud and more so when the contention that the suo motu power could be exercised within a reasonable period from the date of discovery of fraud was not urged, the learned Single Judge as well as the Division Bench of the High Court were right in not examining the question of fraud alleged to have been committed by the non-official respondents. Use of the words “at any time” in sub-section (4) of Section 50-B of the Act only indicates that no specific period of limitation is prescribed within which the suo motu power could be exercised reckoning or starting from a particular date advisedly and contextually. Exercise of suo motu power depended on facts and circumstances of each case. In cases of fraud, this power could be exercised within a reasonable time from the date of detention or discovery of fraud. While exercising such power, several factors need to be kept in mind such as effect on the rights of the third parties over the immovable property due to passage of considerable time, change of hands by subsequent bona fide transfers, the orders attaining finality under the provisions of other Acts (such as the land Ceiling Act). Hence, it appears that without stating from what date the period of limitation starts and within what period the suo motu power is to be exercised, in sub-section (4) of Section 50-B of the Act, the words “at any time” are used so that the suo motu power could be exercised within reasonable period from the date of discovery of fraud depending on facts and circumstances of each case in the context of the statute and nature of rights of the parties. Use of the words “at any time” in sub-section (4) of Section 50-B of the Act cannot be rigidly read letter by letter. It must be read and construed contextually and reasonably. If one has to simply proceed on the basis of the dictionary meaning of the words “at any time”, the suo motu power under sub-section (4) of Section 50-B of the Act could be exercised even after decades and then it would lead to anomalous position leading to uncertainty and complications seriously affecting the rights of the parties, that too, over immovable properties. Orders attaining finality and certainty of the rights of the parties accrued in

the light of the orders passed must have sanctify. Exercise of suo motu power "at any time" only means that no specific period such as days, months or years are not (sic) prescribed reckoning from a particular date. But that does not mean that "at any time" should be unguided and arbitrary. In this view, "at any time" must be understood as within a reasonable time depending on the facts and circumstances of each case in the absence of prescribed period of limitation."

13. His other leg of submission is, since there is no claim by respondent no. 1 for possession within two years of dispossession pursuant to section 32 of the HTAL Act, proceeding for possession and declaration of tenancy is not maintainable. For said purpose, he refers to and relies on decision in the case of "*Gangyya Khandyya Vs. Gangadhar Tanaji and others*" reported in 2011 (1) Bom.C.R. 504. He refers to paragraphs no. 7 and 8 from the same, reading, thus,

"7. When section 32 prescribes specific remedy to person like the petitioner for restoration of possession, section 98 can not be interpreted so as to hold that the remedy provided thereunder also overlaps with section 32. Section 32 contemplates all together different remedy. Section 98 contemplates summary eviction only when there is no other remedy available for eviction of a person unauthorisedly occupying or wrongful in possession of any land. Section 98 is not available after expiry of period of two years when section 32 ceases to be of any assistance.

8. Under section 32 or under section 98 cause of action for the present petitioner can be the loss of possession. The transfer by subsequent purchaser who himself purchased it in 1966 can not confer upon petitioner any such cause of action. "

14. He also purports to invite attention to paragraph no. 15 of *Radhu Gokul Gawali and others V/s. Mohan Kishan Gawali and others*

reported in 2007 (6) Mh.L.J. 117 cited by learned counsel for respondent (for other purpose i.e. regarding extent of protected tenancy) to submit that application under section 98 of the HTAL Act has to be made within a reasonable period and same cannot be entertained by competent authority after inordinate delay.

38. He submits that learned Single Judge although purportedly referred to cases cited above, considered those oblivious of underlying principle. The matters require re-appreciation and reconsideration.

16. He further submits, may be that an objection to maintainability of the appeals is sought to be raised, however, the same having been raised after admission of the appeals, it loses out on having any significance. He submits that the letters patent appeals indeed for more reasons than one are maintainable in the given facts and circumstances of the case.

17. Learned senior counsel for the appellants has referred to and relied on decision in the case of *“Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad”* reported in 1999 (4) LJ (SC) 537 as well as *“Jogendrasinhji Vijaysinghji Vs. State of Gujarat and others”* reported in (2015) 9 Supreme Court Cases 1, submitting that letters patent appeals are maintainable where order in substance falls under Article 226,

wholly or partially and in such cases, it is for the division bench in letters patent appeal to decide on facts and it is not that writ petition challenging order of tribunal or authorities shall always be regarded to be under Article 227. From *Jogendrasinhji* (supra), he refers to observations under paragraphs no. 30 and 45.1 of decision that,

“ It will be the obligation of the Division Bench hearing the letters patent appeal to discern and decide, having regard to the nature, contour and character of the order, whether the order has been passed by the Single Judge in exercise of jurisdiction under Articles 226 or 227 of the Constitution or both. The Division Bench would also be required to scrutinise whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. One of the conclusions recorded by the High Court in the impugned judgment pertains to demand and payment of court fees. However, the court fee payable on a petition to make it under Article 226 or Article 227 or both, would depend upon the rules framed by the High Court. ”

18. According to him, in paragraphs no. 39 to 43 and 45.3 more important observation is as under,

“ **Every adjudicating authority may be nomenclatured as a tribunal but the said authority (ies) are different from that pure and simple adjudicating authorities and that is why they are called the authorities. An Income Tax Commissioner, whatever rank he may be holding, when he adjudicates, he has to be made a party, for he can defend his order. He is entitled to contest. There are many authorities under many a statute. Thus, in essence, when a tribunal or authority is required to defend its own order, it is a necessary party and it is to be made a party failing which the proceeding before the High Court would be regarded as not maintainable.** ”

19. Learned senior counsel submits that for all aforesaid reasons, the letters patent appeals deserve to be allowed.

20. Though it would not be a point which may in given facts and circumstances arise in present matter, it may be worthwhile to deal with maintainability of the letters patent appeals.

21. Learned Advocate Mr. V. D. Salunke appearing for respondents no.1A to 1E in these appeals opposes the letters patent appeals, submitting that those are not maintainable having regard to recent decision rendered by division bench of this court dated 28-02-2018 in letters patent appeal no. 90 of 2013 “*Ramesh S/o Vithal Mane and others Vs. Gurling S/o Mahadeo Bhavare and others*”, wherein it has been observed thus,

“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.”

22. He also refers to the decision of this court dated 09-02-2018 in letters patent appeal no. 40 of 2003 “*Aba S/o Bapu Dange died through his LRs. and others Vs. Vishwanath Bhaurao Morale died*

through LRs. and others” wherein the court in paragraph no. 10 observed thus,

“ 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.”

23. Learned Advocate Mr. V.D. Salunke emphasized that while the name of respondent no.1 has figured in the tenancy register as tenant/protected tenant, it is a conclusive matter vindicating that respondent no.1 had been a protected tenant. In such a case, alleged absence of ostensible assertion of right of tenancy should not work against interest of tenant. There is no evidence coming forth about oral surrender of tenancy. He submits that appellants come from rich, literate and intelligent community. Their such position had carried along lot of influence and the same translated into construction of record. He submits that record which has been overwhelmingly relied on, to impress upon that there has been surrender of tenancy, so far as rights of tenancy of respondent no. 1 are concerned, he submits, in the

circumstances, turns out to be manipulated.

24. He refers to and relies on *Radhu Gokul Gawali and others Vs. Mohan Kishan Gawali and others* reported in 2007 (6) Mh.L.J. 117 to submit that a copy of extract of register maintained under section 37A and 38E of HTAL Act is a conclusive indication of protected tenancy and, thus, claims that respondent no.1 being a protected tenant, action pursuant to section 98 for possession cannot be faulted with on the ground of limitation. He refers to *Mesaji S/o Laxman Ubare Vs. Ramchandra (Dr.) S/o Laxminarayan Toshniwal and others* reported in 2011 (4) Mh.L.J. 668 to submit that protected tenant becomes owner even against his wish and in such case eviction of unauthorised or wrongful occupant under section 98 is an obligation cast on the authority.

25. Learned counsel for respondents no. 1A to 1E Mr. Salunke submits that section 50-B of HTAL Act prohibits any form of transfer *viz.* sale, gift, partition etc. without prior sanction of the collector.

In the circumstances, having regard to that respondent no. 1 being a protected tenant of the land, transfer via a claimed partition taking place under decree, being without previous sanction of the collector would be an invalid transfer and respondent no. 1's rights cannot be said to have been lost with

the same. For said purpose, he refers to decision in the case of *Jain Shwetambar Sthanak Vs. Chintamani Bajirao Naiknavare and others* reported in 1983 (1) LJSOFT 145 : 1984 Mah.L.J. 736 and places reliance on paragraphs 6, 7, 8 and 9 from the same. He also refers to *Parshuram Kathod Gaikar Vs. Pandu Mahadu Hard and another* reported in 1993 (1) LJSOFT 264 : 1993 (2) Mah.L.J. 1570.

He submits that statutory rights accrued to respondent no. 1 would not get destroyed and cannot be deemed to have been waived and refers to and relies on a decision in the case of *Shaikh Usman S/o. Shaikh Burahan and others Vs. Shaikh Badruddin S/o. Shaikh Bhagan and another* reported in 1994(1) Bom.C.R. 362 : 1994 (1) Mh.L.J. 828. He refers to paragraph 8 from the said judgment. Yet another judgment cited in support of said submission is *Lotan Ramchandra Shimpi and others Vs. Shankar Ganpat Kayasth and others* reported in 1994(4) Bom.C.R. 575 : 1996(1) Mh.L.J. 80, referring to paragraph no. 6 from the same. *Himatrao Ukha Mali and others Vs. Popat Devram Patil and another* reported in 1998 (3) Bom.C.R. 680 is relied on for similar purpose.

26. His next leg of submission is so far as assertion of rights of tenancy and claiming of possession is concerned, it emerges to be a settled position that the same would not be impeded by law of limitation or passage of time. Statutory

tenancy would not be able to be truncated by the intervening circumstances and much less with the passage of time.

27. He refers to case of *Vithal Baba since deceased through L.R.s Shevantabai Vithal Andhare and others Vs. Ahmed Khan Nanhe Khan and others* reported in *2004 (1) Mh.L.J. 81 : 2004(2) Bom.C.R. 850* and submits that unless requirements of provisions of HTAL Act for surrender are complied with, there would not be any valid surrender of tenancy and purports to refer to paragraphs no. 9, 16, 17 and 20 from the same and submits that passage of time would not debar respondent no. 1 from prosecuting remedy under section 98 of HTAL Act. He relies on *Babu Parasu Kaikadi (dead) by L.Rs. Vs. Babu (dead) by L.Rs.* reported in *AIR 2004 SC 754* to submit that as observed in the same, claim for surrender of tenancy is not valid and possession of appellants being invalid, restoration of possession of land to respondent no. 1 pursuant to section 98 of HTAL Act shall follow.

28. Learned counsel for respondent no.1 in support of his case with reference to section 98 of HTAL Act refers to *Eknath Raghoba and others V. Somla Lalu Lamani through L.Rs.* reported in *1992 Mh.L.J. 541*. For said purpose, he also refers to and relies on decision in *Vithoba Ram Rahane and another Vs. Bhalchandra Sadashiv Joshi since deceased by heir* reported in *1993 Mh.L.J. 419* along with case of

Shankar Savala Gurav Vs. Bala Govinda Patil reported in 2003(4) Mh.L.J. 864 and *Sudam Anna Suralkar and others Vs. Mahipati Waman Deokar and others* reported in 2004 MCR 880.

29. He submits that decision by division bench of this court in the case of *Hasan Bin Salam Vs. Madhavrao S/o Rangnathrao Shinde* (supra) shows that application under section 98 of HTAL Act is not affected by passage of time and no period of limitation is prescribed and application can be entertained at any point of time.

30. Learned counsel further refers to and relies on decision in the case of *Uttam Namdeo Mahale Vs. Vithal Deo and others* reported in *AIR 1997 SC 2695*, to say that when no specific limitation is provided, application of general law of limitation stands excluded.

31. He further submits that while respondent no. 1 had been a tenant under the provisions of HTAL Act, the proceedings which were initiated pursuant to section 38E were merely ministerial in nature and orders passed in the same would not be appellable.

In order to support his said submission, he refers to and relies on decision in the case of *Bharatlal Hemraj Vs. Kondiba*

Govinda Jadhav and others reported in 2002 (Supp.) Bom.C.R. 216. Referring to placitum (A) thereof, he submits that there is no question of decision or adjudication of rival contentions of parties. He submits that declaration under section 38E about protected tenant being an owner would not be an appellable order, as held in said decision for being in violation of principles of natural justice.

32. He submits, all the authorities right from beginning to high court in writ petitions have decided the proceedings in favour of respondent no.1 which are reasoned decisions based on facts, evidence and law, are not liable to be interfered with in these appeals. He, therefore, urges to dismiss the letters patent appeals.

33. In *Lokmat Newspapers Pvt. Ltd.* decision (supra) circumstances were, termination of an employee had taken place through conciliation proceedings, complaint by employee had been dismissed by labour court, observing that retrenchment had been pursuant to provisions of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice and employer was not guilty of unfair labour practice. Revision filed by employee against decision of Labour Court dismissed by Industrial Court. Writ petition filed by employee under Articles 226 and 227

of the Constitution of India before Single Judge was also dismissed. Division Bench thereafter had entertained the letters patent appeal and held employer had been engaged in unfair labour practice and had directed to pay backwages and other benefits from the date of order of retrenchment till the date of retirement. It was also considered as to whether the letters patent appeal had been maintainable and answered the same in the affirmative.

It was this decision of high court which had been subject matter before supreme court and supreme court, *inter-alia*, had considered, thus,

“ 6. What is final order ?

Held : Point No. 1 – Dismissal of writ by single Judge – Maintainability of LPA under clause 15. (See Para 15, 16)

“ It is true, as submitted by learned counsel for the appellant, that the order of the learned Single Judge nowhere stated that the Court was considering the Writ Petition under Article 226 of the Constitution of India. It is equally true that Courts below had appreciated the contentions and rejected the complaint. But the said observation of the learned Single Judge did not necessarily mean that the learned Judge did not inclined to interfere under Article 227 of the Constitution of India only. The said observation equally supports the conclusion that the learned Judge was not inclined to interfere under Articles 226 and 227. As seen earlier, that he was considering the aforesaid Writ Petition moved under Articles 226 as well as 227 of the Constitution of India. Under these circumstances, it is not possible to agree with the contention of learned counsel for the appellant that the learned Single Judge had refused to interfere only under Article 227 of the Constitution of India when he dismissed the Writ Petition of the respondent.” (Para 16)

“Consequently, it could not be said that Clause 15 of the Letters

Patent was not attracted for preferring appeal against the judgment of learned Single Judge. It is also necessary to note that the appellant being respondent in Letters Patent Appeal joined issues on merits and did not take up contention that Letters Patent Appeal was not maintainable. For all these reasons, therefore, the primary objection to the maintainability of the Letters Patent Appeal as canvassed by learned counsel for the appellant, has to be repelled. Point No. 1 is, therefore, answered in affirmative against the appellant and in favour of the respondent. ” (Para 16).

It would further be pertinent to refer to placitum 'A' sub clauses 5 and 6 of the decision of supreme court in the case of *Jogendrasinhji Vijaysinghji Vs. State of Gujarat and others* reading, thus,

“A. Courts, Tribunals and Judiciary - High Courts - Letters Patent Appeal - When maintainable before Division Bench of High Court against orders of Single Judge of High Court issued in exercise of writ jurisdiction - Principles summarised - Duties of Appellate Bench of High Court when determining maintainability of LPA, delineated - "Original jurisdiction" occurring in Cl. 15 of Letters Patent of High Court - Import of expression - (1) Ordinary original jurisdiction of High Court, (2) Extraordinary original jurisdiction of High Court under Art. 226 of Constitution, both (1) & (2) as distinguished from (3) Revisional or Supervisory nature of jurisdiction of High Court under Art. 227 of Constitution-

....
....

- V. Thus, LPA maintainable in writ petitions against orders of tribunals/authorities (other than civil courts) when Writ petition/Single Judge's order is in substance under Art. 226 - LPA is maintainable in such cases so long as writ petition/Single Judge's order in substance falls under Art. 226, either wholly or partially - Quaere: whether tribunal/authority against whose order writ petition is filed is original tribunal/authority or appellate tribunal/authority irrelevant for deciding maintainability of LPA, so long as writ petition/order passed by Single Judge in writ petition is one in substance under Art. 226 of Constitution, wholly or partially, as jurisdiction under Art. 226 itself is original in nature

- VI. Duty of Division Bench in LPA to decide on facts if Single Judge's order in substance falls under Art. 226, wholly or partially - Division Bench to which LPA is made, is required to ascertain whether facts justify assertions made in writ petition to invoke jurisdiction under Art. 227 or

Art. 226 or under both/whether Single Judge exercised jurisdiction under Art. 227 or Art. 226 or under both having regard to nature, contour and character of his order

F. Constitution of India - Art~. 226 and 227 - Jurisdiction of High Court under the said two Articles is distinct - But both can co-exist and coincide.

G. Constitution of India - Arts. 226 and 227 - Writ petition under Art. 226 or Art. 227 - Determination of - Writ petition challenging order of tribunal or authority cannot always be regarded for all purposes to be under Art. 227

Held:

Article 226 confers a power on a High Court to issue the writs, orders, or directions mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. This is neither an appellate nor a revisional jurisdiction of the High Court. The High Court in exercise of its power under Article 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction. If that be so, it cannot be contended that a petition under Article 226 of the Constitution is a continuation of the proceedings under the Act concerned. (Paras 9 and 10)

The order passed by the civil court is only amenable to be scrutinised by the High Court in exercise of jurisdiction under Article 227 of the Constitution. Once it is exclusively assailable under Article 227 of the Constitution of India, no intra-court appeal is maintainable. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226 of the Constitution and, therefore, a letters patent appeal or an intra-court appeal in respect of an order passed by the Single Judge dealing with an order arising out of a proceeding from a civil court would not lie before the Division Bench. No writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable. (Paras 18, 19, 30 and 45.2)

Where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article

226. If the judgment under appeal falls squarely within four corners of Article 227, it goes without saying that intra-court appeal from such judgment would not be maintainable. On the other hand, if the petitioner has invoked the jurisdiction of the High Court for issuance of certain writ under Article 226, although Article 227 is also mentioned, and principally the judgment appealed against falls under Article 226, the appeal would be maintainable. What is important to be ascertained is the true nature of order passed by the Single Judge and not what provision he mentions while exercising such powers. A statement by a Single Judge that he has exercised power under Article 227, cannot take away right of appeal against such judgment if power is otherwise found to have been exercised under Article 226. The vital factor for determination of maintainability of the intra-court appeal is the nature of jurisdiction invoked by the party and the true nature of principal order passed by the Single Judge.

(Paras 20 to 29)

Thus, maintainability of a letters patent appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the Single Judge, the type of directions issued regard being had to the jurisdictional perspectives in the constitutional context. Whether a letters patent appeal would lie against the order passed by the Single Judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet.

(Paras 30 and 45.1)

Barring the civil court, from which order a writ petition can lie only under Article 227 of the Constitution, orders from tribunals cannot always be regarded for all purposes to be under Article 227. Whether the Single Judge has exercised the jurisdiction under Article 226 or under Article 227 or both, would depend upon various aspects. There can be orders passed by the Single Judge which can be construed as an order under both the articles in a composite manner, for they can co-exist, coincide and imbricate. It will be the obligation of the Division Bench hearing the letters patent appeal to discern and decide, having regard to the nature, contour and character of the order, whether the order has been passed by the Single Judge in exercise of jurisdiction under Article 226 or 227 of the Constitution or both. The Division Bench would also be required to scrutinise whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. One of the conclusions recorded by the High Court in the impugned judgment pertains to demand and payment of court fees. However, the court fee payable on a petition to make it under Article 226 or Article 227 or both, would depend upon the rules framed by the High Court.

(Paras 30 and 45.1)

How the jurisdiction under the letters patent appeal is to be exercised cannot exhaustively be stated. It will depend upon the Bench adjudicating the lis how it understands and appreciates the order passed by the Single Judge. There cannot be a straitjacket formula for the same.

Needless to say, the High Court while exercising jurisdiction under Article 227 of the Constitution has to be guided by the parameters laid down by the Supreme Court. ”

34. Apart from aforesaid, the reasons which went into invalidating amendment to Maharashtra Land Revenue Code empowering the commissioner with revisional powers, would be relevant to be considered as has been held by the division bench of this court in the case *Bhagwan Bajirao Bhargude and others Vs. State of Maharashtra and others* reported in 2004 (4) Mh.L.J. 1010. It has been observed in paragraphs no. 23, 26 and 27 thereof reading, thus,

“ 23. In this connection, we may also refer to a judgment of this court, which was confirmed by the Supreme Court. In State vs. Labour Law Practitioners Association, 1987 Mh.L.J. 191, this court was concerned with the validity of the notification of the State Government appointing the respondents, who were Assistant Commissioners of Labour as judges of the Labour Court. A declaration was sought that the amended provisions of the Industrial Disputes Act and Bombay Industrial Relations Act adding Assistant Commissioners of Labour to the categories of persons, who could be appointed as presiding officers of the labour court were void as being contrary to Article 234 of the Constitution of India. A direction was sought to the State Government to comply with the provisions of Article 234 when appointing judges of the Labour Court. A learned single judge of this Court held that the posts in the Labour Court were civil judicial posts and that the posts were inferior to that of the District Judge so that Article 234 was attracted. The appointments of the respondents were quashed and the State was directed to comply with the provisions of Article 234 in the matter of appointment of Labour Court judges. In an appeal carried to the Division Bench, the Division Bench referred to the judgment of the Supreme Court in Bharat Bank Ltd. vs. Employees of the Bharat Bank Limited, Delhi, AIR 1950 SC 459, where a passage from Cooper vs. Wilson, (1937)2 KB 309 was quoted and it was held that the Industrial Tribunal had all the necessary attributes of a court of justice. We may quote the said paragraph.

“A true judicial decision presupposes an existing dispute between two or more parties, and then involves four

requisites :— (1) The presentation (not necessarily orally) or their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice."

It was then held that what was said of the Industrial Tribunal in the Bharat Bank's case (supra) would in full measure apply to the Labour Court. The appointments of the judges to the Labour Courts must, therefore, be made under the provisions of Article 234. In the circumstances, the Division Bench dismissed the appeal.

26. If the Tribunal is performing purely judicial functions, if it has trappings of a court, then in our opinion, the decision of the State Government to abolish it and entrust its powers with the Divisional Commissioner, who is an executive officer is clearly violative of the principle of separation of powers and independence of judiciary emphasized by the Supreme Court in Labour Law Practitioners' case (supra).

27. The Amending Act is also liable to be struck down on yet another ground. Under Article 227(1), every High Court has superintendence over all courts and Tribunals within its territorial jurisdiction, except those which are constituted under a law relating to armed forces. This includes the power to call returns from such courts, to make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts are to be kept by the officers of such courts. The power of superintendence extends not only to administrative but even to the judicial superintendence over Courts and Tribunals. The power and duty of the High Court under Article 227 of the Constitution is essentially to ensure that the Courts and Tribunals, inferior to the High Court, have done what they were required to do. This jurisdiction is intended to ensure that subordinate Courts and Tribunals act within the limits of their authority and according to law. This power is used for the purpose

of keeping the subordinate Courts and Tribunals within the bounds of their authority. A person could assail the Tribunal's decision under Article 227 of the Constitution, if the Tribunal had acted arbitrarily or declined to do what is legally incumbent on it to do and refused to exercise jurisdiction vested in it by law or if the Tribunal had exceeded its jurisdiction, or assumed erroneous jurisdiction. The order of the Tribunal could also be challenged on the grounds that the Tribunal had acted against the principles of natural justice; that its findings are based on no evidence, or are otherwise perverse, or that there was an error of law apparent on the face of the record. The vital rights of the parties would now be determined by the Divisional Commissioner, who will not be amenable to the High Court's superintendence under Article 227 of the Constitution. The abolition of Tribunal ousts the power of superintendence of the High Court under Article 227 of the Constitution. The validity of the Amending Act can successfully be challenged on this ground."

35. Perusal of the decisions by appellate authority - deputy collector and revisional authority - commissioner as annexed to the petition would show that, while in the first instance, the *tahsildar* purports to refer to various documents, the *tahsildar* has taken into account only the tenancy register and has not addressed himself on the other topics and ignored all other facts and circumstances, had passed the order in absence of hearing appellants, has not fallen for their consideration.

In appeal therefrom at the instance of appellants, the matter had been remitted for fresh enquiry.

36. On fresh enquiry, the additional *Tahsildar*, has observed that the register of protected tenant refers to Bhanudas Ranga Ingale yet, the owners have propounded the theory of oral

surrender of tenancy and since such period tenant had not been in possession. It has been referred to that date for section 38E notification is 01-02-1957 and from the record, it was found that respondent no. 1's name had not been declared as owner giving an indication of surrender of tenancy rights by the tenant and accordingly, respondent no. 1 had not been considered for grant of ownership right. In view of the same, application under section 38E of respondent no. 1 would not be considered. On the point of limitation, it was appreciated that there has been failure to act within reasonable time after the final declaration of list published by authorities and that there is no name of respondent no. 1 in the final list, Pahani Patrak of 1954-1955 and record shows that respondent no. 1 had not been in possession of land from a long time and, accordingly, it had rejected the application.

37. Respondent no. 1 had thus been in appeal before appellate authority – deputy collector. Appellate authority had considered that tenancy register depicts list of protected tenants and respondent no. 1's name figures in the same and perusal of declaration record under section 38E of the HTAL Act and final declaration list shows that there was no declaration of ownership in favour of respondent no. 1 and considered, for land holder possessing more than two family holdings respondent no. 1 is

deprived of his right of declaration due to oral surrender of tenancy pleaded by appellant without evidence. Possession of land holders is considered not to be referable to section 32(2). The appeal had been allowed, declaring respondent no. 1 to be owner to the extent of 7 *Hectare* and 77 *Are*, setting aside additional *tahsildar's* order.

38. In the circumstances, appellants had been in revision before the commissioner under the amended provisions validity of which had been posed challenge to before the high court. The commissioner appears to have been adumbrated upon provisions of section 19 of the HTAL Act, wherein surrender is expected to be in writing and has to be admitted by tenant before tahsildar in good faith and to the satisfaction of the tahsildar. It was then considered that since there is no other mode of surrender of tenancy, it is difficult to accept contention of appellants of surrender of tenancy of 1952 and there is no evidence adduced in respect of the same and while section 38E declares and transfers ownership to protected tenants. Notification published by Government on 01-02-1957 would be the relevant date for transfer and, therefore, respondent no. 1 or his father had become full owner of the suit land.

39. Aforesaid aspects show that the *tahsildar* had taken into account certain documents and considered the matter and rejected the application. It appears that neither the appellate nor the revisional authority has taken into account various facts and circumstances and events which have taken place from 1952 onwards. Even declaration pursuant to section 38E(1) is subject to section 38(7) (a)(b) and provisos to section 38E which do not appear to have not been taken into account. There is no reference to the same. None of the authorities has dealt with the relevant aspects elaborately and their implications.

40. It is not disputed that respondent no. 1 at any point of time since 1952, had ever asserted his right till 1999. It emerges that government notification in respect of 38E for Osmanabad district is dated 01-02-1957 and respondent no.1's name does not figure in the record of relevant period and even since then, there had been no assertion of right for almost 40 years.

In the interregnum, a third person's name has intervened as a tenant over concerned land. To that as well no objection had been taken by respondent no. 1. Said third person has been party to the proceedings. Respondent no. 1 had not asserted rights either on due date i.e. 01-02-1957 or even in

reasonable period thereafter.

It appears that ceiling proceedings as well have taken place. The land has been treated to be of ownership of appellants. Record depicts that lands all along have been shown as lands of appellants. There had never been any objection to the same.

41. Revisional authority – the commissioner has not at all given regard to section 19 had been amended in 1954 after claimed surrender of tenancy is around 1952. In such a case, it had been incumbent to consider this aspect and whether for non-observance of said provision would negate the case of appellants in respect of surrender of tenancy. Surrender of tenancy will have to be considered having regard to facts and circumstances surrounding and attending and the conduct of parties. This aspect as well would be relevant and ought to be considered.

In view of this, it is difficult to consider that in the absence of consideration of above aspects, the order passed by commissioner would be said to be confined and limited as considered by decision referred to by learned counsel for respondent no. 1 to have reflection on maintainability of letters patent appeals. More so, while the appeals were admitted, it is difficult to revert to the question of maintainability of appeal when

it has not been specifically kept open for consideration.

42. Decision by learned single judge shows that he had considered that authorities have relied upon final tenancy register and other ancillary documents and though revenue record discloses one Sawase was protected tenant, there is no credible evidence with respect to oral surrender of tenancy except statement of appellant and there are concurrent findings by the authorities about respondent no. 1 being entitled to tenancy certificate.

Learned single judge had considered that while jurisdiction of divisional commissioner under amendment is questioned and amendment had been set aside by high court, yet, there had been interim relief given staying operation of high court's decision quashing the amendment. As such, notwithstanding withdrawal of special leave petition, power exercised during operation of said interim relief by commissioner could be justified, on application of doctrine of *de-facto*.

It appears that attention of learned single judge had not been drawn to certain aspects involved in the matter that it is claimed that surrender had taken place around 1952 which is before amendment to section 19 in 1954. His attention had also not been drawn to that on the relevant date of notification of

1957, respondent no. 1's name did not figure anywhere with respect to said survey no. 34. Effect of non-appearance of name of respondent no. 1 had not fallen for consideration. He also appears to be oblivious of proceedings under the ceiling act taking place subsequently in 1975 upto 1982 and distribution to other persons of the land had taken place accordingly. Their interest as well would be getting affected under the proceedings by respondent no. 1. Apart from aforesaid, learned single judge appears to have been oblivious of that after 1952, possession had never been asserted by respondent no. 1 nor had questioned his dis-possession for over 40 years and of its implication. The cases referred to in respect of surrender of tenancy though appear to have been touched upon, there is no elaboration on distinguishing factors.

43. It appears that attention of learned Hon'ble single judge had not been drawn to observations of high court in the case of *Bhagwan Bhargude* (supra) may be not being pointed out.

44. Learned judge had also fallen oblivious of reasons for which the amendment to M.L.R. Code had been quashed. As such, since the amending jurisdiction had been questioned with reference to competency and expertise and its effect, the doctrine of *de-facto* in the present case does not appear to be a sustainable

consideration.

45. Perusal of order passed by commissioner under section 98 proceeding would show that the only consideration which has weighed with him is order dated 15-02-2006 passed in revision bearing no. 71/B/2002/Osmanabad whereas the deputy collector has considered that appellant no. 1 being female, cannot demand partition. This assumption despite the decree of partition having been passed by civil court, rather is an extraneous and fragile consideration and also turns out to be without reference to the facts and circumstances. He also purports to dwell on the aspect about surrender of tenancy which would hardly a consideration in the matter having regard to that the other proceeding was with respect to the same ground and was being considered prior to application under section 98. Having regard to that the decision in other proceedings will have bearing on the proceedings under section 98, it would be expedient that the proceedings under section 98 will have to await the decision in the other proceedings and thus, the impugned order in letters patent appeal no. 23 of 2008 would be unsustainable.

46. Effect of long lapse of time in assertion of rights, non-assertion after government notification dated 01-02-1957, the intervening ceiling proceedings, while all these aspects ought

to receive proper consideration beyond observations of the authorities and under allusion and passing advertence.

47. The decision in the case of *Bhartlal Hemraj* (supra) was in Writ petition against refusal by the authorities to condone delay of 20 years while declaration in favour of respondent in that case had been made on 12-01-1959 and the petitioner had claimed the same to have been made without issuing notice to him or his father and without hearing them. It was claimed by petitioner that family had no knowledge of the declaration till 1979 and the proceedings against declaration, as such, had ensued in 1979 whereas contention on behalf of respondent had been that the appeal has been filed 20 years down without sufficient cause. The learned Judge in said case has considered upon notification in the gazette by the Government, the respondent therein had prayed for declaration under section 38E and there had been no proceedings against said decision for over 20 years.

Observations in *Bhartlal Hemraj* (supra), are distinguishable primarily for the reason that on the date of notification in Government gazette, respondent no. 1's name had not figured and after the date of notification, respondent no. 1 had not been declared owner pursuant to section 38E for over 40 years. After 40 years, proceedings had been initiated by respondent no. 1 making appellants and the erstwhile tenant of the land, as parties.

The matter with regard to declaration had been sought to be litigated by respondent himself while there had been no declaration and realizing that other persons interest had been created and subsisting and as such would be required to be heard. The corollary of the decision in *Bharatlal Hemraj* (supra) can be said to be otherwise, where the proceeding was preferred to condone delay of 20 years and same had been dismissed. Alongside making some observations in the given facts and circumstances of that matter, would hardly be able to hold the facts and circumstances of the present case.

48. *Hasan Bin Salam V. Madhavrao* (supra) was a case wherein the respondent had been declared as owner under section 38E and that he had deposited the price of the land. In the circumstances, the ownership had been statutorily transferred to the respondent. Despite this, the original landlord purported to resist claim for possession by tenant, referring to section 32 as possession not been claimed within two years after dispossession and in the circumstances, proceedings under section 98 ensued. It is in the context that ownership had been transferred statutorily upon declaration being made and price having been paid, claimed possession by original landlord has been considered to be unauthorized for severance of ties as landlord and tenant with declaration of ownership. It was considered that section 98 proceedings can be initiated on satisfaction of that person to be

evicted must be in unauthorized and wrongful possession and there is no other provision under which such person can be evicted and that the person against whom relief is claimed is not entitled to possession of the land. It was considered that statute does not have time hedge for initiation of action pursuant to section 98 which is a summary proceeding for eviction of the person unauthorizedly occupying the land.

49. The scenario in the present matter is thus obviously distinguishable and is different than the ones considered in aforesaid two decisions.

50. In the circumstances, while commissioner would not be said to be proper authority in accord with the observations of division bench invalidating the amendment to Maharashtra Land Revenue Code, looking at the matters from all sides, the decisions by the commissioner have been rendered unsustainable and the circumstances entail that the orders by commissioner being untenable ought to be set aside. All the aspects will have to have detailed consideration and decision by proper forum.

51. Having regard to the observations quoted hereinbefore in respect of maintainability of letters patent appeals, and the facts and circumstances of the case and

decisions hitherto are a pointer to that present set of letters patent appeals is not liable to be thrown out on the ground of their maintainability. The letters patent appeals therefore succeed. Orders of commissioner and learned single judge in both the proceedings are set aside. The matters by the appellants are remitted to the maharashtra revenue tribunal for proper and detailed consideration.

52. The matters may be dealt with by maharashtra revenue tribunal passing appropriate orders, including if it is considered appropriate to remit the matter for proper consideration.

53. Letters patent appeals accordingly are partly allowed. Matters are remitted to the Maharashtra Revenue Tribunal as aforesaid.

54. In view of disposal of letters patent appeals, all pending civil applications stand disposed of.

[R. G. AVACHAT]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE

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