

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

LETTERS PATENT APPEAL NO. 148 OF 2008

1. Kalusing @ Kaysing Jairam
Bhil (Naik)
Since deceased, through his
Legal Representatives.
- 1a. Nagibai w/o Kaysing Bhil
Age : 66 years, occu.: household
R/o Bamkheda, Taluka Shahada,
District Nandurbar.
- 1b. Harsing s/o Kaysing Bhil
Age : 54 years, occu.: labour
R/o as above.
- 1c. Bhimsing s/o Kaysing Bhil
Age : 55 years, occu.: labour
R/o as above.
- 1d. Rajibai w/o Shaysing Bhil
Age : 58 years, occu.: household
R/o as above.
- 1e. Babadibai w/o Pandu Bhil
Age : 55 years, occu.: household
R/o as above.
- 1f. Gojarbai w/o Sudam Bhil
Age : 52 years, occu.: household
R/o as above.
- 1g. Sayankabai w/o Sakharam Bhil
Age : 46 years, occu.: household
R/o Tembre, Taluka Shahada,
District Nandurbar.

Appellants.

Versus

Ramsing s/o Sakharam Girase
Deceased, through
Legal Representatives.

1. Deosing s/o Ramsing Girase
Age : 50 years, occu.: agri.,
2. Arvindsing s/o Ramsing Girase
(Deceased) through LRs
- 2a. Pramilabai w/o Arvindsing Girase
Age : 38 years, occu.: household
- 2b. Chetsing s/o Arvindsing Girase
Age : 17 years, occu.: student
- 2c. Rakesh s/o Arvindsing Girase
Age : 15 years, occu.: student
- 2b and 2c minors, through their
natural guardian mother – 2(a)
Pramilabai Arvindsing Girase.
3. Dalbabai w/o Ramsing Girase
Age : 67 years, occu.: agri.,
4. Nanubai w/o Jayendrasing Jamadar
Age : 48 years, occu.: household
5. Nimalabai w/o Jagdishsing Rajput
Age : 38 years, occu.: household
6. Kamalbai w/o Devising Deshmukh
Age : 42 years, occu.: household
- All r/o Osrali, Tal. Nandurbad
District Dhule (Nandurbar).

7. State of Maharashtra.

Respondents.

Mr. M.L. Dharashive, Advocate for the appellants.

Mr. R.B. Bagul, A.G.P. for respondent No.7.

Mr. P.R. Patil, Advocate for respondent Nos.1, 2 (a to c), 3 to 6.

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

Dated : 25 January 2019.

JUDGMENT (Per Sunil K. Kotwal).

. This Letters Patent Appeal is preferred by the respondent in Writ Petition No. 2092 of 1996 against the judgment passed by the learned Single Judge of this Court wherein the orders passed by Tahsildar and Maharashtra Revenue Tribunal are quashed. The appellant is the original respondent and the present respondent is original petitioner in Writ Petition No. 2092 of 1996.

2. Heard learned Counsel Mr Dhrashive for the appellant, learned A.G.P. for the State and Mr P.R. Patil, learned Counsel for the respondents.

3. Learned Counsel for the appellants submits that the appellants are tribal whose land was sold out in revenue auction on 30 May 1969 for recovery of Tagai Loan. However, before the

date of auction the said loan was already repaid by the appellant. Therefore, under section 4 of the Maharashtra Restoration of Lands to Scheduled Tribes Act 1974 (hereinafter referred to as “Scheduled Tribes Act”), the appellant is entitled to get the restoration of possession of his land.

4. In reply, the learned Counsel for the respondents supported the judgment passed by learned Single Judge of this Court on the ground that under Section 2 (i) (c) of the Scheduled Tribes Act, the auction of the disputed land for recovery of Government loan is excluded, as the said transaction is covered under proviso to sub-section 3 of Section 36 of Maharashtra land Revenue Code (hereinafter referred to as the “Code”). He has also pointed out that prior to initiation of proceeding under Section 3 of the Scheduled Tribes Act, the Tahsildar Nandurbar *suo-moto* initiated enquiry under the provisions of Section 36 (3) of the Code and after holding enquiry, directed that the non-tribal transferee be evicted from the disputed land and possession of the disputed land be restored to the tribe transferor. However, the present respondent, who is non-tribal transferee, had filed Special Civil Application No. 2405 of 1976 before the High Court

raising challenge to the initiation of proceeding by Tahsildar. After giving opportunity of hearing to both parties, this Court held that purchase of land by petitioner under auction sale cannot amount to transfer by tribal in favour of non-tribal and the question of contravention of Section 36 (3) or any other law does not arise.

5. The next limb of the argument of learned Counsel for the respondents is that as the learned Single Judge exercised supervisory jurisdiction under article 227 of the Constitution of India against the order passed by the Civil Court, the Letters Patent Appeal is not tenable. Our attention was drawn to the judgment of full bench of this Court in the case of **“Advani Oerlikon Ltd. Vs. Machindra Govind Makasare and others”** [2011 (2) Mh.L.J. 916].

6. We have gone through the judgment passed by the learned Single Judge of this Court which is impugned in the present Letters Patent Appeal. In the case of **“Advani Oerlikon Vs. Machindra Govind Makasare”** (supra), the full bench of this Court settled the following principles of law :-

“20. Upon this discussion, we now proceed to answer the questions 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 meaning 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 before the Single Judge 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 the 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”.

7. No doubt, Writ Petition No. 2092 of 1996 was filed under Articles 227 and 226 of the Constitution of India. However, nomenclature of Writ Petition or mere reference of Article 227 of the Constitution of India, does not make any difference. As ruled by the Full Bench of this Court, unless the Maharashtra revenue Tribunal, which is under the supervisory jurisdiction of This Court, exceeds its jurisdiction or contravenes the principles of natural justice, this Court cannot invoke writ jurisdiction under Article 226 of the Constitution of India. However, obviously the order passed by Tahsildar, Nandurbar in Case No. 26 of 1975 under Section 3 of the Scheduled Tribes Act and subsequent order passed by the Maharashtra Revenue Tribunal in Appeal No. 1 of 1992 on 15 June 1992 are passed within its jurisdiction. Even in both the proceedings opportunity of hearing was given to both the parties. Therefore, it cannot be said that the Tahsildar or Maharashtra Revenue Tribunal exceeded their jurisdiction or in any manner contravened the principles of natural justice.

Therefore, in view of the above discussed settled position of law the learned Single Judge cannot invoke writ jurisdiction under Article 226 of the Constitution of India. On the other hand after going through the order passed by the learned Single Judge and after considering the facts and pleadings in the writ petition as well as prayer, it becomes clear that the learned Single Judge exercised supervisory jurisdiction under Article 227 of the Constitution of India. Therefore, against the judgment passed by this Court exercising supervisory jurisdiction under Article 227 of the constitution of India, the Letters Patent Appeal is not tenable. On this account alone the present Letters Patent Appeal deserves to be dismissed.

8. Otherwise also, assuming that this Court can entertain this Letters Patent Appeal. Undisputed facts in between the parties are that initially Tahsildar, Nandurbar in Case No. 26 of 1975 initiated suo-moto enquiry under section 36 (3) of the Code and after holding that enquiry, held that transfer of the land in revenue auction in favour of non-tribal is in contravention of Section 36 (3) of the Code and in the result the order was passed to evict the respondent / non-tribal from the

disputed land and to restore the possession of that land to the tribal appellant. However, in Special Civil Application No. 2405 of 1976 filed in this Court by non-tribal/transferee challenging initiation of proceeding by Tahsildar under Section 36 (3) of the Code, this Court after hearing both the parties, held that transfer within the meaning of section 36 (3) of the Code mean voluntary act of owner and does not include auction sale, which has been effected for recovery of Government loan. This Court held that purchase of disputed land by tribal appellant under auction sale does not amount to transfer by appellant in favour of respondent and thereby there was no contravention of Section 36 (3) of the Code or any other law. In the result, this Court quashed the proceeding initiated by Tahsildar, Nandurbar under Section 36 (3) of the Code.

9. However, it reveals that despite the order passed by the this Court in Special Civil Application No. 2405 of 1976, again Tahsildar, Nandurbar initiated suo-moto enquiry in Case No. 1 of 1991 invoking his powers under Section 3 of the Scheduled Tribes Act. Tahsildar passed order for restoration of possession of disputed land to the tribal / appellant. That order

was upheld by Maharashtra Revenue Tribunal. In fact, after the decision of Special Civil Application No. 2405 of 1976, the Tahsildar, Nandurbar was not expected to initiate the proceeding under Section 3 of the Scheduled Tribes Act. After going through the judgment passed by the learned Single Judge, it reveals that the learned Single Judge held that transfer of the disputed land under auction sale in favour of the respondent / non-tribal does not amount to “transfer” within the meaning of section 2 (i) (c) of Scheduled Tribes Act. Section 2 (i) (c) of the Scheduled Tribes Act reads as under :-

“2 (i) “transfer” in relation to land means the transfer of land belonging to a tribal made in favour of a non-tribal during the period commencing on the 1st day of April 1957 and ending on 6th day of July 1974, either -

(c) for recovering any amount of land revenue due from such Tribal, or for recovering any other amount due from him as an arrear or land revenue, or otherwise under the Maharashtra Co-operative Societies Act, 1960 or any other law for the time being in force but does not include a transfer of land falling under the proviso to sub-section (3) of section 36 of the Code; and the expressions, “Tribal-transferor” and “non-Tribal-transferee” shall be constructed accordingly”.

10. A bare glance at the definition of “transfer” under Scheduled Tribes Act shows that the transfers falling under the

proviso of Section 36 (3) of the Code are excluded, and therefore, the Tahsildar cannot invoke the provisions of Section (3) of Scheduled Tribes Act for directing restoration of land which has been transferred in view of the provision of Section 36 (3) of the Code. As the disputed land falls within the ambit of proviso to Section 36 (3), the transfer of the disputed land in auction sale in favour of respondent does not amount to “transfer” within the meaning of Section 2 (i) (c) of the Scheduled Tribes Act. So also in previously decided Special Civil Application No. 2405 of 1976, this Court held that the sale of disputed land in auction cannot be construed as “transfer” and it was not therefore permissible for Collector to exercise the power for extending the relief in favour of tribal-transferor. As that judgment has reached to finality, in any case the acquisition of disputed land by the respondent in auction sale does not fall within the ambit of Section (3) of the Scheduled Tribes Act. Therefore, we do not find any type of perversity in the judgment passed by the learned Single Judge setting aside the order passed by the Maharashtra Revenue Tribunal, Bombay and consequently the order passed by Tahsildar, Nandurbar regarding restoration of the disputed land to the appellant / tribal. In the result, otherwise also, on merits

the present Letters Patent Appeal is not tenable.

11. Accordingly, Letters Patent Appeal No. 148 of 2008 is dismissed. Civil application No. 742 of 2013 for injunction is disposed of. Parties to bear their respective cost.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

vdd/