

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.3701 OF 2022

Kalpataru Properties (Thane) Private Limited ...Petitioner
vs.
Late Balu (Balya) Deu Warli (since deceased)
legal heir Laxman Balu Dive (since deceased)
through legal heirs and Ors. ...Respondents

**WITH
WRIT PETITION NO.4254 OF 2022**

D. Dahyabhai & Co. Private Limited ...Petitioner
vs.
Late Balu (Balya) Deu Warli (since deceased)
legal heir Laxman Balu Dive (since deceased)
through legal heirs and Ors. ...Respondents

Mr. Girish Godbole, Senior Advocate a/w. Mr. Vishal Kanade i/b. Mr. Makarand Savant for the Petitioner in W.P. No. 3701 of 2022 and for Respondent No. 3 in W.P. No. 4254 of 2022.

Mr. Siddhesh Bhole a/w. Ms. Srushti Mandade i/b. Mr. Sunil Tyagi, for the Petitioner in W.P.No.4254 of 2022 and for Respondent No. 3 in W.P.No. 3701 of 2022.

Mr. Shrirang Katneshwarkar a/w. Mr. Anthony Floriyen Foss, for Respondent No. 1.1 in both the Petitions.

Mayuresh Nagle i/b. Utangale & Co., for Respondent No. 1.2.

Mr. S.D. Rayrikar, AGP for the State.

CORAM : N. J. JAMADAR, J.
RESERVED ON : APRIL 28, 2023
PRONOUNCED ON : JULY 13, 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the learned counsel for the parties, heard finally.

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2. These petitions call in question the orders passed by Tahsildar and Agriculture Land Tribunal, Thane whereby the applications preferred by the respective petitioners seeking framing of the issue of the maintainability of the proceedings under section 32-G of the Maharashtra Tenancy and Agricultural Lands Act, 1948 (the Act, 1948) and to try and decide the said issue as a preliminary issue, came to be rejected.

3. Though the litigation has a checkered history, the facts necessary for determination of these petitions can be stated in brief as under:-

3.1 For the sake of convenience and clarity the parties are referred to in the capacity in which they are arrayed in Writ Petition No. 3701 of 2022.

3.2 The respondents No. 1.1 and 1.2 claim to be the successors in interest of Balu Dive, who according to respondent Nos. 1.1 and 1.2, was the protected tenant of the land bearing Gut No. 59/A situated at village Chitalsar Manpada, Thane (subject land). Late Shamaldas Laxmandas Gandhi, the predecessor in title of respondent Nos. 2.1 to 2.3 was the landlord of the subject land. Late Balu Dive was a member of Warli, Scheduled Tribe. In a proceedings against late Shamaldas, the landlord, the Court Receiver, High Court, Bombay

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came to be appointed as the Receiver of the subject land.

3.3 Respondent Nos. 1.1 and 1.2 alleged that, by taking undue advantage of the illiteracy of tribal, the Court Receiver unlawfully dispossessed late Balu who was a protected tenant of the subject land in flagrant violation of the protective provisions contained in Maharashtra Tenancy and Agricultural Lands Act, 1948.

3.4 The delivery of possession to the Court Receiver and deletion of the name of late Balu Deu, the protected tenant of the subject land, was evidenced by mutation entry Nos. 239 and 240 dated 1st August, 1960. The petitioners claimed, after the said mutation entries were certified, the Court Receiver executed a sale deed in respect of several lands of the landlord and others, in favour of D. Dayabhai & Company Private Limited, respondent No. 3 (and petitioner in Writ Petition No. 4254 of 2022). The later, in turn, executed a sale deed in favour of Tata Hydroelectric Power Supply Company Limited and others, on 27th May, 1970. Tata Power Company Limited executed a development agreement dated 10th June, 2005 in favour of Kalpataru Properties (Thane) Private Limited, the petitioner.

3.5 In the meanwhile, Laxman Balu Dive, the predecessor in title of respondent Nos. 1.1 and 1.2 and the respondent Nos. 1 and 2 instituted multiple proceedings before various authorities. One

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plank of the respondents legal pursuit was that the late Balu was a tribal and, therefore, late Balu, having been wrongfully dispossessed of the subject land, was entitled to restoration of the subject land under the provisions of section 3 and 4 of the Maharashtra Restoration of Lands to Scheduled Tribes Act 1974. The other plank was that late Balu was in cultivation of the subject land on tiller's day and thus became a deemed purchaser under the provisions of Maharashtra Tenancy & Agricultural Lands Act, 1948.

3.6 It may not be necessary to trace the history of all these proceedings for determination of these petitions. It would suffice to note in pursuance of the claim of late Balu being a protected tenant of the subject land, the respondents No. 1.1 and 1.2 had preferred Writ Petition No. 7153 of 2003 before this Court. The said petition came to be dismissed by a Division Bench of this Court by an order dated 27th June, 2005.

3.7 The respondent Nos. 1.1 and 1.2 professed to seek review of the aforesaid order and filed an application for condonation of delay in filing Review Petition. By an order dated 13th February, 2015 this Court rejected the application for condonation of delay as there was gross and unexplained delay of 8 years.

3.8 The respondent Nos. 1.1 and 1.2 preferred an application purportedly under section 32-G of the Act, 1948 seeking fixing of

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the purchase price and eventual grant of certificate under section 32M of the Act, 1948 before the Tahsildar and ALT, Thane, being proceeding No. 60/2021 (under section 32G).

3.9 Kalpataru Properties (Thane) Private Limited, the petitioner, filed an application for intervention. By an order dated 30th December, 2021 the said application came to be allowed and the petitioner was directed to file reply to the main application, under section 32G.

3.10 The petitioner preferred an application challenging the maintainability of the said proceedings primarily on the ground that in view of the decision of this Court in Writ Petition No. 7153 of 2003 and the Civil Application No. 675 of 2014 dated 13th February, 2015, the issue of late Balu being a deemed purchaser of the subject land stood conclusively determined and it was not open for the Tahsildar and ALT to again delve into the said issue. The petitioner thus prayed that a preliminary issue as to maintainability of the application under section 32-G be framed and decided.

3.11 D. Dahyabhai & Co. Private Limited, respondent No. 3, which was impleaded as respondent No. 2 therein, also preferred an application for framing and deciding issue of maintainability of the said application as a preliminary issue.

3.12 The respondent Nos. 1.1 and 1.2 resisted the application

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preferred by D. Dayabhai and Kalpataru. By the impugned orders, the Tahsildar & ALT was persuaded to reject the applications taking a view that it was necessary to decide the tenancy application on merits. The petitioners have thus invoked the writ jurisdiction.

4. I have Mr. Girish Godbole, learned senior advocate for the petitioner in Writ Petition No. 3701 of 2022 and for respondent No. 3 in Writ Petition No. 4254 of 2022; Mr. Siddhesh Bhole, the learned counsel for the petitioner in Writ Petition No. 4254 of 2022 and for respondent No. 3 in Writ Petition No. 3701 of 2022; Mr. Saurabh Katneshwarkar, learned counsel for Respondent No. 1.1, Mr. Mayuresh Narle, learned counsel for respondent No. 1.2 and Mr. S.D. Rayrikar, learned AGP for the State. With the assistance of the learned counsel for the parties, I have perused the material on record including the orders passed by this Court in Writ Petition No. 7153 of 2003 and the Civil Application No. 675 of 2014 in Review Petition (St.) No. 29898 of 2013 and the orders passed by the authorities under the Act, 1948 and Revenue Authorities.

5. Mr. Girish Godbole, learned senior counsel for the petitioner, would submit that the issue having been decided by this Court, the Tahsildar and ALT has no authority to again adjudicate the aspect

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as to whether late Balu was the protected tenant of the subject land. On this premise, the petitioners had sought a decision on the maintainability of the tenancy application as a preliminary issue. Tahsildar and ALT, Mr. Godbole would urge, committed a gross error in not at all delving into the objection to the maintainability raised by the petitioners and passed a single line order that, in his opinion, the application was required to be determined on merits. The impugned order, according to Mr. Godbole, singularly lacks reasons. Nor there is any indication in the impugned order that the question of maintainability of the application in the light of the orders passed by this Court would be considered by the ALT while finally deciding the tenancy application.

6. Mr. Godbole further urged that the objections to the maintainability of the tenancy application are well merited and could not have been brushed aside by a single line order. Mr. Godbole invited the attention of the Court to the prayers in the Writ Petition No. 7153 of 2003. In prayer clause (a), the respondent Nos. 1.1 and 1.2 had sought a mandamus to State of Maharashtra, the respondent No. 4 therein, to fix the purchase price of the suit land in the name of the petitioners in accordance with the provisions of Act, 1948, restore the possession of the suit land to the petitioners

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by removing the then occupants thereof. It was urged that the very prayers in the instant application before the Tahsildar and ALT were made in the said Writ Petition and this Court declined to grant those reliefs. The dismissal of the Writ Petition, in the circumstances of the case, according to Mr. Girish Godbole, clearly constitutes *Res Judicata*. At any rate, the principle of issue of estoppel operates.

7. Mr. Godbole further submitted that institution of a multitude of proceedings by respondent Nos. 1.1 and 1.2 is a clear case of abuse of the process of the Court. Having not succeeded up to this Court in multiple proceedings, respondent Nos. 1.1 and 1.2 cannot be permitted to re-agitate the very same issue again and again. An instance of the abuse of the process of the Court is relitigation, submitted Godbole. To bolster up this submission, reliance was placed on the decision of the Supreme Court in the case of **K.K. Modi vs. K.N. Modi and Others**¹, and a judgment of a learned single Judge of Madras High Court in the case of **Ranipet Municipality Rep. By Its Comer, and Special Officer, Ranipet vs. M. Shamsheerkhan**².

8. Mr. Siddhesh Bhole, the learned counsel for the petitioners in

¹ (1998) 3 Supreme Court Cases 573.

² 1998 (I) CTC 66.

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Writ Petition No. 4254 of 2022 and for respondent No. 3 in Writ Petition No. 3701 of 2022 supplemented the submissions of Mr. Godbole. Mr. Bhole laid emphasis on the fact that the decision by this Court in Writ Petition No. 7153 of 2003 is a complete answer to the controversy sought to be raised, by respondent Nos. 1.1 and 1.2, before the ALT. In any event, according to Mr. Bhole, the mutation entry which evidences the deletion of the name of late Balu, has not been varied and set aside. It was further urged that even if it is assumed that the order rejecting the claim of protected tenancy was passed without jurisdiction, or for that matter it was invalid, it was incumbent upon the respondent Nos. 1.1 and 1.2 to take out the proceedings to establish the cause of invalidity and get the order quashed or otherwise set aside. To buttress this submission Mr. Bhole placed reliance on the decision of the Supreme Court in the case of **State of Punjab and Others vs. Gurdev Singh**³.

9. Mr. Shrirang Katneshwarkar, learned counsel for respondent No. 1.1 stoutly countered the submissions on behalf of the petitioners. It was submitted with tenacity that the order passed by this Court in Writ Petition can not be construed to have conclusively determined the tenancy rights. Nor the said order precludes the

³ (1991) 4 SCC 1

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respondent Nos. 1.1 and 1.2 from instituting the proceedings for enforcement of their statutory rights under section 32G of the Act, 1948. Mr. Katneshwarkar submitted that statutory remedy cannot be taken away either by executive fiat or even judicial order.

10. Mr. Katneshwarkar placed a strong reliance on a three judge Bench judgment of the Supreme Court in the case of **Dayaram vs. Sudhir Batham and Others**⁴ wherein, in the context of the restriction placed by the judgment of the Supreme Court in the case of **Madhuri Patil vs. Additional Commissioner**⁵, on intra-court appeal, the Supreme Court held that a remedy by way of appeal provided expressly by statute, cannot be taken away by an executive fiat or judicial order.

11. On the merits of the matter, Mr. Katneshwarkar would submit that the fact that late Balu was a protected tenant of the subject land is rather incontestible. It can not be disputed that late Balu was cultivating the subject land on tillers day. Neither the tenancy was surrendered by late Balu in conformity with the provisions contained in section 15(2) of the Act, 1948. Nor late Balu was dispossessed under an order of the Mamlatdar passed under section

4 (2012) 1 Supreme Court Cases 333.

5 (1994) 6 SCC 241.

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29(2) of the Act, 1948. The mutation entry No. 239 deleting the name of late Balu and the dispossession thereunder were, according to Mr. Katneshwarkar, tainted with fraud and in flagrant violation of the statutory protections.

12. I have carefully considered the rival submissions.

13. To start with, it is imperative to note that there is not much controversy over the fact that the name of late Balu was shown as a tenant in the cultivator's column of the subject land. Vide mutation entry No. 239, name of the late Balu came to be deleted as the tenant thereof on the premise that the Court Receiver had been appointed and the provisions of the Act, 1948 were inapplicable to the land custodia legis.

14. It is in this context, the order passed by this Court in Writ Petition No. 7153 of 2003 deserves to be considered. Since the controversy revolves around the import of the said order dated 27th June, 2005, it may be advantageous to note the observations in paragraphs 3 and 4 thereof.

3] Mr. Balsara, learned counsel appearing for Respondent No.3, has shown us the entry from the revenue records entered on 24th October 1960 which states that the person concerned, i.e. grand father of

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the Petitioner, has handed over possession of the land to the High Court Receiver willingly. The entry further states that since the Bombay Tenancy and Agricultural Lands Act is not applicable to the Court Receiver, the name of the tenant has been deleted. Mr.Balsara has pointed out that later on in the year 1965, the Respondent No.1 purchased this property from the Receiver and the Respondent No.3 has thereafter purchased it in the year 1979. It is too late in the day for the Petitioner to canvass this submission. It is also pointed out that steps were taken under the Restoration of Land to Tribal Act in the year 1979, but the Act came into force in 1974 and that time the land was already with a non-tribal and, therefore, the Act had no application.

4] The only submission of Mr.Damle, the learned counsel for the Petitioner, is that the rights of the Petitioner, which were protected under the Bombay Tenancy and Agricultural Lands Act, could not be said to have been extinguished. The entry made in the revenue record way back in the year 1960 stares him in the face. It is too late in the day to canvass this submission. The petition suffers from laches. Petition is dismissed.

15. Evidently, this Court recorded in clear and explicit terms that entry made in the revenue record (mutation entry No. 239) way back in the year 1960 stared in the face of the petitioner and it was too late in the day to canvass the submission that the rights of the protected tenant could not be said to have been extinguished. What follows is of significance. The Court further noted that the petition suffered from laches. In the subsequent order passed by this Court in Civil Application No. 675 of 2014 in Review Petition (St.) No. 29898 of 2013, this Court had declined to condone the delay purely

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on the ground of unjustifiability of the explanation.

16. Though the learned counsel for the petitioners made an endeavour to draw home the point that the aforesaid decision in Writ Petition No. 7153 of 2003 conclusively determines the issue sought to be raised by respondent Nos. 1.1 and 1.2 in the tenancy application before ALT, and thereby precludes them from re-agitating the same, I do not consider it appropriate to delve deep into that aspect of the matter.

17. Undoubtedly, the respondent Nos. 1.1 and 1.2 had specifically prayed for the restoration of the possession of the subject land by removing the then occupants and a direction to the State Government to fix the purchase price and declare them as deemed purchasers. Yet the jurisdictional issue as to whether this Court could have determined the question as to whether respondent Nos. 1.1 and 1.2 were, or for that matter late Balu was, the tenant of the subject land would crop up for consideration.

18. The legal position is absolutely clear. Under the provisions of section 70 of the Act, 1948 it is one of the duties of the Mamlatdar to decide whether a person is, or was at any time in the past, a

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tenant or a protected tenant or a permanent tenant. Relevant part of section 70 of the Act, 1948 reads as under:-

70. Duties of the Mamlatdar

For the purposes of this Act the following shall be duties and functions to be performed by the Mamlatdar :-

...

(b) to decide whether a [person is, or was at any time in the past, as tenant] or a protected tenant [or a permanent tenant].

19. Section 85(1) of the Act, 1948 incorporates a jurisdictional bar qua the Civil Court. It provides that no civil Court shall have jurisdiction to settle, decide or deal with any question including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him which is by or under the said Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or Maharashtra Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of control. Under the provisions of the Act exclusive jurisdiction is conferred on Mamlatdar to decide, inter alia, whether a person is or was at any time in the past a tenant or a protected tenant of an agricultural land.

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20. In the case of **Madhumati Atchut Parab (Smt.) vs. Rajaram V. Parab and Others**⁶ after adverting to the provisions of section 70(b) and 85(1) of the Act, 1948, the Supreme Court observed, inter alia, as under :-

“17] From a bare perusal of Section 85 of the Bombay Tenancy Act, it would be evident that this provision bars the jurisdiction of the Civil Court to deal with any question including a question whether a person is or was at the time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him would be decided or dealt with only by the Mamlatdar or Tribunal or a Manager, the State Government in exercise of their powers of control. When a question arises whether a particular person is an agriculturist or a tenant or not, it is only the Mamlatdar who has the jurisdiction to decide the same.”

21. It does not seem to be a case that at any point of time in the past, the respondent Nos. 1.1 and 1.2 or their predecessor(s) in title had preferred an application under section 32-G of the Act, 1948. In that view of the matter, I find substance in the submissions on behalf of respondent Nos. 1.1 and 1.2 that the said aspect primarily falls within the province of authority of ALT, under the provisions of the Act, 1948. At the same time, what is the import of the order passed by this Court in Petition No.7153 of 2003 on the proceedings under section 32G deserves to be adequately dealt with.

6 (2009) 4 Supreme Court Cases 183.

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22. The criticism on behalf of the petitioners that Tahsildar and ALT had not at all delved into the said aspect, as is evident from the impugned order, appears well founded. The impugned order simply records that ALT found it necessary to decide the application on merits. It nowhere indicates that the question of tenability of the application or for that matter the alleged bar to consideration of the said issue by the ALT in view of the decision of the Division Bench in Writ Petition No. 7153 of 2003, would be inquired into. To this extent, the impugned order suffers from the vice of non application of mind.

23. I am, however, not inclined to accede to the prayers of the petitioners that the said issue is required to be determined as a preliminary issue. Since the question of maintainability is rooted in facts also, I deem it appropriate to direct the Tahsildar and ALT to specifically frame and decide the point of maintainability of the application in the context of the order passed by this Court in Writ Petition No. 7153 of 2003 along with rest of the points, while finally deciding the application under section 32-G. The petitions, therefore, deserve to be partly allowed.

Hence, the following order.

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ORDER

- 1] The petitions stand partly allowed.
- 2] Impugned orders to the extent the Tahsildar and ALT rejects the objection of maintainability outright stand quashed and set aside.
- 3] The applications assailing the maintainability of the said application thus stand restored to the file of Tahsildar and ALT.
- 4] The Tahsildar and ALT is directed to frame and decide a specific point of maintainability of the application under section 32-G in view of the order passed by Division Bench in Writ Petition No. 7153 of 2003 along with other points which arise for determination while deciding the application under section 32G, finally.
- 5] By way of abundant caution it is, however, made clear that this Court may not be construed to have expressed any opinion on the maintainability of the application under section 32-G of the Act, 1948 and the aforesaid consideration is confined to test the legality and correctness of the impugned order and the Tahsildar and ALT shall decide the same uninfluenced by any of the observations hereinabove, in accordance with law.
- 6] Rule made absolute to the aforesaid extent.
- 7] In the circumstance of the case there shall be no order as to costs in both the petitions.

(N. J. JAMADAR, J.)

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