



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3102 OF 2014

1. Maheboobkha S/o. Rahemankha, (Died)
Through his Lrs

1-a) Shaikh Rafik s/o Shaikh Meheboob,
Age 38 years, Occu. Labour,

1-b) Yasmeen Begum w/o Shaikh Maheboob,
Age 35 years, Occu. Housewife.

1-c) Ashfak s/o Shaikh Maheboob,
Age 13 years, minor,.

1-d) Mushtak s/o Shaikh Maheboob,
Age 11 years, Occu. Nil.

Petitioner no.1-c and 1-d minor U/G of their
real mother Yasmeen Begum petitioner no.1-b
All r/o. Indian Automobiles,
Mohalla Paltan, Hingoli,
Tq. and Dist. Hingoli.

.... **Petitioners**

Versus

1. State of Maharashtra
Through Secretary,
Revenue and Forest Department,
Mantralaya, Mumbai
2. The Deputy Collector (Land Reforms), Parbhani
3. The Deputy Collector (Land Reforms), Hingoli
4. The Naib Tahasildar (Revenue), Kalamnuri
5. The Tahsildar, Hingoli
6. The Talathi, Ambheri Sajja, Ta. And Dist.: Hingoli,

7. Julekha Begum W/o. Mohmad Yusuf,
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
8. Mohmad Yunus S/o. Mohmad Yusuf,
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
9. Mohmad Khalik S/o. Mohmad Yusuf,
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
10. Mohmad Sajid S/o. Mohmad Yusuf,
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
11. Shamjad Begum W/o. Mohammed Kader
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
12. Sabira Begum W/o. Ahmed Khalid
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
13. Mobin Begum D/o. Mohammed Yusuf
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
14. Kasam Begum W/o. Mohd. Akram
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
15. Mohamad Majid S/o. Mohmad Yusuf,
Age. Major, Occ. Agril,
R/o. Ambheri Tq. & Dist. Hingoli.
16. Sayyad Vajid Ali Sayyad Mahemood Ali
Age: 38 years, Occu. Business and Agril.,
R/o Pensionpura, Hingoli, Tq. and Dist. Hingoli.
17. Shaikh Pashu s/o Shaikh Raheem
Age: 79 years, Occu. Agril.,
R/o Ambheri, Tq. & Dist. Hingoli.

18. Shaikh Gulab Shaikh Pashu
Age: 51 years, Occu. Agril.,
R/o Ambheri, Tq. & Dist. Hingoli.
19. Shaikh Rahim Shaikh Pashu,
Age: 48 years, Occu. Agril.,
R/o Ambheri, Tq. & Dist. Hingoli.
20. Shaikh Karim Shaikh Pashu,
Age: 35 years, Occu. Agril.,
R/o Ambheri, Tq. & Dist. Hingoli.
21. Shaikh Hanif Shaikh Gani Tamboli,
Age: 57 years, Occu. Agril.
R/o Pensionpura, Hingoli, Tq. & Dist. Hingoli.
22. Sayeed Wazidali s/o Syed Mohd Ali
Age: 36 years, Occu. Agril. & Business,
R/o Pensionpura, Hingoli, Tq. and Dist. Hingoli.

.... Respondents

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Advocate for Petitioner : Mr. A. G. Dalal
AGP for Respondents-State : Ms. A. S. Mantri
Advocate for Respondent No. 16 : Mr. P. D. Suryawanshi
Advocate for Respondents No. 18 to 20 : Mr. P. S. Shinde
Advocate for Respondents No. 17 to 22 : Mr. P. S. Agrawal

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CORAM : MANJUSHA DESHPANDE, J.

RESERVED ON : 03 FEBRUARY, 2025

PRONOUNCED ON : 19 MARCH, 2025

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of parties.

2. The petitioner is assailing the judgment and order dated 25.07.2013 passed in Revision Petition No.2B/2008/H by Maharashtra Revenue Tribunal, Aurangabad (henceforth 'MRT' for short). As a result of dismissal of the Revision Petition before the MRT, the order dated 30.06.1986 passed by the Deputy Collector (Land Reforms), Parbhani, in two appeals filed by the respondents under Section 38-E(1) and 38-E(i) Explanation of the Hyderabad Tenancy & Agricultural Lands Act, 1950 (hereinafter 'the Act of 1950' for short) has been confirmed. Therefore, the petitioner is challenging the orders passed by the MRT as well as the respondent No. 2 i.e. Deputy Collector (Land Reforms), Parbhani. The appeals filed by the respondents herein have been allowed and the declaration of ownership under Section 38-E and Order under Section 38-E(i) Explanation of the Act of 1950 passed on 30.06.1986 has been canceled.

3. Learned Advocate Mr. Dalal appearing for petitioner submits that though initially, writ petition was filed by the legal heirs i.e. son of original protected tenant Mehboob Khan Rehman Khan, however, during the pendency of the present writ petition, the original petitioner has expired and the present writ petition is now being pursued by the legal heirs of Mehboob Khan Rehman Khan. Similarly, during the pendency of the writ petition, one civil

application seeking intervention in the writ petition has been filed by the subsequent purchasers of the land in question. Vide order dated 17.01.2023, this Court has allowed the intervention application and accordingly, amendment has been carried out and they have been added as Respondents No. 16 to 22 in the present writ petition.

4. Present writ petition is filed by the legal heirs of one Reheman Khan who was declared as a protected tenant under Section 38-E of the Act of 1950 to the extent of 17A-34G from the agricultural land in Sy. No. 32 of village Ambheri, Tq, Kalamnuri, Dist. Hingoli. The Naib Tahsildar (Revenue), Kalamnuri, passed an order to hand over the possession of the tenanted land to the father of petitioner on 18.08.1962. The father of the petitioner refused to accept the possession. Therefore, the land was taken in government custody and it was given on *Ek-Sala Lavni*.

5. Tahsildar, by his order dated 19.05.1976, handed over the possession of the said land on *Ek-sala Lavni* to Abdul Kalim Gulam Rasool. He had given an undertaking that Mr. Rehman Khan Gulab Khan is the declared protected tenant, since he has refused to take possession, the land was taken in Government custody, if and when the legal heirs of Rahemankhan would claim possession, he will hand over the land to the protected tenant.

6. The petitioner who was a minor, on becoming major, filed an application seeking possession of the land for which his father was declared as a protected tenant. The Tahsildar, vide his order dated 20.02.1986, directed the Circle Inspector to hand over the possession of the agricultural land in Sy. No. 32, Gat No. 91 to the extent of 17A-34G at village Ambheri, Tq. Kalamnuri, Dist. Hingoli, from the original land holder Umashankar Nagoba or Abdul Karim to the legal heirs of Mehboob Khan Rehman Khan and others. Accordingly, the possession of the said land was handed over to the petitioner by issuing possession receipt.

7. Being aggrieved by the said order of handing over the possession, Mohammad Yusuf Gulam Rasool filed two appeals challenging the declaration under Section 38E of the Act of 1950 as well as handing over the possession of the tenancy land to the petitioner under Section 38-E(i) Explanation of the Act of 1950 before Deputy Collector (Land Reforms), Parbhani. The Deputy Collector (Land Reforms), Parbhani, by his judgment and order dated 31.12.1986, has allowed both the appeals. By allowing the appeals, the declaration of ownership in favour of the petitioner under Section 38-E of the Act of 1950 and order under Section 38-E(i) Explanation of the Act of 1950 has been cancelled.

8. The order passed by the Deputy Collector (Land Reforms), Parbhani was challenged by the petitioner in the Revision under Section 91 of the Act of 1950 before the MRT. After hearing the parties and condoning the delay in filing the Revision, the MRT has refused to interfere with the order passed by the Deputy Collector (Land Reforms), Parbhani and confirmed the order passed in both the Appeals vide judgment and order dated 25.07.2013. Being aggrieved by the order passed by the MRT as well as Deputy Collector (Land Reforms), Parbhani, petitioner is challenging the legality, validity and correctness of the orders invoking Article 227 of the Constitution of India.

9. Mr. Dalal, learned Advocate for petitioner contends that the Deputy Collector has committed grave error in allowing both the appeals filed by the respondent Mohammad Yusuf Gulam Rasool. According to him, both the appeals were not at all maintainable. It is his contention that the order dated 31.12.1986, which has been challenged by the respondent is not a judicial order but it is an administrative order. The Appeal under Section 90 of the Act of 1950 is maintainable only against a judicial order. The only remedy available to the respondent is to file writ petition under Article 226 of the Constitution of India.

10. It is further contention of the learned Advocate for petitioner that the appeal was filed beyond the period of limitation without any application for condonation of delay. The delay caused in filing the appeal has also not been satisfactorily explained by the respondent. The other objection raised by the learned Advocate for the petitioner is that the respondent did not have any *locus standii* to file an appeal before the Collector since he was in possession of the disputed land on the basis of *Eksala Lavni*. Therefore, he did not have any right to challenge the order passed by the Tahsildar wherein it was directed that whoever is in possession of the tenancy land, should hand over possession to the petitioner. The respondent, in fact, is a tress-passer and has no legal right. Though the respondent claimed that there was a gift-deed in his favour, however, no such gift-deed has been placed on record nor such entry is found in the revenue record.

11. It is undisputed that father of the petitioner is a protected tenant. According to him, once a tenant is declared as a protected tenant, his status as a protected tenant continues. Status of a tenant is a deeming provision. The protected tenant is created by operation of law and no order can set aside the status of Protected Tenancy. The status of a protected tenant is a legal right conferred upon him by

operation of law. According to the learned Advocate for the petitioner, protected tenant loses his right of tenancy, only if he surrenders or by way of termination of tenancy as provided under Section 19 of the Act of 1950. Legal right as a Protected Tenant can never extinguish.

12. Learned Advocate for the petitioner submits that while passing the order, the Deputy Collector has wrongly relied on Section 38(6)(d) of the Act of 1950, thereby cancelling declaration of ownership under Section 38E of the Act of 1950 as well as the order under Section 38E(i) Explanation. While passing the impugned order, it is observed that *suo-moto* proceedings for putting the declared tenant in possession of land under Section 38E(i) Explanation of the Act of 1950 were initiated wherein the father of the petitioner has filed an affidavit on 25.07.1962 informing the Tahsildar that he was never in possession of the suit land and he does not wish to take possession of the land, an affidavit to that effect has been filed and verified by the Naib Tahsildar (Land Reforms).

13. Learned Advocate for the petitioner further submits that it is held by the Deputy Collector that on perusal of the record, it discloses that as per notification dated 10.06.1970, the said land was taken under Government supervision on 02.06.1970 and the same

remained to be in Government possession till the year 1975. Thereafter, it was released in favour of Abdul Karim Gulab Rasool as per orders of Collector on 22.10.1975 and the possession was handed over to him on 10.06.1976. Thereafter, being legal heir of deceased protected tenant, the present petitioner has filed application seeking restoration of possession wherein the Tahsildar, Kalamnuri, has passed an order directing to hand over the possession of the land to the petitioner and submit a compliance report after handing over the possession of the land vide order dated 20.02.1986.

14. It is observed by the Deputy Collector that in fact, the outer limit of time for depositing the price fixed by the Tahsil Office, Kalamnuri had already lapsed. Therefore, the price could not have been deposited by the petitioner herein. The price of the land was fixed at Rs. 140.62/- and it was to be deposited within 8 equal installments. The last of such installment was to be deposited before 01.06.1968. Therefore, though the price has been deposited on 31.03.1986, it was not within the prescribed period of limitation as has been provided under Section 38(6)(d) of the Act of 1950.

15. In view of Section 38(6)(d) of the Act of 1950, it was declared that the purchase made by the declared protected tenant under Section 38E of the Act of 1950 has automatically become

ineffective, and by placing reliance on the judgment of this Court, the order passed by the Tahsildar has been set aside.

16. According to the learned Advocate for the petitioner, the impugned order is contrary to the mandate of Section 38(6)(d) of the Act of 1950. The Collector has wrongly interpreted the said provisions and has passed an erroneous order. The order under Section 38(6)(d) and the subsequent order of restoration of possession of the petitioner has been set aside. It is his contention that the Collector has failed to appreciate that Clause (d) of sub-Section (6) of Section 38 of the Act of 1950, which itself provides that if the protected tenant fails to pay the entire amount of the reasonable price within the fixed period or the same is not recovered from him, the purchase by the protected tenant becomes ineffective and he forfeits his rights to purchase the land. Sub-section (d) cannot be read in isolation but it has to be read alongwith sub-section (e) which provides that if the tenant fails to pay the installment or he fails to obtain the extension for making such payment, Tribunal is empowered to grant him further time for making such payment and even after granting further time for installments, which can be extended up to (16) sixteen installments and at such intervals during a period not exceeding (8) eight years, he fails to make payment of such installments within such extended period, only in that case, the purchase becomes ineffective and provisions of

Clause (d) would apply.

17. The learned Advocate for the petitioner in support of his contention relies on the judgment of this Court in case of **Ganpat Sakharam Deshmukh Vs. Yeshwant Digambar Deshmukh [2000(1) Mh. L. J. 126]**. The issue in the reported case was regarding declaration of protected tenant becoming ineffective. While deciding the issue, this Court has held that two conditions are required to be fulfilled for declaring the purchase transfer in favour of protected tenant ineffective under Section 38E of the Act of 1950. The first condition is that (I) the tenant commits a default in the payment of entire purchase price; and (II) in spite of proceedings for recovery, the entire amount could not be recovered as arrears of land revenue. This Court has observed that on failure of the protected tenant to pay any installment, it has to be recovered by the Government as arrears of land revenue. As per first proviso under Section 3(3) of Section 38 of the Act of 1950, if the whole or any part of the price given to the land holder, cannot be recovered as an arrears of land revenue, the transfer becomes ineffective.

18. This Court has further held that these steps are required to be taken chronologically and in continuity. Therefore, it is observed that in order to declare that the purchase transfer under Section 38E

of the Act of 1950 ineffective, two conditions are necessarily required to be fulfilled. Unless these two conditions have fulfilled, the purchase transfer does not become ineffective under Section 38(6)(d) of the Act of 1950.

19. The learned Advocate for petitioner submits that the finding about surrender of tenancy by protected tenant are perverse. Merely refusing to take possession of the land would not amount to surrender of tenancy. The procedure of surrender is provided under Section 19 the Act of 1950 itself. Section 19 of the Act of 1950 provides for termination of tenancy. The tenancy can be terminated by tenant surrendering his right to the land holder or by the land holder on the ground that the tenant has failed to pay in any particular year the fixed rent of the land and other contingencies as provided under Section 19(2) of the Act of 1950.

20. It is contended that while surrendering his right, the tenant has to surrender it before the commencement of the year in writing and admitting before the Tahsildar that his surrender is made in good faith and voluntarily. Only after satisfaction of the Tahsildar about voluntary surrender and recording the same in writing, such voluntary surrender becomes valid. In the present case, no such procedure is claimed to have been followed by the Tahsildar. Rule 7

of the Act of 1950 provides for the procedure to be followed by the Tahsildar during such surrender of tenancy.

21. The learned Advocate for the petitioner further relies on the judgment of the Hon'ble Supreme Court which is delivered as back as in the year 1970 in case of **Ramchandra Keshav Adke (Dead) by Lrs and Others Vs. Govind Joti Chavare and Others [(1973)1 SCC 559]**. The Hon'ble Supreme Court has held that a surrender of tenancy by a tenant in order to be valid and effective must fulfill the following requirements.

- (I) It must be in writing;
- (II) It must be verified before the Mamlatdar;
- (III) While making such verification, the Mamlatdar must satisfy himself with regard to two things that (a) the tenant understands the nature and consequence of surrender; and (b) surrender is voluntary;
- (IV) The Mamlatdar must record his findings about satisfaction of such surrender.

22. The Mamlatdar which has been referred to in the judgment (supra) is Tahsildar under the Act of 1950. It is held in the said decision that the imperative language, the beneficent purpose and the importance of these provisions for efficacious implementation of the general scheme of the Act, unerringly lead to the conclusion that they are intended to be mandatory. Neglect of any of these

statutory requisites would be fatal. Disobedience of even one of these mandates would render the surrender invalid and ineffective. Hence, all the requirements as provided under Section 5(3)(b) and Rule 2(a) of the Act of 1950 were declared to be mandatory and not directory. Unless those were fulfilled, it was held that surrender cannot be valid.

23. Learned Advocate for the petitioner relies on the observations made by the Hon'ble Apex Court in the above judgment and submits that record discloses that no such exercise is undertaken by the Tahsildar wherein his satisfaction has been recorded that such surrender is voluntarily made and is a genuine surrender. Unless the mandatory conditions as provided under Section 19(1)(a) of the Act are fulfilled, it cannot be held that surrender made by the father of the petitioner is valid surrender.

24. It is further contended by the learned Advocate for the petitioner that even otherwise, it is not disputed that while allotting the land to the respondent on *eksala lavni* basis, he has executed an undertaking that if and when the legal heirs of the protected tenant makes a demand of the said land, he is ready to return it. Therefore, now, he is estopped from claiming otherwise.

25. According to him, the appeal filed by the respondents seeking cancellation of his declaration as protected tenant is not

maintainable at all. The order passed by the Deputy Collector, cancelling the declaration of ownership of the petitioner under Section 38E as well as Order under Section 38E(i) Explanation, suffer from total non-application of mind and arbitrariness. It is well settled that the declaration of ownership under Section 38E, neither can be challenged nor can it be set aside. In this regard, the learned Advocate for the petitioner places on reliance on the reported judgment of this Court in **Bharatlal Hemraj Vs. Kondiba Govinda Jadhav [2001(3) Mh. L. J. 380]**, wherein this Court has held that the declaration under Section 38E is not a decision or an order within the meaning of Section 90 of the Act of 1950. Therefore, no appeal in the circumstances is maintainable. There is no provision for individual notice before issuing declaration of ownership of land in favour of protected tenant under Section 38E of the Act of 1950.

26. It is held in the said judgment that ownership of land in a protected tenant is created by virtue of provisions under Section 38E. The well established principle of law is that when a statute creates a legal fiction providing that something shall be deemed to have resulted from the facts established in a particular circumstance, then full effect has to be given to the legal fiction created by the statute.

27. In view of the judgment of this Court referred supra, the

declaration under Section 38E of the Act of 1950, not being a decision, cannot be challenged under Section 90 Act of the Act of 1950. It is the submission of the learned Advocate for the petitioner that though the Collector has committed an error in passing the order, the MRT has also failed to correct the error committed by the Collector.

28. While challenging the order passed by the MRT, learned Advocate for the petitioner contends that the learned Member of MRT has wrongly interpreted Section 19, of the Act of 1950 and has recorded a finding that though the rights of the tenant is a heritable, but considering that father of the petitioner had surrendered his rights and had not deposited the purchase price, therefore, the finding of the Collector did not deserve any interference. Though the learned Member has recorded that it is undisputed that father of the petitioner was protected tenant, but has committed an error in recording that he has surrendered his tenancy on 25.07.1962. The finding recorded by the Member that though the purchase price was directed to be deposited, but the father of the petitioner has not deposited it within the given period, and he had already surrendered his right on 25.07.1962, therefore, the question of depositing the purchase price does not arise, is contrary to the law as well as record.

29. Hence, merely on the basis of refusal by the father of the petitioner to take possession of the land, the MRT has recorded a finding that the father of the petitioner who was a protected tenant has surrendered his tenancy rights. The refusal to take possession does not extinguish right of a Protected Tenant.

30. Learned Advocate Shri. Agrawal has opposed the writ petition by filing intervention application who claims to be the subsequent purchaser of the said land. It is his contention that since the father of the petitioner has refused to take possession of the said land, he has surrendered his rights as a protected tenant. Upon refusal to take possession of the said land, the land was taken by the Government in its possession and supervision on 10.06.1970. It remained with the Government for some years and thereafter, the land was released in favour of Abdul Karim Gulam Rasool as per order passed by the Tahsildar on 20.02.1976 and the possession was handed over to him on 10.06.1976.

31. It is his further contention that one Rehmankha Gulabsha who was the protected tenant surrendered his tenancy rights by refusing to take possession in accordance with Section 19 read with Rule 7 of the Act of 1950. The surrender was accepted and no further right of tenancy remained with the present petitioner and the

Government has given the land on *eksala lavani* for cultivation on year to year basis. On 14.02.1986, the son of the original protected tenant Mehboob Khan S/o Rasool Khan filed an application for possession of the land in question to re-establish his possession over the said land. It is his contention that by suppressing that his father had already surrendered his tenancy right, he has filed an application on 14.02.1986 to assert his right over the land. Irrespective of the fact that, he was not entitled to seek possession after the lapse of 22 years from the date of surrender.

32. According to him, the order passed by Tahsildar on 20.02.1986 did not re-establish the tenancy rights of the petitioner. The said order did not restore original tenancy rights. The decision of Tahsildar was challenged before the Deputy Collector which was allowed and it has been rightly held that the original tenant has surrendered his right way back in on 25.07.1962. Even the Revision filed before the MRT has been rightly rejected.

33. He further submits that though the earlier revision filed by the petitioner before the MRT bearing case No. 3339/87/8 was dismissed for default on 13.09.1989, and it had attained finality. It was never challenged nor any application for recalling the order was filed. Without making any attempt for restoration of the matter, the

petitioner has again attempted to challenge the earlier decision by filing fresh revision in the year 2008, which was eventually dismissed on 13.07.2013 on its own merits.

34. According to him, the petitioner did not file any separate application for condonation of delay. The revision application itself should not have been entertained by the MRT. Though eventually the revision has been dismissed, the fact remains that the petitioner has suppressed the fact of filing earlier Revision and its dismissal, even in the present writ petition.

35. It is his contention that a limitation of 60 days is provided under the Act of 1950, for filing Revision Application or Appeal. Though the earlier revision filed by the petitioner was dismissed on 13.08.1989, he has approached MRT by fresh Revision Application without filing any application for condonation of delay. It is his contention throughout the proceedings, there is huge delay on the part of the petitioner in approaching the authorities for challenging the orders and seeking relief.

36. The Advocate for the intervenor submits that the applicants have purchased the land in Sy. No. 32, Gat No. 91 situated at Ambheri, Tq. Dist. Hingoli from respondents No. 8 to 16 in the present writ petition who are the legal heirs of Mohammad Yunus

who claims to be the possessor of the land initially on the basis of *eksala lavni* and simultaneously, on the basis of gift-deed executed in his favour by the original owner Bhimashankar Nagoba. It is his contention that they have purchased the said land on 20.07.2011 for a valuable consideration by way of registered sale-deed. Hence, he has every right to protect his interest in the land. The petitioner herein is making a time barred claim over the land which is purchased by him pursuant to surrender of tenancy rights by his father long back.

37. It is his contention that, right from dismissal of the Revision Application filed on 13.08.1989 till the filing of fresh Revision Application in the year 2008 and order dated 13.07.2013 passed by the MRT, there was no stay during the pendency of the proceedings. In spite of the fact that the petitioner was aware that the present intervenor have purchased the land from respondents No. 8 to 16 yet he has not added the intervenor as a party respondents to the present proceedings.

38. The petitioner has also not challenged the mutation entry which have been taken in the name of intervenor in the revenue record on the basis of sale-deed executed in their favour. It is his contention that considering that the tenancy rights of the original

tenant were legally surrendered in the year 1962, and all the subsequent proceedings have been dismissed against the present petitioner, the orders passed does not deserve any interference.

39. It is his further contention that once the father of petitioner has surrendered the tenancy rights, they are extinguished forever and those cannot be revived. Therefore, according to him, since it is established by the concurrent findings recorded by the Authorities that the original protected tenant i.e. father of the petitioner had surrendered his tenancy rights, petitioner does not have any right to re-establish his rights which have already been relinquished by his father. According to him, the writ jurisdiction cannot be exercised by the Court in aid of person who is not diligent about his rights and commits delay in pursuing the remedies. The land was already taken in government supervision. The order of taking the land in supervision was never challenged by the tenant. Without challenging the order, the petitioner has merely filed an application for restoration of the possession. In view of the same, the intervenor prays that the writ petition may kindly be dismissed.

40. The initial application filed by the petitioner before the Tahsildar was after a delay of 24 years and even the Revision filed before the MRT is after a lapse of 21 years. It is his contention that

the petitioner is not diligent about his rights. Therefore, his rights cannot be considered at such belated stage when already rights have accrued in favour of all the parties due to passage of time and those cannot be ignored. Hence, according to him, on the ground of delay and laches alone, the writ petition deserves to be dismissed.

41. Upon hearing the respective parties and from the perusal of record, the following questions arise for consideration in the present writ petition :- (I) Whether the surrender made by the Mohammad Khan Rehman Khan who was the protected tenant is a valid surrender under the Act of 1950 ? (II) Whether declaration of a protected tenant is an order under Section 38-E of the Act of 1950 ? (III) Whether the tenancy declared under Section 38-E of the Act of 1950 automatically become ineffective, upon failure to deposit the reasonable price, as provided under Section 38(6)(d) of the Act of 1950 ?

42. From the documents placed on record as well as the arguments advanced by the parties, it is not disputed that the father of the petitioner was a protected tenant under Section 38-E of the Act of 1950 to the extent of 17A-34G at village Ambheri, Tq. Kalamnuri, Dist. Hingoli. He had refused to take possession of the land and he has filed an affidavit on 25.07.1962 accompanied by an application

addressed to the Tahsildar informing him that he does not want to take possession of the land. The affidavit of declared tenant was taken on record by the Naib Tahsildar (Land Reforms) and the land was taken under Government supervision on 18.08.1962.

43. The order dated 18.08.1962 is passed by the Tahsildar, Kalamnuri, in the suo-motu inquiry wherein it was held that the protected tenant Mehboob Khan Rehman Khan had appeared in person and submitted an application stating that he has not cultivated suit land, he was a servant with the original land holder. He, therefore, does not require the land for cultivation. It is observed by the Tahsildar that the name of the protected tenant has been ascertained from the list published under Section 38-E(i) of the Act of 1950. Therefore, for cancellation of declaration, he should file appropriate proceedings. Hence, his request cannot be considered. Therefore, it was directed that the father of the petitioner should be put in possession.

44. In spite of issuance of notices to the father of the petitioner by the Tahsildar, Kalamnuri, he did not remain present and the land was, therefore, taken in supervision of Government. Further it was granted to Mohammad Yunus Gulam Rasool on *eksala lavni*. Upon his affidavit dated 18.08.1970, accepting the condition that he

will pay the amount prescribed by the Government towards cultivation of land and if and when, the legal heirs of Rehman Khan Mehboob Khan makes any demand for recovery of possession, he will hand over the possession of the land as per the rules, to the legal heirs of Rehman Khan. He has filed an affidavit to that effect on 10.05.1976. Accordingly, he remained in possession as a cultivator of the land on year-to-year basis.

45. Though such affidavit has been executed by Abdul Karim Gulam Rasool, when the present petitioner Mehboob Khan Rehman Khan filed an application for restoration of possession before the Tahsildar, it was directed that the possession should be restored to him. The order of Tahsildar dated 20.02.1986 was challenged by the Yusuf Gulam Rasool.

46. In the appeal before the Deputy Collector, the predecessor of respondents No. 7 to 10, 13 and 15, have filed two appeals. (I) Appeal File No. 86/TNC/A-38-/67 was filed on 24.10.1986 with a prayer for cancellation of declaration status of protected tenant of Mehboob Khan Rehman Khan in respect of land Sy. No. 32, Gat No. 91 at village Ambheri, Tq. Kalamnuri, Dist. Hingoli to the extent of 17A-34G. (II) Appeal File No. 86/TNC/A/38(E)(i)/48 was filed on 13.05.1986 with a prayer that the order

passed by the Tahsildar on 20.02.1986, directing the Circle Inspector to restore the possession of the land to the present petitioner under Section 38-E(i) Explanation should be set aside.

47. While deciding both the appeals, the Deputy Collector (Land Reforms), Parbhani has totally failed to take into consideration that Mohammad Yunus Gulam Rasool was neither the owner of the land nor a tenant. Therefore, he did not have any right to possess the land which was already declared in favour of Mehboob Khan Rehman Khan who was declared as a Protected Tenant. Only upon an undertaking given by Mohammad Yunus Gulam Rasool in the form of an affidavit that he has granted the possession of the land on *eksala lavni*, with an undertaking to return the land to the legal heirs of declared protected tenant as and when such demand is made.

48. The appellants before the Deputy Collector did not have any locus either to challenge the declaration of Protected Tenant or order of restoration of possession to the present petitioner passed by the Tahsildar. While deciding the appeals, apart from ignoring the fact that the appellants before him did not have locus, the Deputy Collector has also relied on the affidavit filed by the declared Protected Tenant on 25.07.1962, alongwith application addressed to Tahsildar refusing to take possession of the suit land, to record a

finding that it is a surrender of his tenancy rights.

49. It is held by the Deputy Collector that though the Tahsildar, Kalamnuri, has fixed the reasonable price of the land, the Protected Tenant has failed to deposit the amount. Referring to the order passed by the Tahsildar, Kalamnuri on 20.02.1986, it is held by the Deputy Collector that the Tahsildar Kalamnuri has ordered that the price of the land should be got deposited first and file be submitted for passing of orders on possession, but inspite of these orders, the Revenue Inspector, Basamba has directed on 20.02.1986 to hand over the possession of the suit land and the price was deposited by the respondent on 31.03.1986.

50. It is held by the Deputy Collector that, the Tahsildar has committed an error in directing to restore the possession of the land, since the time for depositing the reasonable price of the land had already expired. It is further held that the price of the suit land was fixed @ Rs. 11.25/- and it was to be paid in 8 equal installments of Rs. 140.62/- each. The amount of such installment was to be paid before 01.06.1968, which was not deposited within the time prescribed.

51. Hence, relying on Section 38(6)(d) of the Act of 1950, the Deputy Collector has held that considering that the petitioner has

failed to deposit the amount by 01.06.1968, the purchase made by the declared Protected Tenant under Section 38-E of the Act of 1950 becomes ineffective as provided under clause (d) of Section 38(6) of the Act, and therefore, the transaction of ownership, under Section 38E of the Act of 1950 has automatically become ineffective due to failure on the part of tenant to pay the reasonable price. It is held that since the sale itself has become ineffective, the subsequent order passed under Section 38-E(i) Explanation of the Act of 1950 is also liable to be quashed and set aside.

52. The Deputy Collector has placed reliance on Section 38(6)(d) of the Act of 1950 to declare the purchase of the land under protected tenancy as ineffective. Hence, it would be appropriate to reproduce the said provision, which reads thus :

Section 38(6)(d) :

“If the protected tenant [or as the case may be, ordinary tenant,] fails to pay the entire amount of the reasonable price within the period fixed under sub-section (5) or the same is not recovered from him, the purchase by the protected tenant [or, as the case may be, ordinary tenant] shall not be effective and he shall forfeit the right of purchase of the land, and the amount paid by him towards the reasonable price shall be refunded to him with interest at three per cent, per annum together with land revenue paid by him if any after deducting therefrom the rent due from him for the period :

Provided that if the amount of reasonable price in respect of

which the protected tenant [or, as the case may, ordinary tenant] has committed default, does not exceed one-fourth of the price fixed by the Tribunal under sub-section (5), the right of purchase of the protected tenant [or, as the case may be, ordinary tenant] shall not be forfeited and the Tribunal shall cause the balance of reasonable price to be recovered as arrears of land revenue and paid to the landholder.”

53. It is evident from the above provision that if the protected tenant fails to deposit the amount, the Authorities have to take necessary steps to recover the same from him as an arrears of land revenue.

54. The Deputy Collector has totally ignored the proviso which makes it necessary to cause the balance of reasonable price to be recovered as arrears of land revenue and pay it to the land holder. Therefore, in order to declare a purchase of Protected Tenant ineffective, the two conditions are required to be fulfilled.

(I) The protected tenant has failed to deposit the entire amount within a period fixed under Sub-section (5); and (II) on his failure, the Tribunal causes balance of reasonable price to be recovered as an arrears of land revenue and pay it to the land holder.

Unless these two conditions are fulfilled, the purchase by the protected tenant does not become ineffective.

55. This view has been taken by this Court in the reported

judgment of **Ganpat Sakharam Deshmukh Vs. Yeshwant Digambar Deshmukh (supra)**. Paragraphs No. 6 and 7 of the judgment is relevant for the issue under consideration, which are reproduced hereunder.

“6. It is required to be noted that the provisions of [section 38](#) of the Act are applicable for both the protected tenant as well as ordinary tenant and they provide for a voluntary act for transfer of ownership from the landlord to the tenant and if such voluntary exercise does not result in transfer, the tenant has a remedy of approaching the tribunal which shall in turn determine the reasonable price and transfer the ownership of the land in favour of the tenant. If the tenant fails to pay entire amount of reasonable price within a fixed period under sub-section (5) or is the same is not recovered from him, the purchase of the tenant shall not be effective and he shall forfeit the right of purchase of land, as per the provisions in Clause (d) of sub-section (6) of [section 38](#). The word used in Clause (d) is 'or', which means either on failure to pay the entire amount of reasonable price within the period fixed under sub-section (5) or if the same is not recovered from him, the purchase becomes ineffective. These two conditions are in alternate and if any one of them is satisfied, the transfer by purchase in favour of the tenant becomes ineffective.

7. [Section 38-E](#) is applicable only to a protected tenant and not an ordinary tenant and it is not by way of any voluntary act. As soon as the notified date is declared in respect of any area, a protected tenant becomes owner of the land he was cultivating as a tenant and the only relief available to the landlord is to apply within 90 days from such date before the tribunal for the determination of the reasonable price of his interest in the land which has been transferred to the ownership of a protected tenant. This provision has been incorporated with an intention to transfer ownership in favour of the tiller namely the protected tenant, by operation of a statute automatically and confirmation of such a transfer is made by issuing a certificate in the prescribed format. It is pertinent to note that issuance of such certificate of transfer of ownership under [section 38](#) is

only after the entire amount of reasonable price is paid by the transferee tenant and whereas, under provisions of [section 38-E\(2\)](#) there is no such condition precedent for issuing the certificate of ownership. Failure to deposit or pay the entire amount of the reasonable price may result in non issuance of certificate of ownership under subsection (6) of [section 38](#) and till such a payment is made within the period and instalments fixed by the tribunal, the certificate cannot be issued. It further provides that even failure to pay the entire amount of the reasonable price within the period fixed under sub-section (5) shall make the purchase ineffective under Clause (d) of sub-section (6) of [section 38](#). Same is not the case under the provisions of [section 38-E](#) and the purchase in favour of the protected tenant can be ineffective only under the eventualities stipulated under the proviso of sub-section (3) of the said section, as reproduced hereinabove. For making the purchase transfer under [section 38-E](#) to be ineffective, there are two conditions to be fulfilled simultaneously viz.

(i) protected tenant commits default in payment of the entire amount of purchase price and (ii) if the whole or any part of the purchase price due to the landlord could not be recovered as arrears of land revenue.

The proviso states that if the protected tenant commits default in respect of any instalment, it shall be recovered by the Government as areas of land revenue and paid to the landholder. The language used in this proviso is clear and different from the language used in Clause (d) of sub-section (6) of [section 38](#) of the Act. On the failure of the protected tenant to pay any instalment, it is clear that the instalment amount has to be recovered by the Government as arrears of land revenue as per the first proviso under sub-[section 3](#) of [section 38-E](#) and if the whole or any part of the price due to the landholder cannot be recovered as arrears of land revenue, the transfer shall be ineffective. These steps have to be read one after another and in continuity. The legislature has, therefore, provided a separate methodology for declaring the transfer of ownership under [section 38-E](#) ineffective and the procedure provided for making the transfer ineffective under [section 38](#) of the Act cannot be transposed or implied to be included under the provisions of

section 38-E. Though sub-section (3) states that the provisions of sub-section (4) to (9) of section 38 shall "mutatis mutandis" apply, that does not mean that the provisions of sub-section (6) of section 38 are made applicable suo motu for declaration of the transfer as ineffective and the term "mutatis mutandis" means "with necessary changes", as has been held by the Supreme Court in the case of *M/s Ashok Service Centre & Others Vs. State of Orissa* (1983)2 SCC 82."

56. Section 38-E(3) of the Act of 1950 is also relevant here

which reads thus :

Section 38-E(3) :

“(3) Within 90 days from the date specified in a notification under sub-section (1) every landholder of lands situated in the area specified in such notification shall file an application before the Tribunal for the determination of the reasonable price of his interest in the land which has been transferred to the ownership of a protected tenant under sub-section (1) ³(and if an application is not so filed within such period by a landholder but a certificate under sub-section (2) has been issued, the Tribunal may suo motu proceed to determine such price and thereupon] all the provisions of sub-sections (4) to ¹[(9)] of section 38 shall *mutatis mutandis* apply to such application:

Provided that if the protected tenant commits default in respect of any installment, it shall be recovered by the Government as arrears of land revenue and paid to the landholder:

Provided further that if the whole or any part of the price due to the landholder cannot be recovered as arrears of land revenue, the transfer shall not be effective and the amount, if any, already paid by the protected tenant towards the price shall be refunded to him together with interest at three

per cent. per annum and the land revenue paid by him, if any, after deducting therefrom the rent for the period].”

57. Therefore, from the decision of this Court, it is evident that as far as protected tenant is concerned, it would be governed by Section 38-E(3) and by the proviso thereto. This Court has made a distinction between Section 38 and 38-E of the Act. It is held that both the sections are required to be read independent of each other. Section 38 applies for both protected tenant as well as ordinary tenant while Section 38-E deals only with the statutory right of ownership of the Protected Tenant alone.

58. Therefore, in view of the findings recorded by this Court, it is settled law that as far as the present petitioner who is legal heir of Protected Tenant is concerned, his rights have not been extinguished on account of failure to deposit the amount as the above mentioned conditions in the first proviso under Section 38-E(3) of the Act are not fulfilled. Therefore, the order passed by the Deputy Collector being erroneous and contrary to the provisions of the Act of 1950, is required to be interfered with.

59. Based on the observations regarding ownership becoming ineffective, the order under Section 38-E(I) Explanation restoring the land to the petitioner has been cancelled by the Deputy Collector. The

MRT has given a finding that considering that father of the petitioner has surrendered the tenancy rights on 25.07.1962, there was no question of depositing the purchase price of Rs. 1,500/- on 31.03.1986 by the legal heir Mehboob Khan Rehman Khan.

60. Relying on the 7/12 extract, the Member, MRT, has observed that name of Abdul Karim Gulam Khan came to be recorded on the basis of Mutation Entry No. 72 after Umashankar Nagoba i.e. original land owner. The MRT has also confirmed the view taken by the Deputy Collector, that the protected tenant could not deposit the purchase price within the prescribed time limit i.e. before 01.06.1968. Therefore, the tenancy under Section 38-E has become automatically ineffective as provided under Section 38(6)(d) of the Act.

61. Though it is observed by the Member, MRT that as per Section 40 of the Act of 1950, right of a tenant are heritable, yet only on the ground that Rehman Khan has surrendered his right and failed to deposit the reasonable price, the order passed by the Deputy Collector is confirmed by the MRT by order dated 25.07.2013. Both the Authorities have committed error in wrongly relying on Section 38(6)(d) of the Act, as observed herein above. Therefore, in my view, the purchase of the land by the Protected Tenant does not become ineffective. In fact, record does not disclose that any steps were taken

by the Government for recovery of the defaulted amount from the petitioner as arrears of land revenue as provided in the proviso to Section 38-E(3) of the Act of 1950. Section 40 of the Act of 1950 provides that right of tenant are heritable which reads thus.

Section 40 :- Rights of tenants are heritable:

“(1) Where a tenant dies, the landholder shall be deemed to have continued the tenancy-

(a) If such tenant was a member of an undivided Hindu family, to the surviving members of the said family, and

(b) If such tenant was not a member of an undivided Hindu family, to his heirs, on the same terms and conditions on which such tenant was holding it at the time of his death.

(2) The surviving members, or as the case may be, the heirs to whom the tenancy is continued under sub-section (1) shall be entitled to partition and sub- divide the land leased subject to the following conditions:-

(a) each sharer shall hold his share as a separate tenant,

(b) the rent payable in respect of the land leased shall be apportioned among the shares according to the share allotted to them,

(c) the area allotted to each sharer shall not be less than the unit which the State Government may, by general or special order, specify in this behalf having regard to the productive capacity and other circumstances

relevant to the full and efficient use of the land for agriculture,

(d) the area is less than the unit referred to in clause (c), the sharers shall be entitled to enjoy the income jointly, but the land shall not be divided by metes and bounds,

(e) if any question arises regarding the apportionment of the rent payable by the sharers, it shall be decided by the Tahsildar, whose decision shall be final].”

62. Though the father of the petitioner had refused to accept the possession of the land and apparently, the purchase price could not be deposited within prescribed time, however, due to failure on the part of Government to take steps for recovery of the amount of reasonable price fixed by the Government does not make the purchase ineffective. As has been held by this Court in the judgment of **Ganpat Vs. Yeshwant (supra)**, no steps are required to be taken by the protected tenant once it is declared that he is a Protected Tenant under Section 38-E of the Act, by issuance of notification. The law takes its own course. Only upon satisfaction of twin condition provided in proviso to Section 38-E(3) of the Act, the purchase becomes ineffective.

63. Aforesaid decision makes it clear that, there is no role assigned to the land holder except to apply for fixation of reasonable

price. Though the various objections are raised by the respondents herein, the respondents do not have any locus to challenge the declaration of protected tenant in favour of the father of petitioner.

64. Even otherwise, as has been held by this Court in the decision of **Bharatlal Vs. Kondiba (supra)**, that declaration under Section 38-E of the Act is not a decision or order within the meaning of Section 90 of the Act of 1950, therefore, no appeal is maintainable against such declaration. In view of the settled legal position rendered by this Court, the right of a protected tenant continues unless he surrenders or it becomes ineffective by operation of Section 38-E(3) of the Act. The petitioner has already given explanation for the delay caused in the memo of the Revision before the MRT, and upon considering the explanation given by the petitioner, the delay has already been condoned by the MRT. Therefore, there is no substance in challenge raised by the respondents on the ground of delay. Once it is held that respondents do not have any locus, the challenge raised by the respondents on any of the grounds is not capable of being entertained.

65. In view of the findings recorded herein above, the writ petition deserves to be allowed. Hence, following order :

ORDER

- I. Writ Petition is **allowed**.
- II. The order dated 25.07.2013 passed by the Member, Maharashtra Revenue Tribunal, Aurangabad, in Revision Application No. 2-B-2008-Hingoli, thereby confirming the order passed by Deputy Collector (Land Reforms), Parbhani, in Appeals filed by the respondents in Files No. 80/TNC/A/38E(1)48 and 86/TNC/A-38/E-67, thereby cancelling the declaration, stands quashed and set aside.
- III. The order dated 20.02.1986 passed in File No. LR/A3/204/38E(1) by the Tahsildar, Kalamnuri is hereby confirmed.
- IV. Rule is made absolute in above terms. Writ Petition stands disposed of.

[MANJUSHA DESHPANDE, J.]

Omkar Joshi