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(2017) 07 BOM CK 0265

In the Bombay High Court

Case No : 1477 of 1992

Bharat S/o Balbhimrao Kulkarni, & Ors. APPELLANT

Vs

Prabhakar S/o Shirappa Mahabole, & Ors. RESPONDENT

Date of Decision : 27-07-2017

Acts Referred:

Hyderabad Tenancy and Agricultural Lands Act, 1950, Section 38E(1), Section 38E, Section 38E(3) - Ownership of lands held by protected tenants to stand transferred to them

Citation : (2017) 07 BOM CK 0265

Hon'ble Judges : Ravindra V. Ghuge

Bench : SINGLE BENCH

Advocate : V.R. Sonwalkar, Smita Deshpande, Satyajit S. Bora, Anand P Bhandari

Final Decision : Dismissed

Judgement

1. The petitioners in both these petitions are real brothers. During pendency of this petition, petitioner No.2 Abhay has passed away and his legal heirs have been brought on record.

2. In the first petition, the petitioner has put forth prayer clause ''B'' as under:-

" B. The impugned judgment and order passed by the Learned Member of M.R.T. in Revn. Appln. No. TNC-B-91-C on 31.1.1992 confirming the Judgment and order passed by Learned Tahsildar, Tuljapur in file No.89/TNC/CR/50 dtd. 22.5.90 and Judgment and order dated 12.8.1991 in Appeal No.90/TNC/A/19 passed by Learned Deputy Collector, Osmanabad be quashed and set aside. "

3. In the second petition, the petitioners have put forth prayer clause ''B'' as under:-

" B. The Judgment and order dated 31.1.1992 passed in Revision application No.134-B/91-O by Member of Maharashtra Revenue Tribunal Aurangabad and confirmed by the Judgment and order passed by the Deputy Collector (L.Rs.)

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Osmanabad on 12.8.1991, in Appeal No.1990-TNC-A- 18 and Judgment and order dated 22.5.1990 passed by the Tahsildar, Osmanabad infile No.89-TNC-CR-49 be quashed and set-aside. "

4. I have heard the learned Advocates for the petitioners and the learned AGP, initially on 22.6.2017. Since the Advocate for respondent No.1, who are the contesting parties Viz. Prabhakar Shivappa Mahabole, Lalsing Budha Rathod and Hariba Budha Rathod in these two petitions, remained absent, I called upon Mr. Satyajit Bora and Mr. Anand Bhandari, learned Advocates to assist the Court as Amicus Curiae.

5. I have considered the submissions of all the learned Advocates and have gone through the record available. The issue before this Court is, as to whether the declaration of protected tenant would become ineffective, as the said tenant failed to pay the purchase price that was fixed, within the time prescribed by law and refused to take possession of the land at issue. So also, whether the Petitioners have any locus-standi to resort to litigation in the facts of this case.

6. The petitioners have relied upon the Judgment of this Court in the matter of Shaikh Noor S/o Shaikh Kathu versus Shaikh Rasool S/o Shaikh Hasan (BCR-1988-3-311) and Hanmantrao S/o Vithalrao versus Bhimrao S/o Govindrao others (1983 (1) Bom C.R.30).4

7. Mr. Bora and Mr. Bhandari learned counsel have placed reliance upon the Judgment of the learned Division Bench of this Court in the matter of Ganpat Sakharam Deshmukh versus Yeshwant Digambar Deshmukh (2000 (1) Mh. L.J. 126) and the Judgment of this Court in the matter of Datta Manika Dhobi versus Dattatraya @ Dattopant s/o Ganpatrao Kulkarni (2003 (3) Mh.L.J. 393).

8. The facts in both the cases are quite peculiar.

9. The land at issue falls in Survey Nos.240, 243, 244 and 245. Shivappa Mahabole was the original tenant, who was declared as a protected tenant (DPT) on 1.2.1957 by following the due process of law under section 38E of the Hyderabad Tenancy & Agricultural Lands Act, 1950. After this declaration was made, the price of the land was fixed. Shivappa was obliged to pay the first installment in 1960 and the second installment in 1961. It is so happened that Shivappa has neither paid the amount, nor has the said amount been recovered by the revenue authorities as arrears of land revenue though an attempt was made by the Revenue authorities.

10. For the sake of ready reference section 38E is reproduced as under:-

" 38E. Notwithstanding anything in this chapter or any law for the time being in force of any custom, usage, decree contract or grant to the contrary, the Government may, by notification in the (Official Gazette), declare in respect any area and from such date as may be specified therein that ownership of all lands held by protected tenants which they are entitled to purchase from their landholders, in such area under any provision of this Chapter shall stand

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transferred to any vest in the protected tenants holding them and from such date the protected tenants shall be deemed to be the full owners of such lands:

(Provided that the transfer under this sub-section shall be subject to the condition''s (a) and (b) mentioned in sub-section (7) of section 38 and the further condition that the extent of the land remaining with the land-holder after the purchase of the land by the protected tenant, whether to cultivate it personally or otherwise, shall not be less than twice the area of family holding:

Provided further that where in respect of any such land, any proceeding under sections 19, 19A or 32 is pending on the date so notified, the transfer of ownership of such land shall take effect on the date on which such proceeding is finally decided and the tenant retains possession of the land in accordance with the decision in such proceeding.

(Explanation. - If a protected tenant, on account of his being dispossessed otherwise than in the manner and by order of the Tahsildar as provided in section 32 is not in possession of the land on the date of the notification issued hereunder then for the purpose of the sub-section, such protected tenant shall notwithstanding any judgment, decree or order of any court, or the order of a Revenue Board of Revenue Tribunal or other authority, be deemed to have been holding the land on the date of the notification, and accordingly, the Tahsildar shall notwithstanding anything contained in the said section 32, either suo motu or on the applications of the protected tenant hold summary enquiry and direct that such land in possession of the land holder or any person claiming through or under him in that area, shall be taken from the possession of the land holder or such person, as the case may be, and shall be restored to the protected tenant and the provisions of this section shall apply thereto in every respect as if the protected tenant had held the land on the date of such notification with the modification that in sub-section (8) for the words, figures and brackets "Within 90 days from the date specified in the notification under sub-section (1)" the words, figures and brackets, "Within 90 days from the date of restoration of the possession under the Explanation to sub-section (1) shall be substituted. "

(2) A certificate in the prescribed form declaring him to be owner shall be issued by the Tahsildar to every such protected tenant and notice of such issue shall simultaneously be issued to the landholder. Such certificate shall be conclusive evidence of the protected tenant having become the owner of the land, with effect from the date of the certificate as against the landholder and all other persons having any interest therein:

Provided that when the land held by a protected tenant happens to be an " Inam" the Tribunal shall not issue such a certificate unless the previous sanction of the Government has been obtained.

(3) Within 90 days from the date specified in a notification under subsection (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

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price of his interest in the land which has been transferred to the ownership of a protected tenant under sub-section (1) (and if an application is not so filed within such period by the 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 (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 percent, per annum and the land revenue paid by him, if any, after deducting therefrom the rent for the period. "

11. As the DPT Shivappa failed to pay the fixed price, he was issued with a notice for taking possession of the land. 18.2.1962 was the date on which the Nayab Tahsildar - Land Reforms, Taluka Tuljapur along with three witnesses/Panchas Viz. Prabhakar Bapurao Pudale, Nivrutti Shivram Nagane and Ahemad Husain Lade were present at the site. Shivappa has also participated in the proceedings. When the Nayab Tahsaildar called upon Shivappa to take possession of the land, he stated that he does not want the possession, because the land is not fertile. He refused to take possession or pay the price and the Panchanama dated 18.2.1962 was prepared in his presence.

12. The Security Sheet for Verification of Refusal of Possession cases by DPT under section 38E(1) explanation, indicates that the Deputy Collector called upon Shivappa to remain present for confirming his refusal to take over the possession. Despite passage of six months, Shivappa remained absent, though he was served with the summons. The Deputy Collector, therefore, passed an order on 16.12.1964 that, the declared protected tenant (DPT) Shivappa Vithoba has refused to take possession.

13. In 1989 which is after about 32 years from the date of fixing of the price of the land, Prabhakar Shivappa i.e. the son of the deceased DPT Shivappa approached the Tahsildar by filing an Application, contending that he is the successor in title and should be handed over the possession of the land, as he is willing to pay the price of Rs.100 for land in survey No.243, Rs.65 for the land in survey No.241 and as such was willing to pay the total price of Rs.165/-. The Tahsildar, by order dated 22.5.1990 allowed his application and granted the land admeasuring 11 acres, 11 gunthas in survey No.241 and 3 acres 9 gunthas in survey No.244 and the complete land survey No.243 to Prabhakar Shivappa, said to be a total of about 30 Acres for Rs.165/-.

14. The petitioners herein moved an Appeal, challenging the order to the extent

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of the land in survey No.241. Similarly, Madhav and nine others filed their Appeal with regards to land survey No.240, 243 and 244. The Deputy Collector - Land Reforms took up both the Appeals together for hearing and by the Judgment dated 12.8.1991 dismissed the appeals and the order of the Tahsidlar was upheld. It was concluded that the first order was of 1957 whereby Shivappa was a declared protected tenant and that the appellants were trying to challenge the declaration which was 35 years old and hence the appeals were without merit. It was recorded that the original land holders have illegally sold and transfered the land in the name of the appellants.

15. The petitioners, in the first and second petitions filed their revision applications before the Maharashtra Revenue Tribunal bearing No.135 and 117 of 1991, respectively. By common judgment dated 31.1.1992, the Revision Petition filed by Madhav and eight others was allowed and the Revision Petition filed by Bharat and Abhay was dismissed. The Maharashtra Revenue Tribunal concluded that the original owner of the disputed land bearing survey Nos.240, 243, 244 and 245 Bhagirathibai w/o Ganesh Kulkarni and Shivaji, were in actual possession of the land. Madhav and eight others purchased the land from the land lady through registered sale deed and they were put in possession of the land as bonafide purchasers. The sale deeds were registered. It is contended that they were still in possession and were cultivating the land. The Tahsildar had never issued notices to Madhav and 8 others before issuance of the sale certificate to Prabhakar Shivappa.

16. It appears that Shivappa was not in possession of the land from 1957 and had subsequently declined to take possession. After 31 years of the declaration by which Shivappa became a protected tenant, Prabhakar Shivappa has come forward and had paid the price fixed in 1959 when the entire land was in possession of Madhav and eight others. Naturally, without issuance of notice to Madhav and eight others, the Tahsildar could not have issued the sale certificate. Shivappa had died in 1979.

17. This Court (Coram: M.P. Kanade, J) in Shaikh Noor Shaikh Kathu Vs. Shaikh Rasool Shaikh Hasan [1988 (3) Bom.C.R. 311] had recorded some what similar facts in paragraph Nos.2, 3, 4 and 5 which read as under:-

" "2. The few facts leading to this petition are....

That the respondent No. 1 and one Kondiba, whose heirs are respondents No. 2 & 3 on record, were declared the owner under the provisions of section 38E of Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as the ''Tenancy Act''). The date of declaration of ownership is May 25, 1957. It further appears that in the exercise of powers under subsection (3) of section 38E of the Tenancy Act the learned Tahsildar fixed the price of the said land at Rs. 4,115.12/in respect of the land Survey No. 61/1 and Rs. 354/in respect of land Survey No. 53/AA. The learned Tahsildar who fixed the price also fixed the specified dates for payment at the specified rates of installments each year.

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Installments is respect of land Survey No. 61/1 for 8 years and in respect of land Survey No. 53/AA are for 12 years.

It appears that 3 notices have been issued prior to the filing of the application and they are dated 31-7-1971, 8-8-1973 and 10-12-1973. In spite of the said notices the respondents did not pay any installment whatsoever. On failure of the payment of the purchase price within the stipulated period, the original owner filed an application on August 26, 1974 under subsection (5) of section 38E of the Tenancy Act for cancellation of ownership rights. Similar application was also made against the original protected tenantKondiba on August 27, 1974. It appears that the learned Tahsildar reviewed the purchase price on August 27, 1971 and fixed it at Rs. 285.20/for land Survey No. 61/1. It is rather surprising to note that the said price is reviewed without any authority of law. Subsection (3) of section 38E of the Tenancy Act itself empowers the Tahsildar to fix the price in the presence of the parties and once the purchase price is fixed the Tahsildar is supposed to pass an order fixing the dates of installments for the payment of the purchase price. Such an order was already passed by the Tahsildar on declaration of the ownership in favour of the tenants. The application filed by the petitioner was dismissed by the learned Tahsildar and Agricultural Tribunal, District Kalamnuri by judgment and order dated September 6,1975. Thereafter, the Dy. Collector, Hingoli dismissed the appeal filed by the petitioners and those orders are confirmed by the learned Member, Maharashtra Revenue Tribunal at Aurangabad. It is that order of the learned Member, Maharashtra Revenue Tribunal is challenged in this petition.

The orders passed by all the authorities appear to be misconceived. The authorities have not taken into consideration the scheme of law under the Tenancy Act and, therefore, committed an error apparent on the face of the record which requires to be corrected by this Court.

3. Shri R.C. Bhadekar, the learned Counsel appearing in support of this petition, contended that the tenants have not paid a single farthing towards the purchase price fixed by the Tahsildar. The respondent No. 1 had paid an amount of Rs. 150/. On April 11, 1975. That payment is also made on the expiry of the date by the Tahsildar. According to Shri Bhadekar the defaults committed by the respondents are more or less admitted by all the three authorities and still erroneously rejected the application.

Shri V.B. Patil, the learned Counsel appearing in support of the respondents, strenuously argued that the respondent No. 1 has paid the purchase price fixed by the Tahsildar somewhere in the year 1971, although late, and therefore, the application against the respondent No. 1 is not maintainable. So far as the respondents Nos. 2 & 3 are concerned none appeared, although served. There is a statement made by respondent No. 3 that she does not want to purchase the land and expressed her inability to pay the price of the land. The respondent No. 2, although served, has not appeared before the lower Courts or pleaded his case.

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4. This Scheme under the provisions of section 38E of the Tenancy Act, is very clear. On the tillers'' day the ownership of the land held by such protected tenant has been transferred under subsection (2) of section 38E of the Tenancy Act and certificate in the prescribed form declaring to be the owners, requires to be issued by the tribunal to every such protected tenant and a notice of such order shall simultaneously be issued to the land holder. Such a certificate shall be a conclusive evidence of protected tenant having become the owner of the land with effect from the date of the certificate. Under sub-section (3) of section 38E of the Tenancy Act a landlord is supposed to make an application for fixing the price within 90 days from the date specified. If the landlord does not make an application in the specified time the Tahsildar is empowered to take proceedings and fix up the purchase price. In determining the purchase price all provisions of subsection (4) to (9) of section 38 would apply mutatis mutandis to such an application. The proviso of subsection (3) further lays down 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. The second proviso further lays down 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. It is useful to refer to subclause 6(d) of section 38 of the Tenancy Act. It lays down thatif 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 subsection (5) or the same is not recovered from him, the purchase by the protected tenant or, as the 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.

The provisions referred to above make it very clear the scheme for the compulsory purchase of the land by the protected tenant. It is a statutory transfer of ownership, and the purchase price is also to be fixed under the said provisions of the Act. In respect of land Survey No. 61/1 the price was fixed in the presence of the parties. The respondent No. 1 agreed to pay the said price of Rs. 4,115.12/in 12 installments each year. That price was fixed on October 27, 1960. It is an admitted fact that till October 27, 1972 the respondent No. 2 has not paid a single farthing towards the purchase price. Somewhere in the year 1971 the learned Tahsildar without any authority of law altered the purchase price fixed by him to Rs. 205.20/. I am unable to appreciate that the Tahsildar could exercise the power to alter the purchase price once fixed in the presence of the parties. There is no provision in the whole Act which empowers the Tahsildar to revise the purchase price. Accordingly the order passed by the Tahsildar and Agricultural Tribunal on August 27, 1971 fixing the purchase price of the land at

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Rs. 285.20/is either arbitrary or without jurisdiction. Therefore, that order has got to be ignored since not sanctioned by law. Even assuming that the subsequent order dated August 27, 1971 was correct, still the said amount was not paid within the stipulated period of 12 installments. The respondent No. 1 had admittedly paid some amount after April 11, 1975. It is, therefore, under the second proviso to section 38E of the Tenancy Act or subsection 6(d) of section 38 the purchase becomes ineffective and the tenants'' right to purchase the land gets forfeited.

Shri V.B. Patil, the learned Counsel appearing in support of the respondents submitted that the State has to recover the purchase price by way of land revenue and in the absence of such procedure being followed by the State the purchase cannot be declared to be ineffective. I am unable to persuade myself to accept this submission. The power to recover the purchase price is also sought by the proviso to section 38E. The first proviso lays down that .....if the protected tenant commits default in respect of installment it shall be recovered by the Government as arrears of land revenue and paid to the landholder. The power is given under the said proviso to the State Government to recover the installments only. That power can be exercised by the Government till the expiry of the period specified. In the instant case that power could have been exercised by the State within 12 years from the date of fixing the purchase price. Admittedly the Tahsildar has not exercised that power till the expiry of the period specified by the Act. The said section does not empower the Tahsildar to extent the period once fixed by the authority.

5. The legal effect of the said proviso to section 38E of the Tenancy Act is that the statutory purchase shall be ineffective and the right to purchase the land by the tenant is forfeited. The petitioner admittedly made an application after 12 years, from the date of fixing the price and the installments thereof. The price was fixed on October 27, 1960. The facts are not disputed by the respondent that they failed to pay the purchase price or any installment within the stipulated period fixed by the Tahsildar and Agricultural Tribunal. In view of those admitted facts the legal consequences must follow viz. declaring that the purchase has become ineffective and the right to purchase the land by the protected tenant or ordinary tenant is forfeited. It is, therefore, the purchase of the land Survey No. 61/1 by the respondent No. 1 has become ineffective and the right to purchase is forfeited. So far as respondents Nos. 2 & 3 are concerned, their purchase also should be declared to be ineffective. They have not paid any amount or installment towards the purchase price. The respondent No. 3 has expressed her inability to pay the amount and to purchase the land. The respondent No. 2 has not appeared to plead the case although served. The conduct of respondents No. 2 & 3 shows that they are not willing to purchase the land. It is, therefore, the declaration of ownership made in their favour shall be ineffective, and their right to purchase the land should also be forfeited. This Court in a reported judgment in Maharashtra Law Journal, 1983 in case of Hanumantrao Vithalrao v. Bhimrao and others Page 434, held that if the protected tenant refuses to purchase the

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land, such a transfer of ownership should be declared ineffective. The respondent No. 2 has made such a statement. Therefore, there is no difficulty in declaring her purchase to be ineffective. So far as the respondent No. 3 is concerned she has not showed her willingness to purchase the land. Further she is not willing to plead her own case in this matter. Even she has not remained present in the Court or engaged any advocate although served. In view of this conduct, the purchase of land Survey No. 53/AA should be declared ineffective, and the right to purchase the land should be forfeited. All the three Courts below had not taken into consideration any of the provisions referred to above and, therefore, there is an error apparent on the face of the record which calls for interference by this Court under Article 227 of the Constitution of India."

18. As such, as the DPT in the Shaikh Noor''s case (supra) had failed to pay the fixed price as on 27.10.1960, the move for obtaining a sale certificate after 12 years was considered to be untenable and the declaration of ownership made in favour of the applicant was held ineffective and the right to purchase the land was forfeited.

19. In Hanmatrao s/o Vithalrao vs. Bhimrao s/o Govindrao and Ors. [1983 (1) Bom. C.R. 30], this Court held that if the protected tenant refuses to purchase the land, such a transfer of ownership should be declared ineffective. Having not shown the willingness and having not paid the purchase price render the DPT ineligible for purchasing the land.

20. The observations of this Court (Coram: S.J. Deshpande, J) in Hanmatrao''s case (supra) in paragraph Nos.7 to 11 read as under:-

"7. Now the real question that arises for consideration is the effect of the refusal of Govinda to purchase the land and to pay its price. According to Mr. Vaishnav, this does not amount to a surrender and according to him it does not comply with the statutory provides of section 19 of the Tenancy Act. He contended that the statement of Govinda cannot amount to a surrender under section 19 of the Tenancy Act. According to him at best it would be an admission of Govinda and he urged further that this admission would not revert the land back to the land owner. He contended that by operation of law, the ownership was transferred to Govinda and it would not revert back to the landlord by virtue of the admission made by Govinda on 7-3-62 and on 31-5-64 or 1-6-64. Mr. Vaishnav placed reliance upon two rulings of this Court. One is Apparao v. Sadhu . I do not think that this ruling has any application to the facts of the instance case. In that ruling, the question this Court was the question of limitation. In that case a tenant in possession was forcibly ousted from the land. It was held by Abyankar, J., that there was presumption that the tenant remained in possession till ousted in due course of law. The second ruling also is a decision of his Court Bhoomanna v. Nagorao . That rulings is not applicable to the facts of the instance case. Mr. Godhamgaonkar reliance upon the decisions of this Court. One is Anasuyabai v. Sopan . In that ruling, the question for consideration was that the landlord objected to the provisional declaration. The tenant stated on oath that he has

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enough land of his own and he has already surrendered that land before 1950 and he was not interested in the land. It appears that the tenant gave evidence on solemn affirmation that he surrender the land voluntarily. Inspite of this, the courts below gave a decision in favour of the tenant and, therefore, this court interfered with those orders and held that the admission given by the tenant could not be ignored by the Revenue Authorities. This ruling will also not apply to the facts of the instant case. There is nothing in the petition or in the statement of Govinda to the effect that he had already surrender the land. The next ruling is Babanji v. Kachroji . This ruling also relates to a surrender and, therefore, it is not relevant for our purpose.

8. As already stated, the question is of the effect of Govinda''s refusal to purchase the land even after the declaration was made in his favour and to refuse to pay the purchase price for which declaration was made in his favour.

9. Now the scheme of the Act is to confer ownership of agricultural land on tenant cultivating the land. Section 38 which is included in Chapter 4A of the Tenancy Act confer rights on protected tenants to purchase land. Section 38A (i) enables the Tribunal to determine the encumbrance subsisting on the land purchased by the tenant. This is not of important to us in this case. Then section 38A lays down the procedure when reasonable price is agreed to between the landlord and the protected tenant or the ordinary tenant. Section 38B lays down the procedure when the land holder agrees to relinquish the right in favour of the tenant. Section 38C and D are deleted by the amendments made in 1959 and 1965. What is relevant for our purpose is sanction 38E. This section lays down the provisions relating to ownership of land held by protected tenants to stand transferred to them from the notified date. Now I have already stated that there is a declaration of ownership in favour of Govinda under section 38E. Subsection (2) of section 38E lays down that a certificate in the prescribed form declaring the tenant to be the owner shall be issued by the Tribunal to every protected tenant and notice of such issue simultaneously to the landlord. Subsection (3) lays down that within 90 days from the date of notification under subsection (1), the landlord has to apply before the Tribunal for determination of reasonable price and this subsection further lays down that if an application is not so filed within which such period but a certificate under subsection (2) has been issued by the Tribunal, the Tribunal may suo motu proceed to determine such price and thereupon at the provisions of subsections (4) to (9) of section 38 shall mutatis mutandis apply to such application. Then first proviso to subsection (3) lays down that if the protected tenant commits in respect of any installment, it shall be recovered by the Government as arrears of land revenue and paid to the landholder.

10. Then comes important provision containing second proviso to subsection (3) and it runs as follows :

" 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

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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 percent annum and the land revenue paid by him, if any, after deducting there from the rent for the period."

It is this provision, which now arises for my consideration. As already stated, it is clear that although there is a scheme for transferring ownership to the tenant, this second proviso provides that the transfer shall not be effective in the circumstance mentioned in it. Extending this logic further it can very well be said that if a tenant appears before the competent authority at a stage earlier to the fixing of a price and gives in writing and makes a statement on oath before that competent authority that he does not want purchase the land, in my opinion this statement has the same effect as provided in second proviso to subsection (3). As already stated, Govinda gave a written application on 7-3-62 and then made a statement on oath before the Tahsildar to the same effect. Again on 31-5-64 or 1-6-64 he made the same statement before the Tahsildar in the presence of the panchas and thereafter the file was directed to be closed. In my opinion , in view of the refusal of Govinda to purchase the land, the transfer does not become effective.

11. Even if, we consider the panchanama dated 3-5-64 or 1-6-64, Govinda has clearly stated before the Tahsildar in the presence of panchas that he is not prepared to pay the price of the land. Hence this statement clearly falls within the ambit of the second proviso of subsection (3) of section 38E of the Tenancy Act. There is a total refusal on the part of Govinda to pay any price and this includes the price that would be fixed by the Tahsildar. Hence on this count also, the transfer in favour of Govinda becomes ineffective. Unfortunately all the authorities below have not taken this aspect into consideration and have come to wrong conclusion in this respect. In my opinion this writing given by Govinda and the statement made by Govinda on oath on these two dates conclude the whole issue and they go to show that the transfer has become ineffective and, therefore, respondents Nos. 1 to 4 are not entitled to possession of this land."

21. Considering the above observations, this Court concluded that the total refusal on the part of Govind to pay the fixed price and take the possession of the land, would render the transfer in favour of Govind ineffective.

22. In the case in hand as recorded above, Shivappa refused to pay the fixed price and declined to take the possession of the land at issue. As such, there was no sale certificate in favour of Shivappa and it could never be concluded that Shivappa had become the owner of the land. Once purchase by Shivappa had become ineffective, Prabhakar Shivappa was left with no right vested in him by law which he could assert within the frame work of law. The record reveals that till 1964 the Tahsildar and the Deputy Collector had made all efforts to transfer the land in the name of Shivappa and complete the purchase transaction. Installments were granted to be paid by Shivappa in 1960 and 1961. Even this was rendered futile by Shivappa. Even if it is assumed that the State/revenue

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authorities did not take steps to recover the fixed price of the land from Shivappa, the question would be how long can the revenue authorities wait for Shivappa to make up his mind and pay the price, take possession and transfer the land in his name as an owner.

23. There was a difference of opinion on the above issue in between the Judgments delivered by Hon''ble Justice M.P. Kanade and Hon''ble Justice B.N. Deshmukh, who had taken a divergent view in Ganpat S. Deshmukh''s case. The case of Ganpat S. Deshmukh versus Yashawant Deshmukh was, therefore, referred to the larger bench (Learned Division Bench). By Judgment dated 29.11.1999 in the matter of Ganpat Sakharam Deshmukh Vs. Yeshwant Digambar Deshmukh [2000(1) Mh.L.J. 126] (supra), the learned Division Bench concluded that the view taken by Justice M.P. Kanade was overruled.

24. The issue referred to the Division Bench by the learned Chief Justice was as under:-

" (I) Whether the transfer of ownership in favour of the tenant under section 38-E of the Act becomes ineffective merely on the default of payment of the entire purchase price or

(ii) such a transfer would not be ineffective unless the two conditions are satisfied Viz:

(I) the erstwhile tenant fails to pay the entire purchase price and

(ii) in spite of proceedings for recovery by the Tribunal, the purchase price could not be recovered from the said tenant."

25. The observations of the learned Division Bench regarding the effect of the failure of the tenant to pay the fixed price or on failure of the steps taken by the revenue authorities to recover the fixed price amount are noted in paragraph Nos.6 to 9 which read as under:-

"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 subsection (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 subsection (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 subsection (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.

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7. Section 38E 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 38E(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 installments 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 subsection (5) shall make the purchase ineffective under Clause (d) of subsection (6) of section 38. Same is not the case under the provisions of section 38E and the purchase in favour of the protected tenant can be ineffective only under the eventualities stipulated under the proviso of subsection (3) of the said section, as reproduced hereinabove. For making the purchase transfer under section 38E 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 installment, 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 subsection (6) of section 38 of the Act. On the failure of the protected tenant to pay any installment, it is clear that the installment amount has to be recovered by the Government as arrears of land revenue as per the first proviso under sub- section 3 of section 38E 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 38E 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 38E. Though subsection (3) states that the provisions of subsection (4) to (9) of section 38 shall "mutatis mutandis" apply, that does not mean that the provisions of subsection (6) of section 38 are made applicable suo

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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 v. State of Orissa, : [1983] 2 SCR 363 .

8. Both sections i.e. 38 and 38E are required to be read independent of each other, specially when section 38 applies for both protected as well as ordinary tenant and deals with a voluntary act on the part of the tenant and the landlord and section 38E deals with the statutory right of ownership automatically from the date notified by the Government in favour of protected tenant alone and there is no role assigned to the landholder except to apply for fixation of a reasonable price. To make transfer under section 38E effective, the provisions of subsection (3) of the said section alone will apply and the provisions of Clause (d) of subsection (6) of section 38 do not come into play at all. Both the provisions apply in the case of respective purchase transfers independently and it cannot be read that for declaring the purchase transfer under section 38E as ineffective the provisions of Clause (d) of subsection 6 of section 38 would apply.

9. We, therefore, agree with the view taken by Shri B.N. Deshmukh, J., and we are of the opinion that the view of Shri Kanade, J., is not a good law. The reference is answered accordingly and we hold that for declaring the purchase transfer under section 38E of the Act as ineffective, two conditions are essential viz. :

(i) tenant commits a default in the payment of entire purchase price ; and

(ii) inspite of the proceedings for recovery, the entire price amount could not be recovered;

The reference is answered accordingly."

26. Learned Division Bench, therefore concluded, as in the reproduced paragraph No.9 above that the purchase transfer under section 38E would be ineffective if the two conditions i.e. the tenant commits a default in the payment of entire purchase price and in spite of the proceedings for recovery, the entire price amount could not be recovered.

27. The learned single Judge (B.N. Deshmukh, J) while referring the issue to the larger bench in Ganpat Sakharam (supra) had observed that if the tenant expresses his inability to pay the amount and purchase the land, the revenue authorities have to recover the land price as arrears of land revenue from the tenant and pay the amount to the land holders. In case, the price due to the landlords cannot be recovered as arrears of land revenue, then the transfer shall become ineffective by virtue of the second proviso to subsection 3 of Section 38-E.

28. In that matter, the price of the land was fixed on 18.12.1959 and six installments commencing from 1.4.1960 were granted. The tenant failed to make the payment of any installment. On 22.10.1974 the landlord made an application

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for recovery of the purchase price. The DPT was in possession of the said land and that was sought to be recovered by the original landlord. The revenue authorities had not taken any step to recover the price of the land as arrears of land revenue. Considering that the tenant was still in possession of the land and the land price was not recovered by the revenue authorities as no steps were taken, this Court finally concluded in Judgment dated 4.3.2003 in Ganpat Sakaharam''s case that the revenue authorities may initiate steps to recover the price along with interest from the tenant and if that exercise fails, then only the transfer can be declared ineffective.

29. I have myself called for the file in Writ Petition No.54/84 wherein, this Court (B.N.Deshmukh, J) had delivered the Order on 17.11.1987. After the learned Division Bench answered the issue referred to it by Judgment dated 29.11.1999, this Court (A.P. Deshpande, J) decided the case on 4.3.2003. The conclusions in the said Judgment in paragraph Nos.2, 3 and 4 read as under:-

" 2. In the present case, it is admitted position that no efforts ere either made for recovery of the price fixed as arrears of land revenue and in the absence of which, the declaration under section 38E cannot become ineffective.

3. The M.R.T., whose order is called in question by this petition, has remanded the matter to the Tahsildar and directed to limit the scope of his enquiry only to the extent of recovery of price fixed along with interest. It further directed that if the said amount cannot be recovered as arrears of land revenue, then only the transfer can be declared ineffective.

4. The order passed by the M.R.T. being in tune with the reference Judgment delivered by the Division Bench of this Court and as such, deserves to be confirmed. The instant petition, is devoid of any merit and the same is dismissed. Rule is discharged. There shall be no order as to costs. "

30. The learned single Judge of this Court (A.B. Naik, J) dealt with a similar issue in the matter of Datta Manika Dhobi (supra). In the said case, the land was transferred to the tenant on 27.5.1957. After the declaration till 1965, the tenant was in possession of the land and in the year 1966, the tenant filed an affidavit before the Tahsildar, expressing his intension not to purchase the land though ownership stood transferred in his favour. It was noted that though the landlord claims that in 1965 the tenant surrendered the land to him, by that time, the tenant had become the statutory owner of the land. It was held that if the landholder claims that he took possession of the land in 1965, then he should have approached the revenue authorities to mutate his name in the revenue record pertaining to the said land. In the absence of such effort by the land holder, it would be difficult to hold that the tenant, after becoming the owner, has surrendered the land in favour of the land holder.

31. The relevant observations in paragraph No.20 of Datta Manika Dhobi (supra) read as under:-

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"20. There are some documents produced on record, such as, statement of the tenant recorded by the Tahsildar on 11th October 1965 whereby the Tahsildar has recorded the statement of the tenant. In the said statement, the tenant has made a statement that he is not interested in taking possession of the land as he has voluntarily relinquished his right. But such an act on the part of the tenant will not disentitle the tenant to claim possession of the land. As this statement is recorded much after the transfer of land which was effected on 25.5.1957. This Court in Narayan''s case (supra) noted the importance of Section 38E. It is to be noted that scheme of the Tenancy Act is to protect the tenant and even in cases when the tenant failed to pay the price or refused to purchase the land, the authorities has to proceed in accordance with the provisions of the Act. Merely because the tenant refused to purchase the land or take the possession of land, does not mean that the landlord is entitled to possession of land so declared in favour of the tenant. From the record, it is clear that the date of vesting of the land in favour of the tenant is 25th May 1957 and since 1957 the tenant has become the owner of the land and the tenant by any means cannot surrender the lands in favour of the landlord. It is to be noted that how the tenant can surrender his right of tenancy is also governed by the Act. No proceeding as required under the Act regulating surrender has been taken by the landholder and placing reliance on the affidavit filed in 1965, cannot be called as valid surrender. The proceedings which are relied on by the landholder are that of 1965, as surrender itself void ab initio that by itself gives any right to the landholder to contend that he received possession as the tenant was not willing to continue the possession. In view of this undisputed position the landholder cannot retain the possession of land, because his possession became unauthorized from the notified date. With this backdrop I have to consider the correctness of the order passed by the MRT. I noticed from the record that (i) tenant was a protected tenant (ii) there is declaration in his favour (iii) the price has been fixed (iv) no proceedings for recovery of price as contemplated under section 38 subsection (5) has been initiated by the tenancy authorities.(v) No record is produced by the landlord that any time the tenant has refused to purchase the land and the authorities record the statement to that effect. The act of refusal is to be established as a " fact" and on assumption and presumption no inference can be drawn. It is to be noted that the petitioner is accepted to be the tenant and the statute conforms the ownership on the tenant, the cancellation and / or invalidation of ownership also must be provided by the statute. A statutory right cannot be taken away or given up even by the act of parties, in absence of any positive evidence produced by the landholder that the tenant has refused to purchase the land. The findings so recorded by the MRT is thus without any basis, in view of this aspect, the documents relied on by the landholder which are of the year 1965 cannot be accepted to have any effect on the right of the tenant to get back the possession."

32. I am dealing with these two petitions in my supervisory jurisdiction. The MRT has held that these petitioners have no locus standi to claim any right to the

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lands at issue. The petitioners claim that the purchase transfer is ineffective owing to the facts recorded above.

33. Record reveals that Madhav and 8 others had purchased the same land from Bhagirathibai, original Landlady, on 26.4.1982. Notice was published in the newspaper and objections were called. Nobody had challenged the said sale and even today, the said sale is not questioned by anybody before the Civil Court.

34. Bharat Balbhim and the deceased Abhay Balbhim are the sons of Balbhim Kulkarni. They are cousins of the branch from Bhagirathibai. Whether tenancy could be created against the widow Bhagirathibai, is not an issue before me. However, it appears from paragraph No.2 of the appeal No.1990 TNC-A-14 that, these petitioners have not made a truthful statement that, their father was the original landlord. The petitioners, in both these petitions have no where stated as to how their father Balbhimrao could establish his connection with the land at issue.

35. Record reveals that Shivappa lost his possession voluntarily. He refused to take possession and declined to pay the fixed price. By beating of drums, Shivappa was called upon to appear before the Deputy Collector for confirmation of his refusal. He had the opportunity to pay the fixed price and take possession. He was also issued with summons. Yet he did not appear before the Deputy Collector, who finally confirmed, by order dated 16.12.1964 that Shivappa has given up the possession and does not desire to pay the price. It was thus after about seven years from the declaration as protected tenant, that it was finally concluded by the revenue authorities that Shivappa does not desire to pay and has refused possession of the land.

36. Considering the above, the conclusion of the MRT that these petitioners have no locus standi, cannot be faulted. Both these petitions, being devoid of merit, are therefore, dismissed.

37. Rule is discharged.

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