

(2010) 05 BOM CK 0017

In the Bombay High Court

Case No : Second Appeal No. 20 of 1988

Mahadappa Sangappa Bhange and Others

APPELLANT

Vs

Shivaji Narsu Dhormare (died through L.Rs. Devaibai Shivaji
Dhormare and Others) and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 32M, 85
Limitation Act, 1908 — Article 148, 28
Transfer of Property Act, 1882 — Section 59

Citation : (2010) 5 BomCR 156

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : S.S. Halkude, for the Appellant; S.S. Choudhari, instructed by D.A. Mane, for Respondent Nos. 1 and 2, Legal heirs of Respondent No. 4 and S.P. Urgunde, for the Respondent

Final Decision : Allowed

Judgement

P.R. Borkar, J.—This second appeal is preferred by original Defendant No. 4 Mahadappa, being aggrieved by common judgment and decree passed by the District Judge, Latur, in two appeals i.e. Regular Civil Appeal No. 130 of 1983 and 131 of 1983 decided on 2.1.1988 whereby appeal No. 130 of 1983 filed by plaintiffs (Respondent Nos. 1 and 2 herein) for possession of the suit property was allowed and appeal No. 131 of 1983 filed by original defendant No. 4 Mahadappa (present appellant) challenging the finding of the trial court on issue No. 1 holding the plaintiffs to be the owners on title of the suit land was dismissed. Said two Regular Civil Appeals were directed against the judgment and decree of the Joint Civil Judge, Junior Division, Ambajogai in Regular Civil Suit No. 338 of 1975 decided on 28.8.1980. Plaintiffs had filed first appeal because the trial court had dismissed their suit for possession, and defendant No. 4 had filed first appeal because it was held by the trial court that the plaintiffs had superior title and that defendant Nos. 1 to 3 (present respondent Nos. 3 to

5) had no title to the suit property and they could not have created tenancy in respect of the suit property in favour of defendant No. 4-appellant herein.

2. At this stage itself, it may be made clear that pending this appeal, five brothers of Mahadappa were joined as appellants and thereafter four out of six brothers compromised the matter with original plaintiffs (Respondent Nos. 1 and 2 herein). However two of the brothers refused to compromise the matter and they wanted to pursue the appeal. As a result, those four brothers, who wanted to compromise the matter, were transposed as Respondents and those two brothers who did not want to compromise the matter and prosecute the appeal, were continued to be the appellants.

3. For proper appreciation of the core issue involved in this case, it is necessary to reproduce in brief some part of the pleadings giving rise to this second appeal as under;

Present Respondent Nos. 1 and 2 (original plaintiffs) filed R.C.S. No. 338 of 1975 for possession of western one half portion of survey No. 68 ad-measuring 31 acres 36 gunthas of village Harwadi, Taluka Ambajogai, District Beed. They averred that Survey No. 68 was their ancestral property. The said property was divided into two parts i.e. survey No. 68A and 68AA. It is the western side 1/2 portion of Survey No. 68 i.e. Survey No. 68A which is the subject matter of the suit (hereinafter referred to as "the suit property."). It is stated that the suit property was initially given by father of the Plaintiffs (Respondent Nos. 1 and 2) by oral mortgage to one Sonabai w/o Ramprasad in 1332 Fasli (i.e. 1923 A.D.) and on the basis of said oral mortgage she became possessor of the suit property. The father of the Plaintiffs (Respondent Nos. 1 and 2) expired in 1350 Fasli. At that time, the plaintiffs were minor. Subsequently, Sonabai w/of Ramprashad Awasthi took one Bhagwanprashad in adoption. She died in 1342 Fasli. Laxmnaprashad, the natural brother of Bhawanprashad, became possessor of the suit property. It is stated that since the death of Sonabai in 1342 Fasli till 1348 Fasli, Laxmanprashad continued to be in possession. In 1348 Fasli, father of the plaintiffs (respondent Nos. 1 and 2) gave entire survey No. 68 in mortgage for Rs. 1000/= to one Sakharam Dhanorkar for a period of nine years. At that time, mortgage in favour of Sonabai Awasthi was redeemed and Sakharam Dhanorkar continued to be in possession of the said property. It is further stated that in 1357 Fasli (1947 A.D.) the period of mortgage of Sakharam was over and the maternal uncle of the plaintiffs gave the entire property for cultivation to one Santram s/o Rama Babhulgave for a period of five years and thereafter to one Bhaurao s/o Vithalrao Mane for three years on crop share basis.

4. In paragraph 7 of the plaint, it is stated that in 1954 A.D., the plaintiffs came to reside at village Harwadi from the house of their maternal uncle. They were also to procure implements and bullocks for cultivating the land and, therefore, for Rs. 2000/= western side half portion of survey No. 68 was given by oral mortgage to Defendant No. 1 Bansiprashad who was brother of Laxmanprashad referred to above and thus Bansiprashad became possessor of the suit property.

It is stated that since the family of Bansiprashad and Laxmanprashad was an influential family, they got their names entered in the revenue record on the basis of mortgage and showed the name of father of defendant No. 4 (present appellant) as tenant in respect of the suit property. From 1957 onwards, the disputes arose over tenancy rights, but the plaintiffs-Respondent Nos. 1 and 2 remained quiet until the period of 20 years of mortgage was over. In the meantime, Respondent Nos. 3 to 5 (original Defendant Nos. 1 to 3 in present suit) filed R.C.S No. 202 of 1966 against Mahadappa-appellant herein (defendant No. 4 in present suit) and his brothers. That suit was decreed on admission. So, the present appellant Mahadappa was under impression that the dispute over tenancy was over and therefore he waited for period of mortgage to over. It is further stated that after decision in R.C.S. 202 of 1966, present appellant Mahadappa (Defendant No. 4) and his brothers again started tenancy proceedings and in October 1973 they obtained possession over survey No. 68A. It is stated that since the plaintiffs-respondent Nos. 1 and 2 were not parties to the said tenancy proceedings, the decisions in those proceedings were not binding on the plaintiffs. After the period of mortgage was over, they became entitled to get possession of the suit property on the basis of title. In paragraph 11 of the plaint, it is specifically stated that the cause of action to file the suit arose only after the period of oral mortgage was over in June 1974. In the circumstances, the suit was filed for possession simplicitor.

5. Defendant Nos. 1 to 3 Bansiprashad, Sudarshanprashad and Rameshlal (present Respondents 3 to 5) filed their common written statement at Exhibit 2. They stated that the plaintiffs (respondent Nos. 1 and 2 herein) were not the owners and possessors of the suit property. The father of the plaintiffs had never mortgaged the suit property in favour of Sonabai Awasthi. All averments of the plaintiffs regarding oral mortgages or redemptions of the same or regarding giving the suit property on crop share basis to Santram Babhulgave or Bhausahab Mane are false. It is, however, admitted that R.C.S. No. 202 of 1966 was filed and was decreed. It is denied that in 1954, the suit property was given on mortgage to Defendant No. 1 Bansiprashad and he got his name entered in revenue record by using influence. In paragraph 5 of the written statement, it is further stated that present appellant Mahadappa (defendant No. 4) was declared as tenant-purchaser under the provisions of the Hyderabad Tenancy and Agricultural Lands Act ("The H.T. & A.L. Act" for brevity's sake) and was put into possession of the suit property along with his brothers as per the provisions of Section 38E(1) of the H.T. & A.L. Act. However, regarding the same writ petition had been filed in the High Court and the same was pending. It is further stated in paragraph 7 of the Written statement that the declarations under H.T. & A.L. Act or decision by tenancy authorities cannot be challenged by the plaintiffs in the civil court and those are binding on the plaintiffs. It is also stated that Defendant Nos. 1 to 3 (Respondent Nos. 3 to 5 herein) are unnecessarily made parties to the suit. It is stated that in fact, defendants No. 1 to 3 are the owners of the suit property. In paragraph 15 of Written statement, it is further stated that name of

father of present appellant Mahadappa (defendant No. 4) and after his death name of the appellant were wrongly mentioned in tenancy register and they were wrongly declared as tenants. On the basis of these pleadings, it is prayed that the suit be dismissed.

6. Present appellant Mahadappa (original defendant No. 4) filed written statement at Exhibit 34-B and denied that original plaintiffs (Respondent Nos. 1 and 2 herein) or their father was ever owner of the suit property or the suit property was ever given in mortgage or on crop share basis to anybody else. It is, however, admitted that original defendant No. 1 Bansiprashad (Respondent No. 3 herein) had filed R.C.S. No. 202 of 1966 and it was decreed. It is denied that wrongly the name of Bansiprashad was entered in revenue record as owner. It is stated that the suit property had been in possession of Defendant No. 4 Mahadappa (present appellant) and his brothers and mother. It is further stated that the rights of present appellant Mahadappa (defendant No. 4) declared under the H.T. & A.L. Act cannot be challenged by plaintiffs in the civil court and the decisions of tenancy authorities are binding on the plaintiffs (respondent Nos. 1 and 2). If at all the plaintiffs want possession of the suit property, they should approach tenancy court. The civil court had no jurisdiction and, therefore, the civil suit be dismissed. It is stated that in R.C.S. No. 202 of 1966 under false promises, false statements of defendants were recorded. The father of the appellant Mahadappa (defendant No. 4) was declared as tenant and the revision petition against the same was pending in the High Court. Civil court cannot extinguish tenancy rights. The appellant Mahadappa-defendant No. 4 and his father had been in possession for 50 years. It was, therefore, prayed that the suit be dismissed.

7. The trial court framed various issues and it came to the conclusion that though the plaintiffs proved their title over the suit property, they failed to prove that the suit property was given in oral mortgage to Defendant No. 1 (Respondent No. 3) in 1954. The trial court, although dealt with issue No. 3 whether the tenancy of defendant No. 4 Mahadappa (appellant herein) over the suit land is binding on the plaintiffs, has not answered the said issue saying that mortgage was not proved. The Court held that the plaintiffs were not entitled to possession. The suit for possession was therefore, dismissed, by holding that though the plaintiffs were entitled to possession of the suit property, civil court could not give delivery of possession, in view of declaration u/s 38-E(1) of the H.T. & A.L. Act which stands in the way and civil court cannot surpass it. It was therefore, held that giving possession of the suit property was beyond jurisdiction of the civil court as is evident from observations at the end of paragraph 27 of the judgment.

8. The District Court, however, held that the plaintiffs (respondent Nos. 1 and 2 herein) were having absolute or superior title over the suit property since the mortgage which was oral, is not binding, valid mortgage. The mortgagee i.e. present Respondent Nos. 3 to 5 (original defendant Nos. 1 to 3) were not entitled to induct present appellant Mahadappa (defendant No. 4) as tenant. The learned

District Judge held that the Civil Court has right to decide civil rights and, therefore, the learned District Judge decreed the suit and passed the decree for possession.

9. This second appeal is admitted by order dated 17.2.1988 on substantial questions of law involved in ground Nos. 6 and 9 of the appeal memo which read thus;

6. In view of the finding that the Appellant is to be protected tenancy of the Appellant, which had remained unchallenged, and as such final and binding, the learned District Judge committed an error of law in allowing the discussion on this point, which would lead to multiplicity of litigation on the same point which has been decided earlier.

9. The learned District Judge committed an error of law in not accepting the conclusiveness of a certificate u/s 38-E of the Act, which has been aimed at by the statute. Non observance of the presumptions in law is a substandard (substantial) question of law.

10. Shri S.S. Halkude, learned Counsel for the appellant submitted that the first appellate court failed to appreciate that though original mortgage was not written and registered as required under the provisions of the Transfer of Property Act, still the plaintiffs have, by specific pleadings in para.7 of the plaint, admitted that original Defendant No. 1 Bansiprashad was put in possession of western side half portion of the property in 1954 as mortgagee for a period of 20 years for mortgage amount of Rs. 2,000/=. So, possession of Defendant No. 1 Bansiprashad (Respondent No. 3) cannot be said to be unlawful or that of trespasser as has been wrongly held by the first appellate court. Reading of entire paragraph 7 of the plaint makes it clear that in spite of knowledge of tenancy proceedings and delivery of possession of the suit property to the appellant's father as a tenant, original plaintiffs (Respondent Nos. 1 and 2) kept quiet on the premise that 20 years period of mortgage was to over. It is also specifically mentioned in paragraph 8 of the plaint that as a result of decision in tenancy litigation, in October 1973 present appellant Mahadappa (defendant No. 4) and his brothers obtained possession of the suit property. So, pleadings in paragraphs 7 and 8 of the plaint clearly indicate that the plaintiffs (Respondents No. 1 and 2) were fully aware of the tenancy proceedings, but they kept quiet because mortgage period of 20 years was yet to over and that is why in para.11 of the plaint, it is specifically stated that after the mortgage period was over, the cause of action had arisen in June-1874 for getting possession. One thing is very clear from the parties are bound by their pleadings and they are not allowed to lead evidence contrary to the pleadings and if there such evidence, the same has to be ignored as being improvement over and above the pleadings. The only reason given in paragraph 10 of the plaint is that since the plaintiffs/respondent Nos. 1 and 2 and their father were not parties to the tenancy proceedings, decisions in those proceedings were not binding on them. Even assuming that it was not a legal mortgage, still possession of Defendant No. 1/Respondent No. 3

Bansiprashad cannot be said to be of a trespasser, as it was a permissive possession which is relevant when we consider the provisions of the H.T. & A.L. Act.

11. Shri S.S. Halkude, learned Counsel for the appellant argued that though the original mortgage was oral and not written and registered, still we find entries in revenue record regarding right of Defendant No. 1/Respondent No. 3 Bansiprashad as back as in the year 1954. He referred to Exhibit 59/C which is a Pahani Patrak of the year 1954 A.D. in which name of Defendant No. 1/Respondent No. 3 Bansiprashad was shown as Shikmidar. The word "Shikmidar" is defined in Sub-section (12) of Section 2 of the Land Revenue Act of His Exalted Highness the Nizam's Dominions, 1318 Fasli (No. 8 of 1317 Fasli), which reads:

2(12) "Shikmidar" signifies the person who like a "Pattadar" possesses a right to the land or who from the beginning has been jointly in possession with the Pattadar or who before the promulgation of this Act, by virtue of any rule in force, has acquired the right of a Shikmidar or shall hereafter acquire such right under the provisions of this Act.

12. It is, therefore, argued by learned Advocate Shri Halkude that Shikmidar is no less than Pattadar and, therefore, he cannot be said to be a trespasser as held by the District Court. It is further argued by the learned Counsel that even assuming that there was oral mortgage, it has been accepted by the plaintiffs (Respondent Nos. 1 and 2) as valid and it was acted upon, as stated in the plaint itself, by putting Defendant No. 1 (Respondent No. 3) Bansiprashad into possession and by admitting receipt of Rs. 2000/- by plaintiff No. 1 (Respondent No. 1) and therefore abstaining from challenging the same thereafter.

13. In the case of Lachhmi Narain and Another Vs. Kalyan and Another, , it is held that by virtue of Section 28 of the Limitation Act, 1908, the limited right of mortgagee can be acquired by adverse possession. It can be so acquired even if mortgagee has obtained possession under a void or inoperative mortgage deed. The provisions of Section 59 of the Transfer of Property Act are not in any way affected on account of acquisition of rights by prescription. The rights of the parties can be regulated by law if no valid agreement exists. In the said case, there was an unregistered document and delivery of possession. It was held that the suit for redemption of mortgage created by operation of law is governed by Article 148 of the Limitation Act and the period will run after the expiry of 12 years from the date when possession was taken under such mortgage deed. In the said case, authorities of the Supreme Court and of Privy Council were relied upon. Similar view is taken by Madhya Pradesh High Court in Balkrishan and Another Vs. Mohsin Bhai and Others, .

14. Shri Halkude, learned Counsel for the appellant also relied upon Ram Kumar v. Jagdish Chandra 1952 S.C. 23, wherein the same principle was applied to the agreement of lease. Another case on the same point relied upon is of Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others, . In that

case, grant in favour of Municipal Corporation, though invalid; was held to have acquired status of legal grant by virtue of adverse possession.

15. Relying upon the aforesaid rulings, it is submitted by the learned Counsel for appellant-Mahadappa (original defendant No. 4) that though oral mortgage was initially invalid as not being in writing and not registered, but by efflux of time and by acceptance of the same by the parties and particularly by the plaintiffs in their plaint itself, the mortgage can be treated as a valid mortgage. It is argued that Defendant No. 1/Respondent No. 3 Bansiprashad was shown as Shikmidar and the tenancy created by Shikmidar is equally valid. It is also stated that in the revenue record of 1954 onwards, though name of Defendant No. 1 Bansiprashad was shown, he was never shown as mortgagee or Murtahin which is a Urdu word for english word "Mortgagee".

16. On behalf of the appellant, reliance was also placed on *Saraswatibai Gaiakwad v. Damodhar Motiwale* 2002 (2) ALL MR. 944 (S.C.). In the said case, as paras 2 and 3 disclose; one Narayan Motiwale was the owner of certain pieces of land. He was survived by two children, namely, son Dattatraya and daughter Tarabai. Dattatraya became owner of the property after death of his father. By a registered settlement deed dated 12.1.1927, Dattatraya gave certain pieces of lands to his sister Tarabai for her maintenance during her life time. The settlement deed was for a limited right to be enjoyed by Tarabai during her life time. However, Tarabai leased out one piece of land to a tenant in 1968. Dattatraya filed suit bearing No. 362 of 1969 against Tarabai that he was the owner of the property leased out and not Tarabai and she had a limited interest and, therefore, could not have leased out the land. In the meantime, the tenant applied for tenancy right under the provisions of the Bombay Tenancy and Agricultural Lands Act. In paragraph 17, the Supreme Court observed thus;

17. ...Thus, it is to be seen that a Civil Court does not have jurisdiction to decide matters which are required to be dealt with by the Tribunal under the said Act. Thus, it is only the Tribunal which can decide whether a person is deemed to be a tenant and whether he is entitled to purchase the land held by him. The Civil Court has no jurisdiction to decide such a question. Even if such a question was to be raised in a proceeding before it, the civil Court would have to refer the issue to the authority under the said Act. The Suit would then have to be disposed of in accordance with the decision of the authority. Thus, if the Tribunal fixes a purchase price and issues a certificate then that certificate would be conclusive proof of purchase. The civil Court would then be bound to give effect to the certificate and cannot ignore it.

17. It is argued before this Court that the provisions of the Bombay Tenancy and Agricultural Lands Act are almost para-materia and the trial court was justified and correct in holding that it had no right to question the purchase certificate issued in favour of appellant Mahadappa (defendant No. 4) under the provisions of H.T. & A.L. Act and the first appellate court erred in unnecessarily trying to distinguish and assume jurisdiction which, in fact, it did not have, and directed

dispossession of the tenant. It is also argued that when the rights of the appellant-tenant were confirmed upto the High Court and when it was brought to the notice of the District Court that the matter was pending before the High Court regarding right of purchase by tenant between tenant and original defendant Nos. 3 and 4, the District Court ought to have abstained from exercising jurisdiction.

18. The learned Counsel of respondents No. 1 and 2 (Original plaintiffs) relied upon the case of Kanji Kurji v. Kala Gopal (1957) 59 Bomb LR 846. In that case, in paragraph 4, after referring to the Full Bench ruling, it was held that the view that the tenant of a mortgagee ceases to be tenant upon redemption of mortgage under the provisions of the Bombay Tenancy and Agricultural Lands Act, was a wrong view. However, in the present case, on behalf of respondents/ plaintiffs, it was submitted that there was no valid mortgage and as such Defendant No. 1 Bansiprashad had no right to induct tenant in the suit property. Admittedly, Defendant No. 1 Bansiprashad and defendant No. 4 Mahadappa (present Respondent No. 3 and appellant respectively) were the parties to the tenancy proceedings and the decision between them became final as a result of decision of this Court in Special Civil Application No. 3097 of 1973 (Bansi Prashad and Ors. v. Mahadappa and Ors.) decided on 22.3.1978, the copy of which produced is taken on record and marked "X". It, therefore, no more can be disputed by Defendant No. 1 Bansiprashad or Defendant No. 4 Mahadappa or anyone claiming through them that the sale certificate issued under the provisions of the H.T. & A.L. Act was not binding. In the said special civil application, this Court has considered the decree passed in R.C.S. No. 206 of 1966 and observed in para.8 that in proceedings where the exercise of powers by the Tahsildar is suo motu, technical objections such as misjoinder or nonjoinder of the parties are wholly irrelevant. Ultimately, declaration that Sangappa was protected tenant of land and had acquired ownership right u/s 38E and as such was entitled to get possession of the property was upheld by the court.

19. The learned Counsel for the appellant Mahadappa (Defendant No. 4) relied upon the case of Rama Pandu Gavade v. Ramchandra Vishnu Kulkarni 2007 (2) ALL MR 288. In that case, decree of possession was passed by the Civil Court and execution proceedings were filed. In the meantime, sale certificate, after fixing purchase price, was granted by the Tribunal under the provisions of the Bombay Tenancy and Agricultural Lands Act. It is held that the sale certificate issued by the Tribunal is conclusive proof of purchase. Civil Court is bound to give effect to the certificate and cannot ignore it, whether it is in suit or in execution proceedings. As long as purchase certificate issued by tenancy authorities u/s 32M (of Bombay Tenancy and Agricultural Lands Act) stands, decree obtained cannot be executed in respect of such land. Bar u/s 85 of the Bombay Tenancy and Agricultural Lands Act continues irrespective of fact that tenancy right was not brought to the notice of the civil court. In the present case, the District Court was quiet aware of tenancy right and the purchase

certificate issued in favour of appellant Mahadappa (defendant No. 4).

20. It is argued on behalf of the appellant that the provisions of Bombay Tenancy and Agricultural Lands Act and Hyderabad Tenancy and Agricultural Lands Act are para-materia and, therefore, the District Court committed error in passing the decree for possession. It is also argued that in case it is held that since plaintiffs/respondent nos. 1 and 2 and their father were not parties to the proceedings, the sale certificate issued in favour of appellant-defendant No. 4 is not binding on them, then the remedy of the plaintiffs is to approach the tenancy authorities and get the said statutory sale cancelled.

21. Reliance is placed on behalf of the appellant on the observations in State of Punjab and Others Vs. Gurdev Singh, , wherein it is held that the party aggrieved by invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. It is argued that the civil court has no such jurisdiction in view of bar to the jurisdiction of the civil court.

22. So far as plea of the plaintiffs-respondent Nos. 1 and 2 that their father or they were not parties to tenancy proceedings between Defendant No. 1 and Defendant No. 4 (present respondent No. 3 and appellant respectively) is concerned, the learned Counsel for the appellant relied upon Notes of cases (Note No. 40 whereunder case of Ambadas v. Ahmad Amin 1964 Mh.L.J. 20, is reported). It is a judgment by Division Bench of our High Court in Special Civil Application No. 570 of 1962 under the Hyderabad Tenancy and Agricultural Lands Act decided on 6.3.1963. As per the said decision, a general notification was issued in the official gazette declaring all protected tenants therein as owners of the lands held by them. A certificate in the prescribed form declaring the tenant to be the owner of the suit field was issued on 30.4.1960. On 14.10.1960, a notice was served on the landlord intimating to him that he should attend the hearing for the purpose of fixation of the price of the field in suit. The landlord objected to the fixation of the price and complained, inter alia, that he had not received notice before provisional or final declaration and that there was no proper publication of the notice under the Rules made u/s 97 of the Hyderabad Tenancy and Agricultural Lands Act. It was held that no personal notice is provided either in respect of provisional or final declaration. This ruling squarely applies to the facts of the present case.

23. We may refer to certain provisions of the H.T. & A.L. Act. The term "landholder" is not defined under the Act. The terms "ordinary tenant" and "protected tenants" are defined. Tenancy is defined in Section 2(u) as "relationship of landholder and tenant". "Tenant" is defined to mean an asami shikmi who holds land on lease and includes a person who is deemed to be a tenant under the provisions of the Act. As per Section 2(6) of the Land Revenue Act of His Exalted Highness the Nizam's Dominions 1318 Fasli (No. 8 of 1317 Fasli), "To hold land" or to be a "landholder" or "holder" of land means to be lawfully in possession of land, whether such possession is actual or not. As per

Section 2(z) of the H.T. & A.L. Act, words and expressions used in the said Act but not defined therein shall have the meaning assigned to them in the Hyderabad Land Revenue Act, 1317 Fasli (VIII of 1317 F.). The copy of the relevant provisions of the Act is placed on record. Thus, the word "landholder" used in Section 2(u) of the H.T. & A.L. Act for defining "tenancy" would mean any one who is in lawful possession of the land. In present case, as per plaint para 7, original defendant No. 1 Bansiprashad was put in possession of the disputed portion by way of oral mortgage in 1954 and he had inducted Sangappa, father of present appellant Mahadappa (deft. No. 4) as tenant. Plaint para 7 itself shows that Defendant No. 1 was in lawful possession of the suit property. It was a permissive possession, assuming for a moment that he was not mortgagee in law. So, deft. No. 1 Respondent No. 3 Bansiprashad had every right to induct tenant under the provisions of the H.T. & A.L. Act.

24. Section 5 of the H.T. & A.L. Act, which defines persons who can be deemed tenants, is as follows;

5. Persons deemed to be tenants. -A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the land-holder and if such person is not-

(a) a member of the land-holder's family, or

(b) a servant on wages payable in cash, or kind, but not in crop share or a hired labourer cultivating the land under the personal supervision of the land-holder or any member of the land-holder's family, or

(c) a mortgagee in possession;

Provided that if upon an application made by the landholder within one year from the commencement of this Act to the Tahsildar within whose jurisdiction the land is situate-

(a) the Tahsildar declares that such person is not a tenant and his decision is not reversed on appeal or revision, or

(b) the Tahsildar refuses to make such declaration but his decision is reversed on appeal or revision, such person, shall not be deemed to be a tenant.

[Provided further that a Sub-tenant cultivating any land belonging to another person on the day on which the Hyderabad Tenancy and Agricultural Lands (Second Amendment) Act 1951, came into force shall notwithstanding the fact that the creation of the Sub-tenancy might have been prohibited by any law for the time being in force, be deemed to be lawfully cultivating the land as a tenant for the purposes of this section,]

[Provided also that, any person who, on the date of the commencement of the Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1957 (that is 8th day of June 1958) was cultivating personally any land belonging to another, and

(a) is in possession thereof on the date of the commencement of the Hyderabad Tenancy and Agricultural Lands (Amendment) Ordinance, 1960 (that is, the 18th day of October 1960), or

(b) who has been dis-possessed (otherwise than in the manner and by order of the Tahsildar as provided in Section 32), and the land is in actual possession of the landholder or his successor-in-interest at the date of the commencement of the Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act, 1961, shall notwithstanding that such person did not hold a lease in conformity with the provisions of Sections 6, 7, 8 or 9 as those sections stood immediately before the 8th day of June 1958, be deemed to be tenant for the purposes of this section.]

25. It is stated in the plaint paragraph 7 that dispute regarding tenancy started from 1957 onwards. So, Sangappa must have been inducted as tenant sometime before 1957 and, therefore, he was a tenant within the meaning of Section 5 of the H.T. & A.L. Act. Section 5 does not say that it is only the owner who can induct the tenant. It can be a land-holder. Pahani-Patrak of 1954 is relevant inasmuch as in said Pahani Patrak Defendant No. 1 Bansiprashad was shown to be a Shikmidar.

26. Section 38-E of the H.T. & A.L. which is regarding ownership of lands held by protected tenants to stand transferred to them from a notified date, lays down that notwithstanding anything in Chapter IV-A or any other law for the time being in force or any custom, usage, decree, contract, or grant to the contrary, the Government may, by notification in the Official Gazette, declare in respect of 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 provisions of Chapter IV-A shall stand transferred to and 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. So, it is a statutory presumption in respect of protected tenants whose names were declared in the official gazette and it does not depend upon terms of contract or even decree to the contrary.

27. At Exhibit 65/C, there is a copy of register of protected tenants from village Harwadi wherein name of Sangappa-father of appellant Mahadappa is shown as protected tenant. As per Sub-section (2) of Section 38-E, a certificate in the prescribed form declaring him to be owners shall be issued by the Tribunal 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. So, Sub-section (2) of Section 38-E makes the certificate of declaration of ownership as a conclusive proof of protected tenant being owner not only against the landholder, but also against all other persons having interest in the land and that includes present Respondent Nos. 1 and 2/original plaintiffs

in our case.

28. As per Sub-section (3) of Section 38-E, 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).

29. We may also refer to Section 99 of the H.T. & A.L. Act. It reads:

99(1). Bar of jurisdiction. [Save as provided in this Act] no Civil Court shall have jurisdiction to settle, decide or deal with any question [including a question whether a person is or was at any time in the past a tenant or protected tenant and whether any such tenant or protected tenant is or should be deemed to be the full owner of the lands] which is by or under this Act required to be settled, decided or dealt with by the Tahsildar, Tribunal or Collector or by the [Commissioner] or Government.

(2) No order of the Tahsildar, Tribunal or Collector or of the [Commissioner] or Government made under this Act, shall be questioned in any Civil or Criminal Court.

30. It is, therefore, abundantly clear that in present case, the trial court was fully justified in holding that it had no right to dispossess the tenant who had been declared owner and given the certificate u/s 38-E of the H.T. & A.L. Act. The District Court clearly exceeded its jurisdiction in entering into the question whether the mortgage was valid or invalid and whether original defendant No. 1 Bansiprashad (Respondent No. 3) had right to induct tenant without considering the fact that as stated in plaint para 7 itself, Bansiprashad, was lawfully put in possession of the suit property. It may be that Defendant No. 1 Bansiprashad may not have rights of mortgagee though recognized by the plaintiffs, but he was definitely in permissive possession of the property.

31. In my opinion, this second appeal must succeed. The tenant, who is in lawful possession of the property and in whose favour declaration of ownership u/s 38-E of the H.T. & A.L. Act is issued and who is declared owner of the property, could not have been dispossessed by order of the civil court as held in the case of Ramu Gavade v. Ramchandra Kulkarni (supra).

32. In the result, this second appeal is allowed. The judgment and decree passed by the learned District Judge, Latur in Regular Civil Appeal Nos. 130 of 1983 and 131 of 1983 is hereby set aside and the decree of dismissal of suit passed by the learned Civil Judge, Junior Division, Ambajogai in Regular Civil Suit No.338 of 1975 on 28.8.1980 is restored. The suit stands dismissed.