IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.1701 OF 2019

Baliram S/o Reva Chavhan]
Aged about 54 years, Occ. Agriculturist,]
Through his Power of Attorney Holder :-]
Shrikant S/o Baliram Chauhan,]
Aged about 30 years, Occ. Self Employed,]
R/o. Near Gajanan Maharaj Mandir,]
Pusad, District – Yavatmal.] …. PETITIONER

VERSUS

1) Gajanan S/o Shekrao Wanjare,]
Aged about 35 years, Occ. Agriculturist,]
R/o. Adegaon, Post Adegaon,]
Tehsil Pusad, District Yavatmal.]

2) Ravichand Dhansingh Rathod,]
Aged about 62 years, Occ. Agriculturist,]
R/o. Gandhinagar, Pusad,]
District Yavatmal.]

3) Rajusingh Dhansingh Rathod,]
Aged about 61 years, Occ. Agriculturist,]
R/o. Adegaon, Post Adegaon,]
Tehsil Pusad, District Yavatmal.]

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4) Asha Rajusingh Rathod,]
Aged about 55 years, Occ. Agriculturist,]
R/o. Adegaon, Post Adegaon,]
Tehsil Pusad, District Yavatmal.]

5) The Tahsildar, Pusad,]
Tehsil Office Pusad, District Yavatmal.] .... RESPONDENTS

Mr. S.P. Dharmadhikari, Senior Advocate with Mr. A.M. Sudame, Advocate for the Petitioner in W.P. No.1701/2019 & W.P. No.6059/2016.

Mr. Bhojraj Dhandale, Advocate in C.P. No.23/2017.

Mr. M.P. Khajanchi, Advocate for the Appellant in LPA No.60/2011.

Mr. Panchakukar Karekar, Advocate, with Mr. Rishi Narkhede, Advocate for Respondent No.1 in W.P. No.1701/2019.

Mr. Dhandale, Advocate for Respondent Nos.l5(a) & 5(b) in W.P. No.6059/2016.

Mr. Hemraj Sakhare, Advocate for the Respondent in C.P. No.23/2017.

Mr. S.M. Ukey, Additional Government Pleader for Respondent No.5 in W.P. No.1701/2019, Respondent Nos.1 and 2 in W.P. No.6059/2016 and Sole Respondent in LPA No.60/2011.

Mr. S.P. Bhandarkar, Advocate, with Ms. Sejal Lakhani, Advocate for the Intervenor.

CORAM : SUNIL B. SHUKRE, A.S. CHANDURKAR AND ANIL L. PANSARE, JJ

Date of Reserving the Judgment : 20TH DECEMBER 2022.

Date of Pronouncing the Judgment : 21ST APRIL 2023.

[In Chamber – Through Video Conference]

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JUDGMENT : (Per SUNIL B. SHUKRE, J.)

1. Heard.

2. By this reference, we have been called upon to answer a question which arises quite often while applying the provisions of Section 3 of the Maharashtra Restoration of Lands to Scheduled Tribes, 1974 *(for short* ***"Restoration Act")*** and which has intrigued legal minds in the State of Maharashtra for quite sometime. For answering the question, a brief reference to the facts of the case would be useful.

3. The petitioner, a non-tribal, is an owner of the agricultural field involved in the petition, which is hereinafter called as 'the land in question'. It was purchased by the petitioner from respondent no.4 vide registered sale deed dated 26.06.1994. The land in question was a part of larger piece of land belonging to father of respondent no.1 late Mr. Shekorao who sold it to one Dhansingh Rathod by executing the sale deed in the year 1968. Dhansing, thereafter, partitioned the land and the land in question came to the share of respondent no.2. Respondent no.2 sold the land in question to the respondent no.4 and thereafter the respondent no.4, on 22.06.1994, sold the land in question to the petitioner and since then the petitioner is in continuous cultivating possession of the land in question.

4. Father of respondent no.1 and for that matter the respondent no.1 belonged to "Andh" tribal community, however, this community came to be

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included in the list of Scheduled Tribe's contained in the Scheduled Tribes Order, 1950 only in the year 1974, insofar as place of residence of Respondent No.1 was concerned. The land in question had been transferred for the first time by father of respondent no.1 in the year 1968 and at that time "Andh" community was not recognized to be a Scheduled Tribe in relation to the certain parts of Maharashtra. The Restoration Act, which provided for protection to a tribal by directing restoration of land from a non-tribal transferee to a tribal transferor, came into force in the State of Maharashtra with effect from 01.11.1975. Realizing that the protection had been conferred upon tribals and having become sure of his status as a person belonging to Scheduled Tribe, respondent no.1, in the year 2016, filed an application before the Respondent no.5, the Tahsildar Pusad seeking restoration of the land in question in terms of Section (3) of the Restoration Act.

5. Respondent No.1 contended that transfer of the land in question by his father, who was recognized to be a tribal subsequently in the year 1974, stood in violation of the provisions of the Restoration Act. The petitioner contested the application, but in vain. The Respondent No.5 allowed the application of respondent no.1 and directed that the land in question be restored to the respondent no.1, and the revenue record be mutated accordingly. He also directed the petitioner to hand over the possession of land in question to the respondent no.1 within 30 days of the date of the

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order. The appeal preferred by the petitioner against this order of respondent no.5 did not prove to be a fruitful exercise for the petitioner as it came to be dismissed on 06.02.2019 by Maharashtra Revenue Tribunal.

6. Being aggrieved, the petitioner is now before the High Court. When the petition was heard by the learned Single Judge, who is part of this larger bench, a question arose, as to whether or not the transfer of land by a tribal to a non-tribal would be affected by section 3 of the Restoration Act, if on the date of such transfer, the tribal was not recognized to be of a Scheduled Tribe and his tribe was subsequently included in the Scheduled Tribe's Order, 1950. The question arose primarily on account of conflict of views in two judgments rendered by two different division benches, one in the case of ***Tukaram Laxman Gandewar Vs. Piraji Dharmaji Sidhalwar by LR's Laxmibai and Ors. 1989 MH.L.J. 815*** and second in ***Kashibai widow of Sanga Pawar and ors. vs. State of Maharashtra, 1993 (3) MH.L.J. 1168***. In Tukaram Laxman Gandewar, a judgment prior in point of time than the judgment in Kashibai, it was held that a transferor would be entitled for restoration of the transferred land under section 36A of the Maharashtra Land Revenue Code, 1966 *(for short **"Code"**)* only if he was a tribal within the meaning of Explanation to Section 36 of the Code on the date of the transaction and this judgment was followed by various learned single Judges in several cases, a reference to which can be found in the referral order. But, in Kashibai the other Division Bench held that irrespective of date on which a tribe is

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recognized as such and included in the Scheduled Tribe's Order, 1950, such tribal-transferor would be entitled to be restored the lands transferred by him under the provisions of the Restoration Act. It was also held that Section 36A of the Code was prospective. The judgment, however, held that provisions of Section 3(1) of the Restoration Act would apply to past transactions. It was further held that the view taken in Tukaram Laxman Gandewar was *per incuriam*.

7. Noticing the conflict of views in Tukaram Laxman Gandewar and Kashibai, the learned single Judge found that the position as it emerged there from was irreconcilable, as on the one hand, the division bench in Tukaram held that the date of recognition of a transferor as a tribal by Scheduled Tribe's Order is relevant and if such recognition is granted after the date of transfer, the transferor would not be entitled to seek restoration of the land in question in terms of Section 36A of the Code and on the other hand, Kashibai putforth a view that the judgment of the division bench in Tukaram Laxman Gandewar was rendered *per incuriam* and further held that Section 3 (1) of the Restoration Act would operate on past transactions between the parties and thus even if a transferor was not a tribal within the meaning of the Restoration Act on the date of the transfer and was subsequently included in the Scheduled Tribe's Order, 1950 by virtue of an amendment, such transferor would be entitled to seek restoration of the transferred land by virtue of the provisions made in section 3 (1) of the Restoration Act.

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8. Learned single Judge, therefore, found it fit to seek resolution of the divergence of views by making a reference to a Bench of two or more learned Judges, if considered appropriate by the Hon'ble the Chief Justice. In doing so the learned single Judge also referred to the view taken by Single Bench at Aurangabad in the case of ***Chandrabhagabai Dhondiba Gutte v/s Ladba son of Narayan Sidarwad and Ors. reported in 2006 (1) MLJ 485***. The view so taken was after referring to the judgment of the Constitution bench of the Supreme Court in the case of ***State of Maharashtra vs. Milind 2001 (1) MH.L.J. (1).*** It was to the effect that a transferor would not be entitled to restoration of the transferred land if on the date of the transfer he was not recognized as a Scheduled Tribe by virtue of his exclusion from the Scheduled Tribe's Order, 1950. Learned Single Judge found that even though a person is born in a tribal community, such person would not get the status of a tribal for the purposes of the Restoration Act till his community is recognized as a Scheduled Tribe. Hence, was framed the question by the learned Single Judge, which we are called upon to answer here. It reads thus :

> *"Whether the subsequent recognition of the transferor as a tribal after transfer of the land would entitle the transferor to seek restoration of possession of land under Section 3(1) of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 as held in* ***Kashibai wd/o Sanga Pawar and ors. Vs. State of Maharashtra, 1993 (2) Mh.L.J. 1168*** *or whether such subsequent recognition would be of no assistance to the tribal transferor as held in* ***Tukaram Laxman Gandewar***

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Vs. Piraji Dharmaji Sidarwar by LRs Laxmibai and others, 1989 Mh.L.J. 815"

9. The question referred to us arises from the provisions made in the Restoration Act, in particular Section 3 thereof. But, as we would see in later part of this judgment, it also has its relation to the explanation to Section 36 of the Code, as amended by Mah. Act 35 of 1974 and Mah. Act 11 of 1976.

10. The legislative history of the Restoration Act, amendments introduced to Section 36 of the Code and insertion of Section 36A in the Code by way of amendment has been discussed in details by the Division Bench of this Court in the case of Kashibai. A brief reference to it would provide to us insight about the issue involved in this reference.

11. The legislative history shows that the Government of Maharashtra had appointed a Committee by its Resolution dated 15.03.1971 to enquire into and report to it, *inter alia,* on how far the provisions of the Code and the relevant Tenancy Acts have been effective in giving protection to persons belonging to Scheduled Tribes and to suggest amongst other things suitable amendments therein, if any of the existing provisions are found to be inadequate. It further shows that Committee submitted its report and recommended that provisions should be made for restoration to persons belonging to Scheduled Tribes the lands which had been duly transferred to other persons. It is further seen that these recommendations were duly

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considered by the Government of Maharashtra and there occurred enactment of the Restoration Act which came into force w.e.f. 01.11.1975 and also introduction of amendment to the Code and further amendment to it by MAH.35 of 1974. By these amendments, Explanation to Section 36 of the Code which defines the concept "Scheduled Tribes" came to be widened in its scope and Section 36A providing for restrictions on transfer of occupancies of tribal came to be inserted in the Code. It is further seen that the intention of the legislation was to confer benefits upon the tribals by restoring their lands, which were transferred to non-tribals during the period mentioned in the Restoration act and imposing restrictions on transfer of occupancies by tribals to non-tribals on or after 06.07.1974, without previous sanction of the Collector or previous approval of the State Government as the case may be.

12. While implementing these provisions of law, difficulties arose such as what would happen if a transferor, not a tribal, who had sold his land to a non-tribal, is subsequently included in the Schedule to the Constitution (Scheduled Tribes) Order, 1950 *(for short the **"Order 1950")*** as a Scheduled Tribe and whether Section 36A of the Code was retrospective or prospective in operation. When these issues reached the High Court through different petitions, conflicting views were expressed. These conflicting views could be broadly divided into two views. One view which emanated from the case of ***Tukaram Laxman Gandewar*** *(supra)*, decided at Aurangabad, is that unless a

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transferror is a tribal as defined in Explanation to Section 36 of the Code on the date of the transaction, he would not be entitled to the benefit of restriction provided under Section 36A of the Code even if, he has been subsequently included as a Scheduled Tribe in the Order 1950. This view has been followed by different Benches of learned Single Judges in cases of ***(1) Lachmanna Maalanna Alurwar Vs. Maharashtra Revenue Tribunal and others, 1992 (2) Mh.L.J. 1139, Gopal S/o Jianna Madrewar Vs. Poshatti S/o Bhojanna Khurd and Others, 1997 (1) ALL.MR 341, (3) Sheikh Mohammed Sheikh Gulab Vs. The Additional Commissioner, Aurangabad 1997 (1) ALL MR 680, (4) Bhujaji Mahadu Ingole Vs. The Additional Commissioner, Auraugabad 1997 (2) Mh.L.J. 261, (5) Chandrabhagabai Dhondiba Gutte Vs. Labda Narayan Sidarwad, 2006 (1) Mh.L.J. 485*** and ***(6) Ravindra Natthuji Dhobe Vs. Member, Maharashtra Revenue Tribunal, Nagpur, 2019 (1) Mh.L.J. 677***. Second view arose from the judgment of a Division Bench at Nagpur in Kashibai. It is that since right to restoration of the land is conferred upon a tribal as defined in the Restoration Act, it is of no consequence as to what status he held when the transaction was actually entered into by him, meaning thereby that even if the transferor on the date of the transaction was not a tribal and subsequently became a tribal, the transaction would be covered by the mischief of Section 3 of the Restoration Act thereby entitling the tribal to get the land restored to him. Same view had been earlier expressed by the learned Single Judge who was part of the bench in Kashibai, in the earlier case of ***Chhotelal Bansilal Awasthi Vs. State***

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of Maharashtra, 1990 (2) Mh.L.J. 766. The view taken in Kashibai was followed by learned Single Judges in some other cases, such as, ***(i) Vimlabai and Another Vs. State of Maharashtra and Another, 2002 SCC Online Bom 790***, ***(ii) Mulchand S/o Ganpat Surpame and Others Vs. Rambhau Gopalrao Ingale (Dead) through Lrs. and Others***, ***(iii) Writ Petition No. 428/2008***, decided on 30.03.2015 and ***(iv) Bapurao S/o Narayan Telrandhe Vs. Shalik Rambhau Sarate and Others, 2004(3) Mh.L.J. 1095***.

13. There was one more case brought to our notice by learned counsel for the petitioner in Writ Petition No. 1701/2019, decided by learned Single Bench after Tukaram and Chotelal but before Kashibai. This was the case of ***Babulal Ramnath Dekate and Others Vs. Shantabai Wd/o Hari Dekate, 1990 (2) Mh.L.J. 679***. The learned Single Judge held that if on the date of Order, 1950, a 'Halba Koshti' of Wardha District was not notified as a Scheduled Tribe under the Order, 1950, he would not be deemed to be a Scheduled Tribe only because the Parliament subsequently amended the Order, 1950 by the Scheduled Castes and Scheduled Tribes Order (Amendment) Act of 1976, thereby conferring the status of Scheduled Tribe on Halba Koshtis of Wardha District. The learned Single Judge reasoned that since the Parliament had explicitly made the operation of 1976 Act prospective, no benefit attached to a Scheduled Tribe can be extended to a person who was subsequently included in the Order, 1950 as a Scheduled Tribe. Similar view was taken by a learned Single Judge of Madhya Pradesh High Court in the case of

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Mangilal and Others Vs. Registered Firm Mittilal-Radheylal Rastogi and Others, AIR 1978 MP 160.

14. It can be thus seen that divergence of views in respect of conferment of benefits of the Restoration Act upon a transferor who was not a tribal as such in law on the date of the transaction is clear and sharp. For resolution of the conflict, it would be necessary for us to consider the relevant provisions contained in the Restoration Act and the Code. The principal Section that is required to be considered is Section 3 of the Restoration Act. Together with it, it would also be necessary for us to examine the definition of the keywords such as "non-Tribal", "Transfer" and "Tribal" provided in Section 2 of the Restoration Act. Such examination would also require making of reference to Explanation provided to Section 36A of the Code. These relevant provisions are therefore extracted to the extent of their relevant parts as below :-

"***The Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974***.

Section 3. Restoration or transfer of lands to Tribals in certain cases.

(1) Where due to transfer -

(a) the land of a Tribal-transferor is held by a non-Tribal-transferee, or

(b) the land acquired in exchange by a Tribal-transferor is less in value than the value of the land given in exchange, and the land so transferred is in

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possession of the non-Tribal-transferee, and has not been put to any non-agricultural use on or before the 6th day of July 1974, then, notwithstanding anything contained in any other law for the time being in force, or any judgment, decree or order of any court, Tribunal or authority, the Collector either suo motu at any time, or on the application of a Tribal-transferor made [within thirty years from the 6th July 2004] shall, after making such inquiry as he thinks fit, direct that –

(i) the lands of the tribal-transferor and non-Tribal-transferee so exchanged shall be restored to each other; and the Tribal-transferor, or as the case may be, the non-Tribal-transferee shall pay the difference in value of improvements as determined under clause (a) of sub-section (4), or

(ii) the land transferred otherwise than by exchange be taken from the possession of the non-Tribal-transferee and restored to the Tribal-transferor, free from all encumbrances and the Tribal-transferor shall pay such transferee and other persons claiming encumbrances the amount determined under clause (b) of sub-section (4):

Provided that, where land is transferred by a Tribal-transferor in favbour of non-Tribal-transferee before the 6th day of July, 1974, after

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such transferee was rendered landless by reason of acquisition of his land for a public purpose, then only half the land so transferred shall be restored to the Tribal-transferor.

Section 2. Definitions.

(1) *In this Act, unless the context requires otherwise -*

(a) ……....................................…

(e) ***"Non-Tribal"*** *means a person who is not a Tribal and includes his successor-in-interest;*

…….............................…

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

(a) *by act of parties, whether by way of sale, gift, exchange, mortgage or lease or any other disposition made inter-vivos; or*

(b) *under a decree or order of a court, or*

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

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Tribal transferee" shall be constructed, accordingly;

(j) ***"Tribal"*** *means a person belonging to a Scheduled Tribe within the meanings of the Explanation to section 36 of the Code, and includes his successor -in-interests;*

The Maharashtra Land Revenue Code, 1966

Section 36. Occupancy to be transferable and heritable subject to certain restrictions –

…………………………………………

…………………………………………

Explanation *– For the purposes of this Section, "Scheduled Tribes" means such tribes or tribal communities or parts of, or groups within, such tribes of tribal communities as are deemed to be Scheduled Tribes in relation to the State of Maharashtra under Article 342 of the Constitute of India [and persons, who belong to the tribes or tribal communities, or parts of, or groups within tribes or tribal communities specified in Part VIIA of the Schedule to the order [made under] the said Article 342, but who are not residents in the localities specified in that Order who nevertheless need the protection of this Section and Section 36A (and it is hereby declared that they do need such protection) shall, for the purposes of those Sections be treated in the same manner as members of the scheduled Tribes.]*

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15. It would be clear that Section 3 of the Restoration Act, a remedial and beneficial legislation, impacts the transfer of land by a Tribal-transferor to non-Tribal-transferee between 1st April, 1957 and 6th July, 1974. It lays down that where due to such transfer of land of a tribal to a non-tribal, the land is in possession of the non-tribal and has not been put to any non-agricultural use on or before 6th July 1974, the tribal would be entitled to seek its restoration by following the procedure prescribed in Section 3 of the Restoration Act. Such restoration can be there even at instance of the Collector taking *suo motu* cognizance of such transfer of land. It would be further clear that in order to qualify for benefit of Section 3 of the Restoration Act, the tribal must be a person belonging to a Scheduled Tribe within the meaning of the Explanation to Section 36 of the Code and includes his successor-in-interest and the non-tribal must be a person who is not a tribal and would include his successor-in-interest.

16. Explanation to Section 36 of the Code indicates that the expression "Scheduled Tribes" means such tribes or tribal communities or parts of, or groups within, such tribes or tribal communities as are deemed to be Scheduled Tribes in relation to the State of Maharashtra under Article 342 of the Constitution of India, irrespective of the area or the place of which they are residents. That only means that when a person who is a resident of a locality not specified in the Order, 1950, in relation to the State of Maharashtra, would also be entitled to be called a person belonging to a

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Scheduled Tribe and thus entitled to the protection granted under Section 3 of the Restoration Act.

17. Section 36 and 36A of the Code also grant protection to the persons belonging to the Scheduled Tribes. Section 36(2) and 36A inserted in the Code by way of amendment by Mah. Act No.35 of 1974, which came into force w.e.f. 06th July, 1974, impose restrictions on transfer of occupancies of the Scheduled Tribes to non-tribals except with the previous sanction of the Collector or previous approval of the State Government as the case may, in the cases specified therein. Although, we are not called upon to interpret effect of these provisions of the Code, we have made a reference to them just to have an idea about the background of definition of the term "Tribal" appearing in Section 2 of the Restoration Act. This term has been defined with the aid of Explanation to Section 36 of the Code and so, a curious mind may ask, why is it so? This inquisitiveness would be satisfied, hopefully, by seeing that Explanation to S.36, which finds it's place by incorporation in Section 2 of the Restoration Act, a subsequent Act, is not a provision picked up randomly to define "Tribal" in the Restoration Act, but is a tool used for uniformly clarifying a concept, an identity of being a tribal, around which a protective seine has been woven in two legislations which are separate in time context but substantially similar in benefit quotient. That apart in Kashibai, the Division Bench held that Explanation to Section 36 of the Code has been incorporated in Section 2(1)(j) of the Restoration Act, and rightly so,

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as Mah.Act No.35 of 1974, which came into force w.e.f. 6th July, 1974 is a previous Act and the Restoration Act, which came into force w.e.f. 1st November 1975, is a subsequent Act. So, any reference to Explanation 36, would necessarily involve examination of it's contextual setting and that is why we have had a cursory glance at Section 36(2) and Section 36A of the Code.

18. This would take us to the rival arguments which are so well informed and so enlightening as to have given us an enriching experience and effective assistance in deciding the controversy involved here. We place on record our appreciation for learned Senior Advocate and learned Advocates who have rendered their assistance to us.

19. The rival arguments that have been made before us are broadly divided into three groups. One group led by Mr. S.P. Dharmadhikari, learned Senior Advocate has submitted that in order to be entitled to protection of Section 3 of the Restoration Act, a tribal, as defined in Section 2(1)(j) of the Restoration Act, must be a Scheduled Tribe as indicated in Explanation to Section 36 of the Code and that would mean that unless and until such person held the status of a Scheduled Tribe on the date of the transaction, such person would not qualify himself to be called a "Tribal" within the meaning of Section 2(1)(j) of the Restoration Act and thus the transfer of land made by him to a non-tribal anytime between 1st April, 1957 and 6th July, 1974 would not be covered by the remedy provided under Section 3 of the

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Restoration Act. This group also submits that since there may have been some transfers of land by the tribals to non-tribals during the period from 6th July, 1974, the date on which Section 36A of the Code was inserted and 1st November, 1975, the date from which Restoration Act came into force and to cover those transactions, Section 36A may have been enacted by an amendment to the Code. We may make it clear here itself that as we are not interpreting Section 36A of the Code in any manner, it is not necessary for us to look into the purpose of Section 36A of the Code, except the aspect of it being a beneficial provision as well. The further argument of this group is that Kashibai, though rightly held Section 36A of the Code to be prospective in operation, it went wrong when it held that just because Section 3 of the Restoration Act would act upon past transactions, it would confer a right upon a person whose community was not a Scheduled Tribe at that time but was made a Scheduled Tribe subsequently, to seek restoration of his land under Section 3 of the Restoration Act.

20. Mr. Dharmadhikari, learned Senior Advocate further submits that Kashibai did not consider the fact that a Scheduled Tribe is a status deemed to be conferred upon a person by his or her inclusion in the Schedule to the Constitution (Scheduled Tribes) Order, 1950 published on 6th September, 1950, which came to be amended from time to time later on. He submits that this would be clear from the definition of the expression 'Scheduled Tribes' given in Article 366, entry No.25, and the provisions contained in

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Article 342 of the Constitution of India. He further submits that this aspect of the matter, a crucial one, was lost sight of in Kashibai and, therefore, it wrongly held that the case of Tukaram decided previously by another Co-ordinate Bench at Aurangabad, as *per incuriam* and *sub silentio* to the extent of it's view that the status of the parties has to be considered at the time of completion of the transfer and that change in status after the transfer, if any, has no relevance and restrictions provided under Section 36A of the Code are not at all attracted in such a case. He further submits that giving retrospective effect to Explanation to Section 36, would be like amending Article 342 and Article 366, entry No.25. This group is joined by learned Advocate Mr. Khajanchi (L.P.A. No.60/2011) and Mr. Giripunje (W.P.No. 6059/2016). For the sake of convenience, submissions put-forth by this group are categorized as opinion "A".

21. Second category of argument led by Mr. S.M. Ukey, learned Additional Government Pleader, is all in support of Kashibai when it is submitted that Kashibai is rightly decided and it rightly held that Tukaram was *per incuriam* and *sub silentio* to the extent indicated above. Mr. Ukey submits that as Section 3 operates upon past actions in the sense that it affects the transfer of lands by a tribal to a non-tribal between the period from 1st April, 1954 and 6th July, 1974 and so not giving of any retrospective effect to the definition of the expression "Scheduled Tribes" appearing in Explanation to Section 36 of the Code would amount to frustrating the object of the

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Restoration Act and intention of the legislature in giving protection to the tribals, who were otherwise a lot exploited by non-tribals, due to their ignorance and backwardness. He also submits that there is no substance in the opinion 'A', which maintains that giving of any retrospective effect to Explanation of Section 36 of the Code, would amount to providing for something not there in Article 342 and Article 366, entry No. 25 of the Constitution and thus in a way amending the Constitution. He submits that as a matter of fact, such an argument cannot be heard by this Court as the point so raised is not within the scope of this reference. We would describe this second category of argument, also joined by learned Advocate Mr.Karekar for respondent No.1 in (W.P. No.1701/2019), for the sake of convenience, as opinion 'B'.

22. The third group of argument comprises Mr. Bhandarkar learned counsel, who made his submission for our assistance. In his opinion, there is not really any conflict between Tukaram and Kashibai as subject matter of interpretation in Tukaram was different than that of Kashibai. He submits that Tukaram considered the effect of Section 36A of the Code while Kashibai interpreted the effect of Section 3 of the Restoration Act. He further submits that Section 36A deals with the occupancies held by tribals and puts restrictions on transfer of occupanices on or after 6th July, 1974 and whereas Section 3 confers a benefit upon the tribals by entitling them to seek restoration of the lands transferred by them to non-tribals during the period

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from 1st April, 1957 and 6th July, 1974. In other words, he submits that Section 3 of the Restoration Act relates to past actions by creating a present right in favour of the tribals and Section 36A of the Code relates to future actions of the tribals w.e.f. 6th July, 1974 and onward by putting the restrictions on the transfer of lands. Therefore, he submits that there could not be seen any inconsistency between the views taken in these two judgments inasmuch as, Section 36A of the Code and Section 3 of the Restoration Act are not in *pari materia* with each other nor are they supplementary and complementary to each other, and to this extent, Kashibai has gone wrong. He submits that although Kashibai rightly held that Section 36A of the Code has a prospective operation, it was wrong in holding that definition of the expression "Scheduled Tribes" given in Section 36 of the Code can be so stretched as to hold a person to be a tribal on the date of the transaction when he was not actually deemed to be a Scheduled Tribe on account of his exclusion as such from the Schedule to the Order, 1950 on the date of the transaction and was declared to be a person belonging to a Scheduled Tribe by his subsequent inclusion in the Schedule to the Order, 1950. He also submits that if it is found that there is any inconsistency between the views in Tukaram and Kashibai, same would have to be resolved by considering the object and purpose of Restoration Act and amended Explanation to Section 36 of the Code and also by dwelling upon the question as to whether or not the amending Act, MAH.35 of 1974 is declaratory or beneficial in nature having or not having retrospective

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operation. For the sake of convenience, we place this line of argument in the category of opinion "C".

23. In order to find out which of the different opinions is in accordance with the legislative intent, thereby helping fulfill the object and purpose of the Restoration Act and hence more appropriate, we would have to examine the scheme of Section 3 of the Restoration Act in the light of the legislative intent disclosed by it, and the applicable principles of law.

24. A careful examination of Section 3 of the Restoration Act would show that entitlement of a Tribal-transferor to seek restoration of the land transferred by him to a non-Tribal-transferee would arise only when the transfer of land has taken place between two living persons, one of whom is a tribal and the other is a non-tribal within the meaning of Section 3 of the Restoration Act. The terms "Transfer", "Non-Tribal" and "Tribal" are assigned specific meanings and their definitions are to be found in Clauses (i), (e)(j) of Section 2(1) of the Restoration Act respectively. "Transfer" has been defined to be a transfer of land belonging to a tribal made in favour of a non-tribal between 1st April, 1957 and 6th July, 1974. The term "Non-Tribal" has been defined as a person who is not a tribal and includes his successor-in-interest. The word "Tribal" has been defined to be a person belonging to a Scheduled Tribe within the meaning of the Explanation to Section 36 of the Code and includes his successor-in-interest.

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25. As stated by us earlier, the Explanation to Section 36 of the Code has been incorporated in Section 2(1)(j) of the Restoration Act and, therefore, the term "Tribal" would have to be understood only by referring to the expression "Scheduled Tribes" used in the Explanation to section 36 of the Code. The expression "Scheduled Tribes" has been defined in the Explanation to Section 36, as amended up-to-date, as meaning such tribes or tribal communities or their parts or sub-groups within them as are deemed to be Scheduled Tribes in relation to the State of Maharashtra, irrespective of area restrictions. The expression "Scheduled Tribes" is defined in Article 366, entry No.25 to be such tribes or tribal communities etc. as are deemed under Article 342 of the Constitution to be "Scheduled Tribes" for the purposes of the Constitution. The tribes and tribal communities or their parts or sub-groups within them can be deemed to be the Scheduled Tribes only when the President, after due consultation, specifies them to be so by a public notification. This shows that a tribal assumes the character of the Scheduled Tribe only upon his recognition to be so by exercise of powers under Article 342 by the President or to put it differently by operation of law. Till the time President does not act and include his tribe in the specified list of Scheduled Tribes, which is under Order 1950, a tribal would remain a tribal only, and would not be of the "Scheduled Tribe" within the meaning of Article 366, entry No.25 r/w. Article 342 of the Constitution. Thus, a tribal, for the purpose of Section 3 of the Restoration Act must be a person recognized as of the Scheduled Tribe under Article 342 of the Constitution.

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26. The expression "Scheduled Tribe" has been coined in Constitution of India with a view to extend various benefits and provide for protection to certain specified tribes and not to all tribes in general. These specified tribes have been referred to as the "Scheduled Tribes" in various provisions made in Constitution of India. As stated earlier, definition of the words "Scheduled Tribes" is given in Article 366, entry No.25. It means to be such tribes or tribal communities or parts of, or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of the Constitution. Article 342(1) empowers the President to specify the tribes or tribal communities or parts thereof or groups within them to be the "Scheduled Tribes" for the purposes of the Constitution. The power of the President under clause (1) of Article 342 to issue on order for specifying the tribes or tribal communities as the Scheduled Tribes is original in nature. It was exercised for the first time when the President made the Constitution (Scheduled Tribes) Order 1950, which was notified on 6th September, 1950. It contains a Schedule giving the list of tribes which are deemed to be the Scheduled Tribes in relation to a particular State or any part thereof specified therein for the purposes of the Constitution. This provision made in the Constitution would make it amply clear that unless a tribe or tribal community or any part thereof or groups within it or them is or are included in the Schedule to the Order issued under Clause-1 of Article 342, the same cannot be called to be a Scheduled Tribe. List of such specified

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tribes notified under Clause (1) of Article 342 came to be amended by Parliament by law so as to add or delete entries thereto or therefrom in exercise of it's power under Clause (2) of Article 342. This would show that concept of "Scheduled Tribes" employed in the Constitution is dynamic and is by way of own devise of the Constitution; is a construct of men of wisdom built to achieve the purposes of the Constitution and is subject to change as time changes. One such change was witnessed when the Order 1950 was amended by the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 which came into force w.e.f. 18th September, 1976, whereby so far as the State of Maharashtra was concerned, area restrictions in relation to some specified tribes came to be removed. There is one more feature of the Order, 1950 which strikes most ones mind, and it is that although there existed many tribes or tribal communities in different States in the year 1950, not all of them found any place in the Schedule to the Order, 1950 and that only some of them were included as the Scheduled Tribes, and in many cases it was so with area restrictions as well.

27. The above referred discussion would enable us to emphatically say that there is a distinction between what we generally understand as a "tribe" and what we would comprehend by the expression "Scheduled Tribe". The word "tribe" is an adjective defined in Cambridge Dictionary as "a group of people, often of related families, who live together in the same area and share the same language, culture and history, especially those who do not live in

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town or cities". In Merriam Webster Dictionary the word "tribe" is defined as "a social group composed chiefly of numerous families, clans or generations having a shared ancestry and language". Thus, the tribe or tribal community is considered to be a separate group of people having distinctive identity, culture, traditions and practices than the groups of people within the main-stream society. But such separate identity as a tribe or a tribal community would not by itself make it to be the Scheduled Tribe, which is an identity given to a tribe or tribal community by Constitutional Provisions. There is of course some controversy amongst Sociologists about the extent to which tribes in India have succeeded in closing their doors to cultural onslaught of Hinduism, a dominant religion, upon them. The truth, however, is that notwithstanding the powerful impact of major cultures of the society, the tribes in general have retained to a great extent their original culture and traditions, so as to maintain their separate identity. There is also a stream of thought amongst Sociologists who say that the distinction between a tribe and main-stream society though exists, may in fact be artificial, made mostly in Indian Censuses carried out by the British in early part of 20th century. We would briefly refer to this thought which came from Professor Dr. G.S. Ghurey.

28. Dr. Govind Sadashiv Ghurye was an Indian academic and a professor of Sociology in Mumbai University. He has done pioneering research work in the field of tribes in India. In his famous work, "The Scheduled Tribes of India" published in 1959, which was second and revised edition of his book,

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"The Aborigines - "So-called" - And Their Future", published in 1943, has found that long ago in India, there were certain groups of people, who were distinct in identity having separate culture than the culture of dominant groups following Hinduism. These groups were referred to as tribes and Professor Dr. Ghurye, in Chapter-I of his book, "The Scheduled Tribes of India" found that the Indian Censuses earlier dealt with them under the religious heading of "Animism", which was changed into the heading of "Tribal Religions" in Census of 1921. Professor Dr. Ghurye has taken stock of various Indian Censuses and has considered opinion of different Census Commissioners in the said book. He has noted that even though attempts were made in various Indian Censuses to make a distinction between groups of people called "Tribes" following "Tribal Religions", there was no justification for they are being separately treated from Hinduism in view of the chorus of opinion pointing to the close similarity between them and those following Hinduism from dominant section of the Hindu society. In his opinion, many of these Tribes, by assimilating cultural traits of Hinduism had become almost homogeneous with Hindu society. Professor Dr. Ghurye, however, also notes in Chapter-I that in modern Hinduism, the special features are undoubtedly Rigvedic, but that is not to be seen in the creeds of the tribes and these peculiar elements of Hinduism have not been incorporated in them. He further writes that the common substratum does subsist in both modern Hinduism and Tribal Religions. Finally, he concludes that the groups of so called Animism and Hinduism, for so much material

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which is either similar or common to both, that demarcation between the two has assumed importance, though it may be thoroughly artificial.

29. Artificial as it may have been in the opinion of Professor Dr. Ghurye, the fact which cannot be denied and which he too admits is that in Indian Society, tribes have always been considered to be groups of people which are not similar in terms of culture, traditions, mores, practices, religion and habitat to those belonging to the main-stream society. Even Prof. Dr. Ghurye admits of their separate and distinct identity and what he disputes is the need for putting them in a religion based category in Indian Censuses, a step taken by the British, owing to their having acquired much of the culture of Hinduism barring Rigvedic substratum. These tribes as separate groups of people, which have preserved their separate identity, exist even today and they go by different names such as, Gond, Madiya, Bhil, Santhal, Korku, Halba, Thakar, Thakur, Kurmi and so on. As many of these tribes were considered to be very backward and in some cases leading primitive life, makers of Indian Constitution thought it fit to incorporate in the Constitution special provisions for conferring benefits and granting protection to them, so that they do not have to suffer for their inability to equally compete with majority section of Indian society which was advanced in development. For this purpose, identification of tribes or tribal communities or their parts or groups within them and notifying them to be entitled for enjoying the benefits given under the Constitution became necessary and that is how the

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concept of "Scheduled Tribes" in Article 366, entry No.25 and inclusion of certain tribes or tribal communities or parts thereof or groups within them in the Schedule to the Order, 1950, issued by the President of India in exercise of the power conferred upon him under Article 342 of the Constitution of India came into being.

30. We have already stated that a perusal of the list of tribes specified in Schedule to the Order, 1950 shows that it is selective in nature and does not include all tribes or groups of people earlier known as "Animistic" or of "Tribal Religions" in the Indian Censuses, in the Schedule to the Order, 1950. It is here that distinction between what is generally known as "Tribe" and what is referred to as "Scheduled Tribe" becomes more clear and it is sufficient to bring home the conviction that a person belonging to a particular tribe would become a Scheduled Tribe only upon inclusion of his tribe in the Schedule to the Order, 1950 and till such inclusion he would only continue to be a member of a tribe but, not the member of a Scheduled Tribe. It would then logically follow that the identity of a tribe would be acquired by a person by an accident of his birth in that tribe, which is considered to be a group of people having culture which is distinct and separate from that of dominant Indian society, while identity as a member of a Scheduled Tribe would be acquired by such person only by operation of law. In other words, membership of a tribe or identity of being a tribal is by natural event while identity of being a member of a Scheduled Tribe is by a

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man-made event. When identity is acquired by natural event like birth which is simply an accident, it is known in a society like India as 'Caste' or 'Tribe' and it exists there since his birth but when it is conferred by the act of men like the Order, 1950 issued under Article 342 or the Constitution (Scheduled Castes) Order, 1930, issued under Article 341 of the Constitution, it is known as "Scheduled Tribe" or "Scheduled Caste", as the case may be, and it operates from the date of it's conferment, and as such, it is a social status acquired by operation of law, and not an identity one gets on birth. Therefore, the identity of being a member of the Scheduled Tribe comes only as a social status conferred upon members of certain tribes or tribal communities or parts thereof or groups within them in the Order, 1950 issued under Article 342 of the Constitution. Till acquisition of such a status, identity of a member of any tribe is only that of a tribal and not of a person having a social status as of the Scheduled Tribe. The Order, 1950 specifying the tribe and tribal communities or parts thereof or groups within them to be the Scheduled Tribes for the purposes of the Constitution is by it's very nature prospective, it being not in the nature of recognising any birth right attached to every tribal as such but about a decision to grant some protection and benefit to some of the tribes selectively by categorising them as "Scheduled Tribes", and so till a notification to that effect is issued, that tribe or tribal community or its parts or sub-group will not qualify to be called the Scheduled Tribe there being, no Schedule whatsoever in existence till then.

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31. Once it is found that identity in the nature of a Scheduled Tribe is a matter of social status conferred upon a person by operation of law and not by any natural event like taking birth in a tribal community, it has to be necessarily found that a tribal-transferor who is the beneficiary of Section 3 of the Restoration Act must be a person belonging to a Scheduled Tribe at a time when the transfer of the land held by him is effected in favour of a non-tribal-transferee. In other words, the social status of a person as a Scheduled Tribe on the date of the transaction and not his natural identity as a member of a tribe is what matters and if he does not possess that status on the date of transaction, he would not be entitled to restoration of his land from the non-tribal. A plain reading of Section 3 of the Restoration Act clearly shows that it was the intention of the legislature that the benefit of restoration be extended only to a person who was a tribal as defined in Section 2(1)(j) of the Restoration Act and that means a tribal who was a person belonging to a Scheduled Tribe as defined in Explanation to Section 36 of the Code. This Explanation clarifies that only such tribes or tribal communities or their parts or sub-groups within them would the "Scheduled Tribes" if they are notified to be the Scheduled Tribes in relation to the State of Maharashtra under Article 342 of the Constitution and which is regardless of the locations of which they are residents in the State of Maharashtra by virtue of Explanation to Section 36 of the Code.

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32. The above referred discussion would show that not only by virtue of the provisions of Article 366(25) and 342 but, also by virtue of Explanation to Section 36 of the Code, a tribal would become eligible to be termed as a person belonging to the "Scheduled Tribe" only when his tribe is included in the Schedule to the Order, 1950 made by the President of India under Article 342 of the Constitution and if his tribe is not included therein, he will only be a tribal simplicitor but not a person belonging to a Scheduled Tribe. The word "Tribal" used in Section 3 of the Restoration Act has been assigned meaning of a person belonging to a Scheduled Tribe as described in Explanation in Section 36 of the Code. Therefore, unless a tribe of a person is included in the Schedule to the Order, 1950, he cannot be called to be a person belonging the Scheduled Tribe and at the most he would be a person of non-Scheduled Tribe. A non-scheduled tribal is not a person who is in contemplation of Section 3 of the Restoration Act for the purpose of getting its benefit and that only means that it is the social status of the tribal as a Scheduled Tribe on the date of the transaction which would determine applicability of the provisions made in Section 3 of the Restoration Act to the transfer of lands envisaged thereunder. If on the date of the transaction, he is not a member of a Scheduled Tribe by virtue of his inclusion in the Schedule to the Order, 1950, he would be simply a non-tribal as defined in Section 2(1)(e) of the Restoration Act and then the transfer of land made by him to a non-tribal would be only be a transaction between a non-tribal and a non-tribal, not hit by the mischief of Section 3 of the Restoration Act. The

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intention of the legislature which can be clearly gauged from plain reading of Section 3 of the Restoration Act is to confer protection and benefits to only those tribals who are Scheduled Tribes within the scheme of Articles 366(25) and 342 of the Constitution and that was the reason why the definition of the term "Tribal" has been linked to the concept of the "Scheduled Tribes" with the aid of Explanation to Section 36 of the Code. There is also a rationale behind it. It is to maintain consistency between constitutional provisions, which grant protection and benefits to only those tribals, who are "Scheduled Tribes" within the meaning of Article 366(25), and the provisions of the Restoration Act. This intention of the legislature fulfils the object of the Restoration Act effectively.

33. The interpretation so given by us to the expression "Scheduled Tribes" receives support from what is held by the Supreme Court in the case of ***State of Maharashtra Vs. Milind and Others, 2001(1) SCC 4***. In paragraph No.11, it has been held that the word "Castes" or "Tribes" in the expression "Scheduled Castes", "Scheduled Tribes" are not used in the ordinary sense, but are used in the sense of the definition contained in Article 366(24) and 366(25). It has been further held that the caste is a Scheduled Castes or a tribe is a Scheduled Tribe only if it is included in the President's Order issued under Article 341 and 342 respectively for the purpose of the Constitution. For the sake of convenience, these observations are reproduced thus :-

> "11. *By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is*

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empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341mutatis mutandis applies to Article 342. The laudable object of the said Articles is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words `castes' or `tribes' in the expression `Scheduled Castes' and `Scheduled Tribes' are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Article 366(24) and 366(25). In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some Orders were issued under the said Articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by Amendment Acts passed by the Parliament."

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34. So, it is clear that for the purpose of extending various benefits and protection to the tribals, certain tribes have been identified and notified to be Scheduled Tribes in the Order, 1950 in exercise of power of the President under Article 342(1) of the Constitution. This only strengthens our conclusion that the Scheduled Tribe is a character; a status acquired by a tribal by only operation of law.

35. Section 3 of the Restoration Act is in the nature of a beneficial legislation and, therefore, generally it would have retrospective operation, provided it is not to the detriment of another. But, here we can see that the benefit it causes to a Tribal-transferor is to the detriment of the non-tribal transferee, who is divested of his right in the land and, therefore, such a legislation would have to be construed as having prospective effect, as held in the case of ***Commission of Income Tax (Central)-I New Delhi Vs. Vatika Township Private Limited, (2015) 1 SCC 1***. It then follows that to say that Explanation to Section 36 of the Code operates retrospectively, would amount to retrospectively invalidating the transfer of land made by a tribal in favour of a non-tribal at a time when the tribal was not a person belonging to the Scheduled Tribe as described in Explanation to Section 36 of the Code. Doing so, would be going against the intention of the legislature and causing injustice to the non-tribal transferee for no fault on his part and would also amount to providing for something not intended to be provided in the Order 1950, as rightly submitted by learned Senior Advocate, though

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it may not amount to amending Article 366(25) or Article 342 of the Constitution. At the cost of repetition, we may mention here that we have already found that Article 342 and consequently the Order 1950 made thereunder are, by their very nature, prospective in effect.

36. It is for the reasons above referred to that we find that the view taken in Tukaram that for the purposes of Section 36A of the Code, the status of the parties has to be considered at the time of completion of the transfer and change in status after the transfer, if any, has no relevance and that restrictions provided under Section 36A of the Code would not at all be attracted in that case is correct. Although, this view was in the context of the interpretation of the restrictions under Section 36A of the Code, it has relevance in deciding the question under reference as the term "Tribal" appearing in Section 2(l)(i) of the Restoration Act has to be understood by the definition of the expression "Scheduled Tribes" given in Explanation to Section 36 of the Code. In fact, disagreeing with the contention of Mr. Bhandarkar, learned Advocate, we find that the provisions made in Section 3 of the Restoration Act and Section 36 and Section 36A of the Code are complimentary to each other, granting more or less similar protection and benefits, though Section 3 of the Restoration Act operates in a different field in the context of time than the rest. It would then mean that to find that what is held in Tukaram is not relevant to interprete Section 3 of the Restoration Act and that there is no conflict of views in Tukaram and Kashibai as Mr.

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Bhandarkar, learned Advocate would have us believe, is to go against the Scheme of Section 3 of the Restoration Act and amended Section 36 and Section 36A of the Code, which have a common legislative history and also common legislative intent of granting protection and benefits to exploited lot of tribals, and which scheme came into effect in 1974 and 1975, covering different time periods. It would be, therefore, a fallacy to say that the view in *Tukaram* that a tribal must hold the status of the Scheduled Tribe on the date of transaction in order to get benefit of Section 36A of the Code is *per incuriam* and *sub silentio*. Of course, Kashibai also holds that Tukaram is correct when it says that Section 36A of the Code is prospective and rightly so. But, Kashibai is wrong when it says that because Section 3 of the Restoration Act operates on past transactions and as it confers a right upon a tribal to seek restoration of his land, it is not necessary that he must have the status of a tribal, as defined in Section 2(l)(j) of the Restoration Act, on the date of the transaction and even if he is subsequently included in the notified list of the Scheduled Tribes, he would succeed in his claim made under Section 3 of the Restoration Act. In a way, Kashibai has given retrospective operation to definition of the expression "Scheduled Tribes" appearing in Explanation to Section 36, meaning thereby that the moment a tribal is recognised to be of a "Scheduled Tribe" under Article 342 of the Constitution, his such recognition would relate back to his birth and thus would entitle him to benefits to which he could not lay his claim previously. But, we have seen that making of a tribal into that of a Scheduled Tribe under Article 342

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is by operation of law and is, by it's very nature, prospective in operation, which is also the view taken by learned Single Judge in *Babulal Ramnath Dekate (supra)*, which we approve. This is the reason why we hold that Kashibai is wrong to this extent.

37. Kashibai further holds that the provisions contained in Section 36 of the Code and those in Section 3 of the Restoration Act operate in different fields and, therefore, interpretation of Section 36A of the Code made by the Division Bench in Tukaram could not be used with any benefit while interpreting the provisions made in Section 3 of the Restoration Act. In doing so, the Division Bench, it appears has lost sight of the distinction between a person who is generally called a tribal and who is not included in the list of tribes specified in the Schedule to the Order, 1950 and a person who is a tribal and who is of the Scheduled Tribe by virtue of inclusion of his tribe in the Schedule to the Order, 1950. It also did not consider the fact that though the rights conferred under Section 36 of the Code and Section 3 of the Restoration Act operate in different fields, in the context of different time-frames, their operation as such is determined by one common factor, viz. definition of the expression "Scheduled Tribes" and the consequences that ensue after a tribal gets status of a "Scheduled Tribe" by deeming fiction under Article 342 of the Constitution. No doubt, Section 3 of the Restoration Act operates on past transactions, and to this extent Kashibai is right, but it's such operation on past transactions is possible only when the transferor was

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a tribal as defined in Section 2(l)(j) at the time of the transaction that it seeks to target. In other words, retrospective operation of Section 3 of the Restoration Act is subject to the condition that on the date of the transaction, the transferor must be a person who is tribal within the meaning of Section 2(l)(j) of the Restoration Act, and if this condition is not fulfilled, it would not operate upon past transactions during the period from 1st April 1957 to 6th July 1974. This aspect of retrospectivity of Section 3 of the Restoration Act is subtle but important, and has not been considered in Kashibai, and hence to this extent, Kashibai is incorrect.

38. For the reasons stated above, we are of the opinion that Kashibai (supra) is not a good law when it holds that a tribal-transferor need not be a person belonging to the Scheduled Tribe on the date of the transfer of land by him to a non-Tribal-transferee and would be entitled to seek restoration of his land from the possession of a non-tribal under Section 3 of the Restoration Act, if he is subsequently included in the list of Scheduled Tribes specified in the Schedule to the Order, 1950 in relation to the State of Maharashtra. This view is, therefore, overruled and consequently the view taken by learned Single Judges relying upon Kashibai or consistent therewith also stands overruled. Conversely, all the judgments referred to us by in the earlier which take similar view as in Tukaram are affirmed by us.

39. Mr. Ukey, learned Additional Government Pleader has invited our attention to Full Bench judgment of Karnataka High Court in the case of ***Shri***

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Jayanna Vs. The Deputy Commissioner, AIR 2012 Karnataka 173, wherein the opinion is expressed by majority that every inclusion of a tribe as a Scheduled Tribe in the Order made by President of India in the year 1950 or and every inclusion of a tribe as a Scheduled Tribe by virtue of amendment to the Order made under Article 342(2) of the Constitution, would have retrospective effect thereby entitling such tribals to the benefits of the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978. The minority opinion, however, is of dissent and it holds that every such inclusion would be prospective in nature. According to Mr. Ukey, the majority opinion of Full Bench of Karnataka High Court in Jayanna (supra) is correct. With due respect, we disagree for the reasons which are to be found in earlier paragraphs.

40. Mr. Ukey, has also relied upon the cases of ***State of Bihar and Others Vs. Ramesh Prasad Verma (Dead) through Lrs. (2017) 5 SCC 665***, ***State of Punjab Vs. Salil Sabhlok and Others, (2013) 5 SCC 1***, ***Union of India Vs. R. Bhusal, (20066 SCC 36*** and ***Dr. Shah Faesal and others Vs. Union of India and Another, (2020) 4 SCC 1***. On going through them, we do not think that they would be of any assistance to us in determining the question involved herein as they are not only on different facts but are also on different aspects of law, not intrinsically involved here.

41. Mr. S.P. Bhandarkar, learned Advocate who has independently assisted us in the present case, has opined basically that there is no conflict between

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Tukaram (supra) and Kashibai (supra) and if there is such conflict, it can be resolved by applying the principle of purposive construction of a beneficial legislation. With due respect, we do not agree with the proposition that there is no inconsistency between Tukaram and Kashibai as regards the question involved here. We have already found that while Tukaram considers status of a person to be a member of the Scheduled Tribe on the date of the transaction as determinative factor for invaliding the transfer, Kashibai holds that even a subsequent inclusion in the Order, 1950 so as to be called a Scheduled Tribe by deeming fiction would operate retrospectively and entitle a tribal to restoration of his land from a non-tribal, even though the transaction when made was valid and between persons, both of whom were not tribals within the meaning of Section 2(l)(j) of the Restoration Act. The conflict between these two views is obvious and now by this judgment, we have made our effort to resolve it. About the contention that controversy involved here can be resolved by applying the principle of purposive interpretation of a beneficial legislation, we must say that we have already taken into consideration the objects and purposes of the Restoration Act, while making our interpretation here and, therefore, beyond that we have nothing to add. Mr. Bhandarkar, learned Advocate has also submitted that rules of interpretation applicable to declaratory statutes can be drafted in to resolve the controversy. With respect, we disagree as the legislations we have interpreted here are in the nature of remedial and beneficial instruments of law providing relief and protection to the tribals.

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42. In the result, we find that opinion "A" is correct while opinion "B" is not and we further find that opinion "C" is partly not correct and partly useful for resolving the divergence of views expressed in Tukaram (supra) and Kashibai (supra). This would enable to us to answer the question referred to us and we do so in the following terms :-

Question :

"Whether the subsequent recognition of the transferor as a tribal after transfer of the land would entitle the transferor to seek restoration of possession of land under Section 3(1) of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 as held in ***Kashibai wd/o Sanga Pawar and ors. Vs. State of Maharashtra, 1993 (2) Mh.L.J. 1168*** *or whether such subsequent recognition would be of no assistance to the tribal transferor as held in* ***Tukaram Laxman Gandewar Vs. Piraji Dharmaji Sidarwar by LRs Laxmibai and others, 1989 Mh.L.J. 815****?"*

Answer :

Subsequent recognition of a transferor as a Tribal within the meaning of Section 2(1)(j) of the Restoration Act would not entitle him to seek restoration of the land transferred by him to a non-Tribal-transferee and his

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subsequent recognition as such is of no assistance to him for the purpose of availing of the benefit of Section 3 of the Restoration Act.

43. Matter be placed before appropriate Bench.

(ANIL L. PANSARE, J.) **(A.S. CHANDURKAR, J.)** **(SUNIL B. SHUKRE J.)**

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