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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.421 OF 2013

WITH
CIVIL APPLICATION NO.1272 OF 2013
IN
SECOND APPEAL NO.421 OF 2013

WITH
CIVIL APPLICATION NO.282 OF 2015
IN
SECOND APPEAL NO.421 OF 2013

1. Shri Chindhu Fakira Satale.)
Age 60 Years, Occu : Agriculture)
2. Shri Vishnu Fakira Satale,)
Age 55 years, Occu : Agriculture)
3. Shri Kashinath Fakira Satale,)
Deceased L.Rs. As under)
- 3.1 Shri Kiran Kashinath Satale,)
Age 32 years, Occu : Agriculture)
- 3.2 Shri Dnyaneshwar Kashinath Satale,)
Age 30 years, Occu : Agriculture)
- 3.3 Shri Pappu Kashinath Satale,)
Age 20 years, Occu : Agriculture)
And Student)
- 3.4 Smt.Latabai Kashinath Satale,)
Age 42 years, Occu : Agriculture)
And Household)
4. Shri Pundlik Fakira Satale,)
Age 43 years, Occu : Agriculture)

5. Shri Ashok Hari Satale,)
Age 45 years, Occu : Agriculture)
6. Smt.Rjubai Hari Satale,)
Age 48 years, Occu : Agriculture)
- Above all Residing at Sangamner,)
Post – Mavadi, Taluka - Dindori,)
District Nashik)
7. Mangalabai Baraku Gangurde,)
Age 46 years, Occu : Household)
C/o : Baburtao Gangadhar Dhikale)
R/at : Khedgaon, Taluka – Dindori,)
District : Nashik)

...Appellants
Ori.Defendants

....Versus....

1. Sau.Vithabai Kashinath Jadhav,)
Deceased L. Rs. - As under :)
- 1A. Shri Sadashiv Kashinath Jadhav)
Age : 44 years, Occupation)
- 1B. Shri Digambar Kashinath Jadhav,)
Age : 44 years, Occupation)
- 1C. Sau.Murabai Honaji Gangurde)
Age : 42 years, Occupation)
- 1D. Sau.Bibabai Hanuman Page,)
Age : 37 years, Occupation)
- 1E. Sau.Ranjana Lalu Dhule)
Age : 32 years, Occupation)
- 1F. Sau.Sarala Tanaji Kadale,)
Age : 32 years, Occupation)
- Nos.1A to 1E residing at Shivre,)
Taluka – Dhandwad, Dist. Nashik)

- | | | | |
|----|----------------------------------|---|-------------------|
| 2. | Sau.Punjabai Khandu Kadale, |) | |
| | Age 72 years, Occupation |) | |
| | R/at : Umbaral Khurd, Taluka |) | |
| | Dindori, District Nashik |) | ...Respondents |
| | | | ...Ori.Plaintiffs |
| 3. | The Maharashtra Rajya Saha |) | |
| | Krushni and Gramin Vikas Bank, |) | |
| | Branch Office, Dindori, |) | |
| | Taluka Dindori, District Nashik |) | |
| 4. | Shivare Vividha Karyakari |) | |
| | Sahakari Society, Shivare, |) | |
| | Taluka Chandwad, District Nashik |) | ...Respondents |
| | | | Ori.Defts.8 & 9 |

Mr.Girish R. Agrawal for the Appellants.

Mr.Nitin Muley for the Respondent Nos.1-A and 2.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 22ND AUGUST, 2016
PRONOUNCED ON : 5TH OCTOBER, 2016

JUDGMENT :-

1. By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original defendant nos.1 to 7) have impugned the judgment and decree dated 30th October, 2012, passed by the learned District Judge – 5, Nashik, dismissing the appeal (Civil Appeal No.112 of 2011) filed by the appellants herein by which the appellants had impugned the judgment and decree dated 10th August, 2006 passed by the learned Civil Judge, Junior Division, Dindori in Regular Civil Suit No.55 of 2001 filed by the respondents herein (original plaintiffs) thereby decreeing the suit filed by the plaintiffs and declaring the plaintiffs as the owners of the suit land to the extent of half area and directing the defendants to deliver the possession of the suit land to the extent of half area to the plaintiffs. Some of the relevant facts for the purpose of deciding this second appeal are as

under :

2. The parties in this judgment are described as per their status in the civil suit. It was the case of the plaintiffs that the deceased Sonubai Shankar Gangurde and deceased Fulji Dhondi Satale were residing together and had purchased the land bearing survey No.18 jointly, admeasuring 6 acres and 30-R jointly from its erstwhile owner Narayan Vitthalrao Jathar on 19th June, 1958. The said deceased Fulji Dhondi Satale and the said Sonubai Shankar Gangurde had half share each in the suit land.

3. It was the case of the plaintiffs that the plaintiffs are legal heirs of the said Sonubai Shankar Gangurde and the defendant nos.1 to 7 are the legal heirs of the said Fulji Dhondi Satale. The defendant nos.1 to 7 however, got mutated their names for the entire area of the suit land after the death of Sonubai Shankar Gangurde. The names of the plaintiffs were shown in the other rights column instead of mutating in the column of ownership insofar as half portion of the suit land is concerned.

4. On 30th August, 1993, the said Sonubai Shankar Gangurde expired. It was the case of the plaintiffs that till the death of the said Sonubai Shankar Gangurde, the said Sonubai Shankar Gangurde and the defendants were in possession of the suit land jointly. The defendant nos. 1 to 7 however, with a view to grab the entire land got mutated false entries and refused to give the share to the plaintiffs. The plaintiffs thereafter sent a legal notice on 24th January, 2001 to the defendant nos.1 to 7 for their share in the suit property. The defendant nos.1 to 7 however, did not comply with the

said notice. The plaintiffs therefore filed a suit (Regular Civil Suit No.55 of 2001) in the Court of the learned Civil Judge, Junior Division, Dindori, Taluka and District Nashik *inter-alia* praying for a declaration and *mesne-profits*.

5. The defendant nos.8 and 9 were impleaded as parties to the suit in view of the fact that the defendant nos.1 to 7 had raised loan from the defendant nos.8 and 9 and their names were appearing in the revenue records. The suit land was irrigated land and various crops such as onion, vegetables etc. were cultivated on the suit land. Though witness summons were issued to all the defendants, the defendants did not appear and did not file any written statement. The suit was accordingly proceeded *ex-parte* against the defendant nos.1 to 7 on 31st March, 2002. The defendant nos.1 to 7 challenged the said order dated 31st March, 2002 before the District Court. On 13th April, 2006, 4th Ad-hoc Principal District Judge was pleased to set aside the said *ex-parte* order dated 31st July, 2002 and remanded the matter back to the trial Court with a direction to decide the suit afresh by giving chance to both the parties to adduce their oral and documentary evidence. The defendant nos.1 to 7 were directed to file the written statement on 26th June, 2006. The defendant nos.1 to 7 however, did not appear on 26th June, 2006 before the learned trial Judge and also did not file any written statement as directed by the learned District Judge. The said suit against the defendant nos.1 to 7 therefore, once again proceeded *ex-parte*. The learned trial Judge framed three issues. The plaintiffs examined plaintiff no.2 on their behalf as a witness and also filed documentary evidence. No witness was examined by the defendants.

6. By a judgment and decree dated 10th August, 2006, the learned trial Judge declared that the plaintiffs had proved that after the death of said Sonubai Shankar Gangurde, they had succeeded her property and became the owners to the extent of half share in the suit property and were entitled to get possession of the half area of the suit land. The learned trial Judge directed the defendant nos.1 to 7 to deliver the possession of the suit land to the extent of half area to the plaintiffs. The learned trial Judge directed that a copy of the decree be sent to the Collector, Nashik for effecting the partition and delivery of actual possession of the suit land to the extent of half area as per the said declaration and directed a separate enquiry about the *mesne-profits* under Order 20 Rule 12 of the Code of Civil Procedure, 1908.

7. Being aggrieved by the said judgment and decree dated 10th August, 2006, the defendant nos.1 to 7 filed civil appeal (Regular Civil Appeal No.112 of 2011) in the Court of the learned District Judge – 5, Nashik. The learned District Judge framed five points for determination and has rendered various findings about the ownership of the plaintiffs' half area in the suit property, for possession of the suit property to the extent of half area of the suit land etc. The learned District Judge also had framed an issue as to whether it was necessary for the learned trial Court to frame an issue in respect of the tenancy and to refer the same to the competent authority for decision under section 85-A of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short the said “BTAL Act”). The learned District Judge rendered a finding on the said issue in negative. By a judgment and decree dated 30th October, 2012, the learned District Judge – 5, Nashik dismissed the said appeal (Civil Appeal No.112 of

2011). Being aggrieved by the said judgment and decree dated 30th October, 2012 passed by the learned District Judge – 5, Nashik, the defendant nos.1 to 7 filed this second appeal under section 100 of the Code of Civil Procedure.

8. The defendant nos.1 to 7 have filed Civil Application No.282 of 2015 in this second appeal, *inter-alia* praying for an order and direction to take on record a certificate issued under section 32(M) of the BTAL Act bearing No.ALT-V-9T/63 dated 1st September, 1963 on record and to mark the same as exhibit. The defendant nos.1 to 7 also filed a separate civil application (1272 of 2013) in this second appeal *inter-alia* praying for an injunction against the original plaintiffs from executing the decree dated 10th August, 2006 passed by the learned trial Judge.

9. Mr.Agrawal, learned counsel appearing for the defendant nos.1 to 7 submits that his clients are illiterate and are tribal and were unable to pursue the matter before the learned trial Judge with due diligence and also because of their agricultural responsibilities. He submits that when the defendant no.4 visited the advocate appearing for the defendant nos.1 to 7 in the High Court along with documents, they came across a certificate issued by the authorities under section 32(M) of the BTAL Act in respect of the suit property. The defendant nos.1 to 7 had already placed on record other relevant documents in the form of 7x12 extract and mutation entries. He submits that the name of Sonubai Shankar Gangurde was already deleted from the ownership column and was entered in other rights column, whereas the names of Chindhu Fakira Satale and Vishnu Fakira Satale were entered as the owners who were brothers of Fulji Dhondi Satale and

submits that the sale deed executed in favour of Sonubai Shankar Gangurde has been already cancelled by the authorities as is clear from the mutation entry nos.430 and 446 and in place of that entries, entry no.430 is recorded according to which in view of section 32(M) of the BTAL Act, the certificate issued under the said BTAL Act, the certificate of sale dated 1st September, 1963 was given in favour of Fulji Dhondi Satale in view of section 43 of the said BTAL Act.

10. It is submitted that since the said certificate issued under section 32-M of the said BTAL Act is a public document and since the the appellants (defendant nos.1 to 7) could not produce the same for the reasons which were neither intentional nor deliberate, the defendant nos.1 to 7 be permitted to rely upon the said certificate showing the ownership of the suit land in favour of the defendant nos.1 to 7 and be taken on record and marked as exhibit. He submits that in view of the said certificate dated 1st September, 1963, the predecessor in title of the defendant nos.1 to 7 had become deemed purchaser of the suit land and thus the plaintiffs and their predecessor in title have no right right, title and interest of any nature whatsoever in the suit property.

11. Mr.Agrawal, learned counsel appearing for the defendant nos.1 to 7 placed reliance on the judgment of the Supreme Court in case of **Saraswatibai Trimbak Gaikwad vs. Damodhar D. Motiwale & Ors. 2002(2) ALL MR 944** and in particular paragraphs 17, 19 and 24.

12. Learned counsel appearing for the defendant nos.1 to 7 placed reliance on the judgment of this Court delivered by the Full

Bench of this Court in case of **Rajaram Totaram Patel vs. Mahipat Mahadu Patel & Ors. AIR 1967 Bombay 408** in support of the submission that the question as to whether a person is a tenant or not would fall within section 70(b) of the BTAL Act and has to be decided by the Mamlatdar and not by the Civil Court. He submits that the judgment and decree passed by the learned trial Court and the order and judgment delivered by the first appellate Court are contrary to section 70(b) of the BTAL Act and contrary to the principles laid down by the Full Bench of this Court in case of **Rajaram Totaram Patel** (supra).

13. Learned counsel for the defendant nos.1 to 7 placed reliance on the judgment of this Court in case of **Tulsiram Adku Marape & Anr. vs. State of Maharashtra & Ors. 2011(1) ALL MR 22** and would submit that since no sanction of the Collector was obtained under section 36(2) of the Maharashtra Land Revenue Code, 1966 before transfer of the suit property by the plaintiff, the plaintiff being tribal, the sale transaction was void.

14. Learned counsel for the defendant nos.1 to 7 placed reliance on the judgment of this Court in case of **Smt.Savita Bapu Shinde & Ors. vs. Rau Rama Shinde & Anr. 2006(1) ALL MR 423** in support of his submission that since a certificate under section 32-M of the BTAL Act was issued by the authority, the same could be challenged by the plaintiffs only before the higher forum provided under the said BTAL Act and therefore the Civil Court cannot go into the validity of the said certificate issued by the authority and the same being conclusive insofar as the title of the party, who has been declared as a deemed purchaser under the provisions of the BTAL

Act is concerned.

15. Learned counsel for the defendant nos.1 to 7 submits that though his clients could not produce a copy of the certificate issued under section 32-M of the BTAL Act before the trial Court, this Court will have to consider the said document, the same being a public document and can set aside the judgment and decree passed by the trial Court and the first appellate Court after considering the said document.

16. Learned counsel for the plaintiffs on the other hand submits that the predecessor of the defendants was entitled to half share in the right, title and interest in the suit land. Her name was recorded in the mutation entry as the joint owner. The said Sonubai Shankar Gangurde had issued a notice of partition. He submits that though the first appellate Court had granted an opportunity to the defendants to file a written statement after remanding the matter back to the learned trial Judge, the defendants did not file the written statement. The defendants also did not lead any oral evidence before the learned trial Judge. The matter against the defendants thus rightly was proceeded *ex-parte*. He submits that the plaintiffs however, had led oral as well as documentary evidence.

17. It is submitted by the learned counsel for the plaintiffs that the learned counsel for the defendant nos.1 to 7 never relied upon any such alleged certificate under section 32-M issued under the provisions of the BTAL Act before the learned trial Court and even before the first appellate Court. There was no pleading about the said certificate in any of the proceedings. He submits that the Revenue

Court cannot declare the sale deed void. He submits that even if any such certificate was issued by the authority, the declaration of the sale deed executed in favour of the plaintiffs by the Revenue Court is totally illegal and void. He submits that the issue before the Civil Court was relating to partition of the suit property and not in respect of the tenancy. It is submitted that the Civil Court has not declared the issue of tenancy as canvassed by the defendant nos.1 to 7.

18. Learned counsel for the plaintiffs placed reliance on the judgment of his Court in case of **Pulmati Shyamlal Mishra & Anr. vs. Ramkrishna Gangaprasad Bajpai & Ors. 1981 Mh.L.J. 321** and would submit that the Civil Court is not bound to frame and remit the issue of tenancy mechanically merely because the same was being raised in the written statement, without judicial satisfaction of its necessity and justification. He submits that in this case, since there was no plea and / application for referring the issue of the alleged tenancy to the authority under section 85-A of the BTAL Act, the trial Court even otherwise could not have referred the issue of the alleged tenancy to the authority.

19. Learned counsel for the plaintiffs placed reliance on the judgment of this Court in case of **Laxman Siddhu Pote vs. Shri Govindrao Koregaonkar Dharmadaya Sanstha Managing Trustees, AIR 1981 Bombay 33** and in particular paragraph 14 and would submit that finality of certificate under section 32-M is of limited character and does not oust the jurisdiction of the Civil Court to go beyond the certificate and to see whether the certificate had been issued by a Court of Competent jurisdiction after verifying whether the conditions precedent for granting such certificate existed

or not. He submits that in this case, no notice was issued by the competent authority to the plaintiffs before issuing any such certificate under section 32-M of the BTAL Act and thus the said certificate having issued without following the procedure under the provisions of the BTAL Act was even otherwise void and illegal.

20. Learned counsel for the plaintiffs placed reliance on the judgment of this Court in case of **Rama Hariba Khavale vs. Gopika Ramling Survase & Ors. 2003(4) ALL MR 554** and in particular paragraphs 10, 12 and 13 and would submit that it is the duty of the Court to examine the substance and to refuse to frame and remit any issue raised in view of the provisions of section 85-A of the BTAL Act if such issue appears to be demonstratively frivolous and *mala-fide*. He submits that the Court has to also consider the stage at which such plea is raised. It is submitted that since the issue of certificate under section 32-M was not raised in the trial Court and since the application is made now in civil application in second appeal at this stage, the Court has to reject such application in view of the fact that such belated application at this stage is with a view to prolong the litigation.

21. In support of this submission, learned counsel for the plaintiff invited my attention to the annexures to the civil application i.e. Exhibit "B" which is relied upon by the defendant nos.1 to 7 at this stage. He submits that even if a copy of such certificate annexed as Exhibit "B" is passed by this Court, it is clear that a true copy of the said certificate was issued by the authority on 13th January, 2004. The said certificate however was not relied upon by the defendant nos.1 to 7 before the learned trial Court which delivered the judgment

and decree on 10th August, 2006. He submits that though the second appeal was filed by the defendant nos.1 to 7 in the month of April, 2013, the defendants nos.1 to 7 have filed the application for seeking permission to rely upon such certificate only in the civil application filed on 28th November, 2014. He submits that in view of the gross delay on the part of the defendant nos.1 to 7 in placing reliance upon such alleged certificate at this stage for the first time, this Court cannot consider such alleged certificate at this stage. He submits that the whole purpose of relying upon such certificate at this stage is to cause further delay the outcome of the proceedings which were initiated by the plaintiffs as far back in 2001.

22. Learned counsel for the plaintiffs placed reliance on the judgment of this Court in case of **Madhav Kesu Khuspe vs. Sundrabai Mugutrao Phadatare & Ors. 1978 Mh.L.J. 289** and in particular paragraph 15 in support of the submission that since the certificate issued under section 32-M of the BTAL Act by the authority is void and illegal, this Court even otherwise is not bound to consider such certificate and is not required to remand the matter back to the learned trial Judge for consideration of such certificate.

23. Learned counsel for the plaintiffs placed reliance on the judgment of this Court in case of **Husein Miya Dosumiya vs. Chandubhai Jethabhai & Ors. AIR 1954 Bombay 239** and in particular paragraph 3 and would submit that the jurisdiction of the Civil Court can be ousted only in respect of valid orders passed by the Mamlatdar. He submits that since the order passed by the Mamlatdar was totally incompetent and was void and *ultra-vires*, the said order was nullity and it could be challenged in the Civil Court.

24. Learned counsel for the plaintiffs placed reliance on the judgment of this Court in case of **Uttam Sambha Deshmukh & Ors. vs. Yamunabai w/o Chandrabhan Bhoyar & Ors. 1998(3) ALL MR 625** and in particular paragraph 3 and would submit that since there was no plea of tenancy by the defendant nos.1 to 7 in compliance with the order 6 Rule 2 of the Code of Civil Procedure, the learned trial Judge rightly did not frame any such issue of alleged tenancy. He submits that the issue as to whether the certificate under section 32-M of the BTAL Act was issued after following requisite procedure or not, can be gone into by the Civil Court.

25. Learned counsel for the plaintiffs invited my attention to a copy of the certificate annexed to the civil application and would submit that even the said so called certificate shows the name of the original owner and not the name of the predecessor of the plaintiffs. He submits that the certificate thus issued by the authority is based on the wrong premise about the true and correct owner of the suit property.

26. Learned counsel for the plaintiffs placed reliance on the judgment of this Court in case of **Dada Savla Yadav vs. Vasant Anant Sultane, 1960, Bombay Law Reporter 471** and would submit that once the landlord had obtained possession of the lands from the tenant in pursuance of a surrender, Mamlatdar could not have decided the question as to whether such a surrender was a nominal or was a sham surrender within the ambit of section 70 of the BTAL Act. He submits that the jurisdiction of the Civil Court is thus not ousted.

27. Learned counsel placed reliance on the judgment of the Supreme Court in case of **Gurbax Singh s/o Chanda Singh vs. Financial Commissioner & Anr., 1991 Supp.(1) SCC 167** and in particular paragraph 19 in support of his submission that since the Mamlatdar has not acted in conformity with the fundamental principles of judicial procedure while issuing the certificate under section 32-M of the BTAL Act, the jurisdiction of the Civil Court to examine the said certificate is not ousted.

28. It is submitted by the learned counsel for the plaintiffs that the predecessor of the plaintiffs had become the joint owner. The Revenue Authority thus could not declare the sale deed as illegal and had no jurisdiction to declare the sale deed as illegal. He submits that since the predecessor of the plaintiffs had already become the half owner of the suit property, such ownership could not have been divested by the competent authority.

29. Mr. Agrawal, learned counsel appearing for the defendant nos.1 to 7 in rejoinder submits that the certificate under section 32-M of the BTAL Act has been already annexed to the civil application for stay filed by the defendant nos.1 to 7 and since the said certificate is a public document, the same can be relied upon by the defendant nos.1 to 7 even at this stage. He submits that under section 84-B of the BTAL Act, the Mamlatdar is empowered to set aside the sale transaction. Learned counsel distinguished the judgment of this Court in case of **Husein Miya Dosumiya vs. Chandubhai Jethabhai & Ors. AIR 1954 Bombay 239** on the ground that there was no prayer in the plaint that the certificate was nullity. He submits that the

defendant nos.1 to 7 had already produced 7x12 extract before the first appellate Court. It is submitted by the learned counsel that the certificate issued under section 32-M of the BTAL Act can be considered as nullity only if the same is issued not for the purpose of the BTAL Act or was not required under the said Act and not otherwise.

30. Learned counsel for the defendant nos.1 to 7 distinguished the judgment of this Court in case of **Uttam Sambha Deshmukh & Ors. vs. Yamunabai w/o Chandrabhan Bhoyar & Ors. 1998(3) ALL MR 625** on the ground that there was no proper plea raised by the defendants in the written statement. In this case however, the defendant nos.1 to 7 had produced the mutation entry before the first appellate Court.

31. Learned counsel for the defendant nos.1 to 7 distinguished the judgment of the Full Bench of this Court in case of **Rajaram Totaram Patel vs. Mahipat Mahadu Patel & Ors. AIR 1967 Bombay 408** on the ground that in that matter no documents were produced by the defendants, whereas in this matter, the defendant nos.1 to 7 had produced the mutation entry and 7x12 extract.

32. Learned counsel also distinguished the judgment of the Supreme Court in case of **Saraswatibai Trimbak Gaikwad vs. Damodhar D. Motiwale & Ors. 2002(2) ALL MR 944** on the ground that in this case it was not the case of the plaintiffs that the certificate issued under section 32-M of the BTAL Act was beyond the purpose of the BTAL Act or was beyond the powers of the Mamlatdar. It is submitted that the 7x12 extract produced by the defendant nos.1 to 7

could not have been ignored by the learned trial Judge. Learned counsel placed reliance on the judgment of the Supreme Court in case of **Shikharchand Jain vs. Digamber Jain Praband Karini Sabha & Ors., AIR 1974 SC 1178** and the judgment of this Court in case of **Tulsiram Adku Marape & Anr. vs. State of Maharashtra & Ors. 2011(1) ALL MR 22**. It is submitted by the learned counsel that in any event, since the certificate issued by the Mamlatdar was 30 years old document, in view of section 114(e) of the Evidence Act, the same can be relied upon by the defendant nos.1 to 7.

33. Learned counsel for the defendant nos.1 to 7 distinguished the judgment of this Court in case of **Pulmati Shyamlal Mishra & Anr. vs. Ramkrishna Gangaprasad Bajpai & Ors. 1981 Mh.L.J. 321** on the ground that in that matter the defendant had not produced any documents for consideration of the Court to refer the dispute to Mamlatdar, whereas in this case the defendant nos.1 to 7 had produced 7x12 extract before the learned trial Court and has now produced the certificate issued under section 32-M of the BTAL Act. He submits that the certificate issued under section 32-M of the BTAL Act is conclusive evidence of purchase of the land under the provisions of the BTAL Act.

34. It is submitted that unless the said certificate issued under section 32-M of the BTAL Act is set aside in appropriate proceedings, the issue of tenancy cannot be decided by the Civil Court.

35. Learned counsel for the defendant nos.1 to 7 placed reliance on the judgment of this Court in case of **Tulsiram Adku**

Marape & Anr. vs. State of Maharashtra & Ors. 2011(1) ALL MR 22 and would submit that since in this case the transfer of the land was from one tribal to another tribal, permission of the authority was mandatory before transfer of the land.

REASONS AND CONCLUSIONS :-

36. There is no dispute that the defendant nos.1 to 7 were served with the writ of summons. The defendant nos.1 to 7 did not file any written statement. The trial Court had accordingly passed an order to proceed against the defendant nos.1 to 7 *ex-parte*. The said order dated 31st July 2002 was challenged by the defendant nos.1 to 7 by filing an appeal before the District Court. The District Court, by an order dated 13th April 2006, was pleased to set aside the *ex-parte* order dated 31st July 2002 and remanded back the matter to the learned trial Judge for deciding it afresh by giving an opportunity to the defendant nos.1 to 7 to file written statement on 26th June 2006. It is not in dispute that though the matter was remanded back to the learned trial Judge with an opportunity to the defendant nos.1 to 7 to file written statement before the trial Judge, the defendant nos.1 to 7 once again failed and neglected to file any written statement. The learned trial Judge thus once again passed an order to proceed with the matter against the defendant nos.1 to 7 *ex-parte* on 10th July, 2006.

37. A perusal of the judgment and decree dated 10th August 2006 passed by the learned trial Judge indicates that the learned trial Judge framed three issues which are extracted as under :-

<u>Sr.No.</u>	<u>Issues</u>	<u>Findings</u>
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1	Whether the plaintiffs prove that after death of Sonubai Shankar Gangurde, they succeeded her property and become owners to the extent of half share ?	Yes
2	Whether the plaintiffs entitled to get possession of half area of the suit land ?	Yes
3	Are the plaintiffs entitled to get decree as prayed for ?	As per final order

38. A perusal of the copy of the plaint filed by the parties for perusal of this Court indicates that the dispute before the learned trial Judge was in respect of the ownership of half share of the plaintiffs in the suit property which they were claiming through Sonubai Shankar Gangurde being her legal heirs who was residing jointly with Fulji Dhondi Satale and both had jointly purchased the land bearing Survey No.18 from its erstwhile owner Narayan Vitthal Jathar on 19th June, 1958. The plaintiffs did not dispute the half share of the legal heirs of Fulji Dhondi Satale i.e. the defendant herein in the suit property. It was however the case of the plaintiffs that after the death of Fulji Dhondi Satale and Sonubai Shankar Gangurde, the defendant nos.1 to 7 illegally got their names mutated in respect of the entire suit property and the names of the plaintiffs were illegally shown in the other rights column. In view of this act on the part of the defendant nos.1 to 7, the plaintiffs filed a suit for declaration of their half share in the suit property claiming through the said Sonubai Shankar Gangurde who had half share in the suit property. The plaintiffs had also issued a notice on 24th January, 2001 through their advocate to the defendant nos.1 to 7. The defendant nos.1 to 7 however did not comply with the notice issued

by the plaintiffs.

39. A perusal of the order passed by the learned trial Judge indicates that the learned trial Judge has considered the copy of 7x12 extract of the suit land and the copy of the sale deed dated 19th June 1958 and has rendered a finding that the names of the said Fulji Dhondi Satale, predecessor of the defendants and Sonubai Shankar Gangurde, predecessor of the plaintiffs were shown as owners and in possession of the land bearing survey no.18. The learned trial Judge also held that the said Fulji Dhondi Satale and Sonubai Shankar Gangurde had purchased the suit property from Narayan Vitthal Jathar for consideration of Rs.850/-. The learned trial Judge has rendered the said finding on the basis of the documents produced by the plaintiffs and the oral evidence led by the plaintiffs and on the ground that the said evidence led by the plaintiffs remained uncontroverted by the defendant nos.1 to 7.

40. A perusal of the plaint as well as the order passed by the learned trial Judge clearly indicates that there was no issue of tenancy involved before the learned trial Judge raised by either party.

41. A perusal of the judgment and decree passed by the learned District Judge on 30th October, 2012 indicates that the first appellate Court framed five points for determination. The first appellate Court also considered the oral and documentary evidence led by the plaintiffs. In view of the issue raised by the defendant nos.1 to 7 before the first appellate Court for the first time that the learned trial Judge ought to have framed the issue in respect of the tenancy and referred the matter to the competent authority for decision in

view of Section 85-A of the BTAL Act, the first appellate Court framed the said issue no.4. The first appellate Court also after considering the oral and documentary evidence has rendered a finding that the plaintiffs had proved that they had become owners of half share in the suit property being daughters of deceased Sonubai Shankar Gangurde and were entitled to get half share of the suit land.

42. In so far as the issue no.4 framed by the first appellate Court is concerned, it is held that no certificate under Section 32-M of the BTAL Act was produced by the defendant nos.1 to 7. There was no dispute that the sale deed was executed by Fulji Dhondi Satale and Sonubai Shankar Gangurde and that they were occupying the suit property, originally owned by Narayan Vitthal Jathar and the same property was being cultivated not alone by Fulji Dhondi Satale but also by Sonubai Shankar Gangurde. The ancestors of the plaintiffs and the ancestors of the defendants, both were protected tenants of the suit property and after death of their ancestors were also in joint cultivation of the property. It is held that since Fulji Dhondi Satale and Sonubai Shankar Gangurde succeeded the suit property which was in possession of their father Dhondi Satale as protected tenants, it cannot be said that jurisdiction of the Civil Court was barred.

43. The first appellate Court accordingly rightly refused to refer the matter under Section 85-A of the BTAL Act to the competent authority in view of unchallenged testimony of the plaintiffs and the documents on record made available. The first appellate Court also held that the plaintiffs had established that Sonubai Shankar

Gangurde had purchased the property along with Fulji Dhondi Satale from Narayan Vitthal Jathar and nothing was placed on record to show that the sale deed was cancelled by the authority.

44. The first appellate Court accordingly held that since the sale deed in favour of Sonubai Shankar Gangurde and Fulji Dhondi Satale was established, the said Sonubai Shankar Gangurde and Fulji Dhondi Satale, both had share in the suit property and consequently, the legal representatives of both these parties jointly have half share in the suit property each and are entitled for possession of their share in the suit land.

45. A perusal of the said judgment and decree passed by the first appellate Court also clearly indicates that no issue of tenancy could be established by the defendant nos.1 to 7 for referring the same to the competent authority for decision under Section 85-A of the BTAL Act. I am thus not inclined to accept the submission made by the learned counsel for the defendant nos.1 to 7 that two Courts below were bound to refer the said alleged issue to the competent authority under Section 85-A of the BTAL Act. Reliance placed by the learned counsel for the defendant nos.1 to 7 on the judgment of the Full Bench of this Court in the case of **Rajaram Totaram Patel** (supra) is thus misplaced. In my view, since the defendants did not file any written statement inspite of opportunities given by the learned trial Judge twice and more particularly not raising any issue of tenancy, the learned trial Judge even otherwise could not have referred any alleged issue of tenancy to the competent authority. The judgment of the Full Bench of this Court in the case of **Rajaram Totaram Patel** (supra) does not apply to the facts of this case and is

clearly distinguishable.

46. In so far as the submission of the learned counsel for the defendant nos.1 to 7 that the certificate alleged to have been issued by the authority under Section 32-M of the BTAL Act being a public document and has to be considered by this Court though the same is produced by the defendant nos.1 to 7 at this stage by allowing the civil application filed by the defendants is concerned, it is not in dispute that the said alleged certificate under Section 32-M of the BTAL Act was alleged to have been issued on 23rd September 1963. A photocopy of the certified copy of the said alleged certificate is issued on 13th January, 2004. The trial Court has passed a judgment and decree dated 10th August, 2006. The civil appeal filed by the defendants (112 of 2011) was dismissed on 30th October, 2012. Though the certified copy of the said alleged certificate was made available with the defendant nos.1 to 7 at least on 13th January, 2004, the same was not produced before the learned trial Judge as well as before the first appellate Court.

47. A perusal of the record further indicates that though the second appeal was filed by the defendants in this Court sometime in the month of May, 2013, the defendant nos.1 to 7 filed an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 *inter-alia* praying for permission to place reliance on the said alleged certificate only on 28th November, 2014 i.e. much after filing of the second appeal. In my view, learned counsel for the plaintiffs is right in his objection in opposing the said civil application (282 of 2015) filed by the defendant nos.1 to 7 for seeking permission to rely upon the said alleged certificate dated 1st September, 1963 under Section

32-M of the BTAL Act and to mark the same as exhibit at this stage.

48. A perusal of the averments made in the civil application indicates that it is averred by the defendant nos.1 to 7 that they are illiterate, rustic villagers and also tribals and due to their agricultural responsibilities were unable to pursue the matter with full diligence. It is alleged that the applicant no.4 and the applicant no.1 visited the advocate on record along with the documents after the second appeal was placed for admission on 28th November, 2014 and showed the said document to the advocate on record for the first time. It is alleged that after going through the record recently procured by the defendant nos.1 to 7, the advocate on record came across the said certificate issued under Section 32-M of the BTAL Act. The defendant nos.1 to 7 had thus placed on record the other relevant documents by filing the said civil application. It is also alleged in the said civil application that the defendant nos.1 to 7 had filed the mutation entry nos.430 and 346 in the appeal filed before the learned District Judge and as per the mutation entry no.430, the sale deed executed in favour of the Sonubai Shankar Gangurde was cancelled being illegal. It is alleged that the entry no.346 was deleted and in that place, entry bearing no.430 was recorded according to which the certificate of sale dated 1st September, 1963 under Section 32-M of the BTAL Act was issued.

49. A perusal of the averments made in the civil application by the defendant nos.1 to 7 indicates that the defendant nos.1 to 7 have not explained as to why the application for certified copy of the said alleged certificate under Section 32-M was made for the first time in the year 2004 though the said certificate was alleged to have

been issued in the year 1963. It is also not explained as to why the application for certified copy was made and for what purpose. The suit was filed by the plaintiffs in the year 2001. Though the opportunities were given by the learned trial Judge twice to file written statement, the defendant nos.1 to 7 chose not to appear before the learned trial Judge. The matter was accordingly proceeded with against the defendant nos.1 to 7 *ex-parte*. Though the certificate was alleged to have been issued in the year 1963 and the certified copy thereof was alleged to have been obtained in the year 2004, the defendant nos.1 to 7 did not bother to produce the said alleged certified copy before the learned trial Judge and even did not bother to produce the same before the first appellate Court. In these circumstances, I am not inclined to permit the defendant nos.1 to 7 to place reliance on the said alleged certificate issued in the year 1963 at this stage. No case is made out by the defendant nos.1 to 7 for not producing the said alleged certificate though the defendant nos.1 to 7 had possessed the certified copy thereof in the year 2004.

50. The next question arises for consideration of this Court is, that even if the defendant nos.1 to 7 would have produced such certificate at the relevant time before the learned trial Judge for consideration, whether the learned trial Judge, without deciding the relevance thereof is bound to refer the issue of alleged tenancy to the competent authority for determination or not.

51. The plaintiffs had applied for declaration of their ownership and had applied for injunction. The question of referring any alleged issue of tenancy by the Civil Court to the competent

authority therefore even otherwise did not arise.

52. In so far as the judgment of the Supreme Court in the case of **Saraswatibai Trimbak Gaikwad** (supra) relied upon by the learned counsel for the defendant nos.1 to 7 is concerned, it is held by the Supreme Court that so long as the certificate issued under the provisions of the BTAL Act declaring ownership stands, the decree cannot be executed against the parties holding such certificate. In the said judgment, it is clarified that the decision of the revisional authority or the appellate authority must be based only on the provisions of the BTAL Act. It is not in dispute that the defendant nos.1 to 7 never produced the alleged certificate under Section 32-M before the learned trial Judge as well as before the first appellate Court. Learned counsel for the defendant nos.1 to 7 also could not produce any material before this Court to demonstrate that the said alleged certificate was issued by the competent authority after issuing any notice upon the owners whose names were recorded in the record of the rights or that any procedure prescribed under the provisions of the BTAL Act before issuing of such certificate under the provisions of the BTAL Act was followed by the competent authority.

53. This Court in the case of **Laxman Siddhu Pote** (supra) has held that finality of certificates is of limited character. The finality does not oust the jurisdiction of the Civil Court to go beyond the certificate and to see whether the certificates have been issued by a Court of competent jurisdiction after verifying whether the conditions precedent to grant the certificates existed or not.

54. A perusal of the alleged certificate under Section 32-M relied upon by the defendant nos.1 to 7 indicates that the said certificate refers to the name of Narayan Vitthal Jathar as landlord and not the names of Fulji Dhondi Satale and Sonubai Shankar Gangurde as landlords. If by virtue of the sale deed executed in favour of Fulji Dhondi Satale and Sonubai Shankar Gangurde in respect of the suit land and they were already the owners of the suit property prior to the date of issuance of the said alleged certificate dated 1st September, 1963, Fulji Dhondi Satale could not have been declared as tenant and the original owner and the joint owners could not have been divested of their ownership under the said alleged certificate by declaring one of the co-owner as a tenant.

55. A perusal of the said alleged certificate further indicates that a note is appended in the said certificate to the effect that the said land shall not be transferred by sale, gift, exchange, mortgage, lease or assignment or partition of the land without the previous sanction of the Collector provided under Section 43 of the BTAL Act. In my view, the said Fulji Dhondi Satale could not have been declared as a tenant since he was one of the co-owner in the suit property. The principles laid down by this Court in the case of **Laxman Siddhu Pote** (supra) squarely applies to the facts of this case. I am thus not inclined to accept the submission of the learned counsel for the defendant nos.1 to 7 that the said alleged certificate shall be considered as conclusive and until the same is set aside in the appropriate proceedings, decree of the two Courts in favour of the original plaintiffs cannot be executed.

56. This Court in the case of **Rama Hariba Khavale**

Vs.Gopika Ramling Survase & Ors. (*supra*) after adverting to the judgment of this Court in the case of **Fulmati Shivilal Mishra & Anr. Vs.Ramkrishna Gangaprasad Bajpai & Ors., 1981 Mh.L.J. 321** and in the case of **Ramu Shivappa Agalawe & Ors. Vs. Imam Kashim Pathan & Ors., 1992 (3) BCR 560** has held that the Court has a duty to examine the substance and refuse to frame and remit any such issue to the authority under Section 85 or 85-A of the BTAL Act, if the same appears to be demonstrably frivolous and *mala-fide*. This Court also held that though the issue as to whether a person is a tenant or not has to be decided by a tenancy Court, a reference to tenancy Court cannot be made for the sake of asking. The judicially trained mind of the Court must scrutinize the pleadings and the documents, make the necessary inquiry and find out whether the plea is genuine or is *mala-fide* and fraudulent aimed at procrastinating the litigation. Vague pleadings, unsubstantiated by *prima facie* material will put the Court on guard.

57. It is held that the Court will also consider the stage at which the plea is raised. If the issue is never raised in the trial Court and application is made belatedly at the appellate stage then it may be a sure indication of an attempt to prolong the agony of litigation. While dealing with such application at the appellate stage, the Court will have to be more cautious. In my view, the principles laid down by this Court in the case of **Rama Hariba Khavale Vs.Gopika Ramling Survase & Ors.** (*supra*) squarely apply to the facts of this case. The defendant nos.1 to 7 did not file any written statement though the opportunities were rendered by the learned trial Judge at the first instance and thereafter by the first appellate Court while remanding the matter back to the learned trial Judge for giving an

opportunity to file written statement. Though the alleged certificate under Section 32-M was issued in the year 1963 and the certified copy thereof was issued in the year 2004, admittedly the defendant nos.1 to 7 neither cross-examined the witness examined by the plaintiffs nor produced the said alleged certificate before the learned trial Judge as well as before the first appellate Court.

58. A copy of the alleged certificate is produced belatedly in the year 2014 i.e. much after filing of the second appeal and that also without rendering any sufficient explanation for not producing the said copy of the alleged certificate for last more than 50 years in any proceedings or no alleged rights have been asserted based on such alleged certificate in any correspondence. It is clear beyond reasonable doubt that the defendant nos.1 to 7 against whom the decree for possession is passed by the learned trial Judge which is upheld by the first appellate Court has made such application at this belated stage obviously with a view to further prolong the agony of litigation. In my view, the defendant nos.1 to 7 thus cannot be allowed to rely upon such alleged document at this stage and cannot be allowed to succeed in their intention of further prolonging litigation which is pending for last more than 15 years.

59. This Court in the case of **Madhav Kesu Khuspe** (supra) has held that the express provisions of Section 32-G have not been complied with, inasmuch as no notice was served upon the plaintiff and no statement of the plaintiff was recorded and thus the enquiry was patently in breach of Section 32-G. The principles of natural justice were also not observed as the enquiry was held without notice to the plaintiff, and any decision without notice to the person likely to

be affected and without giving him an opportunity of being heard would be not in conformity with the fundamental principles of judicial procedure. This Court rejected the contentions of the opponent that unless the certificate issued by the authority was set aside, the same would be binding on the parties on the ground that if the order itself is ultra vires then it is a nullity and there is no obligation upon a party against whom the order is made to prefer an appeal against that order.

60. In my view, the judgment of this Court in the case of **Madhav Kesu Khuspe** (supra) squarely applies to the facts of this case. The defendant nos.1 to 7 could not produce any material before this Court to show that the procedure prescribed under Section 32-M and other provisions of the BTAL Act which are required to be complied with before issuance of the certificate under Section 32-M of the BTAL Act was at all complied with by the competent authority. In my view, the said alleged certificate alleged to have been issued by the competent authority thus cannot be considered as conclusive and final and binding upon the plaintiffs and thus the impugned decree passed by the two Courts below cannot be stayed or execution thereof cannot be denied on that ground. In these circumstances, in my view even if such alleged certificate would have been produced by the defendant nos.1 to 7, the trial Court could not have referred the issue of alleged tenancy to the competent authority under Section 85-A of the BTAL Act.

61. This Court in the case of **Husein Miya Dosumiya** (supra) has held that jurisdiction of the Civil Court is ousted under Section 85(2) only in respect of valid order made by the Mamlatdar. It

is held that if the order passed by the Mamlatdar is incompetent or '*ultra vires*', then the order is a nullity and it can be challenged in a civil Court. In my view, the principles laid down by this Court in the case of **Husein Miya Dosumiya** (supra) squarely applies to the facts of this case.

62. This Court in the case of **Uttam Sambha Deshmukh & Ors.** (supra) has held that unless the material facts constituting the plea of tenancy in accordance with Order VI Rule 2 of the Code of Civil Procedure, 1908 have not been pleaded in the written statement, viz. as to when the tenancy commenced, who was the landlord, what were the terms and conditions of the tenancy, what was the rent fixed etc., the issue of alleged tenancy cannot be referred to the competent authority. In this case, admittedly no written statement was filed by the defendant nos.1 to 7 and thus this Court cannot be asked to refer the issue of tenancy to the competent authority and that also at this stage. In my view, the principles laid down by this Court in the case of **Uttam Sambha Deshmukh & Ors.** (supra) squarely applies to the facts of this case.

63. In my view, the issue of tenancy raised by the defendant nos.1 to 7 at this stage appears to be patently frivolous and is raised with a view to prolong the litigation further and thus cannot be accepted. This Court in the case of **Dada Savla Yadav** (supra) has held that once the landlord obtains possession of the land from a tenant in pursuance of a surrender which is accepted by the Mamlatdar in accordance with the provisions of the Tenancy Act, the question whether such a surrender was a nominal or sham surrender does not fall within the ambit of Section 70 of the Tenancy

Act. The jurisdiction of the Civil Court to decide that question cannot be held to be ousted by virtue of Section 85 of the Tenancy Act. In my view, the said Fulji Dhondi Satale and Sonubai Shankar Gangurde having acquired right, title and interest in the suit property much prior to the date of such alleged certificate could not have been divested of their title and thus the joint ownership of the two parties could not have been converted into a tenancy by virtue of the said certificate under Section 32-M of the BTAL Act.

64. Supreme Court in the case of **Gurbax Singh Chanda Singh** (supra) has held that if the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the civil Courts have jurisdiction to examine those cases. In my view, since the alleged certificate issued under Section 32-M of the BTAL Act is without following the mandatory procedure under the provisions of the BTAL Act, the same being nullity and thus cannot bind the plaintiffs and thus no cognizance thereof can be taken by this Court.

65. In so far as the judgments in the cases of **Rajaram Totaram Patel** (supra), **Tulsiram Adku Marape & Anr.** (supra), **Saraswatibai Trimbak Gaikwad** (supra) and **Smt.Savitra Bapu Shinde & Ors.** (supra) relied upon by the learned counsel for the defendant nos.1 to 7 are concerned, none of those judgments would assist the case of the defendant nos.1 to 7. The defendant nos.1 to 7 not having raised plea of alleged tenancy before the learned trial Judge, inspite of having rendered opportunities to file written statement twice, the defendant nos.1 to 7 cannot be allowed to raise a plea that the learned trial Judge ought to have referred the issue of

tenancy to the competent authority under the provisions of the BTAL Act. The judgments relied upon by the learned counsel for the defendant nos.1 to 7 are thus clearly distinguishable.

66. In so far as the submission of the learned counsel for the defendant nos.1 to 7 that the defendant nos.1 to 7 had already relied upon the mutation entry before the first appellate Court and thus the first appellate Court ought to have referred the issue of tenancy to the competent authority is concerned, the mutation entry is not conclusive to prove the title in respect of the suit property. The defendant nos.1 to 7 had never disputed that the sale deed was executed in favour of Fulji Dhondi Satale and Sonubai Shankar Gangurde by the original owner Narayan Vitthal Jathar. Learned counsel for the defendant nos.1 to 7 could not demonstrate before this Court as to how the sale deed executed between Fulji Dhondi Satale and Sonubai Shankar Gangurde and Narayan Vitthal Jathar could be declared as void by the competent authority and in any case without following the procedure of law.

67. In my view, the findings recorded by the two Courts below are concurrent findings of facts which are rendered after considering the oral and documentary evidence produced by the plaintiffs which remained uncontroverted and being not perverse cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908. There is no substantial question of law arises in this appeal. I am not inclined to allow the Civil Application No. 282 of 2015 filed by the defendant nos.1 to 7 *inter-alia* praying for taking the alleged certificate under Section 32-M of the BTAL Act dated 1st September, 1963 on record by marking the same as exhibit for the reasons

already recorded aforesaid. In my view, the second appeal as well as civil application are totally devoid of merits.

68. I therefore pass the following order :-

- i). Second appeal is dismissed with costs quantified at Rs.25,000/- which shall be paid by the appellants to the respondents within two weeks from today.
- ii). Civil Application No.282 of 2015 is dismissed.
- iii). In view of the dismissal of the appeal, Civil Application No.1272 of 2013 does not survive and is accordingly dismissed.

(R.D. DHANUKA, J.)

Learned counsel appearing for the appellants seeks continuation of the *ad-interim* relief granted by this Court for a period of eight weeks, which is vehemently opposed by the learned counsel for the respondents. In my view, no case is made out for continuation of *ad-interim relief* granted by this Court. The application for continuation of the *ad-interim* relief is rejected.

(R.D. DHANUKA, J.)