

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6747 OF 2016

M/s. Niketan Land and Estate Pvt. Ltd.]
Nashik, a Company incorporated under]
the Companies Act, 1956 and having its]
Registered Office at : Poddar House]
L. P Poddar House, Nashik 411 005]
Through its Director :-]
Nemichand Lalitaprasad Poddar]..... Petitioner.

versus

1] State of Maharashtra]
Through its Secretary of Revenue &]
Forest Department, Mantralaya,]
Mumbai – 32]
2] The Collector, Nashik]
3] The Commissioner Nashik Division]..... Respondents.

Mr. G S Godbole a/w Mr. Shailendra S Kanetkar for the Petitioner.
Mr. A B Vagyani, Government Pleader, a/w Ms. Tintima Hazarika for the
Respondent Nos.1 to 3.

CORAM : R. M. SAVANT, J.
Reserved on : 14th December 2016
Pronounced on : 10th January 2017

JUDGMENT :-

1 Rule with the consent of the learned counsel for the parties made
returnable forthwith and heard.

2 The writ jurisdiction of this Court is invoked against the order
dated 24/02/2010 passed by the Respondent No.2 i.e. the Collector, Nashik by

which order the application filed by the predecessor of the Petitioner for grant of permission to transfer the land and for its conversion from agricultural to non-agricultural came to be allowed on the terms and conditions mentioned therein. The terms and conditions mentioned in the impugned order entail the payment of unearned income to the State Government, as also the condition that the land in question would continue to remain as Occupancy Class II land. The Petitioner is principally aggrieved by the aforesaid condition mentioned in the impugned order.

3 The factual matrix involved in the above Petition can in brief be stated thus :-

 The subject matter of the application filed by one Namdeo Eknath Bankar was the land bearing Survey No.836 at Nashik. The said land was allotted in the year 1949 by the State Government to the father of the said Namdeo Bankar on new and impartible tenure on permanent grant basis. The father of the said Namdeo Bankar had accordingly executed a Kabuliyat in form F-I in terms of the requirements mentioned in the allotment letter. The said Kabuliyat which is in the nature of an undertaking would be referred to in the instant judgment a bit later.

 In so far as the categorization of lands into Class I and Class – II is concerned, the same finds place in Section 29 of the Maharashtra Land

Revenue Code. The said Section also sets out the attendant attributes of the lands belonging to each of the aforesaid categories. The said Section 29 is reproduced herein under for the sake of ready reference :-

“Section 29:- Classes of persons holding land.

(1) There shall be under this Code the following classes of persons holding land from the State, that is to say--

(a) Occupants – Class I

(b) Occupants – Class II

(c) Government lessees.

(2) Occupants - Class I shall consist of persons who –

(a) hold unalienated land in perpetuity and without any restrictions on the right to transfer;

(b) immediately before the commencement of this Code hold land in full occupancy or *Bhumiswami* rights without any restrictions on the right to transfer in accordance with the provisions of any law relating to land revenue in force in any part of the State immediately before such commencement; and

(c) notwithstanding any notification or order issued under Section 150 of the Madhya Pradesh Land Revenue Code, 1954, are holders of land in *Bhumidhari* rights in any local area in Vidarbha and are permitted hereafter, subject to the rules made by the State Government in this behalf, on payment of a premium (not exceeding three times the assessment payable in respect of such land) to be included in occupants- Class I.

(3) Occupants- Class II shall consist of persons who,--

(a) hold unalienated land in perpetuity subject to restrictions on the right to transfer;

(b) immediately before the commencement of this Code hold--

(I) land in Vidarbha in *Bhumiswami* rights with restrictions on the right to transfer or in *Bhumidhari* rights under the Madhya Pradesh Land Revenue Code, 1954; and

(ii) elsewhere hold land in occupancy rights with restrictions on the right to transfer under any other law relating to land revenue; and

(c) before the commencement of this Code have been granted rights in unalienated land under leases which entitle them to hold the land in perpetuity, or for a period not less than fifty years with option to renew on fixed rent, under any law relating to land revenue and in force before the commencement of this Code; and all provisions of this Code relating to the rights, liabilities and responsibilities of Occupants- Class II shall apply to them as if they were Occupants-Class II under this Code.”

Hence a reading of the aforesaid provision indicates that in so far as Class II land is concerned, it is subject to restrictions on the right to transfer.

4 The transfer of agricultural lands belonging to Class II, that is held on restricted tenure and their conversion from agricultural to non-agricultural user is regulated by the Government Resolutions passed from time to time. In the instant case there is no dispute about the fact that the Government

Resolution dated 08/09/1983 is applicable. The said Government Resolution (“GR” for short) contemplates 50% of the unearned income to be paid as premium for such transfer and conversion. In terms of the said GR an application is required to be made to the Commissioner of the concerned Revenue Division.

5 The original owner Shri Namdeo Bankar filed an application dated 19/09/1989 for transfer and conversion of the land from agricultural to non-agricultural. The said Bankar was informed by the office of the Respondent No.2 that he should deposit an amount of Rs.59,52,000/- as premium on account of unearned income for permission to sell/transfer the land and its conversion from agricultural to non-agricultural.

6 Aggrieved by the said computation the said Namdeo Bankar filed an Appeal under Section 247 of the Maharashtra Revenue Code, 1966 (for short “MLR Code”) before the Respondent No.1. The Secretary and Officer on Special Duty (“Secy. & OSD” for short) acting on behalf of the Respondent No.1 partly allowed the said Appeal and held that out of the ready reckoner value as on 01/01/1997 and the agreement to sale value, the higher of the two should be taken and 75% of the amount as unearned income should be charged. After the said order dated 09/08/2002 came to be passed by the Respondent No.1, the Respondent No.1 had informed the said Namdeo Bankar that it is taking

steps to review the said order dated 09/08/2002 passed by the Secy. & OSD. It seems that in view of the order dated 09/08/2002 the said Namdeo Bankar had filed a Writ Petition in this Court being Writ Petition No.9688 of 2003 for implementation of the said order dated 09/08/2002. It seems that thereafter the said Namdeo Bankar was called for hearing in respect of the suo moto review undertaken by the State Government. The said Writ Petition No.9688 of 2003 was accordingly withdrawn. The then Hon'ble Minister for Revenue who heard the review by his order dated 07/02/2007 allowed the said review application and consequently modified the order passed by the Secy. & OSD dated 09/08/2002. It was held by the then Hon'ble Minister that the amount should be recovered as an unearned income with interest as per GR dated 08/07/1999.

7 Being aggrieved by the said order dated 07/02/2007 the partner of the Petitioner herein as the Power of Attorney of the said Namdeo Bankar filed Writ Petition No.5740 of 2007 in this Court. The said Writ Petition was heard by a learned Single Judge who, in view of the agreement reached between the parties, set aside the condition imposed by the then Hon'ble Minister and consequently the Petitioner was directed to pay the principal sum as computed in the order of the Appellate Authority i.e. the Secy. & OSD along with interest at the rate of 12% from 1998 to 2002 and at the rate of 9% from 2002 till 2007. However, what is significant in the context of the challenge

raised in the above Writ Petition is the fact that the partner of the Petitioner herein had filed the said Writ Petition as a Power of Attorney of the original owner Namdeo Bankar. Another important aspect of the said Petition was that a contention was urged on behalf of the Petitioner that the order passed by the “Secy. & OSD” fully implements the GR dated 08/09/1983 and that the Hon'ble Minister had imposed certain conditions which are patently unsustainable. The learned Single Judge in his order dated 21/01/2008 has observed that if the amount of earned income is remitted, then the authorities to take necessary steps so that the purchaser/transferee of the land holds the same on the terms and conditions as stipulated in the order of allotment, meaning thereby that the transferee would hold the land on the same terms and conditions which are stipulated in the original order of allotment. In the instant case, the same would mean Class II occupancy that is the land held on restricted tenure. The relevant extract of the said order is reproduced herein under for the sake of ready reference :-

“All sums as computed with interest shall be remitted within a period of six weeks from the date a revised computation/calculation is forwarded and received. If remittance is made within this period, the concerned authorities to accept the same as full and final settlement of the claim towards unearned income and Authorities to take necessary steps so that the Purchaser/Transferee of the land holds the same on the terms and conditions stipulated in the order of allotment.”

(emphasis supplied)

8 In view of the discrepancy in the figure mentioned in the said order dated 21/01/2008, a Review Petition was filed for correcting the figure i.e. the principal amount which was payable by the said original owner. The said Review Petition accordingly came to be allowed by the order dated 21/04/2008 and the principal sum accordingly came to be corrected. The recording of the consent on behalf of the State was also set aside.

9 It seems that after the Review Petition came to be disposed of, the partner of the Petitioner, as Power of Attorney of the original owner i.e. the said Namdeo Bankar, addressed a letter dated 02/05/2008 that the Petitioner is ready and willing to deposit the amount mentioned in the order dated 21/01/2008. The Petitioner sent a cheque for an amount of Rs.9,24,185 along with a forwarding letter. It seems that the Collector, Nashik issued a letter to the Tahsildar regarding acceptance of the said amount but it was stated that the said amount would be subject to and without prejudice to the rights of the Government, as it was in the process of filing an Appeal against the said order dated 21/01/2008 passed in Writ Petition No.5740 of 2007. The Petitioner in view of non-compliance of the said order dated 21/04/2008 filed a Contempt Petition in this Court being Contempt Petition No.269 of 2008. Against the said order dated 21/01/2008 the State Government filed an LPA being No.410 of 2008 impugning the order dated 21/01/2008 as also the order dated 21/04/2008 passed in the Review Petition. The said LPA came up for hearing

before a Division Bench of this Court. The Division Bench by its judgment and order dated 18/08/2009 dismissed the said LPA principally on the ground that the powers of review could not have been exercised by the Hon'ble Minister when the order dated 09/08/2002 was passed by the Secy. & OSD.

10 In the context of the present Writ Petition it would have to be noted that the focus before the Division Bench was as regards computation of the unearned income which can be seen from paragraph 11 of the judgment of the Division Bench. The State Government had in the said LPA challenged the computation of unearned income as set out in the order passed by a learned Single Judge dated 21/01/2008. The Division Bench found fault with the order passed by the Hon'ble Minister on the ground that during pendency of the review for 7 years there would obviously have been substantial variation in the market value of the property which the Hon'ble Minister had also lost sight of. According to the Division Bench the Secy. & OSD had rightly fixed 01/01/1997 as the date for market value of the property. The Division Bench further held that the Hon'ble Minister had taken a pedantic view by holding that the valuation is to be calculated as on the date of the order irrespective of the period for which the application is kept pending by the State Government. The Division Bench accordingly confirmed the order dated 21/01/2008 (wrongly mentioned in the judgment of the Division Bench as Order dated 7th August 2006) and held that it was not necessary to consider the order passed

in Review dated 21/04/2008. Hence the order dated 21/01/2008 passed by the learned Single Judge was confirmed. What is pertinent to note is that the Division Bench did not deal with the issue of conversion of Occupancy Class II to Occupancy Class I i.e. old tenure as was directed by the Secy. & OSD, as it was not required to do so in view of the order passed by the learned Single Judge of this Court which directed that the transferee would hold the same on the terms and conditions stipulated in the order of allotment. The said paragraph 11 of the judgment of the Division Bench is reproduced herein under for the sake of ready reference.

“Even on merit, in our considered opinion, the impugned order cannot be sustained. Section 253(2) of the Maharashtra Land Revenue Code, 1966 restricts review of the order to three grounds (I) discovery of new and important matter or evidence (ii) some mistake or error apparent on the face of the record (iii) any other sufficient reason. In the instant case, the reason stated in the order by the Hon'ble Minister for exercising power of review is that the appellant authority had ignored Government order (Revenue and Forest Department) dated 8th September 1983 while deciding the appeal. This observation is factually incorrect as can be seen from the order of the appellate authority. The appellate authority noted the Government order (Revenue and Forest Department) dated 8th September 1983 that while fixing valuation of unearned income current valuation of market rate is to be considered. He further noted that the order did not specify the date of valuation whether the date of the application or the date of the order granting permission. In his well reasoned order, the appellate authority has held that if the application for conversion is decided within reasonable time after it is made, no dispute can arise. However, in the instant case, the decision for granting permission was being taken 7 years later. During such long period, there can be

substantial variation in the market value of the property. The appellate authority then noted that the applications filed by the appellant in the year 1989 and 1995 were not on record. Only the application dated 12th December 1996 was on record. Therefore for the purpose of calculating valuation at the market rate, he fixed the date of 1st January 1997. The Hon'ble Minister in his order of review, without discussing this aspect of the matter has taken a pedantic view and held that the valuation is to be calculated as on the date of the order irrespective of length of the period for which the application is kept pending by the Government without taking decision. This view taken by the Hon'ble Minister, in our opinion is neither correct nor reasonable.”

11 After the disposal of the LPA by the Division Bench the Collector Nashik has by passing the impugned order dated 24/02/2010 permitted transfer and conversion from agricultural to non-agricultural inter-alia on the terms and conditions mentioned in the said order. One of the conditions is that the transferee would continue to hold the land as Occupancy Class II i.e. on the same conditions as at the time of allotment which was made to the father of the said Namdeo Bankar. It is principally aggrieved by the said condition that the Petitioner above named who claims to have stepped into the shoes of the original owner Namdeo Bankar, has filed the above Writ Petition.

12 It seems that pending the above Petition the Petitioner had filed a fresh application on 15-01-2015 before the Collector, Nashik on the same lines as the earlier application filed in the year 1989. The said application has been rejected by the Collector, Nashik in view of the order dated 24/02/2010

passed by him which order is the subject matter of the instant proceedings. The aforesaid fact has been brought to the notice of this Court vide written submissions filed on behalf of the State Government. As indicated above, it is the said order dated 24/02/2010 passed by the Collector, Nashik and especially the condition mentioned therein which is taken exception to by way of the above Writ Petition.

13 **SUBMISSIONS OF THE LEARNED COUNSEL SHRI G S GODBOLE
ON BEHALF OF THE PETITIONER :-**

- A] That the Collector Nashik could not have imposed the same condition viz. that the transferee would continue to occupy the land as Occupant Class II which condition has been set aside by the Appellate Authority i.e. Secy. & OSD and confirmed by the Division Bench of this Court in LPA No.410 of 2008.
- B] That the order passed by the Secy. & OSD who was exercising quasi judicial powers having been merged with the order passed by the Division Bench of this Court and since the Secy. & OSD had set aside the condition of the transferee holding land as Occupancy Class II, the Collector, Nashik was bound to follow the order passed by the Secy. & OSD and direct conversion of the land from Occupancy Class II to Occupancy Class I i.e. unrestricted tenure. Reliance is sought to be placed on the judgment of the Apex Court

in the matter of *Kunhayammed and others v/s. State of Kerala and another* reported in *(2000) 6 SCC 359*.

C] That even an erroneous order is final and binding until it is set aside in appropriate proceedings. In the instant case though it is the case of the Respondents that the order dated 09/08/2002 passed by the Secy. & OSD in so far as it does away the condition of the holding being Occupancy Class II and is, according to the Respondents, in breach and violation of the GR dated 08/09/1983, nevertheless the same would have to be followed and given effect to. Reliance is sought to be placed on the judgment of the Apex Court in the matter of *V.S. Charati v/s. Hussein Nhanu Jamdar (Dead) by LRs* reported in *(1999) 1 SCC 273*.

D] That the delay in filing the above Writ Petition has been occasioned in view of the fact that the original owner Namdeo Bankar was involved in litigation with a third party and only after the said litigation got over, on account of the consent decree, that the above Petition could be filed. In support of the said contention, reliance is sought to be placed on Paragraphs 11 and 17 of the Writ Petition wherein the reasons for the delay have been mentioned.

- E] That the Collector, Nashik could not have imposed the condition of payment of unearned income as no such condition is found in the MLR Code. Reliance is sought to be placed on the judgment of the Division Bench of this Court in the matter of Smt. Jaikumari. Amarbahadursingh & ors v/s. State of Maharashtra reported in 2009(1) ALL MR 343.
- F] That assuming there is some delay, the same cannot come in the way of the Petitioner laying a challenge to the order which is patently illegal in the teeth of the order passed by the Division Bench of this Court in LPA No.410 of 2008.
- G] That the Respondents cannot challenge the order passed by the Secy. & OSD in so far as it directs conversion of land from Occupancy Class II to Occupancy Class I i.e. the old tenure on the application of the principles of constructive res-judicata as the Respondents did not challenge the order passed by the learned Single Judge when the opportunity was there for them in the LPA. Reliance is sought to be placed on the judgment of the Apex Court in the matter of Forward Construction Co. and others v/s. Prabhat Mandal (Regd.), Andheri and ors. reported in (1986) 1 SCC 100.

H] That the impugned order dated 24/02/2010 passed by the Collector, Nashik cannot be supported by the reasons now mentioned in the affidavit in reply. Reliance is sought to be placed on the judgment of the Apex Court in the matter of **Mohinder Singh Gill v/s. Chief Election Commissioner, New Delhi** reported in **1978 (1) SCC 405**.

14 **SUBMISSIONS OF THE LEARNED GOVERNMENT PLEADER SHRI A B VAGYANI ON BEHALF OF THE REPODENT NOS.1 TO 3.**

- i] That the condition on the basis of which the land was allotted is clear from Form F-I dated 01/08/1949 as well as from the Kabuliyat, the said documents inter-alia disclose that the land would be of new and impartible tenure i.e. Class II.
- ii] That the Secy. & OSD had exceeded his jurisdiction by directing that the transferee would hold land as per the old tenure i.e. Class I. This was in breach and violation of the GR dated 08/09/1983 which regulates the transfer and conversion of agricultural land allotted by the State Government on Occupancy Class II basis. The order passed by the Secy. & OSD is therefore without jurisdiction in so far as it directs conversion of the land from Occupancy Class

II to Occupancy Class I. The said order being without jurisdiction, no cognizance of the same could be taken. Reliance is sought to be placed on the judgment of the Division Bench of the Delhi High Court in the matter of *Ritz Theatre v/s. Income Tax Officer* reported in *2010 LawSuit (Del) 3771* and the judgment of a learned Single Judge of the Andhra Pradesh High Court in the matter of *Hyderabad Allwyn Metal Works Limited v/s. Collector of Central Excise* reported in *1977 LawSuit(AP) 146*.

- iii] That the learned Single Judge in Writ Petition No.5740 of 2007 has in terms observed that on payment of premium by the original owner the transferee would occupy the land on the terms and conditions stipulated at the time of original allotment implicit in the said recording is the fact that the transferee would hold the land as Occupant Class II.
- iv] That the reasons mentioned in paragraph 17 for the delay in filing the above Writ Petition cannot be accepted and the fact that the Petitioner has filed the above Writ Petition after a delay of about 5 years implies that the Petitioner has acquiesced in the order passed by the Collector, Nashik and waived his rights if any. Reliance is sought to be placed on the judgment of the Apex Court in the

matter of Tridip Kumar Dingal and others v/s. State of West Bengal and others reported in (2009) 1 SCC 768.

CONSIDERATION :-

15 Having heard the learned counsel for the parties, I have considered the rival contentions. At the outset it would be necessary to deal with the issue of delay and laches, which is a ground urged on behalf of the Respondents whilst opposing the above Writ Petition. The impugned order passed by the Collector, Nashik is dated 24/02/2010 and the instant Petition has been filed on 14/07/2015. The reasons for the delay are mentioned in paragraphs 11 and 17 of the Petition. The sum and substance of the reasons in the the said paragraphs is that after the dispute between the 3rd party and the original owner got over on account of the Consent Decree passed in the suit, that the above Writ Petition could be filed by the Petitioner. Before testing the said reasons it would be necessary to take into consideration a few facts. The averments made in paragraphs 11 and 17 do not disclose as to when the Petitioner has acquired the rights in the land in question from the original owner Namdeo Bankar. The nature of the transaction between the Petitioner and the said Namdeo Bankar has also not been mentioned. However, the fact remains that the partner of the Petitioner as the Power of Attorney of the said Namdeo Bankar had filed Writ Petition No.5740 of 2007 before a learned

Single Judge of this Court challenging the order dated 07/02/2007 passed by the Hon'ble Minister. The Petitioner thereafter had also filed Contempt Petition No.269 of 2008 in this Court, as also prosecuted LPA No.410 of 2008 on behalf of the original owner Namdeo Bankar. Hence it was the Petitioner who was in the forefront in prosecuting the proceedings before this Court as well as the authorities below. It was also the Petitioner who had issued notice etc. for compliance of the order passed by the learned Single Judge.

16 Now coming to the justification for the delay in filing the Writ Petition as averred in paragraphs 11 and 17. The record discloses that the suit was filed by the original owner against the Petitioner and its partners for declaration and injunction. The said suit was originally numbered as Regular Civil Suit No.603 of 2012 and thereafter numbered as Special Civil Suit No.383 of 2014. The said suit was compromised and Consent Decree came to be passed on 04/12/2014. The said Consent Decree discloses that in the land in question plots were carved out and certain plots were to go to the original owner i.e. the said Namdeo Bankar. However, by the averments made in paragraphs 11 and 17 an impression is sought to be created that the owner had some dispute with a third party when in fact the suit in question was filed against the Petitioner herein. The said fact is also required to be considered in the context of the fact that it was the Petitioner who was in the forefront of prosecuting the proceedings before the authorities as well as in this Court right

up to the year 2009 as the Power of Attorney of the original owner. As indicated above, the order passed by the Collector, Nashik is dated 24/02/2010; the suit appears to be filed in the year 2010 and the same got settled in the year 2014. Hence in so far as the said order dated 24/02/2010 is concerned, there was absolutely no impediment for either the original owner or the Petitioner to challenge the said order passed by the Collector, Nashik. However, beyond stating that the original owner was involved in the litigation with a third party, there is no explanation as to why there is delay of about 5 years in filing the above Writ Petition challenging the said order dated 24/02/2010. The aforesaid facts therefore imply that the order passed by the Collector, Nashik was acceptable to the original owner i.e. the said Namdeo Bankar as also to the Petitioner and that the present challenge is therefore speculative in nature and by way of taking a chance.

17 In so far as the aspect of delay and laches is concerned, there is another aspect that cannot be lost sight of i.e. the Petitioner in spite of the order dated 24/02/2010 once again applied on 15/01/2015 to the Collector, Nashik for the same relief. The said application has been rejected by the Collector, Nashik by his order dated 27/11/2015. The said application filed by the Petitioner would therefore have to be attributed to the fact that the Petitioner was very well aware that there was a delay in challenging the order dated 24/02/2010 passed by the Collector, Nashik, and therefore wanted to

close the gap in so far as the said delay is concerned. In my view, having regard to the reasons mentioned in paragraphs 11 and 17 of the Petition as also the aforesaid fact, the same do not justify the delay in filing the above Writ Petition, and therefore, do not commend acceptance. The above Writ Petition would accordingly have to be dismissed on the ground of delay and laches and is accordingly dismissed on the said ground.

18 However, it would also be necessary to deal with the matter on merits. The bone of contention as indicated herein above in the instant proceedings is the condition mentioned in the order dated 24/02/2010 passed by the Collector, Nashik which is to the effect that the transferee would continue to hold the land as Occupant Class II. In assailing the said condition, reliance is sought to be placed by the Petitioner on the order dated 09/08/2002 passed by the Secy. & OSD in which order the said condition has been done away with. However, in so far as the said condition is concerned, a few background facts would have to be noted. There is no dispute about the fact that the land in question was allotted to the father of one Namdeo Bankar in the year 1949 on the basis of new and impartible tenure i.e. Occupancy Class II. The said fact is fortified by the entry made in the Village Form No.VI, Form F-I and Kabuliyat. The allottee i.e. the father of the said Namdeo Bankar has stated in the Kabuliyat that the said land has been granted to him in perpetuity from 08/06/1949 subject to the provisions of the Maharashtra Land

Revenue Code, 1879 and subject to the further condition that neither he nor his legal heirs shall at any point of time divide, mortgage, partition, sell, transfer by any means and further condition that he would not transfer the land as a whole or allow any part of it to be cultivated, used or occupied by any other person so as to divide it without prior permission of the Collector. As indicated above the transfer and conversion of agricultural lands allotted by the State Government on the basis of Occupancy Class II is regulated by the said GR dated 08/09/1983. The said GR postulates the terms and conditions on which the transfer and conversion can be granted. One of the conditions is that the transferee would continue to occupy the land as Occupant Class-II. The said GR having been issued by the State Government can be modified or varied only by the State Government and the officers exercising the powers under the Maharashtra Land Revenue Code are required to follow the said GR and not tinker with the terms and conditions mentioned in the said GR. In the instant case, as can be seen, the Secy. & OSD in spite of the mandate of the said GR dated 08/09/1983 has in breach and violation of the said GR directed conversion of the land from Occupancy Class II to Occupancy Class I which was impermissible. Hence it would have to be held that the order passed by the Secy. & OSD to the said extent is illegal as having been passed without jurisdiction and therefore the said condition though in favour of the Petitioner herein would be of no avail.

19 Now coming to the contention as urged on behalf of the Petitioner that the order passed by the Secy. & OSD holds the field and the Petitioner is therefore entitled to conversion from Class II to Class I. As indicated in the earlier part of this Judgment, the said Namdeo Bankar had vide his application dated 19/09/1989 applied to the Collector, Nashik for transfer of the land and its conversion to non-agricultural user. The Collector, Nashik vide letter dated 24/01/2001 informed the said Namdeo Bankar to deposit a sum of Rs.59,52,000/- as premium payable towards permission to transfer the land and its conversion into non-agricultural user. The said Namdeo Bankar challenged the said letter dated 24/01/2001 by filing an Appeal before the Appellate Authority i.e. the Secy. & OSD. The Appellate Authority by its order dated 09/08/2002 partly allowed the said Appeal and directed that 25% of the premium/nazarana should be charged as one time premium for conversion of land from Class II to Class I i.e. the old tenure. This, as indicated herein above, was in breach and violation of the GR dated 08/09/1983 as no such conversion is permissible. The State Government therefore took the matter by way of review. The then Hon'ble Minister for Revenue by his order dated 07/02/2007 reviewed the said order dated 09/08/2002 and set aside the said order and directed that the valuation fixed by the Assistant Director Town Planning to prevail, and the unearned income to be recovered as per GR dated 08/07/1999 and that the area under reservation of the Municipal Corporation shall be excluded from the computation of the unearned income and that after the sale,

the transferee shall hold the land as Occupant Class II. It is against the said order dated 07/02/2007 that the Petitioner had filed Writ Petition No.5740 of 2007 as the Power of Attorney of the said original owner Namdeo Bankar. The said Writ Petition came to be disposed of by a learned Single Judge of this Court by observing that if the remainder of the amount mentioned in the said order dated 21/01/2008 is paid then the transferee would hold the land on the same terms and conditions as mentioned in the original letter of allotment. The said order came to be reviewed in so far as the amount mentioned therein was concerned and the amount was accordingly corrected by exercising the review jurisdiction. The State Government aggrieved by the said order dated 21/01/2008 as also the order passed on review dated 24/01/2008 filed LPA No.410 of 2008. The said LPA filed by the State Government came to be dismissed by a Division Bench of this Court. Whilst dismissing the said LPA, the Division Bench granted its seal of approval to the computation made by the Secy. & OSD in so far as the unearned income and payment of Nazrana is concerned. The Division Bench accordingly confirmed the order dated 21/01/2008 passed by the learned Single Judge of this Court in Writ Petition No.5740 of 2007 in which order the order passed by the Secy & OSD was merged. As indicated above, the Division Bench did not deal with the issue of conversion of land from Occupancy Class II to Occupancy Class I i.e. the old tenure as it was not required to do so. Hence the order passed by the learned Single Judge dated 21/01/2008 merged in the order passed by the Division

Bench. The Division Bench for the reasons mentioned in its order confirmed the said order dated 21/01/2008 passed by the learned Single Judge. As indicated herein above, the learned Single Judge whilst disposing of the Writ Petition No.5740 of 2007 has in terms observed that the transferee would hold the land subject to the same terms and conditions as were mentioned in the original allotment. Hence in terms of the application of the doctrine of merger, the order of the learned Single Judge having merged in the order of the Division Bench, the transferee would continue to occupy the land as Occupant Class II and the order dated 09/08/2002 passed by the Secy. & OSD cannot be relied upon to contend that the condition of land being held as Occupancy Class II having been done away with, the Petitioner is entitled to the conversion of land to Occupancy Class I.

In fact as indicated herein above, before the learned Single Judge in the said Writ Petition No.5740 of 2007, a contention was urged that the order passed by the Secy & OSD fully implemented the GR dated 08/09/1983. Hence in urging the said contention the Petitioner accepted the applicability of the said GR and therefore now cannot be heard to urge a contention which militates against the mandate of the said GR dated 08/09/1983. It is also pertinent to note that the Petitioner has filed Contempt Petition No.269 of 2008 alleging breach and violation of the order dated 21/04/2008 passed by the learned Single Judge. Hence the Petitioner also accepts that it is the order

of the learned Single Judge which operates in the field and which is required to be complied with by the Respondents.

20 Now coming to the judgments cited on behalf of the Petitioner :-

In ***Mohanlal Goenka's*** case (supra) the Judgment Debtor did not raise any objection to the execution being proceeded with on the ground that the Executing Court did not have jurisdiction to execute the decree. The Apex Court in the said fact situation observed that the failure to raise such an objection which goes to the root of the matter precludes the Judgment Debtor from raising the plea of jurisdiction, on the application of the principles of constructive res-judicata. The Apex Court observed that there were two occasions when the Judgment Debtor raised the question of jurisdiction, he however did not press the same with the result that the objection must be taken to have been impliedly overruled.

In ***Forward Construction Co.'s*** case (supra) one of the issues in the said case was whether the Writ Petition filed in the High Court was barred by the principles of res-judicata. The High Court negated the said contention on the ground that in the earlier Writ Petition the validity of the permission granted under Rule 4(a)(i) of the Development Control Rules was not an issue, that the earlier Writ Petition was not a bonafide one inasmuch as the Petitioner was put up by some disgruntled builder. The said reasons did not find favour

with the Apex Court in view of Explanation IV to Section 11 of the Code of Civil Procedure. The Apex Court held that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The Apex Court further held that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim and defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided.

The aforesaid judgments have no application in the facts of the instant case where admittedly the State is not challenging the condition appearing in the order of the Secy. & OSD dated 09/08/2002 but it is the Petitioner aggrieved by the order dated 24/02/2010 passed by the Respondent No.2 i.e. the Collector, Nashik who has filed the above Petition. The State whilst opposing the above Petition is justifying the condition appearing in the order passed by the Collector, Nashik namely that the transferee would continue to occupy the land as Occupant Class- II. The defence taken by the

State cannot be said to be hit by the principles of constructive res-judicata.

21 In so far as the judgment cited on behalf of the Petitioner in *Kunhayammed's* case (supra) is concerned, the Apex Court in the said judgment reiterated the proposition of law that the order passed by an inferior Court, Tribunal or Authority merges in the order passed by the superior Court, Tribunal or Forum which is final, binding and operative decree or order wherein merges the decree or order passed by the Court, Tribunal or Authority below. In the instant case, as indicated herein above, the order passed by the Secy. & OSD has merged in the order passed by a learned Single Judge dated 21/01/2008 which in turn has merged in the order dated 18/08/2009 passed by the Division Bench of this Court in LPA No.410/2008. If that be so, the order passed by the Secy. & OSD dated 09/08/2002 in so far as it directs the conversion of land from Occupancy Class II to Occupancy Class I cannot be relied upon in the teeth of the directions which are contained in the order passed by the learned Single Judge dated 21/01/2008 which can be said to be confirmed by the Division Bench.

22 The matter can be looked at from another perspective. It is required to be noted that the transfer and conversion of land from agricultural to non-agricultural is regulated by the GR dated 08/09/1983. The said GR can be said to be supplemental to the Maharashtra Land Revenue Code and

provides the mechanism as to how an application for transfer and conversion of agricultural land is to be dealt with. The said GR postulates that the transfer and conversion can be permitted on the terms and conditions which are mentioned in the GR. One of the conditions mentioned is that the transferee would continue to hold the land as Occupant Class II. The said GR does not envisage the conversion of the Occupancy Class II to Occupancy Class I. Once that be so, any order passed by the authority exercising powers under the Maharashtra Land Revenue Code directing conversion of Occupancy Class II to Occupancy Class I would be in breach and violation of the said GR. This has precisely happened in the instant case as the Secy. & OSD has exceeded his jurisdiction in directing the conversion of land from Occupancy Class II to Occupancy Class I albeit on payment of 25% nazarana. Once the order can be said to have been passed without jurisdiction, even if the said order was to merge in the orders passed by the higher Courts then such an order would be of no avail to the party who seeks to reap its benefit as it is well settled by the judgments of the High Courts that there is no question of merger of the order passed by the original authority which is void on account of infirmity for want of jurisdiction. It has been held that the doctrine of merger has no application in so far as an illegal order is concerned. In the case of *Hyderabad Allwyn Metal Works Limited* (supra), the learned Single Judge of the Andhra Pradesh High Court has referred to the judgment of the Apex Court in *U.P. State v/s. Mohd. Noor (AIR 1958 SC 86)* and reproduced the following excerpt from the

said judgment :-

“On the authorities referred to above it appears to us that there may conceivably be cases and the instant case is in point where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior Court or tribunal of first instance acts wholly without jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or tribunal of first instance, even if an appeal to another inferior Court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what *ex facie* was a nullity for reasons aforementioned.”

23 In my view, the judgment in *V.S. Charati's* case (supra) would not further the case of the Petitioner in so far as the challenge to the said condition that the transferee could continue to occupy the land in question as Occupant Class – II is concerned. In the said case the application under Section 43-1B(2) of the Bombay Tenancy and Agricultural Lands Act was filed by the Appellant Landlord which came to be allowed by the Agricultural Land Tribunal and resultantly the possession of the land was directed to be handed over to the landlord. The Appeal filed before the Additional Commissioner by the Tenant came to be dismissed. The order passed by the Additional Commissioner was challenged by the Tenant before the High Court. The High Court set aside the orders passed by the authorities below and rejected the

application filed by the landlord. The matter was carried to the Apex Court. The Apex Court held that Section 43-1E of the Bombay Tenancy and Agricultural Lands Act will come into operation only in those cases where there is a completed purchase in favour of the tenant. In the said case before the Apex Court the proceedings under Section 32-G of the Bombay Tenancy and Agricultural Lands Act were earlier dropped in view of the fact that the landlord was a minor. The contention urged on behalf of the Respondent – Tenant that the Agricultural Land Tribunal was not right in dropping the proceedings under Section 32-G and that its order is bad in law was not accepted by the Apex Court on the ground that the order of the Tribunal having not been challenged by the Respondent -Tenant, it became final and binding on both the parties. The Apex Court observed that simply because it may be wrong, would not thereupon become a nullity. It would continue to bind the parties unless set aside. The said judgment would not have any application in the facts of the present case where this Court has come to a conclusion that the order passed by the Secy. & OSD being illegal in so far as it directs the conversion of the land from Occupancy Class II to Occupancy Class I, there can be no merger, and in fact the merger in the instant case is of the order passed by the learned Single Judge in Writ Petition No.5740 of 2007 in the judgment and order dated 18/08/2009 passed by the Division Bench in LPA No.410 of 2008

In so far as *Jaikumari Amarbahadursingh's* case (supra) is concerned, the lands involved therein were nazul lands in the erstwhile Central Provinces area and erstwhile Berar area. The lands in question were granted on lease basis to the grantees. The issue which arose for consideration of the Division Bench of this Court was whether the demand of payment of unearned income for renewal of the lease could be sustained. The Division Bench held that the parties are bound by the terms of the lease. If the lease does not keep the option to the Government to add, modify, alter or delete any condition of the lease, then the discretion of the Government cannot be taken forward unless the lessee put in possession of the land was to accept such change. Similarly, if there is renewal clause in the lease the Government will be obliged to renew the lease on the same terms and conditions. The Division Bench observed that in the said case it was not open to the State Government to delete the condition in the lease/grant which permitted the grantees to transfer the lease plot and/or at the same time introduce a new condition for the first time at the time of renewal of lease. The Division Bench held that where the lease deed is silent about the governments power to add new condition but the government is insisting to impose new conditions, there can be no doubt that such insistence of the State Government is without authority. On the other hand, if the nazul or previous lease contains condition authorizing the Governmental authority to introduce new condition or is silent about renewal clause, it will be open to the authority to introduce new

condition consistent with law enacted by State Legislature on the subject.

In the said case the unearned income was demanded on the basis of the Government Resolutions applicable to the areas where the lands in question were situated. The said judgment is relied upon to contend that the demand for unearned income in the instant case is unjustified.

In my view, the judgment in *Jaikumari Amarbahadursingh's* case (supra) would have no application having regard to the facts of the instant case. In the instant case it would have to be borne in mind that the land in question was allotted to the father of the original owner Namdeo Bankar on a new and impartible tenure i.e. Class II. The father of the said Nameo Bankar had also executed a Kabuliyat wherein he had given an undertaking that the allottee and his successor were bound by the terms and conditions of the allotment and that if he commits a breach, he is liable to be evicted. Hence the instant case is not a case where the renewal of lease was sought but is the case where the original allottee had sought permission to transfer and for conversion of the agricultural land to non-agricultural. In so far as the said aspect is concerned, the GR dated 08/09/1983 regulates the transfer and conversion of agricultural lands belonging to Class II. The said GR therefore supplements the Maharashtra Land Revenue Code in so far as the transfer and conversion of the land belonging to agricultural Class II is concerned. Hence

the instant case can be distinguished on facts from the case before the Division Bench.

24 It would also have to be noted that the Petitioner and original Owner by their conduct are now estopped from contending that the said GR dated 08/09/1983 has no application. It is required to be noted that the Petitioner/original Owner has applied for conversion in the year 1989 as per the then extant policy. The original owner and the Petitioner had prosecuted the proceedings before the authorities and this Court also as regards quantum of the unearned income payable under the said GR for transfer and conversion of the land. The original owner and the Petitioner have also shown their willingness to pay the unearned income and in fact have now deposited the said unearned income with the Collector, Nashik. It was also contended on behalf of the Petitioner in the said Writ Petition No.5740 of 2007 that the GR dated 08/09/1983 has been fully implemented, meaning thereby that the applicability of the said GR was accepted. The aforesaid facts therefore act as an estoppel against the Petitioner and the original owner from contending that the said GR dated 08/09/1983 would have no application. The conduct of the Petitioner amounts to approbation and reprobation i.e. on one hand apply under the said GR for transfer and conversion whereas on the other hand contend that it is not liable to pay unearned income as premium which is contemplated by the said GR. It also cannot be lost sight of that the tenor of

the above Petition is only as regards the challenge to the condition appearing in the impugned order dated 24/02/2010 passed by the Collector, Nashik wherein it is stated that the transferee would continue to occupy the land as a Class II Occupant. The Petitioner or the original Owner therefore never did once question the applicability of the said GR dated 08/09/1983 and therefore the submissions advanced on the basis of the judgment of the Division Bench cannot be countenanced in the facts of the instant case. The judgment in *Mohinder Singh Gill's* case (supra) would also have no application having regard to the facts of the instant case.

25 For the reasons afore-stated, the challenge to the order dated 24/02/2010 passed by the Respondent No.2 must fail. The relief sought vide prayer clause (b) is also rejected in view of the reasons mentioned in the instant Judgment. The above Writ Petition is accordingly dismissed. Rule discharged with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]