

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 264 OF 2019  
WITH  
CIVIL APPLICATION NO. 69 OF 2019  
IN  
WRIT PETITION NO. 264 OF 2019  
WITH  
WRIT PETITION NO. 273 OF 2019  
WITH  
CIVIL APPLICATION NO. 90 OF 2019  
IN  
WRIT PETITION NO. 273 OF 2019**

Ashish Chandrasingh Jhaveri ..Petitioner

v/s.

Yashwant Ankush Bhandari & Ors. ..Respondents

Mr. Girish Godbole a/w. Deepak Shukla i/b. Vinod Mistry & Co. for the Petitioner/Applicant.

Mr. Anil Anturkar, Sr. Advocate a/w. Vishal Khanavkar a/w. Kedar Dighe for the Respondent No.2, 9-A to 9-I in WP/264/2019 and for the Respondent No.2 in WP/273/2019.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.**

**DATED : 15<sup>th</sup> JANUARY, 2019.**

**JUDGMENT :-**

1. The petitioner has challenged the order dated 2<sup>nd</sup> November, 2018 passed by the Maharashtra Revenue Tribunal, Mumbai, in Tenancy Revision Application No.271 of 2018. By the impugned

order, the MRT has confirmed the orders of the SDO and Tahasildar that the proceedings under Section 32G of Bombay Tenancy And Agricultural Land Act (for short BT&AL Act) filed by the respondent nos.1 to 9 are not hit by the principles of res judicata.

2. The petitioner had filed an application before the learned Tahsildar questioning maintainability of the proceeding under Section 32G of BT&AL Act filed by the respondent nos.1 to 9. The challenge was on the ground that the previous proceedings under Section 32G of BT&AL Act, filed by the predecessors of the respondent nos.1 to 9 were dismissed by the learned Tahasildar by order dated 23rd October, 1971. The said order has attained finality and as a consequence thereof, the proceedings filed by the respondent nos.1 to 9 are barred by the principles of res-judicata.

3. The said application has been dismissed by the learned Tahsildar. The petitioner challenged the said order in an appeal before the SDO. The learned SDO concurred with the findings of the Tahasildar and dismissed the appeal by Order dated 15.06.2012. The revision application filed by the petitioners before the MRT has been

dismissed by order dated 02.11.2018. Being aggrieved by these orders, the petitioner has filed the present writ petition.

4. Mr. G.S. Godbole, the learned Counsel for the petitioner submits that the previous application under Section 32G of the BT&AL Act filed by Nathu and Vithu Bhandari, the predecessors of the respondent nos.1 to 9, had been dismissed by Order dated 23<sup>rd</sup> October, 1971. The said order was passed after recording the statements of the predecessor of the petitioner and the same has attained finality. He contends that the respondent nos.1 to 9 have filed fresh application under Section 32G by suppressing these material facts. He contends that the previous proceedings having been dropped, the subsequent proceedings under Section 32G are barred by the principles of res-judicata.

5. Mr. A.V. Anturkar, the learned counsel for the respondent has submitted that the previous application filed by the predecessor of the respondent nos.1 to 9 was not heard on merits. There was no adjudication and or final decision deciding the rights of the parties, and hence the principles of res-judicata are not applicable.

6. The learned counsels for the respective parties have relied upon several decisions of the Apex Court and of this Court to explain the scope and object of Section 11 of the CPC. In order to appreciate the contentions raised by the learned counsels for the respective parties, it would be advantageous to consider the scope of section 11 of the Civil Procedure Code which reads thus :-

*S.11 Res Judicata " No Court shall try any **suit** or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*

***Explanation I:***

*The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.*

***Explanation II:***

*For the purpose of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.*

***Explanation III:***

*The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

***Explanation IV:***

*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.*

***Explanation V:***

*Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.*

***Explanation VI:***

*Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*

***Explanation VII:***

*The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.*

***Explanation VIII:***

*An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res Judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit in which such issue has been subsequently raised. ”*

7. In ***M. Nagabhusana vs. State of Karnataka AIR 2011 SC 1113***, the Apex Court, while explaining the object of the Section 11 of the CPC has observed thus :-

*“the principles of res judicata are of universal application as it is based on two age old principles, namely, Rs. Interest reipublicae ut sit finis litium which means that it is in the interest of the State that there should be an end to the litigation and the other principle is Rs. nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest. ”*

8. In ***Dadu Dayalu Mahasabha, Jaipur (Trust) v/s. Mahant Ram Niwas and Anr. 2008 (2) G.L.H. 557***, the Apex Court has reiterated that to constitute a matter res judicata, the following conditions must be satisfied namely :-

- “(i) the matters directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.*
- (ii) the former suit must have been a suit between the same parties or between parties under whom they or any of them claim.*
- (iii) The parties must have litigated under the same title in the former suit.*
- (iv) The Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised.*

*(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Further Explanation 1 shows that it is not on the date on which the suit is filed the matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier . ”*

9. In ***State of Maharashtra & Anr. vs. National Construction Company Bombay and Anr. (1996) 1 SCC 735***, the Apex Court while considering the scope of Section 11 has held that:-

*"the important words are 'has been heard and finally decided.' The bar applies only when the matter directly and substantially in issue in the former suit has been heard and finally decided by a Court competent to try such suit. That clearly means on the matter or issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue, merely on a technical ground of non-joinder, that cannot operate as res judicata".*

10. In ***Mathura Prasad Bajoo Jaiswal and Ors. v/s. Dossibai N. B. Jeejeebhoy 1970(1) SCC 613***, the Apex Court has held that :-

*A decision of a Competent Court on a matter in issue may be res-judicata in another proceeding between the same parties: the "matter in issue" may be an issue of fact, an issue of law or one of mixed law and fact. In issue of fact or an issue of*

*mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: The reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant clause thereto. A clear question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res-judicata it is meant that the right claimed is res judicata and cannot be again be placed in contest between the same parties. A previous decision of a competent court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res-judicata. A previous decision on a matter in issue is a composite decision and cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent Proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been*

*altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law. "*

11. The Division Bench of this Court in ***Maharashtra General Kamgar Union v. Universal Dyeing and Printing Works (supra)*** and ***Food Corporation of India v. Prashant Pandurang Remteke (supra)***-- has reiterated these principles and has held that to apply the principles of res judicata or principles akin to res judicata what is required is the parties must be the same, the matter must have been in issue and/ or could have been in issue directly and substantially and has been decided finally by a competent court having jurisdiction. It has been further held that a matter cannot be said to be directly and substantially in issue in a suit or lis unless it was alleged by one party and denied or admitted, either expressly or by necessary implication by the other.

12. As regards the applicability of these principles to the proceedings under BT&AL Act, a Single Judge of this Court in ***Laxman Dhondu Bhor vs. Chintaman Bhimrao Pagare Lex Bom.***

**1987 (14)** has observed thus:

*"7. ...Though it is true that under Section 72 of the Tenancy Act the procedure contemplated under the Mamlatdar's Courts Act, 1906 is made applicable to proceedings before the Mamlatdar or Tribunal and the said Mamlatdars Court Act does not make the entire Civil Procedure Code applicable and hence the provisions of Section 11 of the Code of Civil Procedure dealing with res judicate cannot be said to be directly applicable. However, in my judgment the provisions analogous to the principle of res judicata sought to apply to proceedings under the Tenancy Act and the matters cannot be allowed to be agitated and reagitated year in and year out as has been done in the present case.*

*8. In the case of Gulabchand Chhotalal Parikh vs. State of Gujrat reported in AIR 1965 SC Page 1153, the question before the Supreme Court was whether a decision in a Writ Petition rendered on merits after hearing the parties would operate as res judicata in a subsequent suit and it was held that the provisions of Section 11 of the Code of Civil Procedure are not exhaustive with respect to the earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent Regular Suit and on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide, it will operate as res judicata in a subsequent regular suit. The nature of the former proceeding is immaterial. There is no*

*good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 pr 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest.*

*9. On the analogy of the aforesaid decision, I hold that the principles analogous to res judicata must apply to proceedings under the Tenancy Act."*

13. Having considered the aforestated well settled principles, the question that arises for consideration is whether the subsequent proceedings under Section 32G of BT & AL Act filed by the respondent nos.1 to 9 are barred by the principles of res judicata by virtue of order dated 23/10/1971, in earlier proceedings.

14. The records reveal that in the year 1968, Nathu and Vithu Bhandari, the predecessors of respondent nos.1 to 9 had filed an application under Section 32G of the BT&AL Act. The learned Tahasildar had recorded statements of said Balu and Nathu wherein they stated that they were not aware of the address of the landlord and that they would furnish the address as and when it would be

available. They stated that they had annexed 7/12 extract of the year 1967-68 and that they were not aware whether they were owners of the land as on 01/04/1957. They further stated that they were not aware about the whereabouts of the landlord and that they would file application under Section 32O of the BT&AL Act. Based on the said statements, the learned Tahasildar dropped the proceedings by order dated 23rd October 1971, which reads thus :-

*"The Applicants have given application dated 7.2.68 saying that price of the lands be fixed as per their say and so they have enclosed extracts of VII-XII pertaining to the year 1967-68 only. They have failed to present VII-XII extract pertaining to the year 1957-58 to show that they were tenants on 1.4.57. Much time has elapsed but notices are also not possible to be served to the landlords. As the burden lies on the tenants to furnish the addresses of their and they are not furnishing, they were informed to do the needful but in vain. In fact this case falls under Section 32-O of the BT&AL Act, 1948. The tenants should have given intimation of their desire to purchase the lands to the former landlords and the copy of the notice should have been endorsed to the Agricultural lands Tribunal for doing needful in the matter. As this is not done, the notices are cancelled and the proceedings are dropped. The parties be informed accordingly."*

15. Shri. Godbole, the learned counsel for the petitioner contends that the learned Tahasildar, had passed the order after considering

the revenue records produced by Nathu and Balu as well as the statement of said Nathu and Balu. The learned Tahasildar has recorded a categorical finding that the case was covered by Section 32O of BT & AL Act. He contends that the previous proceedings having been dropped after final adjudication, the subsequent proceedings filed by the respondent nos.1 to 9 are not maintainable. In support of this, he has relied upon the decisions in *V.S.Charati vs. Hussein Nhanu Jamdar 1999(3) Bom C.R. (SC) 131*, *Jagu Tukaram Waghmale v. Dnyandeo Bala Waghmale 2003(2) ALL MR 27*, *Laxman Dhondu Bhor vs. Chintaman Bhimrao Pagare Mh.L.J. 1987 641* and *Dattu Hari Mali v/s. Peer Alli Darga Masjid 2005(2)Mh.L.J. 681*.

16. The above judgments are totally distinguishable on factual matrix and not applicable for the reason being in *V.S.Charati (supra)*, proceedings under Section 32G were dropped on the ground of minority of the landlord. It was held that the rights of the tenant as a purchaser had not been crystalised, the landlord belonging to the armed forces could claim benefit of the provisions of Chapter III-AA.

The proceedings under Section 32G having been dropped, the tenant remained only a deemed purchaser and could not be called a purchaser as contemplated under Section 43-1E.

17. In *Jagu Tukaram Waghamale (supra)*, the question was whether the proceedings under Section 32G and the certificate issued under 32M could have been set aside by the Tenancy Court while answering a reference by a Civil Court under Section 85-A of the Act. While answering this question in the negative, it has been held that the Act prescribes a procedure and mode for setting aside orders under Section 32G and 32M. That is the only mode for setting aside these orders. The Tenancy Court while answering a reference by a Civil Court are not seized of the legality or validity of the decision under section 32G or certificate under Section 32M and are bound by earlier decision.

18. In *Laxman Dhondur Bhor (supra)*, the proceedings under Section 32G were dropped as one of the respondents was then a minor. The other respondent i.e. the landlady had not disputed the status of the petitioner as a tenant. The subsequent order of

restoration of possession which was passed on the assumption that the petitioner was a tenant was not challenged. Under these circumstances, it was held that the respondents were estopped from challenging the status of the petitioner as a tenant in a subsequent proceedings under Section 32G.

19. In *Dattu Hari Mali (supra)*, this Court while invoking the principles underlying Order 9 Rule 9 of the Civil Procedure Code, has held that once the earlier application for issuance of exemption certificate under Section 88B of the Act having been dismissed for default, subsequent application for the same relief is not maintainable in law.

20. In the present case, the Petitioner has challenged the proceedings filed by the Respondent Nos.1 to 9 on the basis that the order dated 23.10.1971 finally adjudicated the rights of the parties. In order to appreciate this controversy, it would be necessary to consider the scope of Sections 32, 32G and 32O of the BT & AL Act. Section 32 of the BT & AL Act provides that every tenant who is in possession of the agricultural land as on the Tillers Day

(01/04/1957), subject to the other provisions contained in the very section and in the next succeeding sections, shall be deemed to have purchased the tenanted land from his landlord, free of all encumbrances subsisting thereon on the said day. Section 32G enjoins upon an Agricultural Land Tribunal to fix the purchase price of land of which the tenants are deemed purchasers within the meaning of Section 32 of the BT & AL Act. Whereas Section 32O deals with the rights of tenants whose tenancy is created after Tillers day to purchase the land.

21. In the instant case, the predecessors of the Respondent Nos.1 to 9 had filed an application under Section 32G of the Act on the premise that they were in possession of the land as on the Tillers Day. The learned Tahasildar was therefore required to fix the purchase price after following the procedure prescribed under the said Section. The procedure to be followed in such proceedings has been spelt out in ***Bhau Martand vs. Hajabai Bala AIR 1975 Bom. 233*** as under :-

*"5. ...Such proceedings have to be commenced by the Agricultural Lands Tribunal suo moto and the landlord or the tenant need not make an application for taking proceedings*

under Section 32G. it would, therefore, be necessary to consider the scheme of Section 32-G. Sub-Section (1) thereof *inter alia* provides for publication of a public notice calling on the persons interested in the land including the tenant who is deemed to have purchased the land and the landlord to appear before it on the specified date. In addition, the Tribunal has to give a notice individually to each such tenant, landlord and also, as far as practicable other persons interested in the land to appear before it on the date specified in the public notice. The next step which is contained in sub-section (2) provides that the Tribunal; shall record in the prescribed manner the statement of the tenant whether he is or is not willing to purchase the land held by him as the tenant. Under sub-section (3) where any tenant fails to appear or make a statement that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective. There is also a proviso to sub-section (3) which gives a further opportunity to the tenant who has failed to appear before the Tribunal on the due date to review the order passed by the Tribunal declaring that the tenant is not willing to purchase the land and that the purchase is ineffective. If the tenant has shown his willingness to purchase the land under sub-section (4), the Tribunal is required to determine the purchase price of the land. Section 32-H provides the manner in which the purchase price be determined by the Tribunal. Section 32-K provides the mode of payment of price payable by the tenant-purchasers as also the power of the Tribunal to recover the purchase price. On the deposit of the price fixed by the Tribunal, the Tribunal has to issue a certificate of purchase to the tenant-purchaser in respect of the land under sub-section (i) of Section 32-F. It also provides for the consequences of non-deposit of the purchase price viz. that the purchase shall become ineffective and the land shall be at the disposal of the Tribunal under Section 32-P. It would thus appear from the scheme of the

*said relevant proceedings under Section 32-G and the other relevant provisions of the Act."*

22. In the instant case, the Agricultural Lands Tribunal had not commenced the proceedings under Section 32G suo moto, but the proceedings were initiated based on the application filed by Balu and Nathu, the predecessors of the respondent nos.1 to 9. The records reveal that the Agricultural Lands Tribunal / Tahasildar had not published any notice calling upon the landlord to appear before it on the specified date. The individual notice could not be served on the landlord as his whereabouts were not known. The learned Tahasildar had affixed a notice at the paddy field despite which the landlord had neither appeared nor contested the claim of Balu and Nathu. Thus, there was no contest or final adjudication on the matter in issue.

23. The learned Tahasildar had also not recorded statements of said Balu and Nathu about their willingness to purchase the land. He had cancelled the notices issued to the landlord and dropped the proceedings merely because Balu and Nathu had not furnished the

address of the landlords and had produced revenue records only of the year 1967-68. It is pertinent to note that the learned Tahasildar had not verified the revenue extract of the year 1957-58 and had not ascertained whether Balu and Nathu were in possession of the agricultural land as tenants as on 01/04/1957. He had not recorded a finding on merits that Nathu and Balu were not in possession of the agricultural land as on 01/04/1957. Under such circumstances, the observation that the case falls under Section 32O of BT&AL Act cannot be considered as a decision, much less a final decision on the matter in issue. Such an observation which is de hors the hearing, cannot operate as res judicata.

24. In the proceedings under Section 32G of the Act, the learned Tahsildar was duty bound to decide the status of the person as a deemed purchaser and to fix the purchase price in accordance with law. The learned Tahasildar had not discharged the statutory obligation. He had dropped the proceedings by observing that the case falls under Section 32O of BT & AL Act. These observations are based on the statements of Nathu and Bala that they would file an

application under Section 32O of the Act. Suffice it to say that an illiterate agriculturist is not expected to know the statutory provisions, the difference between Section 32G and 32O and/or other nitty gritty of law. Hence, it was not within the powers of the learned Tahsildar to nullify the rights of the protected tenants, without following the procedure prescribed under Section 32G of the Act. As it has been held by the Apex Court in ***Amrit Bhikaji Kale vs. Kashinath Janardhan Trade & Anr. (1983) 3 SCC 437***, a measure whereby tenant was to be made the owner of the land cannot be permitted to be defeated by such jugglery of orders by low-level revenue officers who hardly knew what they were doing.

25. For the reasons recorded in the preceding paragraphs, the proceedings under Section 32G were not contested by the landlord. The said proceedings were not finally heard and there was no final decision on merits of the matter. The said proceedings were merely dropped without following the procedure and without complying with the statutory provisions. Consequently, the said order cannot operate as res judicata.

26. Under the circumstances and in view of discussion supra, the petitions have no merit and are accordingly dismissed. Civil Applications are disposed of in view of dismissal of the petitions.

**(SMT. ANUJA PRABHUDESSAI, J.)**