

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 453 OF 1992

WITH

CIVIL APPLICATION NO.10989 OF 2017 IN SA/453/1992

WITH

CIVIL APPLICATION NO. 9738 OF 2015 IN SA/453/1992

WITH

CIVIL APPLICATION NO. 15870 OF 2015 IN SA/453/1992

WITH

CIVIL APPLICATION NO. 4270 OF 1992 IN SA/453/1992

WITH

CONTEMPT PETITION NO. 673 OF 2015

1. Kashiram @ Kashinath Sadashiv Mahajan,
Age 51 years, Occupation : Agriculture,
Resident of Nhavi, Tal. Yalwal,
District Jalgaon.
(Amendment carried out on page no. 1-A)
Deceased through L.Rs.

1-A) Jaibai Kashinath Mahajan,
Age 87 years, Occu. Nil,
R/o. Nhavi, Taluka Yawal,
District Jalgaon.

1-B) Shaligram Kashiram Mahajan,
Age 72 years, Occu. Agri.,
R/o. Nhavi, Taluka Yawal,
District Jalgaon.

1-C) Subhash Kashiram Mahajan,
Age 67 years, Occu. Household,
R/o as above

Deceased, through his L.Rs.

1-C-1) Rajani Subhash Mahajan,
Age 65 years, Occu. Household,

1-C-2) Rajendra Subhash Mahajan,
Age 42 years, Occu. Household,

1-C-3) Lalana Manoj Dhande,
Age 45 years, Occu. Household,

All R/o. C-3, Sushil Shilpa Society,
Ramsadan Nagar, Nandivali Cross Road,
Dombivali (East) Pin- 421 421.

- 1-D) Rukhmini Purushottam Bendale,
Age 65 years, Occu. Household,
R/o. Sanmitra Colony, Jalgaon,
Taluka and District Jalgaon.
- 1-E) Vasundhara Premchand Chaudhary,
Age 62 years, Occu. Household,
R/o. Dombivli (West).
- 1-F) Asha Arun Narkhede,
Age 61 years, Occu. Household,
R/o. M.I.D.C. Jalgaon,
District Jalgaon.
- 1-G) Rekha Kishor Chaudhary,
Age 55 years, Occu. Household,
R/o. Khiroda, Taluka Raver,
District Jalgaon.
2. Laxmibai w/o. Narayan Mahajan,
Age 51 years, Occupation Household,
Resident of Nhavi, Taluka Yawal,
District Jalgaon.
3. Vijaya w/o. Chandrakant Rane,
Age 26 years, Occupation Agriculture,
Resident of Vivare, Taluka Raver,
District Jalgaon.
4. Yogita d/o. Narayan Mahajan,
Age 19 years, Occu.
5. Ganpat Narayan Mahajan,
Age 19 years,
(Amendment carried out on page No.1-B)
- Since deceased, through his L.Rs.
- 5-a) Madhuri Ganpat Mahajan,
Age 42 years, Occu. Household,
- 5-b) Tejas Ganpat Mahajan,
Age 20 years, Occu. Student,
- 5-c) Uttejana Ganpat Mahajan,
Age 23 years, Occu. Student,
All R/o. Village Nhavi,
Taluka Yawal, District Jalgaon.
6. Prashant Narayan Mahajan,
Age 14 years, Minor, through his guardian
Mother Smt. Laxmibai w/o. Narayan Mahajan

.. Appellants
(Original Defendants)

Versus

Nhavi Masjid Trust,
Through its trustees :

1. Sarfaraj khan Akbar khan,
Age 81 years, since deceased
Substituted trustees :
Yasinkha Sarfaraj Khan,
Age 68 years, Occu. Agriculture,
 2. Shaikh Jumma Abdul Kari,
Age 61 years,
 3. Taher Khan Nadar Khan,
Age 51 years,
 4. Shaikh Mehboob Shaikh Yakub,
Age 76 years, since deceased,
Substituted trustees :
Haji Yusuf Khan Baldar khan,
Age 78 years,
 5. Jan Khan Kale Khan,
Age 61 years,
- All agriculturists, residents
of Nhavi, Taluka Yawal,
District Jalgaon.
6. Samsher Khan Nadar Khan,
Age 74 years, Occupation Agriculture,
Resident of Nhavi, Taluka Yawal,
District Jalgaon.
 7. Shaikh Budhan Shaikh Mahbub,
Age 66 years, Occupation : Agril.,
Resident of Nhavi, TalukaYawal,
District Jalgaon.

.. Respondents
(Original Plaintiffs)

...
Mr. V. T. Choudhary, Advocate for Appellants /Petitioners in Contempt
Petition
Mrs. Kazi Fatema, Advocate holding for Mr. S. S. Kazi, Advocate for
Respondents no. 1 to 7
...

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 19 APRIL 2022
PRONOUNCED ON : 06 MAY 2022

JUDGMENT :

This is a second appeal by the original defendants who had successfully defended the suit of the respondent-trust for possession after termination of lease of the suit property pursuant to the provisions of Chapter V of the Transfer of Property Act, 1882, but are aggrieved and dissatisfied by the judgment and order passed by the lower appellate court which has quashed and set aside the judgment and the order of the trial court and has decreed the suit.

2. The respondent is a trust duly registered under the Bombay Public Trusts Act ("**Trusts Act**"). It is the owner of the suit property bearing survey no. 490 admeasuring 3 Acre 24 Guntha of village Nhavi, Taluka Yawal, District Jalgaon. The appellants (original defendants) were the tenants in the suit property. The respondent – trust had obtained a certificate from the Collector Jalgaon under section 88B of the Bombay Tenancy and Agricultural Lands Act ("**Tenancy Act**") on 20-10-1960. As a result, some of the provisions of the Tenancy Act were not applicable to the suit property. The quit notice dated 28-06-1977 was served to the appellants terminating the tenancy with effect from 21-01-1978 or in the alternative with effect from 01-04-1978. On failure of the appellants to comply with the demand, the

respondents filed the suit for possession and claimed past as well as future *mesne* profits.

3. The appellants filed written statement. They admitted ownership of the respondent-trust as also they being the tenants in the suit property. They also did not dispute issuance of certificate under section 88B of the Tenancy Act but contended that it was issued behind their back. They admitted receipt of the quit notice but contended that it was vague and was not valid.

4. The trial court framed necessary issues and at the end of the hearing, dismissed the suit holding that the certificate obtained by the respondent-trust under section 88B of the Tenancy Act was not valid. The quit notice was also not legal and also held that the decision in earlier suit R.C.S. no. 29/1974 operated as *res judicata*.

5. The respondent-trust preferred the appeal before the district court which allowed the appeal. It has held that the findings of the trial court regarding the certificate under section 88B of the Tenancy Act, legality of the quit notice and regarding *res judicata* were not sustainable. It has accordingly decreed the suit. Hence this second appeal.

6. The second appeal was admitted on 22-9-1992 on grounds no. 2, 3 and 4 from the appeal memo, which read as under :

- “2. Whether it is just and proper to ignore the important aspect of the matter that when the defendants the deemed purchaser of the suit land, on the Tillers day i.e. on 1-4-1957, the certificate granted under Section 88 of the Bombay Tenancy Act, in the year 1966, can be legal and valid ?
3. Whether a certificate under Section 88, can be issued to the trust, without issuing notice to the defendant, who were tenants, prior to the Tiller’s day, and who became deemed purchasers on the Tillers day i.e. on 1-4-1957 ?
4. Whether it is just and proper to hold that the suit notice is legal, when admittedly, a notice is vague about the starting of tenancy year, and where it has been mentioned taht the tenancy of the suit land commences on 22nd January of each year and ends of 21sty January of the next year, and alternatively claimed that the tenancy commences on 1st April of each year, and ends on 31st March of the next year ?”

7. As can be appreciated, the only points that are now being agitated in this second appeal are circumscribed by these three substantial questions only. The question of *res judicata* is not a substantial question on which this appeal was admitted.

8. The learned advocate Mr. Choudhary for the appellants would vehemently submit that there was dearth of evidence to prove that the respondent-trust had obtained a certificate under section 88B of the Tenancy Act. Only a copy of it was produced before the trial court. Recently when the appellants made an attempt to verify the fact about issuance of the certificate by submitting an application under the Right to Information Act, the office of the Collector could not issue any copy of

the certificate. He would, therefore, submit that in all probability, the certificate was forged and fabricated one and a strict proof thereof ought to have been insisted for by the lower appellate court. He would submit that precisely for this reason by moving civil application no. 10989 of 2017, a direction is solicited for proceeding against the trustees of the respondent-trust for perjury.

9. Mr Choudhary would then submit that by virtue of operation of the provisions of chapter III of the Tenancy Act, since the appellants were the tenants in the suit property on the Tiller's day 01-04-1957 as laid down under section 32 they must be deemed to have become its' purchasers. A certificate under section 88B having been issued in favour of the respondent-trust in the year 1960, after such deeming provision had come into operation, issuance of such certificate under section 88B would not have the effect of divesting the appellants of their title to the suit property created by a statutory provision. Any such certificate would not operate retrospectively. The lower appellate court has grossly erred in appreciating such a logical and legal consequence in discarding such a stand. It has given rise to the afore-mentioned first two substantial questions of law.

10. In support of his submissions, the learned advocate for the appellants would place reliance on the following decisions :

- i) Sri Laxminarayan Temple, Kothure Vs. Laxman Mahadu Chandore; 1969 Mh.L.J. 476
- ii) Chhatrapati Charitable Devasthan Trust Vs. Parisa Appa Bhoska and others; AIR 1979 BOMBAY 218

11. The learned advocate for the respondent would submit that the fact that the certificate was issued under section 88B of the Tenancy Act was never in dispute. It is for the first time that dispute regarding its genuineness is being raised after so many years without ever making any attempt to challenge it in accordance with the provisions contained in the Tenancy Act. By virtue of section 85 of the Tenancy Act, jurisdiction of the civil court has been expressly barred to decide the question which can be decided by the fora available under that Act. Therefore, the appellants are not legally entitled to rake up any issue regarding validity of such certificate calling upon the civil court to decide it. The trial court without advertng to such a serious objection, had proceeded to hold it to be invalid that too without any sound and convincing reasons. The lower appellate court rightly noticed the aforementioned aspects and has reversed the conclusion of the trial court. The issue as to whether the certificate issued under section 88B of the Tenancy Act could not have been raised before the trial court and decided by it.

12. The learned advocate would submit that the decisions in the matters of Sri Laxminarayan Temple, Kothure Vs. Laxman Mahadu

Chandore and Chhatrapati Charitable Devasthan Trust Vs. Parisa Appa Bhoska and others (supra) are not applicable to the facts of the matter in hand.

13. Per contra, the learned advocate Mr. Choudhary for the appellants would submit that the jurisdiction of the civil court to ascertain if a certificate under section 88B could have been validly issued has not been expressly barred. He would submit that whether there existed the circumstances which would have made the respondent-trust entitled to claim such a certificate was an aspect which even the civil court could have legally examined in view of the decisions in the matters of Madhav Kesu Khuspe Vs. Sundrabai Mugutrao Phadatare since deceased by heirs Krishna DagduKhuspe and others; 1978 Mh.L.J. 289 and Laxman Siddu Pote Vs. Shri Govindrao Korgaonkar Dharmadaya Sanstha; 1981 Mh.L.J. 338.

14. Mr. Choudhary would submit that the jurisdiction of the civil court would stand barred only if it can be demonstrated that the order under the Tenancy Act was valid one and not ultra vires.

15. Taking up issue as to whether the certificate under section 88B of the Tenancy Act has been issued or otherwise, suffice for the purpose to observe at the threshold that no such issue was ever raised by the appellants not only in the current proceeding but even during the previous litigation in the form of RCS no. 29 of 1974. A copy of the

judgment passed by the then civil judge in that suit as also a copy of the judgment of the appellate court in RCA no. 242 of 1975 would clearly indicate that the entitlement of the respondent-trust to have a certificate, the fact that such a certificate was issued under section 88B was never in dispute. Even in the present appeal memo, no such issue has been raised regarding genuineness of the certificate. Therefore, it is abundantly clear the fact that the respondent-trust was granted a certificate under section 88B of the Tenancy Act even to the knowledge of the appellants is quite evident and clearly borne out from the evidence on record.

16. It does appear that as late as in the year 2017, the appellants seem to have filed application for obtaining an information regarding issuance of such certificate under section 88B by submitting an application under the Right to Information Act and the information was not provided to them. However, as can be seen from the reply received by them from the concerned office, it has merely been informed that since it was a proceeding of the year 1960, the relevant record was not traceable. It was not informed that no such proceeding was ever held and no certificate was even issued. Therefore, it cannot be said that merely because the office was unable to trace out the papers one should proceed with on the premise that the certificate under section 88B is false and fabricated. Consequently, even the request for proceeding against the respondent for perjury would not be tenable. Consequently, one will have to simply discard the submission

of the learned advocate Mr Chaudhary raising a question as to the genuineness of the certificate issued in favour of the respondent under section 88B of the Tenancy Act.

17. The question as to whether the bar under section 85 of the Tenancy Act would have deprived the civil court from examining the aspect as to the existence of valid grounds for issuance of a certificate under section 88B, in my considered view, need not be gone into for the present. In-fact, no such ground which would have otherwise disentitled the respondent-trust from having such a certificate was ever pleaded before the trial court or argued before the lower appellate court.

18. In the matter of Madhav Kesu Khuspe (supra), in spite of the fact that the appellant was a tenant in his individual capacity, a notice in respect of proceeding under section 32G was served to his brother who made a statement to the effect that he did not desire to purchase the land and consequently the possession was delivered to the landlady. In view of such peculiar state-of-affairs it was held that proceeding under section 32G itself was invalid and could not have been terminated in favour of the landlady directing possession to be delivered to her and in the light of such peculiar facts, it was held that the jurisdiction of the civil court was not barred when the order for delivery of possession itself was ultra vires and null.

19. In the matter of Laxman Siddu Pote (supra), again, the facts were peculiar. In that matter, the defendant was a tenant in the lands since before a gift deed was executed by the landlord in favour of the trust which had obtained certificate under section 88B. It was therefore held that the collector had no jurisdiction to issue any such certificate under section 88B in favour of the trust and the jurisdiction of the civil court to examine this aspect was not ousted.

20. In the matter in hand, there is no dispute about the fact that the suit property stands in the name of the respondent-trust as the owner even in the public trust registration office vide PTR (Exhibit no. 96) dated 7-4-1954. Even there is an agreement of tenancy duly executed between the parties creating tenancy for 10 years by way of registered lease deed dated 18-8-1951. The respondent trust was duly registered even before section 88B came into force on 1-8-1956. In the matter of Sri Laxminarayan Temple (supra) as also in the matter of Chhatrapati Charitable Devasthan Trust (supra), the tenants had become deemed purchasers on the Tiller's day i.e. 1-4-1957 and it is thereafter that the trusts were registered under the Trusts Act.

21. In view of such peculiar facts and circumstances, it was held that merely because the trusts had obtained a certificate under section 88B after the tenant had become a deemed purchaser under section 32 to 32R of the Tenancy Act, the trusts were not entitled to get exemption under section 88B. Such is not the case in the matter in

hand. Admittedly, and even in view of the ample evidence on record in the matter in hand, the respondent-trust was duly registered even since before coming into force of section 88B and was the owner of the suit property.

22. Section 88B of the Tenancy Act reads as under :-

88B. Exemption on certain provisions to land of local authorities, universities and trusts

(1) Nothing in the foregoing provisions except sections 3, 4B, 8, 9, 9A, 9B, 9C, 10, 10A, 11, 13 and 27 and the provisions of Chapters VI and VIII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in the sections mentioned above, shall apply, -

(a) to lands held or leased by a local authority, or University established by law in the Bombay area of the State of Maharashtra; and

(b) to lands which are the property of a trust for an educational purpose, a hospital, Panjarapole, Gaushala or an institution for public religious worship:

Provided that, -

(i) such trust is or is deemed to be registered under the Bombay Public Trusts Act, 1950; and

....

....

(2) For the purposes of this section, a certificate granted by the Collector, after holding an inquiry, that the conditions in the proviso to sub-section(1) are satisfied by any trust shall be conclusive evidence in that behalf.

As can be seen from the first proviso to clause (b) of sub section (1), the exemption from applicability of various provisions of the Tenancy Act is available to a trust, if it is or is deemed to be registered under the Trusts Act and the entire income of such lands is appropriated for the purpose of such trust.

So far as the second condition is concerned, regarding appropriation of income from the suit property, no dispute has ever been raised on behalf of the appellants that its' income is not being appropriated by the respondent trust for the stipulated purposes.

23. As is mentioned herein-above, the respondent-trust was registered on 7-4-1954 even before coming into force of section 88B with effect from 1-8-1956. Therefore, it is quite apparent that the respondent trust was entitled to seek exemption under section 88B.

24. It is necessary to emphasize the fact that the appellants have been alive to the fact of issuance of a certificate under section 88B of the Tenancy Act for last so many decades. The present suit itself was filed in the year 1978. Admittedly, even prior thereto, a similar suit was filed by the respondent trust i.e. RCS/29/1974. In the judgement of the trial court in that suit, as also that of the appellate court in RCA/242/1975, there is a reference regarding such a certificate and even an issue regarding its' validity, not its genuineness, was raised *albeit* it was not decided.

25. Once having found that a certificate under section 88B was issued in favour of the respondent trust, when the appellants had failed to demonstrate that the grounds which could have made the respondent trust entitled to claim exemption were not available, it was imperative rather obligatory on the part of the appellants to have challenged such certificate under the relevant provisions of the Tenancy Act. In the absence of any such challenge, the trial court had grossly erred in refusing to consider all such vital aspects. It has been rightly interfered with and reversed by the judgment under challenge by precisely noticing the aforementioned aspects. Consequently, in the absence of any challenge to the certificate under section 88B granted in favour of the respondent-trust, no fault can be found with the conclusion drawn by the lower appellate court holding it to be valid and excluding applicability of the provisions of section 32 to 32R of the Tenancy Act.

26. There is absolutely no evidence to demonstrate that the Collector had granted the certificate under section 88B without holding any enquiry much less issuing any notice to the appellants. It must be presumed unless the contrary is proved that since the certificate was issued in an enquiry held in the ordinary course of business of the Collector's office, the onus was on the appellants to substantiate their defence of absence of notice. Therefore, even for this reason, the appellants are not entitled to question the certificate.

27. As has been cursorily mentioned herein-above, the second appeal has not been admitted on any substantial question of law in tune with the appellants' contention regarding operation of decision in the earlier round of litigation in RCS/29/1974 as *res judicata*, as has been rightly observed by the lower appellate court, the earlier suit was based on a quit notice issued by the respondent-trust as mentioned in that suit. In the matter in hand, the suit has been filed on the basis of an independent quit notice under section 106 of the Transfer of Property Act, 1882. As can be seen from the judgments of the trial court and the appellate court in the earlier round of litigation, the issue that was directly and substantially in issue in that suit was based on the entitlement of the respondent-trust to claim possession by terminating tenancy on the basis of the quit notice that was then issued by it. In the matter in hand, the issue that is directly and substantially in issue is its entitlement to claim possession on the basis of the quit notice that was issued afresh on 26-06-1977. The question of validity of the certificate under section 88-B of the Tenancy Act though was raised even in the earlier round of litigation it was not finally decided on merits on the ground that the appeal of the appellants was allowed on the ground that the quit notice issued therein dated 04-12-1971 was not in accordance with the provisions of section 106 of the Transfer of Property Act. The lower appellate court has considered this aspect which the trial court had grossly failed in appreciating it in the proper perspective. Consequently, I answer the first two substantial questions against the appellants.

28. Coming to the third substantial question of law regarding validity of the quit notice, there is no dispute about the fact that the respondent-trust issued the quit notice on 28-06-1977 claiming that the tenancy was yearly, starting from 22nd January and terminating on 21st January of the next year. It was also averred in the notice in the alternative that if it was the stand of the appellants that the year of tenancy commenced on 1 April every year, then the tenancy would stand terminated by 31-03-1978.

29. As has been rightly noticed by the lower appellate court, in RCA/242/1975, in the earlier round of litigation in paragraphs no. 10 and 11, the quit notice issued therein was held to be invalid on the ground that it was not terminating the tenancy with the end of the year of tenancy. By referring to the lease deed mentioned herein-above, it was held that the parties were *ad idem* that the lease was on year to year basis, it was agreed to commence on 22 January and ending on 21 January of the succeeding year. In view of such an emphatic finding recorded in the earlier round of litigation, the quit notice in the matter in hand which expressly stated in accordance with such finding that the tenancy would stand terminated coinciding with the termination of the yearly lease on 21-01-1978, it cannot be said that the conclusion drawn by the lower appellate court on similar lines is unsustainable in law. Consequently, even I answer this substantial question of law against the appellants.

30. Resultantly, the second appeal is dismissed with costs.

31. All the pending civil applications including the contempt petition are disposed of.

[MANGESH S. PATIL]
JUDGE

arp/