IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3497 OF 2024

Yakub Baig Trust Panvel
Erstwhile Mominpada Masjid Yakub Baig
Trust, Through its Chief Trustee
Shri. Muzaffar Mustafa Baig,
Age:- 40 years,
Having address as Mominpada,
M.G. Road, Taluka Panvel,
District Raigad. .... Petitioner

Versus

1. Ganu Mahadu Gaikar,
Age:- 67 years
Residing at Ekatpada, Khutari,
Post Taloja, Taluka Panvel,
District Raigad.

2. Kirit Mavji Patel,
Age:- 56 years,
Residing at 1301, Siddhi Grandeur,
Plot No. 84, Sector 19, Kharghar,
Taluka Panvel,
District Raigad 410 210.

ARUN RAMCHANDRA SANKPAL

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3. Amrut Kanji Nisar,
Age:- 54 years,
Residing at 201, Amrut Heritage,
Near BMC Market, Baptist Road,
Ville Parle (West), Mumbai 400 056.

4. Vijay Ravjibhai Gajara,
Age:- 43 years,
Residing at 1303, Ellora Fiesta,
Plot No. 8, Opp. Juinagar Railway Station,
Sector 11, Sanpada, Navi Mumbai 400 705

5. The State of Maharashtra
Through the Additional Chief
Secretary, Revenue and Forest
Department, Mantralaya,
Mumbai 400 032.
(Notice of Respondent No.5 be
served upon the Government Pleader,
Office of Government Pleader, Writ
Cell, High Court, Appellate Side,
Mumbai 400 032. … Respondents

....

Mr. Rajiv Patil, Senior Advocate, with Mr. Sachin S. Punde, for the Petitioner.

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Mr. Sunil Karandikar, with Mr. Mandar Limaye, for Respondent No.1.

Mr. Anil Anturkar, Senior Advocate, with Mr. Tanaji Mhatugade, for Respondent Nos. 2 to 4.

Mr. Haimd Mulla, AGP, for the Respondent No. 5-State.

....

CORAM : AVINASH G. GHAROTE, J.
JUDGMENT RESERVED ON : 26th JULY 2024.
JUDGMENT PRONOUNCED ON : 02nd AUGUST 2024.

ORAL JUDGMENT :

1. Heard Mr. Rajiv Patil, learned Senior Advocate for the petitioner, Mr. Anil Anturkar, learned Senior Advocate for Respondent Nos.2 to 4, Mr. Karandikar, learned Advocate for Respondent No.1, Mr. Hamid Mulla, A.G.P. for the Respondent No.5 – State.

2. The petition questions the Judgment dated 19.01.2023 (Page- 32) passed by the learned Maharashtra Revenue Tribunal ("MRT" for short hereinafter) in Revision against the order of the Sub Divisional Officer ("SDO" for short hereinafter) dated 14.05.2021 (Page-294) which has been set aside and the order of the Agricultural Lands Tribunal ("ALT" for short hereinafter) dated 05.09.2019 (Page-249) holding that the respondent No.1 was a

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tenant in respect of land bearing Survey No.73/1 mouje Rohinjan and therefore entitled to purchase the same under Section 32G of the Bombay Tenancy and Agricultural Lands Act (BT & AL Act), has been restored.

3. Mr. Patil, learned Senior Counsel for the petitioner submits, that Schedule-I of the petitioner-Trust indicates, that the land in question is the property of the petitioner-Trust, which was exempted, for which he invites my attention to the order dated 30.05.1959 (Page-169) passed by the Deputy Collector under Section 88-B of the Bombay Tenancy & Agricultural Act, 1948, (BT & AL Act, for short hereinafter), which holds that the lands indicated in Schedule-I enclosed were exempted under Section 88-B of the BPT Act. He further submits that in the year-1961, the father of respondent No.1, had made an application under Section 32G of the BT & AL Act, which was rejected, which is reflected from the Mutation Entry No.587 (Page-204) dated 18.01.1962. It is further contended that this position has not been considered by the learned ALT while passing the order dated 05.09.2019 (Page-249) on account of which the subsequent Sec. 32G proceedings stand vitiated. He further submits that reason

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for not considering this Entry as indicated in Item 10 at page-250 to mean that the entry is not readable, which is factually incorrect for which he relied upon the copy of the Mutation Entry at Page-204, which indicates that the same is legible and indicates the rejection of the application under Section 32G of the BT & AL Act filed by the father of respondent No.1. It is therefore submitted that the order of the ALT dated 05.09.2019 and the order of the learned MRT dated 19.01.2023 (Page-32) which holds that the rejection of the application of the father of respondent No.1 was not germane as the right to purchase merely stood postponed could not be said to be well founded, on account of the principles of *res-judicata* as embodied in Section 11 of the Civil Procedure Code which are also applicable to proceedings under the BT & AL Act. Learned counsel relies upon ***M. Nagabhushana Vs. State of Karnataka and Others (2011) 3 SCC 408*** Paragraphs 14 & 15, which according to him dilate upon the principles of Section 11 of the Civil Procedure Code. Reliance is also placed upon ***Trimbak Purshottam Patil Vs. Yashodabai AIR 1971 Bom. 295*** Paragraph 7 and ***Laxman Dhondu Bhor, Since Deceased Through his heirs Vithoba Laxman Bhor and Others Vs. Chintaman Bhimrao Pagare***

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and Others 1987 Mh.L.J. 641 Paragraphs 8 and 9 to contend that principles of res-judicata were attracted.

3.1. He further submits that the fact that Survey No.73/1 Mouje Rohinjan was a property of the Trust is the position which is covered by the order dated 30.05.1959 (Page-169), which according to him includes Survey No.73/1 for which, he relies upon Schedule-I annexed thereto (Page-182). It is further contended that non production of this order/certificate earlier in point in time would not change the factuality, for the reason that the order indicates the land being covered by the exemption and therefore not susceptible to an order under Section 32G of BT & AL Act.

3.2. He further relied upon another order of the learned MRT dated 05.07.2022 to contend that the same Trust though in respect of different property and different tenant has been accepted to have been granted exemption under Section 88-B of the BT & AL Act.

3.3. Reliance is also placed upon the Judgment dated 10.11.1952 (Page-94) passed by the District Judge Colaba, Alibag, in Civil Suit No.8/1952 by which the learned District Judge,

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directed to frame a Scheme for the management of the petitioner-Trust and Schedule "A"(1) thereto indicated inclusion of Survey No.73/1 of Village Rohinjan and the Judgment in Appeal No.194 of 1947 dated 01.11.1951 (Page-79) by the learned Division Bench of this Court by which the District Judge was directed to frame a Scheme and appoint Trustees in accordance with the directions given in the Judgment dated 01.11.1951, to contend that the Trust was in existence even prior to 1951 and was holding extensive properties which include the land of Survey No. 73/1 at Mouje Rohinjan.

3.4. He therefore submits that the order of the ALT and that of the learned MRT which ignores this position, cannot be sustained and are liable to be quashed and set aside and that of the SDO is restored.

4. Mr. Anturkar, learned Senior Advocate for the respondent Nos.2 to 4 submits, that the principle of *res-judicata* as embodied in Section 11 of Civil Procedure Code are not attracted to the order of 1961, as mentioned in the mutation entry (pg.204), for the reason that the principle requires the issue to be finally and conclusively decided. He contends that no such

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order passed by the ALT, on the application of the father of the respondent No.1, under Section 32G of the BT & AL Act has been placed on record, to indicate that any such claim in this behalf was rejected. It is contended that since the plea of *res-judicata* is a plea on an issue of fact and law, the same has to be tested in light of the judgment, which decides the issue, when raised and in absence of the order being placed on record, such a plea would not be available. He contends that all that has been submitted in support of the plea, is merely a Mutation Entry in the 7/12 extract (Page-204), which according to him would not satisfy the requirement for applying the principles of res-judicata. It is also contended that the Mutation Entry is only for fiscal purpose and does not confer any title upon the person in whose name it is recorded, apart from which, the entry at Page-204 does not indicate that the claim of the father of respondent No.1 has been rejected and all that it is says is that the claim on account of the certificate under Section 88-B of the BT & AL Act has been postponed.

4.1. It is therefore contended that this would categorically point out that, the fact that father of respondent No.1 was the

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tenant in respect of Survey No.73/1 stands accepted, and therefore the respondent No.1 after the demise of his father, would be entitled to maintain an application under Section 32G of the BT & AL Act. He submits that this is in fact what has been recorded by the learned MRT while passing the impugned order, which is reflected from Paragraph-10 (Page-34) that the entitlement to have the land was not rejected but merely stood postponed on account of the exemption being claimed by the petitioner.

4.2. He further contends that the petitioner – Trust came to be registered in the year-1953 at which point of time the land of Survey No.73/1 did not stand included in Schedule-I. An application to get the land of Survey No.73/1 included in Schedule-I was moved for the first time vide C.R.No.278/1997 before the Assistant Charity Commissioner which has not as yet been decided.

4.3. It is further contended that an application under Section 36 of the MPT Act, was filed by the petitioner for grant of permission to sell the land of Survey No.73/1, which was filed on 13.05.2009 paragraphs 2 & 3 of which, indicate that the said

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property was in the possession of the tenant. The application further recorded in paragraph-14 (Page-14 of the compilation of R-2 to R-4) that the said property was not included in Schedule-1 in the name of the Trust. He further submits that this application came to be rejected by the Joint Charity Commissioner by the Judgment dated 22.10.2018 (Page-47 of the compilation R2 to R4), which specifically records in paragraph-9 that since the property was not included in Schedule-I, it could not be accepted that it is the property of the Trust, which it wants to sell. Writ Petition (St.) No.1610/2019 against this judgment dated 22.10.2018 is said to be pending (Page-57 of the compilation of R2 to R4). The learned counsel for Respondent No.2 also contended that the petitioner has suppressed the fact of filing Writ Petition (St.) No.1610 of 2019 in the present writ Petition and details of the said petition and application filed under Section 36(1)(a) of the MPT Act before Joint Charity Commissioner also not disclosed.

4.4. He further contends, that mischievously the petitioner-Trust filed Misc. Application No.102/2019 (Page-70 of the compilation) and without disclosing the earlier position, sought a

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direction to enter Survey No.73/1 in Schedule-I in respect of the petitioner-Trust, which came to be decided on 24.07.2019 by the Assistant Charity Commissioner, (Page-77) on the basis of which Survey No.73/1 came to be included in Schedule-I, which is indicated by the Schedule-I, Annexure-II at (Page-50 & 51 compilation of the petitioner). He therefore submits, that till such inclusion in the year-2019 Survey No.73/1, was never included in Schedule-I, on account of which the plea which is being taken by the petitioner that it was the property of the petitioner-Trust and therefore covered by the exemption under Section 88-B of the BT & AL (Page-169) was clearly not sustainable.

4.5. It is further contended that the Waqf Act came into effect from 01.01.1996 on account of which since the petitioner-Trust became a Waqf, the provisions of the BPT Act, became inapplicable, due to which all orders passed in favour of the petitioner-Trust by invoking the powers under the BPT Act, were clearly non-est. He further relies upon the Gazette Notification dated 30.12.2004, which is issued by the Chief Executive Officer, Maharashtra State Board of Waqf, Aurangabad, by which list of Waqf's under Section 5(2) of the Central Waqf Act, 1995 was

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published, in which the name of the petitioner-Trust is included at Serial No. WP-108, on account of which, according to him Schedule-I could not have been amended by the Assistant Charity Commissioner by his order dated 24.07.2019. He therefore submits, that even the Judgment dated 22.10.2018 by the Joint Charity Commissioner in Application No.96/2010 filed by the petitioner-Trust under Section 36 of the Maharashtra Public Trust Act, ("MPT Act" for short hereinafter) was without jurisdiction.

4.6. It is further contended, that the application under Section 88-B of the BT & AL Act, was filed by the petitioner-Trust on 30.08.1958 (Page-169), which was subsequent to the tillers day of 01.04.1957 on which day by the statutory deeming created by section 32 of the BT & AL Act, the land already stood vested in the father of the respondent No.1, who was admittedly a tenant on that date. He therefore submits, that any application subsequent point of time in the tillers day, for exemption, would not enure to the benefit of the petitioner-trust, as the title already stood transferred on the tillers day, the subsequent position of filing an application under Section 32G of the BT & AL Act and fixing of the purchase price being actions to be performed for

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perfecting the title. In support of this contention, learned counsel relies upon ***Kondiba Laxman Hanmar Since Deceased by his Legal Heirs Baburao Kondiba Hanmar and Another Vs. Krishnara Anandrao Dalavi Deceased by his Legal Heirs Radhabai Krishnarao Dalavi and Others 2004 (4) Mh.L.J. 324*** .

4.7. It is further contended that the requirement of Section 88-B of the BT & AL Act, are multi-fold inasmuch as, for claiming the exemption it has to be demonstrated that the lands are the property of the Public Trust; such Trust is/or is deemed to have been registered under the BPT Act, the deeming provision, being related to Section 28 of the BPT Act and the entire income of such lands is appropriated for the purposes of such Trust. In this contexts, he invites my attention to the Scheme framed by the learned District Judge Colaba on 23.02.1953 (Page-105) which was in pursuance, to the judgment dated 10.11.1952 by the learned District Judge Colaba in Civil Suit No.08/1952 in terms of the directions as contained in First Appeal No.194 of 1947 decided on 01.11.1951 by the learned Division Bench of this Court (Page-85). He submits that as against the requirement, of

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Section 88-B(1) proviso (ii) of the BT & AL Act, that the entire income of such lands is to be appropriated for the purposes of the Trust, which is necessary for grant of exemption under Section 88-B (1), Clause 14(A) of the Scheme of the petitioner-Trust indicates that out of the net income 1/3 was to be expended upon the decedents of the family of the settlor Yakub Baig in accordance with the shares laid down in the Trust Deed dated 19.02.1909. He therefore submits that this clause as contained in the Scheme framed by the learned District Judge did not fulfill the requirement of the proviso (ii) of Section 88-B(1) of the BPT Act on account of which, the exemption could not have been granted to the petitioner-Trust by the order dated 30.05.1959 (Page-169). It is further contended that this is more so, for the reason that Section 88-B(2) of the BPT Act requires a Certificate in this regard be granted by the Collector after holding an inquiry that the condition in the proviso to Sub-section 1 were satisfied, which Certificate was to be a conclusive evidence in that behalf. He submits, that the order dated 30.05.1959 (Page-169), which is being relied upon by the petitioner-trust to claim exemption therefore does not satisfy this requirement and is non-est. Learned

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Senior Counsel relies upon ***Keraba Dattu Borachate and Others Vs. Sheshashai and Vishnu Trust 1990 (2) Mh.L.J. 1183*** in Paragraph Nos.4, 5 & 6 in support of this contention.

4.8. He further submits, that the provisions of Section 88-B of the BT & AL Act empower the Collector to make such an enquiry and grant an Exemption Certificate and does not empower the Collector to delegate such responsibility on a Deputy Collector and the fact that the order dated 30.05.1959 (pg.169) has been passed by the Deputy Collector, Panvel, would also indicate lack of jurisdiction and Authority on account of which it would be non-est.

4.9. He then contends, that the list annexed with the order dated 30.05.1959, which shows Survey No.73/1 to be the property of the Trust, (Page-180) is a false list, as even according to the own showing of the petitioner-Trust, Survey No.73/1, was not recorded in Schedule-I till 24.07.2019 when for the fist time, by suppressing material facts, in Misc. Application No.102/2019 the order was obtained to include it in Schedule-I. It is further contended that a comparison of the list of the properties of the petitioner-Trust, which is appended to the scheme as sanctioned

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by the learned District Judge by his order dated 23.02.1953, with the list annexed with order dated 30.05.1959, would indicate that properties which were not included in the list along with this Scheme were included in the list with the order dated 30.05.1959 which would indicates *mala fides* on the part of the petitioner-Trust.

4.10. He further submits, that the inclusion of Survey No.73/1, in the Schedule-A(1) which indicated Schedule of the revenue paying lands of various villages in Panvel Taluka, which were claimed to be owned by the petitioner-Trust would not support the plea of exemption, on account of its absence in the order under Section 88-B of the BT and AL Act.

4.11. For all the above reasons, he submits that the order of the ALT as upheld by the learned MRT, is required to be sustained. and the petition dismissed.

5. Mr. S.G. Karandikar, learned counsel for the respondent No.1 supports the submissions made by Mr. Anturkar, learned Senior Counsel appearing for Respondent Nos. 2 to 4. Learned A.G.P. for the Respondent No.5 supports the impugned order.

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6. Mr. Patil, learned Senior Counsel for the petitioner in rebuttal submits, that the Gazette Notification dated 30.12.2004 which includes the petitioner-Trust in the list of Waqf prepared by the Waqf Board is already under challenge before the Hon'ble Supreme Court, in which the petitioner is an intervenor. He also submits, that the judgment of the learned Charity Commissioner dated 22.10.2018 refusing to grant permission to the petitioner-Trust under Section 36(1)(a) of the BPT Act is also under challenge before this Court at the behest of the petitioner, which is pending. He further submits, that Section 2 (2E) of the BT & AL Act, which defines Collector impugned Assistant or Deputy Collector and therefore order dated 30.05.1959 passed by the Deputy Collector could not be said to be without jurisdiction.

6.1. He therefore submits, that the fact that the property bearing Survey No.73/1 belongs to the petitioner-Trust, is an admitted position as without it the claim of the respondent No.1 of becoming owner on the tillers day itself would be unsustainable, in view of which, since the exemption has already been granted by the order dated 30.05.1959 (Page-169) and the property has being included in Schedule-I by the order of the

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Assistant Charity Commissioner dated 24.07.2019, though belatedly, that does not detract from the fact, that all throughout it was the property of the petitioner-Trust on account of which the exemption granted under Section 88-B(1) of the BT & AL Act would enure to the benefit of the petitioner-Trust and the judgment of the learned MRT as impugned herein is therefore incorrect and is required to set aside by allowing petition.

7. The original owner of the land of survey no.73/1 in Mouza : Rohinjan was one Mr. Yakub Baig, who by a 'Will', dated 19.02.1909, had created a trust, which comprised of several immovable properties in various villages, one of them being Survey No.73/1, at Village/Mouja : Rohinjan.

7.1. Since a dispute arose as to the management of the petitioner-trust, the High Court by the judgment dated 01.11.1951 in First Appeal No.194 of 1947, directed the District Judge, Colaba, to appoint trustees and frame a scheme for the management of the trust by name 'Mominpada Masjid Yakub Baig Trust' (now known as 'Yakub Baig Trust'), and its properties. Accordingly, the learned District Judge, Colaba passed a Judgment on 10.11.1952 in Civil Suit No.8 of 1952, appointing

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trustees, and thereafter framed a scheme for the management of the trust and trust properties, vide his order dated 23.02.1953 (page 105). To this Scheme was annexed a list of the properties of the trust in which Survey No.73/1 of Mouza : Rohinjan was included.

7.2. What is necessary to note is that there is no dispute that the land of Survey No.73/1, Mouza: Rohinjan, belongs to the petitioner-trust. This is so for the reason that it is an admitted position that the father of the respondent No.1, had after the tillers date of 01.4.1957, had applied under Section 32-G of the BT & AL Act, for determination of the purchase price, claiming that he was the tenant of the petitioner-trust in respect of the land of Survey No.73/1, on the tillers day and therefore had become a deemed owner, in view of the mandate of Section 32 of the BT & AL Act. This application was however, not considered on the ground that the petitioner-trust, had been granted exemption under Section 88-B of BT & AL Act, on account of which the deemed date stood postponed. This position is reflected from the Entry No. 587 in the mutation register dated 18.01.1962, (page 204), which for the sake of ready reference is quoted as under :

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हक्काचे पत्रक (गां.न.नं. ६) मौजे रोंहीजण तहसील पनवेल जिल्हा रायगड			
नोंदीचा अनुक्रम नं.	हक्काचे प्रकार	फेरफार झालेले सर्व्हे नंबर आणि पोटहिस्से	तपासणी अंमलदाराची सही किंवा शेरा
५८७	तारीख १८/१/१९६२ बाजुस नमूद केलेल्या जमिनीत श्री. महादु पदु गायकवाड हे कुळ असून पनवेल मशिद ट्रस्टी याकुब हे मालक आहेत, मालक यास ८८ ब खाली सर्टिफिकेट मिळाले असल्यामुळे सदरहू जमिन कुळाने खरेदी केली आहे असे सांगण्यात येत नाही. त्यांचे बाबतीत कृषकदिन पुढे ढकलण्यात आला आहे तारीख ४/७/१९६१ रोहींजण ३२ ग ५७५ प्रमाणे	७३-१	ऑर्डर करून तपासले वर्दी देणे सही २०/१/६२ हुकमावरून तपासले नोटीस बजाविली आहे. मंजुर सही ४/४

7.3. That the petitioner-trust was the owner of Survey No. 73/1, is also apparent from the application made by the respondent No.1, under Section 32-G of the BT & AL Act, on 19.12.2018 (page 207) before the learned ALT, which came to be registered as Tenancy Application Section 32-G No.89 of 2018, in which this position is admitted by the respondent No.1. The very fact that the petitioner-trust is arrayed as the opponent in this application, itself amounts to such an admission that the

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petitioner-trust is owner, as an application under Section 32-G of the BT & AL Act, would only lie against the owner, from whom, the applicant claims tenancy in respect of the lands in question. The admission is further reflected from the averments in paragraph 1 (page 208) of this application which is quoted as under :

> "१) दावा मिळकत सामनेवाले यांच्या नावे कब्जेदार सदरी गा. नं. न. ७/१२ सदरी दाखल, सामनेवाले यांचे व्यतिरिक्त, दावा मिळकतीमध्ये कोणाचाही संबध नाही त्यामुळे त्यांना सदर दाव्यामध्ये सामनेवाले म्हणुन पक्षकार केलेले आहे."

The respondent no.1, claims tenancy of his father, which is recorded according to him, vide Mutation Entry No.513, which is claimed to be prior to 01.01.1958. Though there are contradictory claims made in respect of the title of Survey No.73/1 in this application, for the purpose of this the above averment would suffice.

7.4. The Learned ALT, has also proceeded to decide the application under Section 32-G of BT & AL Act, on the basis of the aforesaid premise, as is apparent from a perusal of the order dated 05.09.2019, passed by him (page 254). His order records

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that the first entry regarding Nagu Bama Gaikwad being a protected tenant, is recorded on 02.02.1948. Entry No.413 dated 07.03.1953 records the name of Sitaram Nagu Gaikwad, on account of the demise of Nagu Bama Gaikwad. Entry No.513 dated 01.01.1958 records the name of Mahadu Padu Gaikwad as a tenant. The order further records that the land of Survey No.73/1, is recorded in the name of the petitioner-trust vide Mutation Entry No.249 dated 20.07.1942.

7.5. In light of the above position, the ownership of the petitioner-trust in respect of the land of Survey No. 73/1, and the tenancy of Mahadu Padu Gaikwad , would be an admitted one.

8. The petitioner-trust is claiming exemption under Section 88-B(1) of the BT & AL Act, in view of the order dated 30.05.1959 (page 169), claimed to have been granted in its favour. The question as to exemption under Section 88-B of BT & AL Act, has thus to be considered in light of the above position.

8.1. Section 88-B of the BT & AL Act being material is quoted as under :

> " 88B. (*1*) Nothing in the foregoing provisions except sections 3, 4B, 8, 9, 9A, 9B, 9C, 10, 10A, 11, 13 and 27 and

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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 3 [Bombay area of the State of Maharashtra]; and

(*b*) to lands which are 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

(*ii*) the entire income of such lands is appropriated for the purposes of such trust;

(c) & (d) we are not concerned with.

(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. *[Sub-section (2) was inserted by Bombay 38 of 1957, section 31.]*

The provision contemplates an enquiry and conclusiveness to a certificate granted by the Collector, consequent to the enquiry.

8.2. It is not in dispute that a certificate under Section 88-B of BT & AL Act, has been granted to the petitioner-trust on 30.05.1959 (page 169). The same is being objected to on the

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ground that it is contrary to the requirement of proviso (ii) of Section 88-B(1) of BT & AL Act, in light of clause 14(a) to (c) of the scheme of management of the petitioner-trust as framed by the learned District Judge, Colaba, which contemplates that 1/3rd of the income of the petitioner-trust was to be used for the benefit and welfare of the descendants/legal heirs of the original settlor Mr. Yakub Baig, which position is also recorded by the learned Division Bench of this Court in its judgment dated 01.11.1951, which is reproduced hereunder :

> Now this trust was made by one Yakub Beg, the father of defendant no.1 on the 19th February 1909, and broadly speaking it is a trust for the the maintenance of the children and their descendants of the three sons of Yakub Beg and also it is a trust for charity. The value of the property when the trust was made was Rs.69,600/-, yielding an annual income of about Rs.7,900/-, and the provision of the trust under the trust deed is that the income of about Rs.4,800/- should be utilized for religious and charitable purposes and the income of remaining Rs.3,100/- should be paid as cash allowances

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to the members of the family of the settlor. The trust deed provides that out of this Rs.3,100/-, Rs.900/- each should be given to his three sons Ahmed Beg, Usman Beg and Rustum Beg, and Rs.400/- to his wife Kulsum Bibi. His eldest son Isab Beg is not a beneficiary under the trust as he had been separately provided for. There is a provision for the appointment of Mutavalis and the first Mutavalis were to be the settlor himself, Isab Beg, Ahmed Beg and Rustum Beg. Usman Beg was of a weak mind and therefore he was not appointed a Mutavali. The trust deed also provided that if there was any vacancy among the Mutavalis then the remaining Mutavalis by majority were to appoint a fresh Mutavali, the intention being that at all time there should be four Mutavalis to manage the trust properties.

8.3. The relevant clauses 14 (a) to (c) in the scheme in this regard are reproduced as under :

> "14(a) Out of the net income 1/3 rd shall be expanded on the descendants of the family of the settlor Yakub Baig in accordance with the shares laid down in

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the trust-deed dated 19th February 1909. Provided that if any sharer has been extinct, his share will be distributed proportionately among the other shares. Provided further that the sharers of the branches of the families of the 3 sons of the settlor Yakub Baig shall be paid in equal amount in cash and if any sharer expresses his desire in writing in the month of November to the trustees that he should be given paddy instead of cash, he shall be given paddy at the rate prevailing in the market at that time in lieu of cash.

(b) Out of the remaining 2/3 rd of the net income 1/6 the part shall be set apart and invested in the Government securities in each year. The monies so set apart shall constitute a building depreciation fund. The Trustees shall have recourse to the income, and if necessary to the capital of such Building Depreciation Fund for enabling them to re-build, make alterations, additions and/or repairs (other than ordinary repairs) which may be necessary to the immovable properties belonging to the Trust and for the purchase of new properties for the Trust.

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(c) The remaining 15/6 part out of the 2/3 rd shall be expened on religious, charitables, social and educational objects as laid down in trust-deed dated 19th February, 1909.

Note: In this rule the expression 'outgoings' shall mean and include all land revenue, assessments, local fund cesses, municipal taxes, office expenses, including the salary of the Secretary or Manager, and other staff, the wakf and audit fees."

8.4. What is material to note is that this clause has never been questioned and continues to be operative and effective even today as Mr. Rajiv Patil learned Senior Counsel for the petitioner did not point out to me, any change in the aforesaid clause of the trust scheme, even after the said clause was pressed into service by Mr. Anturkar learned Senior Counsel for the respondents 2 to 4 to contend that in view of the mandate of sec.88-B (1) (b) (ii) of the BTAL Act, which provides that the entire income of the trust has to be applied for the purposes as indicated therein, which requirement being mandatory, in view of clause 14(a) of the Trust Scheme (page 101-compilation of R-2 to 4), the same was not

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complied with and the exemption as granted by the order Dated 30.05.1959 (page 169) was nonest.

8.5. Prima -facie considering the above clauses 14(a) to (c) in the scheme as framed, and as quoted above, this contention would be correct. The fact however remains that the order dated 30.05.1959 (page 169) rightly or wrongly, exists as of today, and inspite of the fact that the claim as made by the father of the respondent No.1, under Section 32-G of BT & AL Act, was not considered on account of the exemption order dated 30.05.1959 (Page 169), as reflected from Mutation Entry No. 587 (page 204), the same has not been questioned and set aside till date, on account of which the exemption order dated 30.05.1959 (page 169), would continue to hold the field even today, in light of the mandate of Section 88-B (2) of the BT & AL Act, which mandates that the certificate issued by the Collector under Section 88-B (1) of BT & AL Act, would be conclusive evidence that the conditions in the proviso to sub-section (1) of Section 88-B (1) are satisfied by any trust.

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8.6. In this context it would be necessary to consider what has been held in ***Keraba Dattu Borachate And Ors. vs Sheshashai And Vishnu Trust*** (supra) while considering a plea that there is no requirement to issue a notice to the tenant, in an application for grant of exemption under Section 88-B of the BT & AL Act, filed by a Trust, and holding that since the valuable right of the tenant is vitally affected on account of which a notice of hearing of such an application would be necessary to have been issued to the tenant. This is what has been said about the consequence and effect of grant of such a certificate of exemption under Section 88-B of the BT & AL Act :

> "The consequence of grant of exemption certificate is that the tenants of the agricultural lands in respect of which exemption certificate is granted lose valuable rights of becoming purchasers on the tillers day. Section 88-B prescribes that on grant of exemption certificate except sections which are set out in sub-section (1), the other provisions of the Tenancy Act will not be attracted in respect of the said lands. Section 32 of the Act provides that on April 1, 1957 which is known as tillers day, every tenant shall be deemed to have purchased from his landlord the land held by him as tenant and face of all encumbrances subsisting on the said day. Section 32 onwards of the Act then set out the mode of determining purchase price and the mode of payment by tenant. The Tenancy Act was enacted by the legislature to confer substantial right upon the cultivator of the land in accordance with the Constitutional mandate. The right conferred upon the cultivated under section 32 of the Act

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stands excluded in respect of the lands belonging to the Trust on grant of exemption certificate."

8.7. This would clearly indicate that where an exemption under Section 88-B of the BT &AL Act, has been granted to the Trust, the provisions of Section 32, therein would not be applicable, thereby making the tenant ineligible, to apply for determining the purchase price under Section 32-G.

9. A schedule is annexed to this order of exemption dated 30.05.1959 (page 169), in which the land of Survey No. 73/1, Mouza: Rohinjan, has been included. Though Mr. Anturkar learned Senior Counsel for the respondent Nos.2 to 4, has raised a plea that the actual schedule annexed to this order dated 30.05.1959, (pages 35 to 46 of his compilation) does not include Survey No.73/1, and therefore the order of exemption needs to be ignored, however, a perusal of the order of the ALT, dated 05.09.2019 (page 249), would indicate that this plea has never been raised and considered, on account of which the same cannot now be permitted to be raised here in the Writ Petition for the first time, as the plea would require evidence to be led, and thus

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was required to have been raised before the learned ALT, with proper foundational facts and supporting evidence, so that a finding could have been rendered, on a proper contest.

10. The contention by Shri Anturkar, learned Counsel for the respondent Nos. 2 to 4, that this order of exemption dated 30.05.1959 (page 169), is without jurisdiction and therefore being a nullity on that count ought to be ignored, as it has been issued by the Deputy Collector, whereas Section 88-B (2) of BT & AL Act, requires that such a certificate of exemption has to be issued by the Collector, is misconceived in view of the definition of 'Collector', as occurring in Section 2(2E) of BT & AL Act, which includes a Deputy Collector, within it.

11. The matter would have ended there, however, the petitioner-trust, itself was of the opinion that the Schedule-1, in the office of the Charity Commissioner, which recorded the properties of the petitioner-trust, did not include Survey No. 73/1 of Mouje : Rohinjan, on account of which it filed an application on 06.10.1995, before the Assistant Charity Commissioner, Alibaug, vide Change Report No. 278/1997, to include Survey

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No. 73,1, Mouza: Rohinjan, in Schedule-1. This application is said to be still pending.

11.1. An application under Section 36(1)(a) of the BPT Act, came to be filed by the petitioner-Trust with the Joint Charity Commissioner, Mumbai, seeking permission to sell the land of Survey No.73/1. This was on the premise that the exemption order dated 30.05.1959, mistakenly included Survey No. 103/1, instead of Survey No.73/1 and thus was exempted. This plea came to be rejected by the learned Joint Charity Commissioner, Mumbai, vide his judgment dated 22.10.2018, (page 47), by holding that Survey No. 73/1, was not recorded in Schedule-1, and though a plea was raised that a Change Report was filed with the Assistant Charity Commissioner for recording Survey No.73/1, in Schedule-1, there were contrary statements in that regard, and it would be difficult to accept that Survey No.103/1 as shown in Schedule-1 and Survey No.73/1, were the same. This judgment also records the admission of the petitioner-trust that the land of Survey No.73/1, was in possession of the tenant and opined that for deciding the issue of tenancy there was a separate forum.

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Though a Writ Petition Stamp no. 1619 of 2019, is said to have been filed against this Judgment dated 22.10.2019 of the learned Joint Charity Commissioner, in which a notice is claimed to have been issued, there are no interim orders, as yet.

11.2. The petitioner/Trust, thereafter again filed an application for recording the immovable properties which according to it, were not taken on record at the time of registration of the petitioner-trust. This was vide Miscellaneous Application No.102 of 2019, filed before the Assistant Charity Commissioner, Raigad, in which by an order dated 24.07.2019, a direction was issued for recording entry of the properties mentioned in Schedule 'A', be taken in Schedule -1 of the Trust, Schedule 'A' being the schedule annexed to the scheme framed by the learned District Judge, Colaba. A perusal of this order dated 24.07.2019, however does not disclose that the judgment of the Charity Commissioner dated 22.10.2018, in Application No. 96/2010, was brought to the notice of the Assistant Charity Commissioner, Raigad.

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11.3. Even otherwise the petitioner/ Trust, having suffered the judgment dated 22.10.2018, by the learned Joint Charity Commissioner and having filed a Writ Petition Stamp No. 1619 of 2019, in this Court challenging the same, could not have approached the Assistant Charity Commissioner, Raigad for inclusion of the land of Survey No. 73/1, in the order of exemption dated 30.05.1959 and in Schedule-1, without disclosing the judgment of the learned Joint Charity Commissioner and the pendency of the Writ Petition challenging the same in this Court.

11.4. The above position would indicate that throughout, till 24.07.2019, when the Assistant Charity Commissioner, Raigad, had passed an order in Miscellaneous Application No.102 of 2019, the consistent stand of the petitioner-trust was that it was the owner of Survey No.73/1, which was in possession of the tenant and was not included in Schedule-1. Thus even presuming everything in favour of the petitioner-trust, the land of Survey No.73/1, for the first time came to be recorded in Schedule-1, of the petitioner-trust subsequent to the order dated 24.07.2019.

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12. However, mere recording of the land of Survey No. 73/1, in Schedule-1, is not enough. What is necessary is that the same should be included in the exemption order under Section 88-B(1) of the BT & AL Act, as it is open to the Authority exercising jurisdiction under Section 88-B of the BT & AL Act, to grant exemption fully or partly or refuse grant of exemption. In ***Laxmibai S. Patil v. Badashah Sultan Mutwali***, 1995 Supp (3) SCC 102 the Hon'ble Apex Court has held as under in this regard :

> "**7.** It was not disputed before us that the Collector who held the inquiry as required by sub-section (2) of Section 88-B of the BT & AL Act issued the certificate of exemption in favour of the Trust in respect of a few of its lands of which the appellants were the tenants, on being satisfied that the Trust is registered under the Bombay Public Trusts Act, 1950 and the income of such lands had been appropriated for the purposes of such trust. What was argued on behalf of the appellants was that condition (*ii*) in the above proviso required the Trust to establish that the entire income of all its tenanted lands was appropriated for its purposes for obtaining the grant of a certificate of exemption under Section 88-B of the BT & AL Act. On the other hand, it was

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argued for the respondent that condition (*ii*) of the above proviso required the Trust to establish that the entire income of merely the lands for which exemption certificate was sought for was being appropriated for the purposes of trust for obtaining the exemption certificate. As seen from the provision in Section 88-B(1) and 88-B(2) of the BT & AL Act exemption certificate could be obtained by a trust in respect of its lands in occupation of tenants as provided for therein. The object of obtaining such exemption, if we have regard to the scheme of the provision, is to allow the Trust to retain the income of its lands, even where such lands are given to tenants for cultivation. Thus, if the object of the provision is to save the income of the lands of the Trust for appropriating for purposes of this Trust, we are unable to see as to why the Trust should establish that the entire income derived by it from lands other than the lands in respect of which it seeks exemption certificate, was being appropriated for the Trust. The entire income of such lands required to be shown to have been appropriated for purposes of the Trust under condition (*ii*) of the proviso, as seen therefrom, is confined to the income derived from such lands for which exemption certificate is sought for by the Trust and not its other lands, for to hold that the Trust when applies for exemption certificate in respect

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of a few of its lands is required to establish for satisfying condition (*ii*) of the proviso that the entire income derived from all its other lands, would amount to asking the Trust to establish something which the Legislature could not have intended having regard to the fact that such requirement could only be an unwarranted burden placed on the Trust with no genuine purpose to be served by it.

8. Hence, condition (*ii*) of the proviso to clause (*b*) of sub-section (1) of Section 88-B of the BT & AL Act, in our view, requires a trust which seeks to obtain an exemption certificate under Section 88-B of the BT & AL Act in respect of certain lands, to establish before the Collector that the entire income derivable by it in respect of only such lands for which exemption certificate is sought was being appropriated for the purposes of the Trust and not the entire income derivable by it in respect of its other lands for which no exemption certificate was sought."

However, for a property to be included in an exemption order, it has first to be included in Schedule-1 and recognized as the property of the Trust, which considering the above discussion, would be apparent that it was not so included, for the exemption

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order under Section 88-B of the BT & AL Act, is dated 30.05.1959 (page169), whereas the inclusion of Survey No. 73/1, in Schedule-1 is dated 24.07.2019. Thus it can safely be said that even if the land of Survey No. 73/1, belongs to the petitioner-trust, the same is not covered under the exemption granted in favour of the petitioner-trust by the order dated 30.05.1959 (page 169).

13. That leads me to the next contention of Mr. Anturkar, learned Senior Counsel for the respondent Nos. 2 to 4, that even presuming for the sake of argument that exemption under Section .88-B of the BT & AL Act, dated 30.05.1959, was there, and that such exemption included the land of Survey No. 73/1, Mouza: Rohinjan, however, considering that the order of exemption was dated 30.05.1959, and the deemed date of transfer in favour of the tenant was 01.04.1957, the exemption, even presuming to be there, would not affect the land of Survey No. 73/1, considering that the land already stood transferred to the tenant on the above deemed date.

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13.1. It is material to note here that there is no dispute regarding the tenancy of the father of the respondent no.1, in respect of the land of Survey No. 73/1, even before the deemed date of 01.04.1957. The language of Section 32(1) of BT & AL Act being material is quoted as under:

> "**32.** (*1*) On the first day of April 1957 (hereinafter referred to as "the tillers' day") every tenant shall, subject to the other provisions of this section and the provisions of the next succeeding section, be deemed to have purchased from his landlord, free of all encumbrances subsisting thereon on the said day, the land held by him as tenant, if—
>
> (*a*) such tenant is a permanent tenant thereof and cultivates land personally;
>
> (*b*) such tenant is not a permanent tenant but cultivates the land leased personally; and
>
> (*i*) the landlord has not given notice of termination of his tenancy under section 31; or
>
> (*ii*) notice has been given under section 31, but the landlord has not applied to the Mamlatdar on or before the 31st day of March 1957 under section 29 for obtaining possession of the land; 3 or
>
> (*iii*) the landlord has not terminated his tenancy on any of the grounds specified in section 14, or has so terminated the tenancy but has not applied to the Mamlatdar on or before the 31st day of March 1957 under section 29 for obtaining possession of the lands :

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> Provided that if an application made by the landlord under section 29 for obtaining possession of the land has been rejected by the Mamlatdar or by the Collector in appeal or in revision by the Maharashtra Revenue Tribunal under the provisions of this Act, the tenant shall be deemed to have purchased the land on the date on which the final order of rejection is passed. The date on which the final order of rejection is passed is hereinafter referred to as "the postponed date" :
>
> Provided further that the tenant of a landlord who is entitled to the benefit of the proviso to sub-section (*3*) of section 31 shall be deemed to have purchased the land on the 1st day of April 1958, if no separation of his share has been effected before the date mentioned in that proviso."

13.2. A perusal of the language of Section 32-G BT & AL Act indicates that it is a deeming provision and by a statutory mandate vests title in the land being cultivated by a tenant, in the tenant, as on 01.04.1957. On account of the deeming provision of Section 32-G of BT & AL Act the vesting is complete on 01.04.1957, and the provisions of the tenant applying for determination of the purchase price and grant of a certificate under Section 32-M of BT & AL Act are consequential to such vesting. The divesting of title in the land cultivated by the tenant

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would only arise, when and if the ALT passes an order in that regard, of the tenant not having completed the requirements of determination of the purchase price or the tenant having surrendered the land or in view of the other provisions of the BT&AL Act which provide for it, in case they are held to have been complied with.

13.3. The position of law, in this regard, is laid down by the learned Division Bench of this Court in ***Laxminarayan Temple v. Laxman Mahadu Chandore, 1968 SCC OnLine Bom 44*** in the following words :

> "**7.** We are, however, unable to accept the view of the Maharashtra Revenue Tribunal that the trust ought to have been a registered trust on 1st August, 1956, on which date Section 88B came into force, in order that its land may be entitled to exemption under that section. There is nothing in the terms of clause (b) of Section 88B(1) which requires its operation to be confined to the properties of those trusts which were already in existence when Section 88B came into force. The exemption granted by Section 88B is not confined to the operation of Sections 32 to 32R of the Act, but extends to the operation of several other provisions of the Act. A trust may be created after Section 88B came into effect and still the lands of the trust would be entitled to

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the exemption given by that section. A trust, however, cannot claim an exemption under that section in respect of lands which had already become the property of its tenants before the right of exemption was acquired by the trust. That is why the trust in the present case, having become entitled to claim exemption under Section 88B for the first time on 28th March, 1958, cannot get exemption in respect of a land which had gone into the ownership of respondent No. 1 on 1st April, 1957."

13.4. In ***Chhatrapati Charitable Devasthan Trust v. Parisa Appa Bhoske, 1978 SCC OnLine Bom 95*** while considering the position, this is what has been held :

"6. It is also not possible for us to accept the contention of Mr. Rege that though in fact an order under section 20 of the Bombay Public Trusts Act is passed by the competent authority on 31-5-1959, in law the trust should be treated as deemed to have been registered on the date of application or on the date when the particulars under section 18 were furnished by the trust. In this case we are not concerned with the doctrine of 'relation back' *qua* the provisions of Bombay Public Trusts Act, but will have to consider this part of the argument, in view of the rights and liabilities created by the Bombay Tenancy and Agricultural Lands Act and particularly section 88B thereof. The Bombay Tenancy and Agricultural Lands Act was amended by Bombay Act XIII of 1956. The amending Act added sections 32 to 32R to the parent Act, with the object of transferring

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the ownership of agricultural lands from landlords to tenants, i.e. to the tillers' of the land. Subject to certain exceptions, with which we are not concerned in this case, tenants became owners of the lands from the tillers' day i.e. 1-4-1957. By the same amending Act section 88B was also added to the Parent Act, along with proviso.

7. By the proviso two conditions have been laid down for a trust to get exemption. One of them is that the trust must be a registered trust under the Bombay Public Trusts Act. Therefore a landlord is not entitled to file an application under section 88B unless such a trust is duly registered. Till then the application itself is not maintainable. In this particular case an occasion to file application under section 88B arose after 1-4-1959. It is not disputed by Mr. Rege that even though an application for registration was filed in 1956, till 1-4-1959 the trust was not entitled to file such an application for exemption under section 88B of Tenancy Act. The tenant became owner of the land on 1-4-1957 i.e. tillers' day. If this is so, then on the basis of alleged doctrine of ‘relation back’ he cannot be divested of his right of ownership. Section 88B is in the nature of exception or exemption. Therefore, it will have to be strictly construed. The object of the Act is to confer the ownership rights on the tiller of the land. He becomes owner of the land on 1-4-1957. Therefore the order of registration passed on 1-4-1959 and that too in the proceedings under Bombay Public Trusts Act, to which tenant was not a party, cannot have an effect of

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extinguishing his acquired or vested right. The order passed on 1-4-1959 registering the trust cannot have effect of reviving an extinguished or lost claim so far as the trust is concerned.

13.5. In ***Eknath Bhiku Yadav v. Ganpatrao Shankarrao Dhawan, 2006 SCC OnLine Bom 136***, after considering ***Laxminarayan Temple*** (supra) and ***Chhatrapati Charitable Devasthan Trust*** (supra) , the following has been held :

"**5.** It is not the case of the respondent trustees that the trust was registered under any of the old Acts relating to the public trusts and therefore deemed to be registered under the BPT Act. It was their case as set out in the application for exemption as also as stated in the cross-examination of the trustees that the trust was registered for the first time on 8th August, 1984. It is also an admitted position that the petitioners were the tenants in possession of the said lands on the tillers day i.e. 1st April 1987. In *Laxminarayan Temple* v. *L.M. Chandore* (supra), a Division Bench of this Court has specifically held that in order for the trust to claim an exemption under section 88-B of the BPT Act, the trust must be registered before 1st April, 1957. This is so because if the trust was not registered on 1st April, 1957, a tenant would become a deemed purchaser of that date and once the tenant became a deemed purchaser and the ownership of the land which vested in him on 1st April, 1957 could not be divested by subsequent registration of the trust. The said

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> decision has been followed and applied by another Division Bench in *Chhatrapati Charitable Devasthan Trust* v. *Parisa Appa Bhoske* (supra). In that case, the Division Bench went further and said that even where an application for registration of a trust was made before 1st April, 1957 but the registration was not actually effected before 1st April, 1957, the tenant would become the deemed owner of the land and thereafter, a certificate under section 88-B of the B.T. and A.L. Act could not be granted. The Division Bench rejected the argument advanced that the registration would relate back to the date of the application.

This has been followed in ***Maroti Sansthan, Tiwsa v. Gulab Haribhau Jirapure, 2006 SCC OnLine Bom 734***.

13.6. The above judgment of the learned Division Bench of this Court in ***Eknath Bhiku Yadav v. Ganpatrao Shankarrao Dhawan*** (supra) was carried to the hon'ble Apex Court, in which the view taken above has been confirmed in ***Janardan Dagdu Khomane v. Eknath Bhiku Yadav***, **(2019) 10 SCC 395** which is as under :

> "39. There can be no doubt that the Trust was all along a public trust within the meaning of Section 2(13) of the

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Bombay Public Trusts Act. The Trust has rightly been registered under the Public Trusts Act, after due enquiry. However, all public trusts are not entitled, as of right, to the exemption under Section 88-B of the 1948 Act. The said section only applies to lands which are property of a trust inter alia for educational purpose or for public religious purpose provided such trust is deemed to be registered or is registered under the Public Trusts Act.

46. As observed above, the Trust, being a public trust, has rightly been registered on 8-8-1984, after due enquiry. The registration of the Trust under the Public Trusts Act cannot be questioned. However, the registration is prospective, w.e.f. 8-8-1984. The respondents became deemed purchasers on Tillers Day, that is, 1-4-1957. The right under Section 32 of the 1948 Act accrued to the respondents on that day. The respondents cannot be divested of such right upon subsequent registration of the Trust. It may be true that a trust for a religious purpose has the right to own and acquire property. However, such property may be taken away by authority of law. The validity of Section 32 of the Public Trusts Act is not in question."

Though this was a case of registration of the trust later in point of time, what is material to note is that the Hon'ble Apex Court, has considered the position of a tenant on the tillers day vis-a-vis exemption claimed by the Trust under Section 88-B (1) of the BT & AL Act, and has held that the right accrued to the

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tenant on account of he being deemed owner on the tillers day cannot be taken away by the subsequent registration of the Trust, as the exemption would operate prospectively.

13.7. In ***Kondiba Laxman Hanmar Vs. Krishnara Anandrao Dalavi*** relied upon by Shri Anturkar learned Senior Counsel for the respondent Nos. 2 to 4, (supra) the position in respect of Section 88-B of the BT & AL Act vis-a-vis the tillers' day has been indicated as under :

> "5. It is well settled that if the Trust was registered prior to 1st April 1957, the tenant in possession would become deemed purchaser, subject to the outcome of proceedings u/s 88B of the Act. Inasmuch as, if such Trust was to succeed in getting certificate u/s 88B of the Act, then it would necessarily follow that the person cultivating the suit land cannot become deemed purchaser as such, but his right to remain in possession of the land will be subject to other provisions of the Act. The entitlement of the Trust to get certificate u/s 88B of the Act will have to be reckoned as on 1st April 1957. Indeed, the respondent No.5 Trust is registered prior to 1st April 1957 as an institution for public religious worship, but that by itself, cannot be the basis to assume that the suit land formed property of the Trust on 1st April 1957. Whereas, if the land has been acquired by the Trust after 1st April, 1957, exemption certificate in relation to

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such a property cannot be granted. Counsel for the respondent No. 5 Trust contends that there is concurrent finding of fact by the two authorities below that the property in question being Survey No.383 is property of the Trust. This submission, however, overlooks the requirement of Law, that is to find whether the property in question was the property of the Trust as on 1st April 1957. The First Authority has referred to extract of V.F. No. III produced by the respondent No.5 Trust to hold that the property was of the Trust. However, this document i.e. Village Extract being V.F. No.III cannot establish the position that the property was of the Trust as on 1st April, 1957, nor the First Authority has recorded a clear finding in that behalf. The Revisional Authority, no doubt, has adverted to Schedules VIII and IX in support of the finding that the property being Survey No.383 is property of the Trust. However, record maintained in the office of the Charity Commissioner in Schedule VIII and Schedule IX is in the context of the requirement under the provisions of the Bombay Public Trust Rules 1951, in particular, Rule 17, which obligates the Trust to maintain accounts in particular manner u/s 32 of the Bombay Public Trust Act. The said Schedules cannot establish the factum of ownership of the Public Trust in respect of the suit land, that too, as on 1st April, 1957. Nor the authorities below have positively adverted to any extract of these Schedules to hold that the suit land was the property of the Trust on April 1, 1957. During the course of arguments, leaned Counsel for the Respondent No.5 placed reliance on Schedule I maintained under Rule 5 of the Bombay Public Trust Rules,

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which was produced before the Authority below, which forms part of record at Page 146. However, neither the First Authority nor the Revisional Authority has adverted to Schedule I under Rule 5 of the Bombay Public Trust Rules and contents thereof. No doubt, Schedule I is required to be maintained in the Office of the Charity Commissioner which would disclose the position as to the ownership of the property and the certification that the property belongs to the Trust by the Charity Commissioner, would be sufficient proof of the ownership. But the question is: whether the Trust was owner of the said land "on 1st April 1957". On examination of the said document along with other contemporaneous record, on which reliance was placed by the Counsel for the respondent No. 5, may be, the respondent No. 5 would be in a position to establish the fact that when application for registration of Trust was made in the year 1955 at the relevant time, it had disclosed that the Trust was owner in respect of the land bearing Survey No.383. However, that adjudication will have to be done by the fact finding authority and it will not be proper for this Court to take upon itself to wade through the entire record, so as to cull out the finding that the Respondent No. 5 Trust was the owner of the suit land "as on 1st April, 1957", which is the sine-qua-non for issuance of exemption certificate."

13.8. In ***Ganpati Bayaji Patil v. Shridhar Babaji Vibhute, (1996) 5 SCC 585*** while considering the right of a tenant as on

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the tillers day, vis-a-vis the claim of exemption under sec.88-C of the BT & AL Act, this is what has been said :

> "4. The High Court was not right in coming to this conclusion. Under the scheme of the Act, a tenant becomes the deemed purchaser of the land on 1-4-1957. Under Section 88-C, however, an exemption is granted to the lands of a small landlord whose land does not exceed an economic holding as defined under the Act and whose total annual income does not exceed Rs 1500. The landlord must fulfil these criteria on the date (1-4-1957) when the tenant would have become the deemed owner of the land, under Section 32-G in order to save his lands from the operation of Section 32-G. Any subsequent change in ownership will not confer any right on the subsequent 'owner' to get the benefit of Section 88-C. Unless the person who is the landlord on 1-4-1957 makes an application under Section 88-C, the rights of a tenant cannot be defeated. (See in this connection *Chanchalben* v. *Gujarat Revenue Tribunal* [12 Guj LR 428] ."

The position extant as on 01.04.1957, i.e. the tillers day, is crucial for the purposes of determining a claim of exemption under Section 88-B of the BT & AL Act, for once the land stands vested in the tenant on the tillers day, there cannot be any divesting, unless the same is so declared in appropriate proceedings, by an order on contest passed in that regard.

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13.9. In the instant case though the issue of registration is not germane, as the trust already existed, earlier to the tillers day and its registration under the BPT Act, before the tillers day has not been disputed by anyone. It is equally a fact that the exemption under Section 88-B(1) of BT & AL Act, was granted for the first time on 30.05.1959 (page169), which is consequent to the tillers' day. Not only this though it is claimed that the exemption was also in respect of the land of Survey No. 73/1, on account of its inclusion in the schedule A annexed to the order of exemption, which is a disputed question. It however remains a fact that even the petitioner-trust was aware that it was not included in Schedule-1 under the BPT Act, realising which successive attempts were made by the petitioner-trust to get it included in schedule-1, which is reflected from the C.R.No.278/1997, which is still claimed to be pending; the application under Section 36(1)(a) of the BPT Act, seeking permission to sell the same claiming it to be the property of the petitioner-trust ; the Misc. Application no. 102 of 2019 which finally resulted in the Assistant Charity Commissioner passing an

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order dated 24.07.2019 permitting its inclusion, on account of which Survey No.73/1, finally came to be included in Schedule-1 of the petitioner-trust. That however in my considered opinion, would not make the petitioner-trust entitled to claim that the said land stood exempted under Section 88-B of BT & AL Act, for the reason, that an exemption can only be granted to lands which are shown to be that of the Trust duly recorded in Schedule-1, as it is open for the trust to claim exemption of only some/part of its lands [see : ***Laxmibai S. Patil v. Badashah Sultan Mutwali*** (supra)]. Since at the time of passing of the order of exemption dated 30/5/1959, admittedly the land of S. No.73/1 was not recorded in Schedule-1, in the name of the petitioner-trust, the exemption could not affect it.

13.10. That apart, on account of the tillers day the land stood vested in the tenant, as on 01.04.1957, on account of which any subsequent exemption granted to the petitioner-trust, under Section 88-B(1) of the BT & AL Act, on 30.05.1959 (page 169), would clearly not enure to the benefit of the petitioner-trust in view of what has been held in ***Laxminarayan Temple*** (supra) and

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Chhatrapati Charitable Devasthan Trust (supra) which have been considered and approved in ***Janardan Dagdu Khomane v. Eknath Bhiku Yadav*** (supra).

14. That takes me to the contention of Mr. Rajiv Patil learned Senior Counsel for the petitioner based upon the Mutation Entry No. 587 dated 18.01.1962 (page 204) that it indicates rejection of an application made by the tenant Mahadu Padu Gaikwad, under Section 32-G of BT & AL Act, for determination of purchase price, and therefore by applying the principles of res-judicata, the second application under Section 32-G of the BT & AL Act cannot be entertained. ***M. Nagabhushana Vs State of Karnataka***, (supra) relied upon by him, enunciates the principles of res-judicata in the following terms :

> "**12.** The principles of res judicata are of universal application as they are based on two age-old principles, namely, *interest reipublicae ut sit finis litium* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa* 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 civilised system of

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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 for ever set the controversy at rest.

13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties.

21. Following all these principles a Constitution Bench of this Court in *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra* [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] laid down the following principle: (SCC p. 741, para 35)

> "*35.* … 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 decided as incidental to or

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> essentially connected with subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."

14.1. In ***Trimbak Purshottam Patil Vs. Yashodabai*** (supra) a learned Single Judge of this Court has held in relation to the question of applicability of the principles in Section 11 C.P.C. to the proceedings under the BT & AL Act, that the principles under Section 11 C.P.C. which were principles of general application should apply to a proceeding under the Tenancy Act and *if* one litigation in respect of the subject-matter under the tenancy law has come to an end or has been withdrawn without the permission of the Court to institute a fresh application, a subsequent application should be barred, in view of the withdrawal of the earlier application, the respondent was precluded from filing the second application again for the same purpose, namely, resumption of the lands, in the possession of the

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petitioner. The same view is reiterated in ***Laxman Dhondu Bhor Vs. Chintaman Bhimrao Pagare*** (supra).

14.2. There cannot be any doubt that the principles of res-judicata as enunciated in Section 11 C.P.C. are of universal applicability and would apply not only to proceedings under the BT & AL Act, but would also apply to all judicial or quasi-judicial proceedings, where jurisdiction is conferred to decide a lis finally between the parties on contest.

14.3. It is however material to note, as rightly contended by Mr. Anturkar learned Senior Counsel for the respondent Nos. 2 to 4, that this plea is not based on any adjudication of any claim by the Agricultural Lands Tribunal, in proceedings initiated by the tenant under Section 32-G of BT & AL Act, but on Mutation Entry No. 587 (page 204). There is no order placed on record by the petitioner-trust passed by any authority under the provisions of the BT & AL Act, to indicate that the plea of tenancy or for that matter the claim of the tenant of having become owner on the tillers day was turned down in any proceedings initiated by the

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tenant. The only basis of the plea that Section 11 is applicable is Mutation Entry No. 587 and nothing else. A perusal of the language of Mutation Entry No. 587 as quoted above does not indicate any application under Section 32-G having been made by the tenant, which can be said to have been adjudicated and turned down. The mutation entry also does not make any reference to any order passed by the ALT of any other Statutory Authority under the BT & AL Act, in this regard. The requirement for applicability of the principles of Section 11 C.P.C. are that the claim, has been adjudicated by a Competent Authority having jurisdiction to do so, on contest between the parties and in absence of such adjudication the plea cannot be held to be attracted.

14.4. All that Mutation Entry No. 587 (page 204) records is that the petitioner-trust is the owner of the land of Survey No. 73/1 in which Mahadeo Padu Gaikwad, is the tenant and in view of the exemption certificate under Section 88-B granted to the petitioner-trust, it cannot be said that the land was purchased by the tenant and the tillers day in his case stood postponed. The

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Mutation Entry No. 587, nowhere states that the tenant had applied for fixation of the purchase price under Section 32-G of BT & AL and the claim of the tenant was rejected upon an adjudication, by a Tribunal having authority to adjudicate such claim.

14.5. As stated above, no adjudication of any nature has been brought to my notice, so as to arrive at a conclusion that the principles of Section 11 CPC are attracted in the matter, in absence of which in my considered opinion, merely on the basis of the Mutation Entry No. 587 (page 204) it cannot be held that the principles of res-judicata as enumerated in Section 11 CPC are attracted or applicable. The contention therefore is rejected.

15. Thus when the title in the land of Survey No. 73/1, Mouza: Rohinjan vested in the original tenant Shri Mahadeo Padu Gaikwad, on 01.04.1957, any exemption which may have been granted to the petitioner trust, even presuming that the order dated 30.05.1959. (page 169) includes the land of Survey No. 73/1, the same would be of no use to the petitioner-trust as it would not encompass the land of Survey No. 73/1, which already

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stood transferred to the tenant on 01.04.1957, the tillers day, on account of the statutory mandate of Section 32 of BT&AL Act.

16. It is also necessary to note that there is no dispute that the original tenant Shri Mahadeo Padu Gaikwad was in cultivating possession on the tillers day and even earlier and that his legal heirs are in cultivating possession even thereafter and today also, as this position has not been disputed by Mr. Patil learned Senior Counsel for the petitioner-trust.

17. Though much has been said about the observation in the order of the ALT dated 05.09.2019 (page 239) where he states that Mutation Entry No. 587 (page 204) was not readable, that however is not the only ground on which the right of the tenant to claim fixation of the purchase price has been adjudicated, as the learned ALT relies upon the admitted position that Shri Mahadeo Padu Gaikwad was a tenant on the tillers day. It is also noteworthy that it is an admitted position that the exemption order dated 30.05.1959 (page 169) was not even placed before the Learned ALT by the petitioner-trust. Though it is contended that this should not affect the decision, as the order is in

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existence, however even considering the exemption order, it is not possible to hold that the right accrued to the tenant by virtue of Section 32 of the BT & AL Act, on account of the tillers day, could be taken away by any subsequent exemption, as already discussed above.

18. In my considered opinion the order of the ALT dated 05.09.2019 (page 239) which allows the application of the tenant for fixing the purchase price under Section 32-G of BT & AL Act, and that of the learned MRT dated 05.07.2022 (page 334) which upholds the judgment of the learned ALT dated 05.09.2019 are correct and are required to be upheld.

19. The petition therefore is dismissed. In the circumstances there shall be no order as to costs.

(AVINASH G. GHAROTE, J.)

20. At this stage, the learned senior counsel for the petitioner seeks continuation of ad-interim relief in terms of prayer clause (f), which was granted on 12.03.2024 for a period of 8 weeks. Considering the fact that the stay was in operation

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during the pendency of the petition, the same is continued for a period of 4 weeks from today.

(AVINASH G. GHAROTE, J.)

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