

(2002) 07 BOM CK 0032

In the Bombay High Court

Case No : Writ Petition No. 5959 of 1988

Vithal Yeshwant Nalavade deceased by his LRs Anusaya Vithal
Nalavade and Others APPELLANT

Vs

Maruti Joti Nalavde and Others RESPONDENT

Date of Decision : 04-07-2002

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29, 31, 33B
Constitution of India, 1950 — Article 226

Citation : (2002) 4 ALLMR 68 : (2003) 2 BomCR 157 : (2003) 1 MhLj 208

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : R.S. Khadapkar and R.G. Ketkar, for the Appellant; R.S. Kate and P.B. Shah, for the Respondent

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—This petition by the tenant takes exception to the order passed by the Maharashtra Revenue Tribunal, Pune dated November 19, 1988 in Revision Application No. MRT-NS-VI-8/87 (TEN-B-122/87). The short question that arises in the present case is : whether the landlord, who has already resorted to an action for possession of the land u/s 31 read with Section 29 of the Bombay Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as the said Act) and which application has been decided in his favour, is competent to institute posterior action u/s 33B of the Act on the basis of certificate issued u/s 88C in his favour?

2. The relevant facts for deciding the above question in this case are that, Section 88C certificate was issued in favour of the respondent No. 1 landlord on 12-1-1959. The respondent No. 1 had already instituted proceedings u/s 31 read with Section 29 of the Act for possession of the suit land which were decided in his favour on 23-6-1960. Later on Section 33A to 33C were inserted by Amendment Act of 1961 with effect from 9-2-1961. After the insertion of these

provisions, respondent No. 1 once again instituted another application for the relief of possession of the suit land against the tenant, albeit u/s 33B of the Act. This application was resisted by the tenant on the ground that once the landlord has taken recourse to proceedings u/s 31 read with 29 of the Act and which proceedings have been decided in his favour, Section 33B of the Act would not permit posterior application for the relief of possession of the same land by the landlord. It is contended that it is only when the earlier application u/s 29 read with 31 was rejected and decided against the landlord or was pending at the relevant time only then the landlord was competent to institute application u/s 33B taking advantage of the said amendment. This question has been decided by the Division Bench of this Court in Chintaman Anant Khasnis Vs. Keshav Dnyanu More and Others, . The question, therefore, is no more res integra. In view of this position the application as filed by the respondent No. 1 u/s 33B was not competent and ought to be rejected at the threshold.

3. The learned Counsel for the respondent No. 1 however, contends that this contention is being raised for the first time in the present writ petition and ought not to be entertained. However, to my mind, as this question goes to the root of the matter, therefore, it will be the bounden duty of the Court to examine the same. As rightly contended by the learned Counsel for the petitioners, even in the case of Chintaman A. Khasnis (supra) the Division Bench of this Court entertained that question for the first time raised during the argument. Accordingly, in my view, if it is held that the respondent No. 1 landlord was incompetent to file the subject application u/s 33B, nay such posterior application was not perceived by the Act, then merely because the objection was not raised before the lower authority will not preclude the petitioners from raising the same before this court as that question is purely a question of law and goes to the root of the matter.

4. It was next contended that it was not open for the petitioners to raise this question as the same is barred by the principles of constructive res judicata. This submission is made on the premise that the matter came right upto the Tribunal on the earlier occasion and this question was not raised though available to the petitioners. To my mind, the petitioners are not precluded from raising this question in the present writ petition before the High Court, assuming that the principles of constructive res judicata would apply against the petitioners. Undoubtedly, the matter has been brought before this Court in writ jurisdiction for the first time. The previous round of litigation went only till the stage of the Tribunal, as the case was remanded. The present Petition is therefore after the remand proceedings have been decided by the subordinate court. In such a situation the petitioners will not be precluded from raising the question before this court which is a superior court. Even this question has been answered by the apex Court in Jasraj Inder Singh Vs. Hemraj Multanchand, .

5. In this view of the matter, there is no substance in the objections taken on behalf of the respondent No. 1. On the other hand, this writ petition will succeed.

If will have to be held that it was not open to the respondent No. 1 to institute posterior application u/s 33B of the Act having regard to the fact that his earlier application u/s 31 read with Section 29 of the Act for possession of the self same lands has already been decided in his favour.

6. Hence, this petition succeeds. The impugned orders are set aside. Moreover, the subject application filed by the respondent No. 1 u/s 33B is dismissed as not maintainable in law. No order as to costs.