

IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH

DATED THIS THE 8th DAY OF OCTOBER 2021

BEFORE

THE HON'BLE MR.JUSTICE S.R.KRISHNA KUMAR

WRIT PETITION No.101046 OF 2021(LA-KHB)

BETWEEN:

SRI KADASIDDESHWARA S/O GURUNATH BYAKODI
AGED ABOUT 51 YEARS
OCC: DOCTER
R/O VIDYANAGAR 580 011
HUBBALLI, DHARWAD DISTRICT

...PETITIONER

(BY SRI GURUDAS KANNUR, SENIOR COUNSEL FOR
SRI C.S.PATIL, ADVOCATE)

AND:

1. THE PRINCIPAL SECRETARY
DEPARTMENT OF URBAN DEVELOPMENT
AND HOUSING, M.S.BUILDING,
BANGALORE-560 001
2. KARNATAKA HOUSING BOARD
BY IT'S COMMISSIONER
CAUVERY BHAVAN, BANGALORE-560 001
3. EXECUTIVE ENGINEER
KARNATAKA HOUSING BOARD
CHANAKYAPURI, HUBLI-580 011
DHARWAD DISTRICT
4. SPECIAL LAND ACQUISITION OFFICER
KARNATAKA HOUSING BOARD
CAUVERY BHAVAN, BANGALORE-560 001.

...RESPONDENTS

(BY SRI. V.S.KALASURMATH, HCGP FOR R1
SRI BASAVARAJ SABARAD, SRI H.M.PATIL AND
SRI H.R.GUNDAPPA, ADVOCATES FOR R2 TO R4)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE RESOLUTION DATED 10.12.2021 IN BEARING NO.KAGRUMUM/BHUSWAVI/17/2006-07 PASSED BY THE 2ND RESPONDENT BOARD PRODUCED AT ANNEXURE-F-1 AND APPROVAL OF RESPONDENT NO.1 STATE GOVT. PRODUCED AT ANNEXURE-F-2 DATED 10.04.2013 IN BEARING NO.VAAE 83 KHAGRUMUM 2013 FOR IMPLEMENTATION OF THE SCHEME WHICH IS POST PURCHASES IN VIOLATION OF SECTION 33(1) OF KARNATAKA HOUSING BOARD ACT WHICH PRESCRIBES PRIOR/PREVIOUS APPROVAL AND CONSEQUENTIALLY, ISSUE ANY WRIT, ORDER OR DIRECTION IN THE NATURE OF CERTIORARI QUASH THE SALE DEED DATED 23.08.2006 EXECUTED BY THE PETITIONERS FATHER IN FAVOR OF KARNATAKA HOUSING BOARD IN RESPECT OF SURVEY NO.29/1 MEASURING 15 ACRES 24 GUNTAS OF SUTAGATTI VILLAGE AS VOID-ABINITIO AND ETC.

THIS W.P. IS BEING HEARD AND RESERVED FOR ORDERS ON 06.09.2021, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

In this petition, petitioner has sought for the following reliefs:-

- (i) *Issue any writ, order or direction in the nature certiorari and quash the Resolution dated 10-12-2012 in bearing No.KAGRUMUM/BHUSWAVI/17/2006-07 passed by the 2nd respondent Board produced at Annexure F-1 and approval of*

Respondent No.1 State Govt., produced at Annexure F-2 dated 10-04-2013 in bearing No.vaEe 83 KHAGRUMUM 2013 for implementation of the scheme which is post purchase is in violation of section 33 (1) of Karnataka Housing Board Act which prescribes prior/previous approval and consequentially, issue any writ, order or direction in as Annexure-A1 the nature of certiorari quash the sale deed dated 23-08-2006 executed in respect of Survey No.29/1 measuring 15 acres 24 guntas of Sutagatti Village Dharwad as vicd-abinitio.

(iii) Issue any writ, order or direction in the nature of mandamus to the 2nd respondent to restore the possession of petition land to petitioner. In so far as petitioner is concerned.

(iv) Pass such other order or orders as this Hon'ble Court deems fit and necessary under the facts and circumstances of the case.

2. The various contentions urged by the petitioner in the present petition are as follows:

(i) The petitioner is son of one late Gurunath Byakodi, who was the owner of the subject land and upon his death, the land was succeeded to by the petitioner as his sole heir and legal representative and consequently, the petitioner became

the owner of the subject land. On account of fraud and misrepresentation practiced by the respondent No.2 – KHB in collusion with real estate brokers, the KHB obtained a Sale Deed dated 23.08.2006 from the petitioner's father by falsely representing to him that the subject land was included in the scheme of acquisition by the KHB and that the KHB had obtained prior permission from the State Government for the purpose of purchasing the subject land from the petitioner's father. It is contended that on account of the said misrepresentation made by the KHB and as a result of fraud and collusion practiced by the KHB and real estate brokers upon the petitioner, a registered Sale Deed was executed by the petitioner's father, which is illegal fraudulent, non-est and void ab-initio.

(ii) It is further contended that under these circumstances, petitioner's father preferred WP No.65687/2009 before this Court seeking quashing of the said Sale Deed dated 23.08.2006 purported to have been executed by him as well as the acquisition proceedings in respect of the

subject land. The said petition was dismissed by this Court on the ground that the legality, validity and correctness of the said Sale Deed cannot be examined by this Court in the exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India.

(iii) Aggrieved by the same, petitioner's father preferred an appeal in W.A.No.30910/2013 which was also dismissed by the Hon'ble Division Bench. However, this Court reserved liberty in favour of the petitioner's father to either challenge the Sale Deed before the competent Civil Court or agitate his rights and seek all reliefs to which he is entitled to and that the dismissal of the petition and the appeal would not come in the way of the petitioner getting the benefit, if available in law.

(iv) Aggrieved by the aforesaid order passed by this Court in **W.A.No.30910/2013**, petitioner's father approached the Apex Court in **SLP (Civil) No. 28739/2013**, which was also dismissed vide final order dated **13.01.2014**.

(v) Meanwhile, the petitioner herein had instituted a suit in O.S.No.412/2007 against his father for partition and

separate possession of his share in the joint family properties including the subject land. The said suit having been dismissed by the trial Court vide judgment and decree dated 24.03.2012, the appeal in RFA No.4066/2012 filed by the petitioner herein was also dismissed by this Court on 31.05.2012 pursuant to which, the matter between the petitioner and his father was settled amicably.

(vi) After dismissal of SLP No.28739/2013 referred to supra, in view of the liberty reserved in his favour by the Hon'ble Division Bench in W.A.No.30910/2013, petitioner's father instituted a suit in O.S.No.68/2014 seeking cancellation and setting aside of the aforesaid Sale Deed dated 23.08.2006 on the grounds of fraud and misrepresentation practiced by the KHB upon the petitioner's father. The said suit having been dismissed by the trial Court vide judgment and decree dated 23.09.2015, petitioner's father preferred an appeal RFA No.100272/2015 which is pending before this Court as on today. During the pendency of the said appeal, petitioner's father died on 12.09.2020, pursuant to which,

petitioner being his sole heir and legal representative was permitted to come on record to prosecute the appeal.

(vii) It is stated that subsequently petitioner came to know after verification of the papers that in the aforesaid RFA No.100272/2015, the respondent – KHB had filed a memo dated 18.02.2020 enclosing the impugned Resolution dated 10.12.2012 of the KHB as well as its approval by the State Government on 10.04.2013. On examining the said documents, petitioner came to know that though the Sale Deed purported to have been executed by the petitioner was dated 23.08.2006, on which day the KHB had not obtained prior approval from the State Government as mandatorily required under Section 33 (1) of the KHB Act, the KHB had passed a resolution dated 10.12.2012, purporting to obtain *post facto* approval from the State Government, who is said to have granted the said *post facto* approval only on 10.04.2013, after almost seven years from the date of the Sale Deed. In this context, it is contended that Section 33(1) of the KHB Act neither contemplates nor permits obtaining of post-facto

approval of a Sale Deed after its execution and consequently, the said impugned Resolution as well as the impugned approval are illegal and deserves to be quashed. It is therefore contended that since obtaining of prior approval from the State Government is a mandatory pre-condition / condition precedent / statutory requirement under Section 33 (1) of the KHB Act, in the absence of any such prior approval being obtained by the KHB before obtaining the Sale Deed dated 23.08.2006 from the petitioner's father, the said Sale Deed is illegal and invalid and consequently, the impugned Sale Deed also deserves to be quashed and as such, petitioner is before this Court by way of the present petition.

3. The respondent – KHB has filed its statement of objections as well as additional statement of objections and has contested the petition by denying the various averments made by the petitioner. The contention of the petitioner that the KHB had obtained the Sale Deed dated 23.08.2006 from the petitioner's father by practicing fraud and misrepresentation upon him has been specifically denied by

the KHB. It is contended that even prior to the Sale Deed, the petitioner's father had given his consent to sell the subject land in favour of the KHB and in pursuance thereof, the petitioner's father executed a proper and valid Sale Deed in favour of the KHB for the purpose of its housing scheme; after receiving the entire sale consideration, petitioner's father not only purchased other properties as detailed in paragraph-19 of the statement of objections, but also disclosed the receipt of the sale consideration to the Income Tax Authorities, thereby indicating that the contention of the petitioner that the Sale Deed was obtained by fraud and misrepresentation is false and incorrect.

The respondent – KHB had also contended that in view of the earlier round of litigation which culminated against the petitioner and in favour of the KHB, the present petition is hit by the principles of *res judicata* and estoppel. It is also contended that the petitioner is guilty of suppression of material fact and the KHB being a bonafide purchaser of the subject land for valuable consideration and for the purpose of

housing scheme in order to allot housing sites to the general public at an affordable price, petitioner is not entitled to seek quashing of the Sale Deed. It is further contended that the conduct of the petitioner in filing the suit for partition against his father and having been unsuccessful in his attempt, the petitioner is not entitled to file the present petition claiming to be the legal heir of his deceased father. It is therefore contended that there is no merit in the petition and that the same is liable to be dismissed.

4. Heard Sri. Gurudas Kannur, learned Senior Counsel on behalf of Sri. C.S. Patil and Sri. Rajshekar R. Gunjali for the petitioner and Sri. Basavaraj V. Sabarad, learned counsel on behalf of Sri. H.R. Gundappa, for the respondents – KHB and learned HCGP for the respondent – State and perused the material on record.

5. In addition to reiterating the various contentions urged in the petition and referring to the documents produced by the petitioner, learned Senior Counsel for the petitioner

submits that Section 33(1) of the KHB Act specifically mandates that in respect of Sale Deeds obtained by the KHB from private land owners in a value of more than Rs.5,00,000/- it is absolutely essential of prior approval of the State Government is obtained by the KHB before execution of the Sale Deed. In this context, learned Senior Counsel invites my attention to the words '*prior approval*' specifically found in Section 33 (1) of the KHB Act in order to contend that obtaining of prior approval is a mandatory pre-condition / requirement and in the absence of a prior approval, the Sale Deed dated 23.08.2006 said to have been executed by the petitioner's father is illegal and void *ab-initio*. In this context, learned Senior Counsel points out that it is an undisputed fact that no prior approval had been obtained by the KHB prior to / before execution of the Sale Deed and it was only on 10.04.2013 that the State Government granted approval to purchase the land of the petitioner; Section 33(1) of the KHB Act does not contemplate or permit *post facto* approval of any

Sale Deed and consequently, the Sale Deed dated 23.08.2006 is clearly illegal and *non-est* in the eye of law.

(i) In the earlier round of litigation, though the petitioner's father had urged several grounds to seek quashing / cancellation of the Sale Deed including the ground with regard to lack / want of prior approval under Section 33(1) of the KHB Act, the said issue was neither adverted to nor dealt with or adjudicated upon and as such, the present petition cannot be said to be barred by *res judicata*.

(ii) Learned Senior Counsel also submitted that the petitioner had not suppressed any material facts in present petition; though the petitioner did not advert dismissal of RFA No.4066/2012, petitioner had specifically mentioned about the said suit and its dismissal and had explained that during the lifetime of his father, the dispute between them had been amicably settled and consequently, petitioner did not pursue the said claim against this father in respect of the joint family properties including the subject land. It is submitted that even in the said proceedings instituted by the petitioner against his

father, there was no finding by the trial Court or this Court with regard to validity of the Sale Deed qua Section 33(1) of the KHB Act and consequently, the said proceedings also would not operate as *res judicata*, thereby preventing the petitioner from putting forth the various contentions urged by him in the present petition.

(iii) Learned Senior Counsel invited my attention to the decision of the Division Bench of this Court in W.A.No.30910/2013 filed by the petitioner's father in order to point out that after coming to the conclusion that the grounds of fraud and misrepresentation urged by the petitioner cannot be examined by this Court and that the same have to be necessarily adjudicated by the Civil Court, this Court granted liberty in favour of the petitioner by taking recourse to such remedies as available in law either by approaching the Civil Court by urging fraud and misrepresentation or to agitate his rights and seek all reliefs, to which he is entitled by making it clear that dismissal of the writ petition and the writ appeal

would not come in the way of the petitioner getting the benefit, if available to him in law.

(iv) Elaborating his submissions, learned Senior counsel also pointed out that the question with regard to validity of the Sale Deed *qua* Section 33 (1) of the KHB Act had not been adjudicated upon by this Court in the writ petition or in the writ appeal and in the light of the specific liberty reserved in favour of the petitioner to either file a suit or challenge the Sale Deed on any other ground, the present petition is maintainable and it is open for this Court to adjudicate upon the Sale Deed in the light of Section 33(1) of the KHB Act. It is therefore contended that notwithstanding the earlier round of litigation by the petitioner and his father, in view of the issue with regard to Section 33(1) of the KHB Act having not been decided by any Court, the present petition is not barred by *res judicata*.

(v) Learned Senior counsel further submits that principles of *res judicata* are applicable only if there is no violation of any statutory provision and in a given case, where there is violation of statutory provision which has not been

considered or adjudicated upon in the previous round of litigation, the said issue with regard to violation of statutory provision cannot be shut out on the technical ground of *res judicata*. It is submitted that the requirement of prior approval by the State Government is an incurable defect and the same cannot be cured or rectified by obtaining an *ex-post facto* approval after execution of the Sale Deed and consequently, the Sale Deed is vitiated on this ground also.

In support of his contentions, learned senior counsel for the petitioner placed reliance on the following decisions:-

(i) Bajaj Hindustan Ltd., vs. State of U.P. - (2016) 12 SCC 613;

(ii) DAV College Managing Committee vs. Surender Rana - 2011 SCC Online SC 280;

(iii) Union of India vs. Vinod Kumar - 1996 SCALE (5) 696;

(iv) State of M.P. vs. Krishna Das Tikaram - 1994 Supp.(3) SCR 747;

(v) Mathura Prasad vs. Dossibai - (1970) 1 SCC 613;

(vi) Sathyendra Kumar vs. Rajnath Dubey - (2016) 14 SCC 49;

(vii) Nandakishore vs. State of Punjab - (1995) 6 SCC 614;

(viii) Ashok Kumar Srivastava vs. National Insurance Company - (1998) 4 SCC 361;

(ix) G.N.Nayak vs. Goa University - (2002) 2 SCC 712;

(x) Nand Ram vs. Jagdish Prasad - (2020) SCC Online 633;

(xi) Popat Rao Vyankatraopatil vs. State of Maharashtra - (2020) SCC Online 291;

(xii) Saiyad Mohammed Bakar El-Edroos vs. Abdul Habeeb Hasan Arab - (1998) 4 SCC 343;

(xiii) Basher Nath vs. Commissioner of Income Tax - AIR 1959 SC 149.

6. Per contra, learned counsel for the respondent – KHB, in addition to reiterating the various contentions urged in the statement of objections and referring to the documents produced by the respondent, submits that there is no merit in the petition and that the same is liable to be dismissed. It is submitted that the petition is barred by *res judicata* in view of the rejection of the claim of the petitioner's father in the earlier round of litigation not only by way of the writ petition but also the suit filed by the petitioner's father before the Civil Court.

(i) It is further submitted that the validity of the Sale Deed dated 23.08.2006 having been upheld in the earlier round of litigation instituted by the petitioner's father which had been upheld right up to the Apex Court, the same had attained finality and cannot be reopened at the instance of the petitioner.

(ii) It is also submitted that the petitioner herein having challenged the Sale Deed dated 23.08.2006 executed by his father in favour of KHB by filing O.S.No.412/2007, which was dismissed by the Civil Court and confirmed by this Court in RFA No.4066/2012 dated 31.05.2012, the present petition filed by the petitioner seeking the very same reliefs of cancellation of the said Sale Deed is liable to be dismissed. So also, the petitioner is guilty of suppression of material facts and has not disclosed about the aforesaid RFA No.4066/2012 being dismissed by this Court and consequently, the petition is liable to be dismissed on this ground also.

(iii) Learned counsel for the respondent - KHB further submits that the previous rounds of litigation instituted by the

petitioner's father and the petitioner, clearly indicate that repeated attempts are made to challenge the Sale Deed which is nothing but an abuse of process of law and the present petition is liable to be dismissed on this ground also. It is therefore submitted that there is no merit in the petition and that the same is liable to be dismissed.

In support of his contentions, learned counsel for the respondent placed reliance on the following decisions:-

(i) Shankara Co-operative Housing Society vs. M.Prabhakar - (2011) 5 SCC 607;

(ii) Ramjas Foundation vs. Union of India - (2010) 14 SCC 38;

(iii) Amar Singh vs. Union of India - (2011) 7 SCC 69;

(iv) Bhaskar Lakshman Jadhav vs. Karamveer Kakasaheb Wagh Education Society - (2013) 11 SCC 531;

(v) ITC Limited vs. Blue Coast Hotels Ltd., - (2018) 15 SCC 1999;

(vi) Maharashtra State Mining Corporation vs. Sunil - AIR 2006 SC 1923;

(vii) Manoharlal vs. Ugrasen - (2010) 11 SCC 557;

(viii) High Court of Rajasthan vs. P.P. Singh - (2003) 4 SCC 239;

(ix) U.P.Avas Evam Vikas Parishat vs. Friends Co-operative Housing Society - AIR 1996 SC 114;

(x) Parameshwari Prasad Gupta vs. Union of India - AIR 1973 SC 2389;

(xi) National Institute of Technology vs. Pannalal - (2015) 11 SCC 669;

(xii) C.R.Guru Rao vs. Corporation of City of Bangalore - ILR 1999 KAR 2826;

(xiii) A.N.Ramalingegowda vs. State of Karnataka - (2012) 3 Kar.L.J. 6;

(xiv) Mohan Singh vs. International Airport Authority of India - (1997) 9 SCC 132;

(xv) Dilip K.Basu vs. State of West Bengal - (2015) 8 SCC 744;

(xvi) Dr.Subramanyam Swamy vs. State of Tamilnadu - (2014) 5 SCC 75;

(xvii) Asgar & Others vs. Mohan Verma & Others - (2020) 16 SCC 230;

(xviii) Sawaran Latha vs. State of Haryana - (2010) 4 SCC 532;

(xix) State of Karnataka vs. All India Manufacturers Organisation - (2006) 4 SCC 683;

7. After hearing the learned counsel for the parties, the following points arise for consideration:-

" (i) Whether the impugned Sale Deed dated 23.08.2006 and acquisition of the subject land by the

respondent - KHB without obtaining prior approval of the State Government under Section 33 of the Karnataka Housing Boards Act, 1962, is valid and legal?

(ii) Whether the present petition is barred by the principles of res judicata?

(iii) Whether the present petition is barred by the principles of constructive res judicata?

(iv) Whether the conduct of the petitioner disentitles him from any relief in the present petition?"

Re-Point No.1:-

8. This point relates to whether the Registered Sale Deed dated 23.08.2006 said to have been executed by the petitioner's father late Gurunath Byakodi in favour of KHB is legal, valid and proper. In this context, it is relevant to extract Section 33 of the Karnataka Housing Board Act 1962, which reads as follows:-

" 33. Power to purchase or lease by agreement.- (1) *The Board may enter into an agreement with any person for the acquisition from him by purchase, lease or exchange, of any land which is needed for the*

purposes of a housing scheme [or land development scheme] or any interest in such land or for compensating the owners of any such right in respect of any deprivation thereof or interference therewith:

Provided that the previous approval of the State Government shall be obtained in case of purchase or exchange involving land worth more than rupees [ten lakhs] or lease for more than five years.

(2) The Board may also take steps for the compulsory acquisition of any land or any interest therein required for the execution of a housing scheme [3] [or land development scheme] in the manner provided in the Land Acquisition Act, 1894, as modified by this Act and the acquisition of any land or any interest therein for the purposes of this Act shall be deemed to be acquisition for a public purpose within the meaning of the Land Acquisition Act, 1894.

(a) A plain reading of the aforesaid provision will clearly indicate that prior to execution of any Sale Deed by a person in favour of the KHB, in respect of any property, having a value of more than Rs.10 lakhs, prior approval of the State Government is essential. A perusal of the said Sale Deed dated 23.08.2006 will indicate that the total value of the sale

consideration stated in the said Sale Deed is Rs.2,07,64,000/-; it is there clear that before the Sale Deed was executed, prior approval of the State Government was essential in terms of Section 33(1) of the KHB Act.

(b) The material on record clearly indicates that no prior approval was obtained by the KHB before execution of the aforesaid Sale Deed in its favour; on the other hand, the said approval was granted by the State Government in favour of the KHB only on 17.10.2012 as can be seen from the communication between the KHB and State Government produced as Annexures- F, F1 and F2. It is therefore clear that no prior approval was obtained by the KHB from the State Government before the execution of the subject Sale Deed dated 23.08.2006.

(c) The next question that arises for consideration is, whether absence / lack / want of prior approval of the State Government would vitiate the impugned Sale Deed dated 23.08.2006 and render the same illegal and invalid as contended by the petitioner. As rightly contended by the

learned counsel for the petitioner, prior approval of the State Government is a mandatory, precondition / condition precedent / *sine qua non* before execution of the Sale Deed in favour of the KHB as can be seen from Section 33(1) of the Act.

(d) The distinction between the words 'approval' and 'prior approval' have been interpreted by the Apex Court in ***Bajaj Hindustan Limited's*** case (supra), wherein it is held that while the words 'approval' includes ratification and *ex post facto* approval, the words 'prior approval' or 'previous approval' contemplates mandatory precondition / condition precedent and in the facts of the said case, the Apex Court came to the conclusion that the absence of the word 'prior' indicates that *ex-post facto* approval or ratification was permissible and valid; however, if the provision contemplates previous approval or prior approval, *ex post facto* approval or ratification would not validate or cure the defect on account of want / absence / lack of prior approval.

(e) So also, in **DAV College's** case, **Vinod Kumar's** case and **Krishna Das Tikaram's** case (supra), the Apex Court has categorically held that absence / lack / want of prior approval would vitiate and invalidate any document, transaction, act, deed or thing etc., required to be done or executed without obtaining previous or prior approval; in the facts of the instant case, obtaining of previous / prior approval from the State Government by the KHB before execution of the impugned Sale Deed dated 23.08.2006 would clearly invalidate and vitiate the said document and consequently, the same deserves to be quashed.

(f) Insofar as the decisions relied upon by the learned counsel for the respondents - KHB with regard to subsequent ratification by way of approval granted subsequent to the sale deed on 10.04.2013 is concerned, the said decisions are clearly not applicable, since the same were rendered in the peculiar facts and circumstances of the said cases, which were dealing with provisions and situations, which did not contemplate obtaining of previous or prior approval or sanction

and as such, the said decisions are not applicable to the facts of the instant case. In fact, in none of the said decisions, the Apex Court as well as this Court was dealing with a situation or statutory provision which mandated obtaining of previous or prior approval / sanction. Under these circumstances, I am of the view that none of the said decisions relied upon by the learned counsel for the respondents - KHB will come to its aid in order to contend that ex post fact approval granted on 10.04.2013 subsequent to the impugned sale deed dated 23.08.2006 would validate and ratify the impugned sale deed and consequently, the impugned Sale Deed deserves to be quashed.

In view of the aforesaid discussion, **Point No.1** is answered in favour of the petitioner by holding that absence / lack / want of previous / prior approval by the State Government before executing the impugned Sale Deed dated 23.08.2006 would vitiate and invalidate the said document and mere *ex-post facto* approval dated 10.04.2013 would not have the effect of ratifying or validating the Sale Deed due to the

inherent lacuna / defect in the document at the time of its execution.

Re-Point No.2:-

9. This aspect arises out of the specific contention urged by the respondent - KHB that the present petition is barred by *res judicata*, in view of the previous litigations instituted by the petitioner's father as well as the petitioner in respect of the subject property. In this context, it is contended that whilst the petitioner's father challenged the very same impugned Sale Deed in W.P.No.65687/2009, which was dismissed by this Court and confirmed by the Division Bench in W.A.No.30910/2012 as well as by the Apex Court in SLP(C) No.28739/2013, the suit in O.S.No.68/2014 also filed by the petitioner's father was dismissed by the Civil Court on 23.09.2015 and is pending in an appeal in RFA No.100272/2015 before this Court. So also, petitioner herein instituted a suit in O.S.No.412/2007 which was dismissed by the Civil Court and confirmed in RFA No.4066/2012 by this Court. It is therefore contended that on account of the

rejection of the claim of the petitioner as well as his father in the previous rounds of litigation, the present petition is barred by *res judicata*.

(a) Secondly, it is contended that in the earlier litigation in W.P.No.65687/2009 (supra) and O.S.No.68/2014, petitioner's father had sought for cancellation of the impugned Sale Deed on the identical ground of want / absence of prior approval under Section 33(1) of the KHB Act and both this Court as well as the Civil Court having rejected the claim of the petitioner's father, the present petition filed by the petitioner was not maintainable and barred by *res judicata*. In support of his contentions, learned counsel relied upon the aforesaid decisions.

(b) Per contra, learned senior counsel for the petitioner submitted that in view of the liberty granted by this Court in W.A.No.30910/2012 to agitate his rights and seek appropriate reliefs, the present petition is not barred by *res judicata*; so also, the decision of the civil court in O.S.No.68/2014 is still pending adjudication before this Court in RFA

No.100272/2015 and consequently, since the said issue has not been heard and finally decided, the question of *res judicata* does not arise. It is also contended that the challenge to the Sale Deed in O.S.No.68/2014 was on the ground of fraud and misrepresentation, which was rejected by the civil court which has not adjudicated upon the issue with regard to want / lack / absence of prior approval which is still at large in RFA No.100272/2015 and the plea of *res judicata* was not tenable. It is further contended that in O.S.No.412/2007 filed by the petitioner, the present issue with regard to want of sanction under Section 33 of the KHB Act was neither adjudicated nor decided either by the civil court or by this Court in RFA No.4066/2012 and consequently, the said decisions would not operate as *res judicata* for the purpose of precluding the petitioner from challenging the impugned Sale Deed in the present petition.

(c) Lastly, it is contended by the learned senior counsel for the petitioner that *Explanation -V* to Section 11 CPC would apply only to a relief sought for and not granted; in the instant

case, though the petitioner's father had sought for cancellation of the Sale Deed in W.P.No.65687/2009, in W.A.No.30910/2012, liberty was reserved in favour of the petitioner's father to agitate his rights and put forth his claim; in other words, the liberty granted by this Court which was not varied, reversed or modified by the Apex Court clearly indicates that the claim of the petitioner that there was violation of Section 33(1) was not rejected and on the other hand, the liberty granted by this Court would enure to the benefit of the petitioner whose claim cannot be said to have been heard and finally decided / rejected and the present petition is barred by *res judicata*. Reliance is placed by the learned senior counsel on several decisions on this aspect of the matter also.

(d) There is no gainsaying the fact that in order to attract the bar of *res judicata*, the issue involved in the subsequent proceedings should have been directly and substantially in issue in the previous proceeding and the said issue should have been heard and finally decided. In the instant case, in

order to attract the bar of *res judicata*, it is essential that the issue with regard to the legality and validity of the impugned Sale Deed *qua* Section 33(1) of the KHB Act should have been heard and rejected finally in the previous proceeding. In this context, it is relevant to state that the claim of the petitioner in W.P.No.65687/2009 with regard to validity of the Sale Deed as being violative of Section 33(1) was not adjudicated upon by the learned Single Judge, who came to the conclusion that the contention of the petitioner's father that the Sale Deed was obtained by fraud and misrepresentation required adjudication by the competent civil court and not by this Court under Article 226 and 227 of the Constitution of India; the issue with regard to validity of the Sale Deed *qua* Section 33(1) was not adjudicated, much less rejected by the learned Single Judge.

(e) In the appeal in W.A.No.30910/2013, this Court affirmed the finding of the learned Single Judge that the contention of the petitioner's father that the Sale Deed was vitiated on account of fraud and misrepresentation has to be

necessarily adjudicated upon by the civil court; in addition thereto, this Court reserved liberty in favour of the petitioner's father to agitate his claim *qua* the Sale Deed by approaching the civil court or agitate his rights and seek all the reliefs to which he is entitled; in other words, liberty was reserved in favour of the petitioner's father to either seek cancellation of the Sale Deed on the ground of fraud and misrepresentation before the competent civil court or by seeking annulment of the Sale Deed as violative of Section 33(1) by way of separate writ petition, particularly when this issue *qua* Section 33(1) had not been adjudicated in the said proceedings. The non adjudication of the validity of the Sale Deed *qua* Section 33(1) and the liberty reserved by the Division Bench to file a fresh petition and urge the said issue was neither reversed, varied or modified by the Apex Court, which summarily dismissed the petition. Under these circumstances, in view of the material on record which clearly indicates that the issue of the validity of the Sale Deed *qua* Section 33(1) having not been adjudicated in the previous proceedings coupled with the

express liberty / permission / leave granted by this Court, I am of the considered opinion that it cannot be said that the present petition is barred by *res judicata* and consequently, the said contention of the learned counsel for the respondent - KHB cannot be accepted and the decisions relied upon by him which were rendered in peculiar and different fact situations are not applicable to the peculiar / special facts and circumstances of the instant case.

(f) Insofar as the contention urged on behalf of the respondent that the relief of cancellation of the Sale Deed as being violative of Section 33(1) having not been granted in the previous round of litigation in W.P.No.65687/2009 and the same is deemed to have been refused, thereby barring the present petition by *res judicata* is concerned, as stated supra, rather than the relief *qua* Section 33(1) being refused in the previous round of litigation, this Court in W.A.No.30910/2013 has granted express liberty / leave in favour of the petitioner to seek the said relief and has clarified that the dismissal of the writ petition and the writ appeal would not come in the way of

the petitioner's father getting the benefit if it is available to him in law. In this context, it is relevant to extract the said liberty granted in favour of the petitioner's father in W.A.No.30910/2013, which reads as under:-

" Therefore, the order of the learned Single Judge is valid. It is open to the petitioner now either to challenge the Sale Deed in the manner known to law before the civil court or to accept the sale deed and agitate his rights and seek all reliefs to which he is entitled. The dismissal of the writ petition and this appeal would not come in the way of the petitioner in getting the benefit, if it is available to him in law".

(g) It is also significant to note that paragraph-7 of the said decision, the Hon'ble Division Bench has referred to Section 33 of the KHB Act and has proceeded to confirm the order of the learned Single on the ground that the issue with regard to fraud and misrepresentation has to be adjudicated by the civil court; however, the issue with regard to Section 33 of the KHB Act was not adjudicated upon by this Court. Under these circumstances, I am of the considered opinion that non adjudication of the issue with regard to the legality and validity

of the sale deed *qua* Section 33 coupled with the express liberty reserved in favour of the petitioner's father extracted above, leads to the inescapable and sole inference that the said contention / issue is not barred by *res judicata* and the contention of the respondent cannot be accepted on this ground also.

(h) Insofar as the contention of the learned counsel for the respondent - KHB that the petitioner / petitioner's father having chosen to file a suit in O.S.No.68/2014 which is pending in RFA No.100272/2015, the liberty given by this Court in W.A.No.30910/2013 has been exhausted and the present petition is barred by *res judicata* is concerned, the said contention cannot be accepted for more than one reason; firstly, RFA No.100272/2015 is still pending adjudication and the same has not attained finality which is a pre condition for *res judicata* to apply; secondly, learned senior counsel on instructions specifically submitted that in the event this Court were to come to the conclusion that the present petition was

not barred by *res judicata*, the petitioner would unconditionally withdraw RFA No.100272/2015 pending before this Court.

(i) The aforesaid facts and circumstances and the submissions made by the learned senior counsel with regard to the petitioner availing only the remedy of challenging the Sale Deed on the ground of violation of Section 33(1) and withdrawing / abandoning the petitioner's claim for cancellation of the Sale Deed on the grounds of fraud and misrepresentation is sufficient to come to the conclusion that the present petition is not barred by *res judicata*. Accordingly, placing on record, the submission made by the learned senior counsel on behalf of the petitioner that the petitioner would withdraw RFA No.100272/2015 and issuing necessary directions to the petitioner in this regard, I am of the considered opinion that the present petition is not barred by *res judicata*.

(j) Insofar as the contention urged by the respondent - KHB with regard to the claim of the petitioner being rejected in O.S.No.412/2007 filed by him which was confirmed in RFA

No.4066/2012 is concerned, it is relevant to state that the said suit was for partition and declaration of the petitioner's alleged share in the suit schedule properties including the subject property; neither in the said suit nor in the appeal, the issue with regard to validity and legality of the sale deed qua Section 33 of the KHB Act was either dealt with or adjudicated upon and consequently, the judgments and decrees in the suit as well as the appeal cannot be said to operate as *res judicata* so as to bar the present petition and the contention of the learned counsel for the respondent in this regard cannot be accepted.

Accordingly, **Point No.2** is answered in favour of the petitioner by holding that the petition is not barred by *res judicata*.

Re-Point No.3:-

10. In addition to the contention with regard to the bar of *res judicata*, learned counsel for the respondents - KHB has also contended that the petition is barred by constructive *res judicata* and has placed reliance upon several decisions. In this context also, it cannot be gainsaid that for the bar under

constructive *res judicata* to be applicable to the facts of the instant case, it is absolutely essential that the contention of the petitioner with regard to validity and legality of the Sale Deed *qua* Section 33 should not have been pleaded by the petitioner in the earlier round of litigation despite being in a position to do so; the material on record clearly indicates that the said plea with regard to validity of the sale deed *qua* Section 33 had been specifically pleaded but not heard or finally decided in the earlier round of litigation, in which express liberty was reserved in favour of the petitioner to put forth the said contention once again. In the light of the specific contention with regard to validity of the Sale Deed *qua* Section 33 having been put forth in the earlier round of litigation, it cannot be said that the present petition is barred by constructive *res judicata*. Under these circumstances, the various decisions relied upon by the respondent in this regard also are not applicable to the peculiar facts and circumstances of the instant case and consequently, even this contention of the respondent - KHB cannot be accepted.

Accordingly, **Point No.3** is answered in favour of the petitioner by holding that the present petition is not barred by constructive *res judicata* also.

Re-Point No.4:-

11. The last contention urged by the respondent - KHB is that the conduct of the petitioner disentitles him from any relief in the present petition. In this regard, it is contended that in view of the undisputed earlier litigations filed by the petitioner and his father coupled with the suppression of material facts in not disclosing dismissal of RFA No.4066/2012 indicates that the petitioner has not come to the Court with clean hands and not entitled to invoke the jurisdiction of this Court in the present petition.

(i) Insofar as RFA No.4066/2012 is concerned, at paragraph-6 of the writ petition, petitioner has stated with regard to O.S.No.412/2007, out of which, the aforesaid RFA No.4066/2012 had arisen. In this context, learned senior counsel submitted that due to oversight and inadvertence, though the petitioner has stated with regard to the said suit, he

has unintentionally not stated anything with regard to the appeal; however, it is specifically averred by the petitioner that the said dispute between himself and his father was settled and the said suit and appeal were not only in respect of the subject property but also other joint family properties, which were settled between the petitioner and his father having regard to his old age. The said submission of the learned senior counsel for the petitioner merits acceptance. So also, in view of the specific averment in paragraph-6 of the petition with regard to O.S.No.412/2007, as also the averment with regard to the said dispute between the petitioner and his father having been amicably settled, I am of the considered opinion that merely because the petitioner has not stated anything with regard to RFA No.4066/2012, the said circumstance cannot be made the basis to come to the conclusion that the petitioner is guilty of suppression of material facts.

(ii) Insofar as the repeated litigations instituted by the petitioner and his father are concerned, it cannot be said that

the same tantamounts to abuse of process of law in view of the express liberty granted by this Court in W.A.No.30910/2013 and as such, even this contention urged by the respondent - KHB cannot be accepted.

Accordingly, **Point No.4** is also answered in favour of the petitioner by holding that his conduct does not disentitle him from any relief in the present petition.

12. After having come to the conclusion that the impugned Sale Deed dated 23.08.2006 deserves to be quashed, cancelled and annulled, the next question that arises is with regard to the sale consideration of Rs.1,07,64,000/- received by the petitioner's father from the respondent - KHB towards the Sale Deed.

13. By applying Section 65 of the Indian Contract Act and the principles of restitution to the impugned Sale Deed dated 23.08.2006, it is necessary to direct the petitioner to repay / refund the entire sum of Rs.1,07,64,000/- back to the respondent - KHB together with 6% p.a. from the date of the

Sale Deed dated 23.08.2006 till the date of payment by issuing necessary directions in this regard.

14. In the result, I pass the following:-

ORDER

(i) Petition is hereby allowed;

(ii) The impugned Sale Deed dated 23.08.2006 executed by the petitioner's father in favour of the respondent - KHB is hereby declared as null and void and directed to be cancelled, subject to the condition that the petitioner pays a sum of Rs.1,07,64,000/- together with interest at 6% p.a. from 23.08.2006 till the date of payment to the Respondent-KHB within a period of three months from the date of receipt of a copy of this order;

(iii) Copy of this order is directed to be transmitted / forwarded to the jurisdictional Sub-Registrar for necessary action / steps to make / effect suitable entries in the Books, Records etc., with regard to cancellation of the impugned Sale Deed dated 23.08.2006; it is needless to state that the jurisdictional Sub-Registrar shall take necessary steps in this

regard only after receiving written confirmation from the KHB about receipt of the entire amount from the petitioner as directed supra.

**Sd/-
JUDGE**

SV/SRL.