

(2014) 09 BOM CK 0072

In the Bombay High Court

Case No : Writ Petition No. 5619 of 2006

Ambaji Narsing Mali

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 32
Urban Land (Ceiling and Regulation) Act, 1976 — Section 10(1), 10(3), 10(5), 20, 20(1)

Citation : (2015) 2 ALLMR 774 : (2014) 6 MhLj 325

Hon'ble Judges : Abhay Shreeniwas Oka, J;A.S. Chandurkar, J

Bench : Division Bench

Advocate : Bhushan A. Walimbe, Advocate for the Appellant; V.S. Gokhale, AGP, A.V. Anturkar, Senior Advocate and Tejpal S. Ingale, Advocate for the Respondent

Final Decision : Dismissed

Judgement

A.S. Chandurkar, J.—By this writ petition filed under Article 226 of the Constitution of India, the petitioners have challenged the order dated 12-7-2006 passed by respondent No. 1 u/s 34 of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the said Act). By aforesaid order the allotment of surplus land in favour of respondent No. 6 has been maintained and the request made by the petitioners for undertaking a housing scheme u/s said Act has been refused. By amending the petition on 7-2-2014, the petitioners have also challenged notice dated 25-11-1983 issued u/s 10(5) of the said Act in respect of the land in question and have further sought a declaration that all proceedings initiated under the said Act stand abated.

2. It would be necessary to refer to certain facts that have bearing on the adjudication of this writ petition. Survey No. 241/3 Part admeasuring 3461.50 square meters and Survey No. 241/4 Part admeasuring 9700 square meters form subject matter of this writ petition. The petitioners were the owners of aforesaid lands. On 30-11-1982, a notification u/s 10(1) of the said Act came to be issued

declaring aforesaid land to be excess vacant land. On 19-9-1983, on the request made by respondent No. 6 Trust for allotment of excess land, the respondent No. 1 directed that necessary action in that regard would be taken after completion of formalities. On 6-10-1983, Gazette Notification was duly published u/s 10(3) of the said Act, by which aforesaid lands stood vested with the State Government with effect from 25-8-1983. On 25-11-1983 in terms of notice issued u/s 10(5) of the said Act, the petitioners land owners were directed to hand over possession of said land to the Competent Authority on 3-12-1983. In aforesaid communication, the petitioners were informed that excess land was being allotted to respondent No. 6 Trust. Thereafter on 3-12-1983, possession of aforesaid land was taken in presence of Panchas. It was noted in the Kabjepatti that the land owners were not present at that time and there was no objection or complaint from any party while taking possession.

3. The petitioners land owners challenged notice dated 25-11 -1983 by which they had been directed to hand over possession as well as notice issued u/s 10(5) of the said Act by filing Writ Petition No. 4066/1984. On 10-10-1984, this Court issued Rule in the said writ petition and observed that as the possession was already delivered, the parties should maintain status quo as on 10-10-1984. On 23-9-1988, the aforesaid writ petition was permitted to be withdrawn on the request made by the petitioners. This Court on 23-9 -1988 passed the following order in Writ Petition No. 4066 of 1984.

"On motion, this Petition is allowed to be withdrawn. Liberty to file fresh petition if any order under the Urban Ceiling Act is hereafter passed against the Petitioners.

No order as to costs."

4. On 27-12-1988, the State Government in terms of exercise of powers u/s 20(1) of the said Act exempted aforesaid vacant lands from the provisions of Chapter III of the said Act and permitted the petitioners to undertake a scheme for construction of tenements. On 27-12-1988 itself another order was passed by the State Government directing the Competent Authority, Sangli to cancel notifications issued under Sections 10(1), 10(3) and 10(5) of the said Act. The Competent Authority was further directed to restore possession of said surplus vacant land to the petitioners. In terms of aforesaid directions, the Competent Authority issued a notice to respondent No. 6 Trust on 6-2-1989 that in terms of communication dated 27-12-1988, the possession of aforesaid lands would be taken back from respondent No. 6 Trust and would be handed over to the petitioners on 21-2-1989. However, on 17-2-1989 a communication was issued by respondent No. 1 informing the petitioners that in view of the order of stay granted by the Hon"ble Minister, the date for delivery of possession was being postponed. A communication to that effect was issued to the petitioners on 21-2 -1989. The petitioners being aggrieved by the order dated 17-2-1989 whereby direction to hand over possession was stayed, challenged the communication dated 17-2-1989 and 21-2-1989 by filing Writ Petition No. 2488 of 1990. In said

writ petition, a prayer was also made that the order dated 6-2-1989 be implemented.

5. It appears from the record that on 2-2-1994, the respondent No. 6 was informed that the order of stay granted by the State Government on 17-2-1989 had been vacated. Being aggrieved thereby, respondent No. 6 trust filed Writ Petition No. 1033 of 1994 and challenged the order dated 27-12-1988 passed by respondent No. 1 u/s 20(1) of the said Act as well as the communication dated 2-2-1994 whereby respondent No. 6 was directed to hand over possession to the Competent Authority. On 3-3-1994, Writ Petition No. 1033 of 1994 was admitted and the communication dated 2-2-1994 was stayed. Said writ petition was directed to be heard with Writ Petition No. 2488 of 1990. On 23-6-2005, Writ Petition No. 1033 of 1994 came to be decided. This Court set aside the order passed by the Dy. Collector and Competent Authority dated 27-12-1994 granting exemption u/s 20(1) of the said Act in favour of the present petitioners. The notice dated 2-2-1994 was also quashed. The State Government was directed to decide the exemption application submitted by the land owners afresh after giving an opportunity of hearing to both parties. On 24-6-2005, Writ Petition No. 2488 of 2005 was dismissed as infructuous in view of the orders passed by the State Government.

6. Pursuant to the order dated 23-6-2005 passed in Writ Petition No. 1033 of 1994, the respondent No. 1 considered the matter afresh. On 12-7-2006 after hearing the petitioners and respondent No. 6 Trust, it was held that the allotment of surplus land made in favour of respondent No. 6 Trust was being confirmed. The scheme proposed by the petitioners u/s 20(1) of the said Act was disallowed. The respondent No. 6 was directed to make use of the aforesaid land for the purposes of setting up an educational institution within a period of three years, failing which the allotment was to stand cancelled. As stated above, it is this order dated 12-7-2006 passed in exercise of powers conferred by Section 34 of the said Act that has been impugned in the present writ petition. Similarly, notice dated 25-11-1983 issued u/s 10(5) of the said Act has also been put to challenge.

7. Shri B. A. Walimbe, the learned Counsel appearing for the petitioners submitted that the order dated 12-7 -2006 passed by the respondent No. 1 under provisions of Section 34 of the said Act was bad in law. He submitted that refusal to grant exemption to the petitioners to undertake scheme u/s 20(1) of the said Act was contrary to law. He urged that even after vesting of the lands in the State Government after issuance of notification u/s 10(3) of the said Act, permission could be granted to the original land owners to implement scheme u/s 20(1) of the said Act. In this regard, he relied upon the decision of the Supreme Court in the case of Special Officer and Competent Authority, ULC and Another Vs. P.S. Rao, It was further submitted that the allotment of surplus land in favour of the respondent No. 6 was contrary to the provisions of Section 23 of the said Act inasmuch as the activity of education undertaken by the said Trust was not an "industry". The learned Counsel submitted that in view of the

provisions of the Urban Land (Ceiling and Regulation) Repeal Act 1999 (for short the Repeal Act), pending proceedings under the said Act stood vitiated and the land in question should therefore revert back to the petitioners. The learned Counsel also relied upon the decision of the Supreme Court in the case of Union of India (UOI) and Others Vs. Shri R.C. Jain and Others, to urge that the meaning of the expression "industry" as construed in a different statute cannot be relied upon in the present matter that arises out of a different statute. He, therefore, submitted that the writ petition deserved to be allowed.

8. Shri V. S. Gokhale, the learned Assistant Government Pleader appearing for the respondent Nos. 1 to 5 relied upon the affidavit-in-reply filed by Shri Sham Wardhane, Joint Secretary, Urban Development Department, Mantralaya Mumbai and submitted that after the proceedings were remanded by this Court on 23-6-2005 as per order in Writ Petition No. 1033/1994, the State Government considered the case of the petitioners to undertake scheme u/s 20(1) of the said Act and had thereafter maintained the allotment of said lands to the respondent No. 6 Trust for educational purposes. He further submitted that in view of vesting of aforesaid land with the State Government, its allotment in favour of the respondent No. 6 was in accordance with law.

9. Shri A. V. Anturkar, the learned Senior Counsel along with Shri Tejpal S. Ingale, the learned Counsel appearing for the respondent No. 6- trust raised preliminary objection to the maintainability of the writ petition on the grounds of delay, laches and constructive res judicata. The learned Senior Counsel submitted that though the notification issued u/s 10(3) of the said Act and the notice issued u/s 10(5) of the said Act were the subject matter of challenge in Writ Petition No. 4066 of 1984, said writ petition was unconditionally withdrawn on 23-9-1988. The liberty granted by this Court was only with regard to filing a fresh writ petition if any order under the said Act was thereafter passed. He, therefore, submitted that having withdrawn the aforesaid writ petition unconditionally in which the notification issued u/s 10(5) of the said Act challenged, it was not now open to challenge the very same notification and notice in this writ petition. It was further submitted that the basic order of allotment dated 19-9-1983 and 25-11-1983 by which said lands were allotted to the respondent No. 6 Trust had not been challenged till filing of the present writ petition on 17-8-2006. It was, therefore, urged that as the allotment of the surplus land in favour of the respondent No. 6 Trust was not under challenge when the impugned order was passed on 12-7-2006, there was no occasion for the petitioners to seek allotment of very same lands for undertaking scheme u/s 20(1) of the said Act. It was further urged that educational activities undertaken by the respondent No. 6 partook the character of an "industry" and hence, there was no breach of provisions of Section 23 of the said Act. He further submitted that as the possession of the land in question was taken by the Competent Authority and thereafter handed over to the respondent No. 6, there was no question of the provisions of the Repeal Act applying. The learned Senior Counsel in support of his contention that the activity of education was an "industry" relied

upon the decisions of the Supreme Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, , Miss A. Sundarambal Vs. Government of Goa, Daman and Diu and Others, and Ruth Soren Vs. Managing Committee, East I.S.S.D.A. and Others, . The decision of the Supreme Court in the case of State of U.P. Vs. Hari Ram, with regard to vesting of land under the said Act was also relied upon. The learned Senior Counsel, therefore, prayed for dismissal of the writ petition.

10. We have carefully considered the submissions made by the learned Counsel for the parties. We have also gone through the entire record of the writ petition. After having given anxious consideration to the same, we are of the opinion that the preliminary objection raised on behalf of the respondent No. 6 Trust to the maintainability of the writ petition deserves to be upheld.

11. It is not in dispute that on 6-10-1983, Gazette notification u/s 10(3) of the said Act was issued and on that basis by issuing notice u/s 10(5) of the said Act on 25-11-1983, the possession of the aforesaid lands was to be taken on 3-12-1983. It is further not in dispute that possession of aforesaid lands was taken on 3-12-1983. On 27-2-1984, the petitioners had filed Writ Petition No. 4066 of 1984 for challenging the notice issued u/s 10(5) of the said Act. Prayer clause (b) made in Writ Petition No. 4066 of 1984 reads as under:-

(b) That the notice issued on 25th November, 1983 and also the notice issued u/s 10(5) annexed at Exhibit "C Colly." be quashed and set aside, and the Respondent No. 4 be directed to hand over the possession of the suit property forthwith.

The fact that the petitioners had lost possession was noted by this Court in its order dated 10-10-1984 passed in the aforesaid writ petition and the same reads as under:-

"Rule. Since the possession is already delivered, status quo as on today with liberty to other side to move."

It is further not in dispute that on 23-9-1988, the aforesaid writ petition came to be withdrawn on the basis of the following order:

"On motion, this Petition is allowed to be withdrawn. Liberty to file fresh petition if any order under the Urban Ceiling Act is hereafter passed against the Petitioners. No order as to costs."

The aforesaid order granted liberty to the petitioners to file a fresh petition if any order under the said Act was passed after 23-9-1988 i.e. after withdrawal of the writ petition. There was no liberty granted to file fresh proceedings with regard to the notice dated 25-11-1983 issued u/s 10(5) of the said Act. Prayer clause (di) made in the present writ petition reads as under:-

(di.) Writ of Mandamus or any other writ in the nature of mandamus be issued under Article 226 of the Constitution of India, 1950 to quash and set aside the

notice dated 25-11-1983 issued u/s. 10(5) of Urban Land (Ceiling and Regulations) Act, 1976 in respect of suit land being Survey No. 241/3 (part) admeasuring 3461.50 sq. mtrs and Survey No. 241/4 admeasuring 9700 sq. mtrs under notification No. ULC/SR/195, 910, 911/76."

In *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, the Supreme Court held that if the earlier writ petition was withdrawn without any liberty to file a fresh writ petition on the same cause of action, then the second writ petition challenging the very same orders that were challenged in the first writ petition would not be maintainable. In para 9 of said judgment, it has been observed thus:

"9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the high Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article.

While the withdrawal of a writ petition filed in a high Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to *res judicata*, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission."

12. From the aforesaid, it is, therefore, clear that though the petitioners had specifically challenged notice dated 25-11-1983 issued u/s 10(5) of the said Act in Writ Petition No. 4066 of 1984, the said writ petition was unconditionally withdrawn without reserving any liberty to challenge the said notice in a subsequent writ petition. Hence, said prayer cannot be permitted to be urged in this writ petition.

13. In the present writ petition, a prayer is also made to set aside allotment of aforesaid lands made in favour of the respondent No. 6 on 19-9-1983. In this regard, it is to be noted that when the Writ Petition No. 4066 of 1984 had been filed by the petitioners on 27-2-1984, said order of allotment was holding the field. The same could have been challenged in Writ Petition No. 4066 of 1984. However, there was no challenge made to aforesaid allotment of land in favour of the respondent No. 6 Trust in said writ petition. Thus, a prayer which could have been made and which ought to have been made in Writ Petition No. 4066 of 1984 was not made and hence, on principles analogous to constructive *res judicata*, a challenge to the allotment of land in favour of the respondent No. 6 Trust dated 19-9-1983 cannot now be now permitted to be raised.

In *State of U.P. Vs. Nawab Hussain*, the Supreme Court held as under:

"3. The principle of estoppel per rem judicatam is a rule of evidence. As has been stated in *Marginson V. Blackburn Borough Council*, it may be said to be "the

broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the Courts to recognize that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of *res judicata*.

In view of aforesaid observations, it would not be permissible for the petitioners in this writ petition to seek to challenge the order of allotment dated 19-9-1983 specially when such challenge could have been made to the order of allotment in Writ Petition No. 4066 of 1984. but the same was not made.

14. Similarly, even if the petitioners are permitted to pursue their challenge to aforesaid order of allotment, the same would be a belated challenge. There is considerable delay on the part of the petitioners in seeking to challenge the order of allotment dated 19-9-1983 in the present writ petition that was filed on 17-8-2006. Thus, aforesaid challenge after lapse of almost 23 years is highly belated and suffers from gross laches. Moreover, it is not in dispute that possession of the lands in question have been already handed over to the respondent No. 6 Trust on 3-12-1983. It would be highly inequitable at this point of time to set the clock back after lapse of considerable period of time. The exercise of writ jurisdiction is discretionary in nature and the same cannot be exercised in a case where there is considerable delay on the part of the petitioners in seeking legal redress. The delay as caused by itself is sufficient to disentitle the petitioners from having their challenge to the order of allotment dated 19-9-1983 being considered on merits.

15. Thus, we find that there is considerable merit in the preliminary objection raised on behalf of the respondent No. 6 Trust by its learned Senior Counsel. We, therefore, uphold the aforesaid preliminary objection and decline to entertain the present writ petition with regard to the challenge to the order of allotment dated 19-9-1983 as said challenge is barred by principles analogous to constructive *res judicata* besides being grossly belated. Similarly, the challenge to notice dated 25-11-1983 was earlier made in Writ petition No. 4066 of 1984 and as the said writ petition was withdrawn without reserving any liberty to challenge said order in a fresh writ petition, the same cannot now be permitted to be challenged in

these subsequent proceedings.

16. In so far as the challenge to the order dated 12-7-2006 passed by the respondent No. 1 u/s 34 of the said Act is concerned, the same will have to be considered in the backdrop of our earlier findings as regards finality attained by the order of allotment dated 19-9-1983 allotting aforesaid lands in favour of the respondent No. 6 trust as well as the fact that the notice issued u/s 10(5) of the said Act on 25-11-1983 has also attained finality. The order dated 12-7-2006 proceeds to confirm the allotment of aforesaid lands in favour of the respondent No. 6 Trust and declines to accept the request of the petitioners to sanction scheme u/s 20 of the said Act. However, in the face of the order of allotment dated 19-9-1983 and the act of taking of possession u/s 10(5) of the said Act having become final, there is no question of considering the petitioners request for undertaking scheme u/s 20(1) of the said Act. In the facts of the present case, it cannot be said that the order dated 12-7-2006 passed u/s 34 of the said Act is either illegal or contrary to law. For the very same reasons, it is not necessary to go into the question as to whether the allotment to the respondent No. 6 trust satisfies the requirements of Section 23 of the said Act and whether the educational activities undertaken by said trust are the activities of an "industry" as per explanation (b) to Section 23 of the said Act. Said question is, therefore, not being gone into in this writ petition at the instance of the petitioners whose challenge to the order of allotment dated 19-9-1983 is not being entertained on merits. Hence, in so far as the challenge to the order dated 12-7 -2006 passed u/s 34 of the said Act is concerned, there is no reason whatsoever to interfere with the same.

17. Hence, for the aforesaid reasons, we are unable to grant any relief whatsoever to the petitioners. The writ petition is, therefore, dismissed. Rule stands discharged with no order as to costs.

18. As by order dated 23-8-2006 this Court had directed the parties to maintain status quo as on said date, the aforesaid interim order shall continue to operate for a period of eight weeks from today. Said interim order shall cease to operate after aforesaid period automatically.