

(2005) 03 BOM CK 0113
In the Bombay High Court
Case No : Writ Petition No. 201 of 1995

Dashrath Gangaram Wasankar

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 16-03-2005

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Maharashtra Land Revenue (Disposal of Government Land) Rules, 1971 — Rule 26, 43, 43(1)

Maharashtra Land Revenue Code, 1966 — Section 20, 257, 31, 34, 38

Citation : (2006) 2 BomCR 380 : (2005) 4 MhLj 270

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : N.W. Sambre, for the Appellant; A.S. Sonare, Assistant Public Prosecutor for respondent Nos. 1 to 4 and 6 and N.A. Vyawahare, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—By this Writ Petition under Articles 226 and 227 of the Constitution of India, the petitioner challenges the order passed by the respondent No. 2 Hon"ble Minister dated 2-9-1994, whereby the Hon"ble Minister, has found that the land in dispute deserves to be allotted to the respondent No. 5, and has directed regularization of his encroachment by putting up appropriate proposal in that respect. The petitioner has further claimed a direction to the Government, Commissioner and Collector to hand over the possession of the plot Nos. 211 and 212 to him.

2. The facts in brief are that - the petitioner claims that he was allotted plot No. 212, ad measuring 25 x lift, total 275 sq.ft. by Collector on 28-6-1972 for temporary period of three months on lease and it was in petitioners" possession as encroacher. He further mentions that on 26-4-1978 he requested the Collector for allotment of that land and he also applied for 895 sq.ft. of land from adjacent plot No. 211. The proceedings were registered and reports were called from the

local authorities like Nagpur Improvement Trust, Nagpur Municipal Corporation Town Planning and after receipt of the reports in favour of the petitioner, the Collector, Nagpur submitted his report to the Government and the Government sanctioned it by its letter dated 8-3-1984, insofar as the land ad measuring 275 sq.ft. from plot No. 212 is concerned. He further mentions that 895 sq.ft. of land from plot No. 211 came to be allotted to him by Government by letter dated 16-4-1988. The Collector as per the Government directives executed in his favour lease on 8-8-1988 on certain conditions in relation to occupancy u/s 34 of the Maharashtra Land Revenue Code. An agreement also came to be registered before the Sub Registrar on 14-8-1988.

3. It is the case of the petitioner that he had constructed a temporary structure i.e. hut of wooden patties/planks on the plot No. 212, which was initially allotted to him for a period of three months, and after expiry of the period of three months, the Collector directed the petitioner to remove this structure and hence the petitioner demolished the structure and sold the same to the present respondent No. 5 on 10-11-1978, for consideration of Rs. 700/-. It is the case, that the respondent No. 5 did not carry away the material, but took forcible possession of the plot and started residing in it in a temporary shed on plot No. 212. He further states that the Collector, called upon the petitioner to pay to the Government the cost of the plot and accordingly he deposited the amount of Rs. 64457/- on 30-10-1990 and Rs. 76,710/- on 24-10-1991 as price of the land. He states that the respondent No. 5 in the meanwhile applied to the Nazul Officer for regularization of his encroachment on plot No. 212, and the said officer as also the Collector several times informed the respondent No. 5 that the land is already allotted to the petitioner. The said respondent No. 5 filed Writ Petition bearing no. 2754/1991, before this Court without joining the present petitioner as party. The petitioner therefore, applied for intervention in it and on 22-6-1992, the petition was disposed of by observing that there was no reason to interfere with the orders passed by the Government and Collector, granting land in favour of the petitioner. However, the State Government and Collector were directed to take decision on the application of the respondent No. 5 herein, within a period of 6 months by the High Court.

4. After this decision of the High Court, the Collector, Nagpur called upon the respondent No. 5 and after hearing passed an order on 17-12-1992 allotting the land in favour of the petitioner and intimated the same to the Government pleader. Thereafter, on 20-9-1993, the Collector directed Nazul Tahsildar, to remove the encroachment of respondent No. 5 and to hand over the possession of the plot Nos. 21.1 and 212 to the petitioner. The Tahsildar, accordingly proceeded to take possession, but, was obstructed by the respondent No. 5, his servants and by lady members of his family, and the Naib Tahsildar was therefore, required to return back without taking back the possession. It is further his case of that the respondent No. 5 filed Civil Suit bearing No. 1961/1993 in the Court of Civil Judge, Junior Division, on 3-10-1992 against the Collector, Commissioner, Nazul Officer and obtained ex-parte status quo order. He

contends that on receipt of the suit summons the petitioner filed his reply and tried to get the orders of status quo vacated. However, the learned trial Court extended this order time and again and on 25-3-1994, the trial Court lastly refused to extend the said interim order any further. The respondent No. 5 then filed Civil Revision before this Court, but it was dismissed on 15-6-1994 and thereafter, he filed another Revision which he withdrew. Later on he withdrew the Civil Suit itself. It is his case that on 19-9-1994, the Collector informed the respondent No. 5 that his application for allotment of land is rejected as the same was given to the petitioner.

5. The petitioner states that on 23-11-1992, the respondent No. 5 placed his previous application before the Revenue and Forest Department and the Desk Officer thereafter forwarded the copy of the said application to the petitioner, Collector though they were not parties, and the petitioner was called upon to appear at Bombay on 2-9-1994 for hearing. He further states that on 2-9-1994, the petitioner sought an adjournment and when he was waiting for communication of next date he received the order dt. 20-12-1994, passed by the Minister for Revenue and Forest Department. By the said order, dated 6-12-1994 the land given to the petitioner was withdrawn by cancelling the order dt. 8-3-1984 and 16-4-1988 and encroachment of present respondent No. 5 was directed to be regularised. It is in this background the petitioner filed the above petition. This Court on 17-2-1995, has admitted the writ petition for final hearing, and issued rule on stay. After hearing all the concerned, the parties were directed to maintain status quo on 22-6-1995.

6. I have heard Advocate N. W. Sambre, for petitioner, Advocate N. A. Vyawahare, for respondent No. 5 and learned Assistant Government Pleader Shri Sonare, for respondent Nos. 1 to 4 and 6. Advocate Sambre, has latter on filed written notes of argument also.

7. The learned counsel for the petitioner has argued that in Writ Petition No. 2754/1991, this Court expressly observed that there was no reason to interfere with the order passed by the Government as well as the Collector, in favour of the petitioner. It is his contention that the allotment of land in his favour was subject matter of that petition and in view of this order of the High Court, the same had attained finality, and as such respondent No. 2 could not have interfered with the allotment given in favour of the petitioner and order dt. 22-6-1994 does not authorise the respondent No. 2 to undertake any such exercise. He further contends that on 10-11-1976, only structure of hut was sold to the respondent No. 5, and he was supposed to remove the structure and carry out the same with him. He contended that the plot beneath the structure was not at all sold to the respondent No. 5, and the respondent No. 5 occupied the said plot as encroacher. He further states that when he filed application for allotment of land from plot No. 212 and also plot No. 211 in the year 1978, the case for encroachment was registered against the petitioner as well as the respondent No. 5 and the petitioner paid an amount of penalty. He contends that in those

proceedings the respondent No. 5 states that he was holding the land on behalf of the petitioner as tenant. He further states that the respondent No. 5 moved an application for allotment only in November/December, 1978 and that application was rejected on 19-5-1980. He further contends that the application moved by the petitioner were prior in point of time and the allotment of land in his favour was therefore justified. He further contends that the rejection of the said application on 19-5-1980 also becomes final, as it was not challenged by the respondent No. 5 anywhere. He further states that the agreement was signed in favour of the petitioner on payment of occupancy price as already discussed above in the facts and the petitioner deposited amount of Rs. 6445/- and Rs. 76710/- as price of the lands. He further contends that reliance upon the recommendation of the Collector dated 7-3-1991 by the respondent No. 5 is thus misconceived, as the land was already allotted to him long back before the said recommendation and no land was available on 7-3-1991 for allotment in favour of the respondent No. 5. He further contends that on 10-12-1993 the respondent No. 5 was informed that land in question was already allotted to the petitioner and therefore, it was not available for allotment and this order of collector was not challenged by the respondent No. 5, (it appears that there are reference of two dates 18-12-1993 and 10-12-1993 which is erroneous and the reference to page No. 33 (iii) reveals that the said letter is annexed at Annexure-H, at page No. 25 of the petition and it is dated 10-12-1993). It is his further grievance that the application moved by the respondent No. 5 before the Government could not have been entertained as revision application. He has also stated that the said order was appealable order. It is his argument that reliance by the Hon'ble Minister upon the voters list is misconceived because the said voters list does not disclose the capacity in which the respondent No. 1 was retaining the suit plot. He further contends that the fact of admission given by the respondent No. 5 in earlier proceedings is also not considered by the Hon'ble Minister. He contends that in view of this admission the allotment could not have been made in favour of the respondent No. 5. He further contends that after the withdrawal of the Civil Suit it was not open to the revisional authority to record any other conclusion in favour of the respondent No. 5. It is his argument that Collector, Nagpur represented the State Government in the Civil Suit and therefore, it was not open for him to take stand contrary to the stand taken by him in the Civil Suit.

8. As against this Advocate Vyawahare, appearing for the respondent No. 5 states that the rejection of request of respondent No. 5 for allotment was neither communicated to him at any time. He states that order dt. 19-5-1980 was never received by the respondent No. 5. It is his argument that on 10-11- 1976, what was sold to him was a hut i.e. hut standing on the suit plot and not a demolished hut. He asserts that as the plot beneath the hut belongs to the State Government, it could not be sold and as such the sale deed executed was of the hut. He contends that it is admitted position that, since the sale deed the respondent No. 5 is occupying the suit plot and petitioner has not resided there.

He invites attention of the Court to the provision of Rules 43 and 26 of the Maharashtra Land Revenue Disposal Rules, to contend that the land can be allotted only to a person who is in unauthorised possession thereof. He states that as the petitioner was not occupying it, there was no question of allotting the land to the petitioner. He further states that real facts were not brought to the notice of the authorities by the Revenue Authorities, and therefore, the respondent No. 1 has directed the office to initiate action against such officials for misleading the government. He further points out that on 7-3-1991 the Collector, Nagpur had written a letter to the State Government in this respect and in the said letter it was expressly pointed out that the land is under encroachment of the present respondent No. 5. It is his contention that, the said letter was not produced by the Government before this Court when the earlier Writ Petition was decided. He states that in the earlier Writ Petition this Court has expressly directed the Authorities to consider the application for allotment made by the respondent No. 5, and therefore, according to him the argument of Advocate Sambre, that allotment of land in favour of the petitioner had attained finality are incorrect. He contends that if that was the intention of the High Court while passing of the orders on 26-6-1992, the Court would have dismissed the petition and would have not directed the Government or Collector to take decision on the application of the petitioner (respondent No. 5 herein) before it, and to take that decision within a period of 6 weeks. He further points out that the present respondent No. 5 does not own any other residential house in Nagpur city, while the petitioner has got two houses in the limits of Municipal Corporation. He further states that the petitioner has two shops in Sadar Locality in Nagpur. He argues that this Court has permitted him to deposit an amount of Rs. 2,64,000/- with Collector, towards costs of the land allotted to the respondent No. 5, by the impugned order. He supports the observation and findings recorded by the respondent No. 2 and contends that no case of perversity or jurisdictional error is demonstrated and the Writ Petition needs to be dismissed.

9. The allotment of land to encroacher with a view to regularise his encroachment, therefore, is the basic issue involved in this petition. The regularisation of such encroachment and allotment is regulated by Rule 43 of the Maharashtra Land Revenue (Disposal of Government Land) Rules 1971, framed under Maharashtra Land Revenue Code. Said Rule reads as under :-

(I) Subject to the proviso to Section 51, and sub-rule (2) of this rule in areas other than the City of Bombay, the Collector may, subject to the general or special orders of the State Government, if the person making the encroachment so desires, grant the land encroached upon to the encroacher either in occupancy right u/s 20 read with Section 31 or in leasehold rights u/s 38 on the following among other conditions, that is to say.

10. Perusal of other provisions of this Rule reveal that the encroacher has to pay assessment for entire period of encroachment and fine, he has to pay occupancy

price and penal assessment. The provisions of Rule 43(1)(a)(vi) also required the encroacher to enter into an agreement in Form XIV. As per said Form of the agreement the grantee is presumed to be a person, who has encroached for the purposes of cultivation or construction. Thus, grantee of land has to be an existing encroacher.

11. It will be seen that, thus existing encroachment is a condition precedent to claim allotment under the said rule. In this case, as is admitted on record, the present petitioner was in possession till execution of sale deed i.e. 10-11-1976. Though the petitioner has raised the dispute and tried to contend that what was sold to respondent No. 5 by said sale deed is only the hut and not plot, the record reveals otherwise. In petition itself there is a statement that respondent No. 5 took undue advantage of sale of these wooden planks etc., and encroached upon the land, took forcible possession and started living there. Thus fact that after sale deed respondent No. 5 has started residing in the said hut on the plot in dispute is admitted by petitioner. Perusal of sale deed executed between parties also reveals that petitioner has sold one hut to respondent No. 5 and the hut has been described as having country tiles on roof and wall of wooden planks on all four sides and two doors. If only material was to be sold, it was not necessary to mention that the land is not being sold. The language used in the sale deed, therefore, shows that the petitioner has transferred the right to occupy the plot in question to respondent No. 5. The land could not be transferred because it belongs to State Government and, therefore, it has been expressly excluded from the sale deed. The sentence appearing at the end of this document that petitioner does not have any right on said hut after sale deed and there is no dispute between parties, also reveal that it was not intended to be sale of material of hut. Such stipulation would be wholly out of place if parties had agreed that petitioner was to carry away the material of hut after sale. In fact for sale of movables execution of written document itself was unnecessary. Thus it appears that before sale deed, respondent No. 5 was residing in said hut as tenant and after sale deed the respondent No. 5 started residing in that hut as its owner. It is thus, apparent that after said date it was not the encroachment of petitioner at all, Rule 43 mentioned above clearly considers the grant of land encroached upon and that too to a person, who is encroacher, if petitioner is not the encroacher, there was no question of granting said land to him after 10-11-1976. It appears that after sale of land the petitioner made efforts to obtain adjacent portion thereof and also in the process made efforts to dispossess the respondent No. 5 on the ground that petitioner has not sold the land beneath the hut to respondent No. 5. However, for reasons mentioned above such a plea and course of action by petitioner cannot be countenanced.

12. In this connection, reference can be made to communication dated 7th March, 1991, issued by the Collector, Nagpur to Additional Secretary, Revenue and Forest Department, Mantralaya, Bombay-32. In this communication the Collector has mentioned that Nazul surveyor reported that there was encroachment on land by respondent No. 5 and Tahsildar, after spot inspection

reported the same thing. The allotment made in favour of petitioner is also considered and it was mentioned that land admeasuring 275 sq.ft. out of 1313.5 sq.ft. was regularised in favour of petitioner vide Government order dated 8-3-1984 and the remaining land of 1038.5 sq.ft. was under encroachment of respondent No. 5. It is, thereafter, mentioned that this land admeasuring 275 sq.ft. with structure is purchased by respondent No. 5 in November, 1976 and in fact the land under encroachment was not in possession of petitioner but it was under encroachment of respondent No. 5. The respondent No. 1 has considered this position in the impugned order while mentioning the background of the case. The defence of the petitioner that the application of respondent No. 5 for allotment was rejected on 19-5-1980 and it was communicated to him and he did not challenge that order, is also found incorrect and the respondent No. 1 has observed that the said rejection dated 19-5-1980 was never communicated to respondent No. 5. In paragraph 4 of said order, respondent No. 1 has found that respondent No. 5, after purchase of the land in question, has encroached upon 1248 sq.ft. in the vicinity and has also constructed upon it. It is further noticed that respondent No. 5 is paying property tax and other taxes in relation to said structures and his name also appears in the voters list as resident of said address. The respondent No. 1 has found that when the proposal for allotment of land in favour of petitioner was submitted to it earlier, the fact that it was sold in 1976 by petitioner to respondent No. 5, was not disclosed and because the proposal was recommended by Divisional Commissioner, the same was accepted and on 8-3-1984 the orders to regularise the same in the name of petitioner were issued. It is further recorded that when this proposal was forwarded to State Government, another proposal for granting 895 sq.ft. land in the vicinity of said portion was also forwarded and in it, it was mentioned that petitioner was not having any house or plot in Nagpur city. The authority also noticed that the bodies like N.I.T., town planning department also gave no objection for granting said land in favour of petitioner. The respondent No. 1 thereafter has remarked that while doing all these the existing encroachment of respondent No. 5 on said land was totally ignored and thus true and correct situation was never placed before the State Government. The respondent No. 1 has expressly observed that the Government was misled and also expressed necessity of taking stern action against the Officers and employees responsible for the same. It is in this background that the respondent No. 1 passed order cancelling earlier allotment made in favour of petitioner and directed allotment in favour of respondent No. 5. It will thus be seen that the action of respondent No. 1 is in accordance with the provisions of Rule 43 of Maharashtra Land Revenue, Disposal of Government Lands Rule, 1971 and after considering the relevant facts and material on record, the said orders have been passed. Nothing has been pointed out to this Court to hold that facts as taken into account by respondent No. 1 are either perverse or erroneous.

13. The petitioner has raised objection that there was a Civil suit filed by respondent No. 5 on the same subject matter and, therefore, he could not have

filed a Writ Petition before this Court. This argument ought to have been advanced when this Court considered earlier Writ Petition. Moreover, no documents of said civil suit are placed on record. Nothing has been pointed out to this Court as to why by filing of civil suit, the petitioner was barred from approaching this Court in earlier writ petition. It is to be noticed that this Court on 22-6-1992 expressly directed the Government and Collector to take decision on the application of petitioner within period of six months. In view of these directions, which are acquired also by present petitioner because he was respondent No. 4 in that writ petition, the above argument of petitioner cannot be entertained.

14. The perusal of impugned order, in its very first paragraph, reveals that the respondent No. 5 presented application to State Government as per orders of High Court dated 22-6-1992 in Writ Petition No. 2754/91. The Government has exercised its powers u/s 257 of M.L.R. Code, in view of High Court directions and has taken cognizance of the matter. Under such circumstances, argument of learned counsel for petitioner that Government could not have taken cognizance in the matter in revisional jurisdiction is also misconceived and cannot be accepted.

15. The last argument of Advocate Sambre, for petitioner is that respondent No. 5 himself admitted before the authorities that he had taken the hut on rent from petitioner and he is residing on that plot as his tenant. He invites attention to the observations in this respect, as contained in letter dated 19-9-1994 filed as Annexure IV along with petition. The said letter is addressed by the then Collector to Deputy Secretary of State of Maharashtra. It is to be noticed that it was never the case of petitioner that after sale in November, 1976 the respondent No. 5 was his tenant and respondent No. 5 was residing on suit plot as his tenant. The case was very specific and it was alleged that respondent No. 5 has encroached on that portion. In any case construing petitioner as landlord encroacher and respondent No. 5 as his tenant only, will not be in consonance with the spirit of Rule 43 of Allotment Rules, and will defeat public policy behind such regularisation of encroachment. Even otherwise in the letter dated 7-3-1991, which is written by Collector to State Government, it is expressly mentioned that Nazul Surveyor as also Tahsildar found encroachment of respondent No. 5 and later on it has also been mentioned that land was not in possession of petitioner. Though the learned counsel for respondent No. 5 contends that there is no such statement made by respondent No. 5 and reference thereto in communication dated 19-9-1994 is incorrect, it is not necessary for this Court to look into that controversy and said controversy is not relevant for adjudication of present issue.

16. Under the circumstances, I do not find any merits in the writ petition. Writ petition, therefore, fails and is dismissed. No order as to costs.

17. At this stage, learned counsel for petitioner makes a request that order of status quo was operating in the petition from 1995 and same should be

continued for further period of six weeks to enable petitioner to take further appropriate steps in the matter. Learned counsel for respondent opposes this request. Under the circumstances, I am inclined to grant time of six weeks to petitioner to take further appropriate steps in the matter. The order of status quo made by this Court shall continue till then.