
(1969) 04 AHC CK 0013
In the Allahabad High Court
Case No : Special Appeal No. 464 of 1968

Government of India and Another	Vs	APPELLANT
Smt. Sahodra Devi and Others		RESPONDENT

Date of Decision : 11-04-1969

Acts Referred:

Cantonments Act, 1924 — Section 280
Cantonments Land Administration Rules, 1937 — Rule 16, 17, 18, 19, 20
Constitution of India, 1950 — Article 226

Citation : AIR 1970 All 357

Hon'ble Judges : R.S. Pathak, J; R.L. Gulati, J

Bench : Division Bench

Advocate : H.N. Seth, for the Appellant; Keshav Sahai and C.P. Agarwal, for the Respondent

Final Decision : Partly Allowed

Judgement

Pathak, J.—On April 30, 1958 the respondents purchased from Messrs. Dost Mohammad Private Limited the property described as No. 45 Tagore Road situated in the Cantonment at Kanpur. It comprises of a bungalow and land. The building site on which the bungalow stands, is referred to as survey No. 100. Admittedly, the lease or written grant under which survey No. 100 was given is not traceable. But it is recorded in the General Land Register as "occupancy land on old grant terms".

2. On May 19, 1958 the respondents applied to the Cantonment Authorities for mutation of their names, but before the request was granted the respondents were required to admit that the land comprised in the property belonged to the Government. On September 13, 1961 the property was mutated in the names of the respondents and on September 15, 1961 the respondents executed a deed admitting that the site appurtenant to the property and forming its compound belonged to the Government of India and was held by them subject to the conditions, limitations and disabilities laid down in the Governor General's Order

No. 179 dated September 12, 1836.

3. The respondents, anxious to obtain a lease of the land in their favour from the Cantonment Authorities, wrote in January 1966 for a blank form of the application set out in Schedule V of the Cantonment Land Administration Rules, 1937 for the purpose of applying for a lease of land. The Military Estates Officer, Lucknow directed the issue of such form. On April 12, 1966, however, the respondents wrote to the Military Estates Officer stating that they were owners of the bungalow, that the property was recorded in the General Land Register as "occupancy land on old grant terms", that no written document defining the rights of the Government was available and, therefore, the respondents' occupation be regularized by the execution of a lease in accordance with Rule 27 in the form set out in Schedule 7. The Military Estates Officer taking the view that the respondents, by applying for a blank form in Schedule 5, wanted the grant of a fresh lease, took no action on this application. On August 27, 1966 the respondents wrote to the Minister for Defence Government of India, praying for a lease under Rule 27 in the form set out in Schedule 7, but inexplicably again applied to the Military, Estates Officer on October 15, 1966 for a blank form of the application set out in Schedule 5. On October 25, 1966 the Military Estates Officer sent the form and informed the respondents that "this also disposes of the letter dated 12-4-1966", Meanwhile, the Ministry of Defence informed the respondents that the Government was prepared to grant them a lease under Rule 28 in the form set out in Schedule 8 but was not prepared to grant a lease under Rule 27, Considerable correspondence ensued. The Ministry of Defence, however, remained firm. On February 28, 1967 the respondents sent a formal notice calling upon the Military Estates Officer, Lucknow, and the Government of India, in the Ministry of Defence, to grant a lease under Rule 27. There being no satisfactory response, the respondents then filed a petition under Article 226 of the Constitution praying for mandamus directing the appellants to execute a lease under Rule 27.

4. The petition came on for hearing before Satish Chandra, J. He allowed the petition and directed the grant of a lease under Rule 27.

5. The Military Estates Officer and the Government of India appeal.

6. Before passing on to the submissions of the parties, we might with advantage refer to the statute and the relevant rules.

7. Section 280 of the Cantonments Act, 1924 confers upon the Central Government power to make rules to carry out the purposes and objects of the Act, and in particular ,the rules may provide for

"(a) the manner in which, and the authority to which, application for permission to occupy land belonging to the Crown in a Cantonment is to be made;

(b) the authority by which such permission may be granted and the conditions to be annexed to the grant of such permission."

In exercise of that power, the Central Government framed the Cantonment Land Administration Rules, 1937. Rule 3 provides for the maintenance of a General Land Register of all land in the Cantonment. The land is divided into different classes, and in Class B (3) land is defined as land

"which is held by any private person under the provisions of these rules, or which is held or may be presumed to be held under the provisions of the Cantonment Code of 1899, or 1912, or under any executive orders previously in force, subject to conditions under which the Central Government reserve, or have, reserved, to themselves the proprietary rights in the soil."

Under Rule 9 the management of such land has been entrusted ordinarily to the Military Estates Officer.

8. The Rules provide for the grant of leases. Different kinds of leases are envisaged, and each kind of lease has its own conditions and terms. Rule 16 provides for a lease for a minimum period of thirty years renewable at equal intervals upto a maximum period of ninety years. The lease is subject to the payment of an initial premium and to an annual rent. Rules 17 to 24 provide for the mode of granting such a lease. Upon application made to the Military Estates Officer in the form prescribed in Schedule V, the site is surveyed and demarcated and the annual rent for it is fixed. Thereafter proceedings are taken for auctioning the land to the highest bidder. Upon acceptance of the bid, the successful applicant is required under Rule 28 to execute the lease in the form prescribed in Schedule VIII.

9. As an alternative to auctioning the lease. Rule 26 empowers the Military Estates Officer in exceptional cases and subject to the approval or the Central Government to lease a site by private agreement.

10. Then follows Rule 27 which reads:

"Special lease for the regularisation of old grants:

Notwithstanding anything contained in Rules 16 to 26, the Military Estates Officer, in any case where a site is held without a regular lease, may on application by the holder, grant, with the approval of the Central Government or such other authority as the Central Government may appoint for this purpose, a lease of the said land in the form set out in Schedule VII."

Leases for a period not exceeding thirty years and leases in perpetuity are covered by Rule 31.

11. The appellants contend that it is open to them to grant a lease to the respondents under Rules 16 to 26 and 28. The appellants further say that even if Rule 27 is attracted the grant of a lease thereunder is discretionary and the respondents are not entitled as of right to such a lease.

12. It is not disputed that the respondents enjoy a right to occupy the land. The deed executed by the respondents on September 15, 1961 at the instance of the

appellants contains the statement that the land is held subject to "the conditions, limitations and disabilities laid down in the G. G. O. No. 179 dated 12th September 1836." The order dated September 12, 1836 was issued by the Governor General-in-Council and provides for the conditions upon which land situated within the limits of a military Cantonment may be occupied. A grant of land is made upon application made in that behalf. It is made subject to the power of the Government to resume the land at any time on giving one month's notice and paying the value of such buildings the erection of which was authorised. So long as the Government does not exercise the power of resumption there is a right to continue in occupation of the land. If this be borne in mind, it will appear at once that the first contention of the appellants is not well founded.

Because in our opinion, a lease contemplated by Rules 16 to 24 is granted where the land is not already in the occupation of a grantee entitled to occupy it. The very circumstance that the lease is auctioned tends to this conclusion. If the auction is of land already occupied by a grantee entitled to occupy it, there could conceivably be a case where the right to possession of the accepted bidder conflicts with the right of occupation enjoyed by the sitting grantee. We find it difficult to accept that this clash of rights was intended.

13. The appellants point out that the auction of a lease is not the only mode of granting it. It is pointed out that Rule 26 provides an alternative. Under that rule a lease can be granted by private agreement. The appellants say that a sitting occupant can be granted a lease under Rule 26 by private agreement without being exposed to the jeopardy which an auction might entail. Rule 26 provides:

"Disposal of lease by Private Agreement:-- Notwithstanding anything contained in Rules 16 to 24, the Military Estates Officer may, in exceptional cases for exceptional reasons to be recorded in writing, and subject to the approval of the Central Government, or such other authority as the Central Government may appoint for this purpose, dispense with the deposit of the cost of survey and demarcation, as prescribed by Rule 20, or with the auction of the lease, as prescribed by Rule 28 or with both, and may lease any site by private agreement, at such rate of rent, and on payment of such premium, as the Central Government or the appointed authority may approve in each case.

Provided that the concurrence of the Collector and the approval by the Officer Commanding the Station shall be obtained before application is made for the approval of the Central Government or the appointed authority."

It is plain from the terms of Rule 26 that it operates merely as an alternative to the scheme embodied in Rules 16 to 24. It is intended to operate in the same field in which Rules 16 to 24 operate, namely in the class of cases where the land is not already occupied by a grantee with a present right to occupy it. For that reason, we cannot accept that Rule 26 can be invoked in this case.

14. Rule 27 contemplates those cases where the site is held without a regular

lease. A site is "held" by a person who has a right in law to hold it. What is envisaged here is an existing right to hold the site but without a regular lease. A person holding a site subject to the provisions of the Governor General's Order No. 179 dated September 12, 1836 would fall within that description. The marginal note itself suggests that Rule 27 has been made for the regularisation of old grants. The lease under Rule 27 is in the form set out in Schedule VII, and unlike the lease contemplated by Rules 16 to 24 no rent is charged. Only a nominal premium of Rs. 5 is payable, evidencing the intention of merely regularizing the occupation by a lease incorporating specific terms and conditions. The appellants urge that the non obstinate clause "notwithstanding anything contained in Rules 16 to 26" with which Rule 27 opens indicates that but for Rule 27 the cases covered by it would ordinarily fall within the scope of Rules 16 to 26, and the use of the non obstinate clause demonstrates that cases of old grants could be the recipients of leases under Rules 16 to 26.

It seems to us that the plea would have substance only if it could be said that Rule 27 operated wholly or in part over the field covered by Rules 16 to 26. Reading Rule 27 as we do, we think it does not. It is not uncommon to come across cases where a non obstinate clause has been inserted ex abundant cautela for the purpose of clarification. In *The Dominion of India and Another Vs. Shrinbai A. Irani and Another*, the Supreme Court pointed out that a non obstinate clause may be read

"as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment."

In *Rai Bahadur Kanwar Raj Nath and Others Vs. Pramod C. Bhatt, Custodian of Evacuee Property*, also, the Supreme Court held that the non obstinate clause had been inserted ex abundant cautela. Having regard to the scope of Rule 27 plainly indicated by its terms we have no hesitation in declining to read in the non obstinate clause the meaning and effect to which the appellants seek to persuade us.

15. We are of opinion that neither the provisions of Rules 16 to 26 nor the non obstinate clause in Rule 27 can lead to the conclusion that the provisions of Rr. 16 to 26 can be invoked where a person already holds a site in Cantonment land. It seems to us that the case of such a person attracts the provisions of Rule 27.

16. The next question is whether the appellants are obliged to grant a lease under Rule 27 in every case where an application is made for such a lease. The learned single Judge has held that the respondents have an absolute right to a lease under Rule 27 and has accordingly directed the appellants to grant them a lease in the form set out in Schedule VII. It appears to us that the learned single Judge is in error.

17. Rule 27 requires the approval of the Central Government, or of an authority

appointed by it, before a lease is granted by the Military Estates Officer under that provision. Even if the Military Estates Officer considers that it is a case where a lease under Rule 27 should be granted, it is for the Central Government to decide whether the grant should be made. Whether the approval should be given is a matter to be determined in its discretion. It will be pertinent to recall that in the case of a grant under the Governor General's Order dated September 12, 1836 no absolute right to occupy the land was recognised in the grantee, because under the terms and conditions laid down by that order the grant of the land was made in the discretion of the Military authorities. Rule 27, which appears to continue the tenor of the grant with certain modifications, has provided for a lease in which, like the terms of the grant, no rent is chargeable. The premium stipulated is in the nominal sum of Rs. 5. The lease is a lease in perpetuity. In this respect, the terms of the lease contemplated by Rule 27 are substantially as liberal as those of the grant. Indeed, they are even more generous. Whereas under the terms of the grant, the Government was entitled to resume the land at any time unfettered by any conditions, a lease under Rule 27 can, be terminated only where the land or buildings are required for a public purpose. In the circumstances, the grant of a lease in perpetuity has to be made with the utmost circumspection. There are many considerations which necessitate this. They are all those considerations which relate to the effective discharge of the duties of the Central Government in respect of military administration. Not the least of these are the pressures of military necessity and military security, pressures which have not lessened with the years. Dealing with a claim to ownership in fee in Cantonment land, the Judicial Committee in *Kaikhusr v. Secretary of State* (1912) ILR 36 Bom 1 (PC) observed:

"It is unnecessary to go in detail through the numerous succeeding regulations which show how strictly the military authorities asserted their proprietary rights. They are summarised in Aitchison's Cantonment Code of 1836, and in Jameson's Cantonment Code of 1850, and they make it clear that, though permission to occupy ground was frequently given, especially for the building of officers' houses or bungalows, such permission carried with it no sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities....."

In this state of things it is impossible to say that mere possession or occupation of the bungalow on this site affords any presumption whatever that he or his predecessors in title were owners in fee. The presumption is all the other way and that adverse presumption is strengthened when the history of the site comes to be examined"

The Judicial Committee regarded the appellants in the case as mere licences and held that the Government was entitled to resume the land. And in the AIR 1939 58 (Federal Court) Gwyer, C. J. pointed out:

"..... The administration of cantonment areas, almost from their first establishment has been for obvious military reasons subject to special

regulations"

18. An analysis of the rules before us demonstrates that throughout the Government has considered it necessary to retain careful control over land within the Cantonment. It is not possible to enumerate all the reasons which emerge out of considerations of military necessity and military security which render it desirable that such control be retained. That is a matter which in greater or lesser degree, varies with the military policy of the time. It cannot be forgotten that even Clause B (3) land is retained in the Cantonment for the effective discharge of governmental duties in respect of military administration. It is land, the management of which is entrusted ordinarily to the Military Estates Officer and not to the Cantonment Board.

19. Upon the aforesaid considerations, it seems clear that the grant of a lease under Rule 27 is a matter to be decided within the discretion of the authorities mentioned in that rule. The discretion must be exercised on considerations pertinent to military necessity and military security and all those other considerations relating to the effective discharge of the duties of the Central Government in respect of military administration. It is not possible to accept the view that an application for a lease under Rule 27 has an absolute right to the grant of such lease.

20. The learned single Judge has directed the appellants to grant a lease to the respondents under Rule 27. When the grant of such lease is, as we have held above, in the discretion of the appellants, we are unable to sustain that direction. The matter is one which must be determined by the appellants who under Rule 27 have been entrusted with that function. We think it settled law that in a matter falling to be decided within the discretion of an authority, an invalid order made by the authority may be quashed by the Court under Article 226 of the Constitution but it is not open to the Court to assume to itself the function conferred upon that authority and exercise a discretion which the law in its wisdom has vested in that authority. *State of Mysore v. K. N. Chandrasekhara* AIR 1965 SC 532.

21. The appeal is allowed in part. We set aside the order of the learned single Judge directing the appellants to grant a lease to the respondents under Rule 27 of the Cantonment Land Administration Rules, 1937. We direct the appellants to consider the application of the respondents made under Rule 27 and to dispose of it in accordance with law. In the circumstances of the case, there is no order as to costs.