

(1970) 07 OHC CK 0008
In the Orissa High Court
Case No : O.J.C. No. 301 of 1965

J.M. Akbar Ahad and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 02-07-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 14, 226, 227

Citation : (1970) 07 OHC CK 0008

Hon'ble Judges : S.K. Ray, J;A. Misra, J

Bench : Division Bench

Advocate : C.V. Murty, for the Appellant; A.G., for the Respondent

Final Decision : Dismissed

Judgement

A. Misra, J.—This application has been filed under Articles 226 and 227 of the Constitution praying for issue of a writ in the nature of mandamus or appropriate order or direction restraining the opposite party the State of Orissa from resuming the leasehold property described in para 1 of the petition.

2. In order to appreciate the contentions raised in this application, it will be useful to refer to the background of this litigation. Petitioner Nos. 1 to 3 are the sons and petitioner Nos. 4 to 6 are the daughters of one Mr. Muhammad Abdul Ahad, a retired Deputy Collector. By a registered sale deed D/- 22-5-1929, Mr. Abdul Ahad purchased plot No. 523 in Khata No. 6 containing an area of 7.724 acres with a residential building standing thereon appertaining to Khasmahal touzi No. 2616, mouza Fatpur bearing annual rent of Rupees 143/2/- from the cosharers of one Rai choudhury family. The land was described in the sale deed as Khasmahal raiyati pattadari and Mr. Ahad was recorded as pattadar. He entered into a fresh lease with the Khasmahal sometime in 1932 and executed a kabuliyat in favour of the Collector, Cuttack. In 1949, Mr. Abdul Ahad by way of family settlement executed a registered deed transferring the property in favour of the petitioners and their late mother. A fresh case was executed by the

petitioners and their late mother on 18-8-1951 in favour of the Collector in respect of the land in the usual printed form. Clause 12 of this lease was to the following effect:

"If the Collector at any time before the expiry of the lease gives the lessee notice in writing that Government desires for any public purpose to resume his holding or any part thereof, he shall vacate the holding of part thereof as required within three months from such notice on receipt of compensation for any building erected or other improvements that he might have made with written consent of the Collector. In case of disagreement as to the amount of compensation, the matter shall be referred to the Commissioner whose decision shall be final and binding on the parties. The lease shall be deemed to have been determined on the expiration of the term of notice issued under this clause."

For the purpose of extending the Sailabala Women's College situate adjacent to the disputed property, Government at first thought of acquiring the disputed property under the provisions of the Land Acquisition Act and issued a notification u/s 4(1) in February, 1950. Subsequently, however, Government decided to resume the leasehold property in accordance with the terms of the aforesaid Clause 12 of the lease deed, and accordingly, issued directions to the collector, Cuttack to take necessary steps and estimate the compensation payable for the buildings existing thereon. The value of the building and other structures was ultimately estimated at Rs. 18,938/- and a notice was served in terms of clause 12 resuming the leasehold property. Petitioners declined to accept the estimated compensation amount and refused to vacate the leasehold premises. Thereupon, opposite party instituted T. S. No. 69 of 1955 for eviction of the petitioners. The suit was decreed on 28-11-1957 by the Additional Subordinate Judge, Cuttack and the appeal filed by the petitioners and their deceased mother which, was registered as F. A. No. 42 of 1953 was dismissed on 22-12-1961 by a Division Bench of this Court.

Applications for leave and special leave filed by the petitioners to appeal to the Supreme Court were also rejected. Thereafter, the decree-holder opposite party levied execution of the decree for eviction which is pending, and at this stage the present writ application has been filed with the aforementioned prayer.

3. In the previous litigation, petitioners as defendants resisted the suit by the opposite party for eviction mainly on three grounds, viz., (1) they possessed a permanent, heritable and transferable right in the lease hold property which is not liable to be extinguished by any resumption proceeding under Clause 12 of the lease deed; (2) in the alternative, the status of the defendants being that of raiyats, their interest can be extinguished only in accordance with the terms of the Orissa Tenancy Act and (3) Clause 12 of the lease deed is invalid, inasmuch as, it does not provide for any compensation for acquisition of the leasehold interest in the suit plot and thereby contravenes Article 31 of the Constitution, All these contentions were negatived and the Court found that the interest of the defendants (petitioners herein) in the disputed property was that of mere

leaseholders regulated by the terms of the lease deed between them and the landlord, viz., Khasmahal; that they will be governed by the provisions of the Transfer of Property Act and that the lease is determined in accordance with the terms of Clause 12 of the lease deed.

It was also held that Articles 19 and 31 of the Constitution have no application to the present case, inasmuch as, the lease hold interest had been determined in accordance with the contractual terms contained in Clause 12 of the lease deed and the defendants had no subsisting interest which was acquired for public purposes.

4. Petitioners do not dispute the abovementioned facts and findings in the previous litigation. The grounds taken in this application and urged by learned counsel for petitioners at the time of hearing are that petitioners have been singled out and discriminated against in the matter of resumption of the land under Clause 12, while lands held under similar lease deeds from the Khasmahal whenever required for public purposes have been acquired by the State Government under the provisions of the Land Acquisition Act, 1894. Therefore, the action of the State being violative of the protection envisaged in Article 14 of the Constitution is liable to be quashed. It is also urged that when two alternative procedures are available to the State Government to acquire similarly placed leasehold lands. One under the provisions of the Land Acquisition Act and the other by resorting to Clause 12 of the Khasmahal lease deed, the one more beneficial to the petitioners should have been adopted to prevent discrimination. In this context, it is pointed out that if acquisition is made under the provisions of the Land Acquisition Act, the State will be liable to pay compensation not only for the buildings and other structures standing on the land proposed to be acquired, but also compensation for the land itself.

On the other hand by resorting to Clause 12 of the lease deed, the State has registered its liability to pay compensation only for the building and other structures and not for the land proposed to be acquired.

5. Learned Advocate-General appearing for the opposite party resists the application mainly on the following grounds: Firstly, it is urged by him that the Judgment and decree in the previous litigation between the parties regarding the same subject-matter having become final, the present application is barred by res judicata or principles analogous thereto. Secondly, it is argued that Article 14 has no application to the present case, because the lease in question was the result of a contractual relationship and the resumption of the land by termination of the lease was in accordance with the terms of the contract. Contracts with individual lessees being independent of each other, even if it is accepted that in some instances Clause 12 has not been resorted to, enforcement of the contractual term against the petitioners cannot be said to offend the constitutional protection of equality before law or equal protection of law embodied in Article 14. Lastly, it is contended that so long the petitioners do not seek to challenge and unsettle the judgment and decree in the previous

litigation, their present prayer is not sustainable as the execution of the decree directing eviction of the petitioners cannot be prevented.

6. The first point that arises for consideration is whether in view of the judgment and decree in the previous litigation, the present application is barred by res judicata or principles analogous thereto. Mr. Murty learned counsel for petitioners contends that the decision in the previous litigation will not operate as a bar, because in the previous litigation petitioners did not take any ground based on Article 14 of the Constitution and the question whether the action of the State was discriminatory and violative of Article 14 was not heard and decided. According to him though it was open to the petitioners to take such a ground in the previous litigation, they could not do so as they were not aware of such instances where the State had resorted to the provisions of the land Acquisition Act whenever the necessity for acquiring such leasehold lands for public purposes had arisen. Relying on the observations in the decision reported in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, that whatever breach of every fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by the constitutional mandate directed to the State contained in Article 14 of the Constitution, it is further argued that the doctrine of res judicata will not apply to cases based on violation of the protection under Article 14 of the Constitution.

In support of his contentions, reliance is placed on the decisions reported in AIR 1964 SC 1013 and *The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others*, . These decisions, in our opinion, are not relevant in the present context. In the decision reported in *The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara*, the question arose whether in the following circumstances the earlier decision operated as constructive res judicata in a subsequent writ application. In the earlier decision, the court expressly refrained from expressing an opinion on the validity or otherwise of the point relating to the increase in the rate of tax from 3 pies to 9 pies per ton as the same had not been taken in the writ application and relevant material was not available on record. In the subsequent petition, the validity of the notice of demand was challenged on grounds different and distinct from those raised on the earlier occasion. In those circumstances, it was held that the earlier decision did not operate as res judicata in the subsequent proceeding.

So also, in the decision reported in *The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others*, , the earlier decision related to the right of the State Government or the Electricity Board under the Electricity Supply Act of 1948 to revise the rates charged for supply of electric energy, while in the latter case, the question that arose for consideration was the right of the petitioner to call for an arbitration u/s 76 of the 1948 Act. As these were two distinct matters, it was held that the decision in one did not operate as res Judicata in the other. The stand taken by the petitioners in the previous

litigation was that they possessed a permanent, heritable and transferable right in the lease hold property and that Clause 12 of the lease deed was constitutionally invalid. Having taken such a stand in which they proved unsuccessful, they cannot now turn round and say that even though they do not have permanent or heritable rights and even though Clause 12 of the lease deed is valid, in enforcing Clause 12 against them. Article 14 has been violated.

7. Learned Advocate-General, on the other hand, contends that the principle of constructive res judicata will also apply in this case, in support of which, he relies on a decision reported in AIR 1965 SC 1150, (*Devilal v. Sales Tax Officer*), Gajendragadkar, C. J., speaking on behalf of the Supreme Court observed:

"There can be no doubt that the fundamental rights guaranteed to the citizen are a significant feature of our Constitution and the High Courts under Article 226 are bound to protect these fundamental rights. There can also be no doubt that if a case is made out for the exercise of its jurisdiction under Article 226 in support of a citizen's fundamental rights, the High Court will not hesitate to exercise that jurisdiction. But the question whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Article 226, cannot be answered merely in the light of the significance and importance of the citizen's fundamental rights. The general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to consideration of fair play and justice. xx xx. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action, but basically even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time and that plainly is inconsistent with, the considerations of public policy to which we have just referred."

Similarly, in the decision reported in AIR 1968 SC 1370, (*Union of India v. Nanak Singh*), it was observed:

"The provisions of Section 11, CPC are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a court competent to decide it, will operate as res judicata in a subsequent regular suit."

8. The above principles fully apply, to the present case. Undoubtedly, it was open to the petitioner to take the present ground in the previous litigation, particularly when they seek to base their present case on certain acquisitions under the Land Acquisition Act which were done openly and must be reasonably expected to be within their knowledge being residents of the same town. Hence, in our opinion, the decision, in the previous litigation operates as *res judicata* and it is not open to the petitioners in this application to reagitate the question of validity of the action taken by opposite party under Clause 12 of the lease deed.

9. The next point for consideration is whether the order terminating the lease by service of notice in accordance with Clause 12 of the lease deed is liable to be quashed as being discriminatory and violative of Article 14 of the Constitution. According to Petitioners, they have been singled out and discriminated against by enforcement of the contractual term contained in Clause 12 of the lease deed, while in respect of similar leasehold, resort had been made to the provisions of the Land Acquisition Act. This contention, in our opinion, has no merit for more than one reason. Firstly, the averments entered into with, different lessees of Khasmahal lands are independent of each other and in each case the rights and liabilities of the parties are regulated by and dependent upon contractual terms agreed to. It is not disputed that as between a private lessor and his lessee a term can be embodied in the lease entitling the landlord to determine the lease and resume the land, if required for his purpose or on happening of any contingency or on expiry of a particular period, etc. Nobody can question the constitutional validity of such a term.

It is equally open to the landlord to enforce such a term or to waive it. This being so, there seems to be no reason why the State should be treated on a different footing where it is acting merely as a lessor in accordance with the terms of the lease and not exercising its power of eminent domain. Therefore, the question of violation of fundamental rights or discrimination while enforcing a contractual term against a particular lessee cannot arise. Secondly, in support of the alleged discrimination, reference is made to Annexures 1 to 3 of the Writ Petition. From Annexure 2, it appears that the manner of obtaining possession of lands held under Khasmahal leases on various occasions has not been the same. In some cases, the right of the lessor reserved under Clause 12 of the lease deed has been enforced. In some others, steps had been taken to acquire the land under the provisions of the Land Acquisition Act or land purchased by way of private sale. In case of acquisition for the municipality however, as it appears, invariably they have been done under the Land Acquisition Act, obviously because it is the municipality that pays the compensation. From the fact that on some occasions, the State as lessor has waived its right reserved under Clause 12 of the lease deed, it cannot be said that petitioners have been discriminated against simply because the benefit of such a waiver has not been extended to them. Enforcement of a contractual obligation against one and waiver of a similar obligation under an independent contract in the case of another, in our opinion, does not amount to denial of equal protection envisaged in Article 14 of the

Constitution.

10. The last point for consideration is whether petitioners' prayer is tenable without unsettling the judgment and decree between the parties which is under execution. Petitioners have prayed for issue of a writ restraining the opposite party from resuming the leasehold property. The validity of the notice served on the petitioners in pursuance of Clause 12 is not disputed. As a consequence, the leasehold was determined and the land resumed. Because the State could not get possession they filed the suit for eviction and obtained a decree which has become conclusive. What the State is now seeking is to enforce the decree under execution and not the order of resumption. Therefore, so long the decree is not unsettled by an appropriate proceeding, the prayer of petitioners for restraining the opposite party from resuming the leasehold property is untenable, because even if such an order is passed, the execution of the decree cannot be stayed or prevented. Therefore, in any view of the matter, the relief prayed for by the petitioners cannot be granted.

11. In the result, there is no merit in this writ application, which is accordingly dismissed, with costs. Hearing fee is assessed at Rs. 200/- (Rupees two hundred) only

S.K. Ray, J.

12. I agree.