

(1999) 07 BOM CK 0128
In the Bombay High Court
Case No : Writ Petition No. 743 of 1985

Mahadu Punjaba Dhage and others

APPELLANT

Vs

Prabhakar Trimbak Joshi and others

RESPONDENT

Date of Decision : 12-07-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Transfer of Property Act, 1882 — Section 106

Citation : (1999) 4 ALLMR 381 : (2000) 2 BomCR 817

Hon'ble Judges : V.K. Barde, J;S.B. Mhase, J

Bench : Division Bench

Advocate : K.V. Kulkarni, for the Appellant; V.B. Sapkal, A.G.P., for the Respondent

Judgement

V.K. Barde, J.—Heard Shri Kulkarni, learned Advocate for the petitioners and Shri Sapkal, learned Assistant Government Pleader, for respondents Nos. 2 and 3. Respondent No. 1 is absent, though served.

2. Being aggrieved by the order passed by the Additional Commissioner, Aurangabad Division, Aurangabad, dated 16-1-1985, the petitioners have filed this writ petition.

3. Land, Survey No. 57, i.e., Block No. 114, of village Khandala, taluka Vaijapur District Aurangabad, is the service inam land. Respondent No. 1 Prabhakar was the Inamdar of this land and he was expected to render services to Datta Mandir. Prabhakar had leased the land to Punjaba, father of petitioners Nos. 1 and 2 and husband of petitioner No. 3. He filed suit, being Regular Civil Suit No. 105 of 1969, in the Court of the learned Civil Judge, Junior Division, Vaijapur, for recovery of the possession against Punjaba. However, the suit was dismissed on the ground that there was no proper notice as contemplated u/s 106 of the Transfer of Property Act, on 30-11-1972. Prabhakar thereafter tendered his resignation as Inamdar. The Deputy Collector, Vaijapur, acting as Atiyat Deputy Collector, directed that the Government should resume the land. The land was

illegally leased to Punjabi; so, it be taken into possession and it should be leased on yearly basis by auction. He also directed that some other person be appointed as Archak, i.e., Pujari, for rendering the services to the deity. This order was passed on 30-7-1979. Punjaba thereafter preferred an appeal before the Atiyat Collector, Aurangabad. However, the same was dismissed on 8-5-1981. Punjaba then filed the second appeal before the Additional Commissioner, Aurangabad. During the pendency of the appeal, Punjaba died; so, the present petitioners were brought on record as his legal representatives. The Additional Commissioner, by his order dated 16-1-1985, dismissed the appeal.

4. The Atiyat Collector has held that the land was service inam land. The Inamdar tendered his resignation. Punjaba was holding this land on thoka basis for at least 32 years prior to the decision. However, he came to the conclusion that Punjaba could not be called Asami Shikmi, because the learned Civil Judge, Junior Division, Vaijapur, has recorded a finding in the suit filed by Prabhakar that Punjaba was not Asami Shikmi, and that decision operated as resjudicata against Punjaba. As there was no other legal right acquired by Punjaba to claim the possession of the land, the appeal filed by Punjaba was rejected.

5. The same reasoning was adopted by the Additional Commissioner, Aurangabad, in appeal filed before him.

6. The petitioners have challenged this order on the ground that the Atiyat Deputy Collector, Vaijapur, was not empowered to resume the land as per the provisions of section 5 of the Hyderabad Atiyat Enquiries Act, 1952 (hereinafter referred to as "the said Act"), and, therefore, his order, and subsequent orders, are without jurisdiction and void ab initio.

7. It is further contended that the concerned authorities have not given any reasons as to why the long standing possession of deceased Punjaba was to be disturbed. The tenant was always ready and prepared to pay the amount of rent and, therefore, it was not necessary to dispossess him. A notice ought to have been issued to Punjaba calling him to show cause as to why he should not be dispossessed. In the absence of such notice, the entire proceedings are null and void. It is, therefore, prayed that the orders passed by the authorities below be set aside.

8. The learned Counsel for the petitioners has argued that the land in question is service inam land, the petitioner Punjaba was inducted as tenant since prior to 1948 by the Inamdar and he was cultivating the land as tenant of the Inamdar. The Inamdar first tried to obtain possession of the land from the tenant. He became unsuccessful and, therefore, to dispossess the tenant, he resigned to act as Inamdar. In such circumstances, the authorities under the said Act had powers to accept the resignation of Inamdar and further as Pujari or Archak. There was no question of dispossessing the tenant, who was lawfully inducted by the Inamdar, that too without giving any notice to him.

9. It is not in dispute that the land is service inam land. It is also not in dispute

that Prabhakar was the Inamdar, who was expected to render services to the deity. It is also not disputed that Punjaba was the tenant on the land since prior to 1950, as inducted by the Inamdar. The enquiry before the Deputy Collector had come up because of the resignation tendered by the Inamdar. So, the nature of the enquiry was only for the limited purpose to accept the resignation, and to see whether any other person can be appointed as Archak or Pujari or Inamdar. The order dated 30-7-1979 passed by the Deputy Collector, Vaijapur, does indicate that the Tahsildar was directed to try to get one Archak to be appointed for rendering services to the deity.

10. Basically, even this order of the Deputy Collector directing the Tahsildar to get somebody as Archak or Pujari for the deity is not correct and legal. Section 7 of the said Act makes a provision as follows:

"7. Succession.---Subject to the provisions of this Act succession to Atiyat grants shall, after the commencement of this Act, be regulated by the personal law applicable to the last holder."

11. The Atiyat Court created under the said Act is vested with powers to appoint a successor, whenever the succession opens and, therefore, the condition is that the succession will be regulated by the personal law applicable to the last holder. So, it was the duty of the Atiyat Deputy Collector to find out who was the successor as per the personal law applicable to Prabhakar for appointment as Archak or Inamdar. That function cannot be delegated to the Tahsildar. On making such appointment as successor to Prabhakar, the function of the Atiyat Court would have come to an end, which was started on the basis of resignation of Prabhakar. At that time, at that stage, there was no reason for the Atiyat Deputy Collector to go into the question whether Punjaba was legally inducted as tenant and whether he should be dispossessed from the land in question. However, without any reason, the Atiyat Deputy Collector also passed the order that the land be taken into possession and it be leased out on yearly basis by auction.

12. The State Government gets a right to resume the Atiyat Grant by following the provisions of section 5 of the said Act. But, here, there was no enquiry u/s 5 of the said Act and, therefore, there was no question of resuming the grant by the Government. The grant was not resumed. On the contrary, it was contemplated to appoint some other Archak or Pujari to render the services to the deity. So, when there was no resumption of the grant, the Government had no authority to take the land in possession or to dispossess Punjaba, the tenant of the land.

13. It is merely stated in the order of the Deputy Collector, Vaijapur, that the land was illegally leased out to Punjaba by the Inamdar. No reasons have been given by him as to why this conclusion was drawn. Even in the order of the Atiyat Collector in appeal; or, for that matter, the Additional Commissioner, Aurangabad, it is not mentioned how any illegality was caused when the land was leased out

to Punjaba by the Inamdar.

14. Probably, the authorities were making applicable provisions of section 6 of the said Act which reads as under:

"6. Prohibition of alienation of encumbrance and exemption of attachment by Court:-

Atiyat grants shall not be liable to be transferred or encumbered in any manner or to any extent whatsoever and it shall not be lawful for any Court to attach or sell any Atiyat grant or any portion or share thereof :"

Lease being a transfer, the authorities thought that the Inamdar had no legal authority to lease out the land and, therefore, the lease is considered illegal. However, this provision has come into force only after the said Act came into force. The circumstances clearly indicate that the land was leased out by Inamdar to Punjaba in the year 1948, or prior to that. So, the bar created u/s 6 of the said Act cannot be made applicable, when the lease was prior to 1952,

15. If the tenant had been given an opportunity of being heard by the Deputy Collector, Vaijapur, he could have shown as to how his tenancy was legal. But no such opportunity was given to him. So, the initial finding recorded by the Deputy Collector, as above was not on proper, sound and legal basis.

16. When the matter was heard by the Atiyat Collector, Aurangabad, he has made reference to the decision given by the learned Civil Judge, Junior Division, Vaijapur, in Regular Civil Suit No. 105 of 1969; and has held that as the Civil Court has recorded a finding that Punjaba was not Asami shikmi, that finding operates as resjudicata against Punjabi; and he cannot claim any right of tenancy. Asami shikmi means tenant. The learned Civil Judge, relying on the ruling Lingo Bai v. Bansilal, ILR 1954 Hyd. 650, had held that as Punjaba was not a tenant for a continuous period of 12 years at the time of commencement of the Hyderabad Tenancy and Agricultural Lands Act, 1950, he was not entitled to claim rights of Asami shikmi, i.e., tenant. But, it is to be noted that the learned Civil Judge dismissed the suit on the ground that there was no compliance of the provisions of notice u/s 106 of the Transfer of Property Act before filing of the suit. So, the suit itself was not maintainable and, because of this finding, the suit was dismissed.

17. The Collector, as well as the Additional Commissioner, have held that, as the finding recorded by the learned Civil Judge goes against the tenant, that finding operates as resjudicata against the tenant and he cannot claim tenancy rights in the proceedings pending before them.

18. We would like to refer to the observations of the Apex Court in the case of Pawan Kumar Gupta Vs. Rochiram Nagdeo, : Their lordships have observed in paragraph 19 thus :

"19. Thus the sound legal position is this; if dismissal of the prior suit was on a

ground affecting the maintainability of the suit, any finding in the judgment adverse to the defendant would not operate as resjudicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause, a decision made in the suit on a vital issue involved therein a subsequent suit between the same parties....."

19. The suit filed by Prabhakar was dismissed, because there was no proper notice u/s 106 of the Transfer of Property Act; and the suit was not maintainable. In such circumstances, the finding recorded by the learned Civil Judge against Punjaba, the tenant, cannot operate as res judicata.

20. One more circumstance also has to be taken into consideration. The suit was between Prabhakar, the Inamdar, and Punjaba, the tenant. The Government was not party to the suit. Furthermore, when enquiry on account of resignation of Prabhakar was under contemplation, the Government had not resumed the grant to be successor of Prabhakar to claim that land. If the Government is claiming the property under Prabhakar, the Inamdar, the decision given in the civil suit would come to the help of the Government. The findings which was recorded in a suit between the Inamdar and the tenant would operate as res judicata only to their extent.

21. The successor of Inamdar is yet to be decided and, if any person steps in the shoes of Prabhakar as Inamdar, then that person may claim the bar of res judicata to seal the mouth of the tenant. The Government has not stepped in as successor of Inamdar by passing any order u/s 7 of the said Act. Hence, while considering the claim of the tenant, it cannot take advantage of the finding recorded in the civil suit to contend that the tenant's claim does not survive because of the principles of res judicata. Thus, the question of legality of tenancy of the tenant inducted by the Inamdar is not at all decided by proper enquiry. Unless that question is decided by proper enquiry, the Government cannot dispossess the tenant. Not only that, first a successor will have to be appointed, as required, on whom the grant would devolve. The successor would have any right to ask for possession of the land leased out to the tenant. The Government cannot take land in possession without following proper procedure of law.

22. Hence, the orders passed by the Deputy Collector, Vaijapur on 30-7-1979; by the Atiyat Collector, Aurangabad on 8-5-1981; and confirmed in appeal by the Additional Commissioner, Aurangabad, on 16-1-1985, are being set aside, only to the extent of taking the land in possession. The petitioners cannot be dispossessed from the land, unless and until due process of law is followed.

23. Rule made absolute accordingly, with no order as to costs.

24. Petition allowed.