
(2010) 02 AHC CK 0086
In the Allahabad High Court

Mohd. Naiyyar and Others

APPELLANT

Vs

Competent Authority/District Magistrate and Others

RESPONDENT

Date of Decision : 08-02-2010

Acts Referred:

Constitution of India, 1950 — Article 31
Constitution of India, 1950 — Article 31
Constitution of India, 1950 — Article 31

Citation : (2010) 3 AWC 2647

Hon'ble Judges : Ashok Srivastava, J; Amitava Lala, J

Bench : Division Bench

Judgement

Amitava Lala, J.—Since the dispute in both the writ petitions relates to the selfsame property, both have been heard analogously and are being decided by this common judgment having binding effect in both the writ petitions, however, taking Civil Misc. Writ Petition No. 12939 of 2007 as leading case.

2. This writ petition, being Civil Misc. Writ Petition No. 12939 of 2007, has " been filed by the petitioners praying inter alia as follows:

(i) to issue a writ order or direction in the nature of certiorari quashing the order passed by respondent No. 1 dated 27.10.2006 and 14.2.2007 rejecting the representation of the petitioners (Annexures-34 and

(ii) to issue a writ order or direction in the nature of mandamus commanding the respondents to handover the vacant possession of the property to the petitioners in view of Section 6 of Act No. 30 of 1952 as the period of 17 years had expired:

(iii) to Issue any other writ order or direction which this Hon"ble Court may deem fit and proper in the circumstances of the case; and

(iv) award costs of the petition to the petitioners.

3. According to the petitioners, one Aizaz Husain was the original owner of various landed properties inclusive of khasra No. 2197 having an area of 67-11-0

bigha, which is equivalent to 33.94 acres, the land in question herein. Said land was non-zamindari abolition (Non-Z.A.) land. The respondents did not dispute with regard to right title interest of said Aizaz Husain (since deceased) in respect of the landed property in question. The land was required by the defence personnels by way of fauji parav. On being questioned, the respective counsel appearing for the parties have given an impression to this Court that in the earlier occasion when defence people were proceeding for war or for any other reasons, they used to halt somewhere and utilize the land, which is in the nature of acquisition without intervention of Land Acquisition Act, 1894. Such action on the part of the defence people was known as "fauji parav". However, an order of requisition was passed on 1.4.1937 under the Government of India Act, 1935 (hereinafter in short called as the "Act, 1935") and various land including the land in question became the subject-matter of requisition. In 1952, the Central Government declared the property as surplus to the military requirements. The District Planning Officer, Muzaffarnagar vide letter dated 12.5.1952 informed the other departments whether any of the camping ground is needed by the revenue department, etc. or not. According to the petitioners, such action was absolutely without Jurisdiction. Since the property was lying abandoned, the petitioner No. 1 alongwith Mohd. Kaisar and All Husnain occupied such portion and subsequently filed a civil suit, being Original Suit No. 49 of 1994. Mohd. Kaisar and Ors. v. Union of India and Anr. before the appropriate civil court for the purpose of declaration and injunction in respect of some portion of the land in question to the extent of 16-11-0 bighas.

4. So far as right, title and interest of the petitioners are concerned, it is clarified by the petitioners not only in paragraph 32 of the writ petition but also in the civil suit that they have inherited the property of Aizaz Husain. The genealogical table of the petitioners is set out hereunder:

Aizaz Hussain		-----	
Wazid Hussain		Intzaam Hussain	Zulfikar Hussain (Died issueless)
(Died issueless)		Sayeed Husnain	alias Buddhu alias Mohd. Husnain

S.	All	Husnain	Mohd.	Kaisar	Mohd.	Nayyar	

Mazhar Wasi Naqi	Aizaz	Fayyaz	Mukarrba	Nawaz	Husnain	Husnain	Husnain
Husnain	Husnain	Husnain	Husnain				

5. The petitioner No. 1 herein, namely, Mohd. Naiyyar is one of the grandsons of Aizaz Hussain, whereas petitioner Nos. 2 and 3 are sons of grandsons of Aizaz Hussain, namely, Mohd. Kaisar and S. All Husnain respectively. Apart from Mohd. Naiyyar, the other petitioners in the second writ petition, i.e., Writ Petition No. 43305 of 2004, are widow, sons and daughters of Mohd. Kaisar. In the said suit the respondents herein did not cross-examine the witness at all about the right of inheritance of Mohd. Naiyyar, being grandson of Aizaz Hussain, as per the ratio of the Supreme Court judgment in Rajinder Pershad (dead) by L.rs. Vs. Smt.

Darshana Devi, So far as the right of other petitioners are concerned, the civil court in its judgment dated 3.11.2008, passed in Original Suit No. 49 of 1994 held as follows (as per the English translation supplied by the petitioners):

On behalf of the plaintiff it is argued that Aijaz Hussain had 3 sons, namely Wajid Hussain, Intejam Hussain and Julfikar Hussain. Intejam Hussain died during the life time of Aijaz Hussain. Wajid Hussain died issueless. Hence, total share of Aijaz Hussain was inherited by Julfikar Hussain. Intejam Hussain has only son, namely Sayeed Hasnain alias Buddhu alias Mohd. Hasnain and plaintiffs are heirs of Sayeed Hasnain. Plaintiffs have stated about this genealogy of family and their right over entire property of khasra No. 2197 of Aijaz Hussain being no other heirs of other Zamindars in the statement of P.W. 1 Mohd. Nayyar in affidavit 580A. Cross-examination of this witness was made on behalf of the defendants and they did not cross the witness on the issue of plaintiffs not being heirs of Aijaz Hussain and on the issue of being other heirs of Aijaz Hussain except plaintiffs. In such situation on account of not questioning this fact in cross-examination and nor clarifying the position hence the statement given by the plaintiff witness in examination-in-chief shall be admitted. Ruling to this effect is given by Hon'ble Supreme Court in Rajendra Prasad v. Smt. Darshan Devi 2001 (7) SCJ 501. On behalf of the defendants no such evidence is filed contrary to this fact where it may be believed that Aijaz Hussain had any other heirs except the plaintiffs.

This is admitted fact that Aijaz Hussain was a Shia Muslim. According to Section 87 of the Shia Law of inheritance of Muslim Law there are two kind of heirs, first, heirs of blood relation, secondly, heirs of marriage. According to Section 88 there are three categories. Wherein first category parents and children come and in second category forefather and foremother and brother sisters and their children come. Since Aizaz Hussain had left away heir of first category, namely Julfikar. After the death of Julfikar his sole heir was his real nephew Sayeed Hasnain alias Buddhu alias Mohd. Hasnain. In such situation according to Sections 87 and 88 of the Muslim Law plaintiffs are legal heirs of Alzaz Hussain. Certified copy of the gift deed dated 13.11.1896 filed by the plaintiffs is paper No. 31C it's Hindi translation is 32C, in which here Julfikar Hussain has admitted Sayeed Hasnain as his real nephew and this verifies the fact that Julfikar Hussain son of Aizaz Hussain had no issue and his legal heir is Sayeed Hasnain.

6. So far as the right of inheritance and other parts are concerned, it has already been held by the civil court in favour of the petitioners. However, the suit was not decreed in favour of the petitioners on the ground that the predecessors of the petitioners (plaintiffs in the suit) never challenged the revenue entries, on the basis of which Union of India came to be recorded over the land in question, therefore, the civil court has no jurisdiction to see the validity of the entries entered in the revenue records. The petitioners challenged said order of dismissal of the suit by way of appeal, which is pending, but no cross-objection has been filed by the respondents therein challenging the findings recorded by the civil

court regarding petitioners being heirs of Aizaz Hussain. It is submitted by Mr. Gupta that earlier the suit was decreed ex parte, against which a restoration application was filed by the Union of India and also made an application for setting aside abatement as the heirs were not included in the restoration application within time. Both such applications were dismissed by the civil court. Against the order dismissing restoration application the Union of India filed an appeal, whereas against dismissal of application for setting aside abatement filed one revision. Both the appeal and the revision were also dismissed by the district court. Against such orders, two writ petitions were filed before this Court, being Civil Misc. Writ Petition Nos. 47588 of 2003 and 47587 of 2003. Both the writ petitions were heard together and allowed by this Court by common judgment and order dated 27.8.2004, whereby ex parte judgment of civil court was set aside and the court below was directed to decide the suit following the procedure prescribed under the CPC and after allowing the parties to complete their pleading, adduce their evidence and also after affording opportunity of hearing in accordance with law. In this background, the civil court proceeded with the suit afresh and dismissed the same by its judgment and order dated 3.11.2008. Irrespective of such fact, we want to say that evidential value of the judgment and order passed by the civil court in trial cannot be ruled out by calling the petitioners as imposters having no locus to dislodge them from their respective claims in respect of the property. So far as such type of requisitions are concerned, previously there was no time limit to release such landed property in case the same is declared as surplus or not necessary for any public purpose, but after the insertion of Sub-section (1A) of Section 6 of the Act, 1952 by way of Amendment Act No. 1 of 1970 is made, a time limit has been specified for the purpose of releasing the same. Sub-sections (1) and (1A) of Section 6 of the Act, 1952, being relevant for the purpose, are quoted hereunder:

6. Release from requisition.- (1) The Central Government may, at any time, release from requisition, any property requisitioned under this Act and shall, as far as possible, restore the property in as good a condition as it was when possession thereof was taken subject only to the changes caused by the reasonable wear and tear and irresistible force:

Provided that where the purposes for which any requisitioned property was being used cease to exist, the Central Government, shall, unless the property is acquired u/s 7, release the property, as soon as may be, from requisition.

(1A) Notwithstanding anything contained in Sub-section (1), the Central Government shall release from requisition:

(a) any property requisitioned, or deemed to be requisitioned under this Act before the commencement of the Requisitioning and Acquisition of Immovable Property (Amendment) Act, 1970, on or before the expiry of a period of seventeen years from such commencement;

(b) any property requisitioned under this Act after such commencement, on or

before the expiry of a period of seventeen years from the date on which possession of such property was surrendered or delivered to, or taken by, the competent authority u/s 4,

unless such property is acquired u/s 7 within the period of seventeenth years aforesaid.

7. For the purpose of better understanding, it is necessary to set out Section 7 of the Act. 1952 hereunder:

7. Power to acquire requisitioned property.-(1) Where any property is subject to acquisition, the Central Government may, if it is of opinion that it is necessary to acquire the property for a public purpose, at any time, acquire such property by publishing in the official Gazette a notice to the effect that the Central Government has decided to acquire the property in pursuance of this section:

Provided that before issuing such notice, the Central Government shall call upon the owner, or any other person who in the opinion of the Central Government may be interested in, such property to show cause why the property should not be acquired; and after considering the cause, if any, shown by any person interested in the property and after giving the parties an opportunity of being heard, the Central Government may pass such orders as it deems fit.

(2) When a notice as aforesaid is published in the official Gazette, the requisitioned property shall, on and from the beginning of the day on which the notice is so published, vest absolutely in the Central Government free from all encumbrances and the period of requisition of such property shall end.

(3) No property shall be acquired under this section except in the following circumstances, namely:

(a) where any works have, during the period of requisition, been constructed on, in or over, the property wholly or partially at the expense of the Central Government and the Government decides, that the value of, or the right to use, such works should be secured or preserved for the purpose of Government, or

(b) where the cost of restoring the property to its condition at the time of its requisition would, in the determination of the Central Government, be excessive and the owner declines to accept release from requisition of the property without payment of compensation for so restoring the property.

(4) Any decision or determination of the Central Government under Sub-section (3) shall be final and shall not be called in question in any Court.

(5) For the purposes of Clause (a) of Sub-section (3) "works" includes buildings, structures and improvements of every description.

8. It appears to this Court that a mandate has been introduced by the Legislature under Sub-section (1A) by inserting the word "shall" in the opening sentence of Section 6 of the Act, 1952.

9. From the reference of H.D. Vora Vs. State of Maharashtra and Others, we get that there is a basic and fundamental distinction recognised by law between requisition and acquisition. The Constitution itself in Entry 42 of List III of the Seventh Schedule makes a distinction between acquisition and requisitioning of property. The original Article 31 Clause (2) of the Constitution also recognised this distinction between compulsory acquisition and requisitioning of property. The two concepts, one of requisition and the other of acquisition are totally distinct and independent. Acquisition means the acquiring of the entire title of the expropriated owner whatever the nature and extent of that title may be. The entire bundle of rights which was vested in the original holder passes on acquisition to the acquirer leaving nothing to the former. Vide : Observations of Mukherjee, J., in Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, The concept of acquisition has an air of permanence and finality in that there is transference of the title of the original holder to the acquiring authority. But the concept of requisition involves merely taking of "domain or control over property without acquiring rights of ownership" and must by its very nature be of temporary duration. If requisitioning of property could legitimately continue for an indefinite period of time, the distinction between requisition and acquisition would tend to become blurred, because in that event for all practical purposes the right to possession and enjoyment of the property which constitutes a major constituent element of the right of ownership would be vested indefinitely without any limitation of time in the requisitioning authority and it would be possible for the authority to substantially take over the property without acquiring it and paying full market value as compensation under the Land Acquisition Act, 1894. We do not think that the Government can under the guise of requisition continue for an indefinite period of time, in substance acquire the property, because that would be a fraud on the power conferred on the Government. If the Government wants to take over the property for an indefinite period of time, the Government must "acquire the property but it cannot use the power of requisition for achieving that object. The power of requisition is exercisable by the Government only for a public purpose which is of a transitory character. If the public purpose for which the premises are required is of a perennial or permanent character from the very inception, no order can be passed requisitioning the premises and in such a case the order of requisition, if passed, would be a fraud upon the Statute, for the Government would be requisitioning the premises when really speaking they want the premises for acquisition, the object of taking the premises being not transitory but permanent in character.

10. Mr. Gupta contended on the strength of a Division Bench judgment of this High Court in State of U.P. and Ors. v. Indian Christian Trustees, Calcutta 2008 (2) ALJ 492 , that vesting is not always absolute. It takes colour from the content in which it is used and it is not necessarily the same in every provision or in every context. This is so held by the Supreme Court in the judgment in Maharaj Singh Vs. State of Uttar Pradesh and Others, and Dr M. Ismail Frauqui

and Others Vs. Union of India (UOI) and Others, Thus, vesting can be absolute : it can be limited.

11. Mr. Gupta very much relied upon a recent judgment of the Supreme Court in Roy Estate Vs. State of Jharkhand and Others, Paragraph 8 of such judgment is as follows:

8. A bare perusal of Section 6 (1A) and 6 (2) would show that the property cannot be requisitioned permanently and that the maximum period fixed by the Amendment Act of 1970 is 17 years from that date and that Section 6 (2) further provides that unless the requisitioned property is acquired u/s 7 within the period of 17 years aforesaid, it shall be released to its owner and as far as practicable, be given to the person from whom the possession had been taken at the time of the requisition or to the successor in interest of such person.

12. We further find from a three Judges' Bench judgment of the Supreme Court in Union of India and Ors. v. Raja Mahendragiri and Ors. 2002 (47) ALR 380, that even in case when statutory period u/s 6 (1A) of the Act, 1952 is lapsed, requisitioning authority has no power to exercise it u/s 7 (1) for acquiring the same.

13. On the other hand, Mr. Subodh Kumar, learned Counsel appearing for the respondents, challenged the locus of the petitioners very much in the place and instead of right to hold the land having been barred u/s 6 (1A) of the Act, 1952. He said that the petitioners cannot, in one hand, proceed with the suit and appeal and, on the other hand, with the writ petition simultaneously. It applies as res Judicata to the proceeding before this Court. Therefore, the writ petition is not maintainable. He relied upon two Supreme Court judgments in Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, and Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, He further said that if the property is given back to the petitioners, to whom it will be given, is not known to them. After the death of Aizaz Hussain, the name of Union of India has been recorded in the record. Against this background, the landed property cannot be released in favour of the petitioners, to which Mr. Gupta has contended on behalf of the petitioners that there is no doubt that the petitioners are successors of the property. Even if there is any doubt with regard to full or partial successorship, that can be adjudicated and decided in the pending appeal arising out of the civil suit or in case of necessity by filing any fresh suit but the respondents have no right to hold the property.

14. According to us, the defence, which has been taken by the Union of India, is feeble in nature. Section 6 (1A) of the Act, 1952 clearly says that they cannot hold the requisitioned property permanently. Public purpose was transitory in nature. Ownership of Aizaz Hussain is undisputed. Successorship of the petitioners cannot be doubted. Evidential value before the civil court cannot be ignored. At best, shares of the successors can be disputed by one against

another though the judicial interpretation of a civil court in respect of succession, as per the Shia Law of Inheritance of Muslim Law, is already existing. The Union of India neither stood in the way before the Civil Court nor they can do so. Amongst others, the ratio of Charanjit Lal Chowdhury (supra) and Roy Estate (supra) both are squarely applying in favour of the petitioners. Yet this Court wants to put a caution in disposing of the writ petition in favour of the petitioners.

15. Thus, the writ petitions are disposed of directing the respondents to vacate the property in question within a period of three months from this date and hand it over to the petitioners, who will hold the same as custodia legis till the decision of a competent civil court regarding shares of the petitioners in the property. This can be done either in the existing appeal before the civil appellate court or in any fresh suit, if so advised to proceed, and subject to decision in favour of the petitioners, they will be able to hold the property absolutely and forever and the status of custodia legis will automatically evaporate. However, there should not be any delay on the part of the respondents in handing over the requisitioned property in favour of the petitioners and the same will be done within the time as prescribed above, in case of failure the appropriate police authority of district Muzaffarnagar will take steps to evict the respondents and to hand over the same to the petitioners forthwith. Consequently, the orders dated 27.10.2006 and 14.2.2007, impugned in the first writ petition, passed by the concerned District Magistrate cannot be sustained and are hereby quashed.

However, no order is passed as to costs.

Ashok Srivastava, J.

16. I agree.