

(1976) 02 PAT CK 0018

In the Patna High Court

Case No : Civil Writ Jur. Case No. 1187 of 1971

Phulwasi Devi

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 11-02-1976

Acts Referred:

Cantonments Act, 1889 — Section 26(1)
Cantonments Land Administration Rules, 1937 — Rule 27
Constitution of India, 1950 — Article 226, 299
Evidence Act, 1872 — Section 115
Government of India Act, 1935 — Section 175

Citation : AIR 1977 Patna 32 : (1977) 10 PLJR 97

Hon'ble Judges : Shambhu Prasad Singh, J; Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : B. Choudhary, Ajayandu Bose and Vijay Nath, for the Appellant; T.K. Jha, G. A., Pashupati Nath Jha, J. C. to G. A. and Debeshwar Prasad Jha, for the Respondent

Final Decision : Dismissed

Judgement

1. By this application under Articles 226 and 227 of the Constitution of India the petitioner prays for quashing of a notice (Annexure 1) dated 27th of July, 1971, from the Government of India, Ministry of Defence, New Delhi, to the petitioner informing the petitioner that on the expiry of one month from the date of service of the notice any rights easements and interests which the petitioner may have in the land described at the foot of the notice and buildings standing thereon shall cease from that date and also stating that the Government were prepared to pay and so offered to the petitioner a sum of Rupees 4469 as the value of the authorised erec- tions standing on the said land. A cheque for the said amount was attached with the said notice.

2. The land mentioned in the said notice (Annexure 1), namely, survey No. 77 (Bungalow No. 9 Mango Lodge) in Dinapore Cantonment measuring 1.170 acres described in the notice as belonging to the President of India and held by the

petitioner on old grant terms as contained in Governor-General's Order No. 179 dated 12th of September, 1836, according to the petitioner, belonged to one Samuel Grose, son of William Gross of Dinapore Cantonment. Samuel Grose sold the bungalow in question to Mool Chand under a registered deed of sale dated 20th of March, 1905 for a consideration of Rs. 1300. Mool Chand died in the year 1926 and after his death under a deed of partition dated 24th of July, 1931 in between his sons, Sarab Lal and Parmanand, the bungalow in question was exclusively allotted to Sarab Lal. Sarab Lal died on 27th of February, 1961 and on his death, the petitioner, who is his widow, became the owner of the bungalow. The bungalow was let out to Government of India, Ministry of Defence, on a month to month tenancy for accommodating the local military officers at the rate of Rs. 85 per month by Sarab Lal in the year 1947. Since after the death of Sarab Lal the petitioner was being paid the rent of the same. On 28th of July, 1971, the notice (Annexure 1) was received by the petitioner. The petitioner claims that she is a lessee of the land in question and not a mere licensee and she cannot be dispossessed in the way sought to be done by the said notice.

3. The case of the respondents is that the petitioner is a mere licensee and not a lessee as per old grant terms of 1836 on the basis of which her predecessors-in-interest was allowed to enter upon the land. Respondent No. 1, the Union of India, is entitled to take possession of the land together with bungalow thereon after paying to the petitioner the amount offered for the bungalow. It is further case of the respondents that the petitioner has got no interest in the land.

4. Several writ applications were filed in the years 1970 and 1971 before this Court challenging the legality of similar notices and some of them, namely, C. W. J. C. Nos. 1947 of 1970 and 179, 461, 501 and 815 of 1971 were disposed of by a Bench of this Court by its judgment dated 22nd of November, 1973. Mr. B. Choudhary, who appears for the petitioner in this case, appeared for petitioners in those cases as well. He urged as many as nine points in those writ applications which are mentioned in paragraph 11 of that judgment and need not be reproduced here. The facts of the present case are almost similar to the facts of C. W. J. C. No. 501 of 1971 which was dismissed by that judgment. The present case being covered by that Bench decision which is binding upon us, has also, therefore, to be dismissed. The reasons why the contentions of Mr. Choudhary which he raised in that case were not accepted are mentioned in that judgment and it is not necessary to reiterate them in this judgment,

5. Mr. Choudhary, however, has urged that that judgment is not binding upon this Bench as it was given per in-curiam ignoring certain statutory provisions. According to him, those statutory provisions were not placed before the Bench which heard C. W. J. C. No. 501 of 1971, and had they been placed, that Bench might have taken view in favour of the petitioner of that case. Elaborating this contention, Mr. Choudhary has first drawn our attention to Rule 27 of Cantonment Land Administration Rules, 1937, which reads as follows:--

"Notwithstanding anything contained in Rules 16 to 26 the Military 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." According to the form set out in Schedule VII to the said Rules, the lease is given in perpetuity. According to Mr. Choudhary, this rule confers upon the petitioner a statutory right to make an application for getting a lease in perpetuity and by the impugned notice the said statutory right has been affected and taken away. He has placed reliance on a decision of the Supreme Court in *Smt. Sahodara Devi and Others Vs. Government of India and Another*, where it has been held that power given to Military Estates Officer to grant lease for regularisation of old grants under the said rule is discretionary but refusal should only be for sufficient reasons. The appellants of that case had made an application under Rule 27. Ministry of Defence informed them that the Government was prepared to grant them a lease under Rule 28 in the form set out in Schedule VIII, but was not prepared to grant a lease under Rule 27. Thereafter the appellants 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, they filed a petition under Article 226 of the Constitution praying for mandamus directing the Military Estates Officer, Lucknow and Government of India to execute a lease under Rule 27. The petitioner came up before a learned single Judge of Allahabad High Court who allowed the petition and directed the grant of lease under Rule 27, Government of India and Military Estates Officer, Lucknow filed a Letters Patent Appeal which was heard by a Bench. The appeal was allowed in part. The order of the learned single Judge directing grant of a lease under Rule 27 was set aside. The Government of India and the Military Estates Officer, Lucknow were directed, however, to consider the application made under Rule 27 and dispose it of in accordance with law. The appeal in the Supreme Court was against this judgment of a Bench of the Allahabad High Court and was dismissed. As it appears from the judgment of the Supreme Court as well as from the Bench decision of the Allahabad High Court (*Government of India and Another Vs. Smt. Sahodra Devi and Others*,), Rule 27 does not entitle the person who makes an application under that rule to get a lease in perpetuity. Whether such a lease should be granted or not is left to the discretion of the authority mentioned in the rule. It merely provides that an application for getting a lease may be made. In that case an application was made and that was not being properly considered. Therefore, the writ was allowed to that extent directing the Government of India and Military Estates Officer, Lucknow to consider the application in accordance with law. In the instant case, the petitioner has not made any such application so far. She has not made any such application even after the notice. In the circumstances, we do not think that the petitioner can legitimately complain that the notice (Annexure "1") is bad because it affects the statutory right of the petitioner to make an application under Rule 27 for getting a lease in perpetuity. A person who fails to avail of such a right, even if it be assumed that Rule 27 confers such a right, cannot complain

before a court of writ jurisdiction that the notice is bad on that score.

6. Mr. Chaudhary has next placed before us the definition of "lessee" in Clause 2 (1) (j) in Cantonment Code, 1899, which reads as follows:--

" "lessee" means a person who has been granted permission, whether before or after the commencement of this Code, to occupy, for the purposes of a building site, land belonging to the Government in a cantonment, and includes the successors in interest of a lessee."

Mr. Choudhary has submitted that according to this definition, Mr Grose, the predecessor-in-interest of the petitioner, was a lessee and the petitioner is also a lessee; she cannot be a licensee. Mr. Choudhary has contended that had this definition been brought to the notice of the Bench which heard C. W. J. C. No. 501 of 1971, it would not have held the petitioner of that case to be a mere licensee. The Cantonment Code, 1899 consists of rules framed by Government of India in the Military Department. The rules were mostly framed under the powers conferred upon the Government of India u/s 26 of the Cantonment Act, 1889. Some of the provisions of the Code were also there on account of Section 25 of the said Act. In this connection Sub-section (1) of Section 26 is relevant, according to which, rules consistent with the Act could be framed to provide for "the manner in which, and the authority to which, application for permission to occupy land belonging to the Government in a cantonment is to be made". It is obvious from Section 26 (1) that the rules that were to be made in this connection could have only prospective effect. The rule making authority was not conferred with powers to make any rule with retrospective effect nor they could confer such a power upon themselves. The definition of the lessee in the Code, therefore, which makes even such person who had before the commencement of the Code been granted permission to occupy land for the purpose of a building site, a lessee was beyond the rule-making power of the authority and could not confer any right on the petitioner. It has been contended by Mr. Choudhary that the Government of India itself having framed the rule having such a definition for "lessee" are estopped from challenging the validity of the rule. Where Government is given powers to frame rules, they are generally framed by some officers of the Government and if they go beyond the authority conferred upon the Government for the purposes of framing rules, those rules cannot bind the Government. In such cases there can be no estoppel, because the rules framed are against the statutory powers conferred upon the rule making body and there can never be estoppel against statute. Therefore, there is no substance in this contention of Mr. Choudhary either, and, in our opinion, even if the attention of the Bench had been drawn to the definition of lessee in the Cantonment Code, 1899, it would not have come to a different decision.

7. Mr. Choudhary has next urged that the presumption as to terms of the contract on the basis of old grant as drawn in the said Bench decision of this Court is against the provisions of Article 299 of the Constitution of India. That presumption was drawn on the basis of terms contained in Governor General's

Order No. 179 dated 12th of September, 1836. At that time neither Article 299 of the Constitution nor Section 175 of the Government of India Act, 1935 were in existence and Article 299 of the Constitution or Section 175 of the Government of India Act, 1935 can have no application in interpreting the said Governor General's Order No. 179 dated 12th of September, 1836. Therefore, even if the attention of the Bench which heard C. W. J. C. No. 501 of 1971 would have been drawn to Article 299 of the Constitution that would have made no difference in the result.

8. Lastly, Mr. Choudhary has urged that by the notice (Annexure "1") right of the petitioner to get adequate compensation in accordance with Article 31 of the Constitution of India has been taken away and, therefore, the notice is bad. He has contended that Article 31 of the Constitution was not relied upon on behalf of the petitioner before the Bench which heard C. W. J. C. No. 501 of 1971. It appears from the judgment in that case that the question of adequacy of compensation was left open and it was observed -- "whether the compensation offered is adequate or not is to be decided in a separate proceeding". Therefore, even if the attention of that Bench had been drawn to Article 31 of the Constitution, it would not have made any difference in the decision.

9. No other point has been raised by Mr. Choudhary, and for the reasons discussed in the preceding paragraphs, it is obvious that the said decision of the Bench in C. W. J. C. No. 501 of 1971 is binding on this Bench and it is not open for us to take a different view. Otherwise also we would not have taken a different view if the petition would have been argued on merits regarding other points.

10. In the result, the application is dismissed, but, in the circumstances, there will be no order for costs. Observations made in the said judgment will be binding on the parties in this case as well.