

(2011) 06 BOM CK 0125

In the Bombay High Court

Case No : Writ Petition No's. 638, 639 and 665 of 2010

Shri Anand Ghadi

APPELLANT

Vs

Smt. Maria Wolfango D'Silva (since deceased) through her
LR, Shri Antonio S.C. Pereira and Others

RESPONDENT

Date of Decision : 07-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 — Section 3(2), 5, 7(2), 7(3), 8A

Limitation Act, 1963 — Article 12, 58

Citation : (2011) 5 BomCR 56

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : A. Agni, for the Appellant; V.R. Tamba and D. Zaveri for Respondent No. 1 and V. Rodrigues, A.G.A. for Respondent Nos. 2, 3, 4 and 5, for the Respondent

Judgement

A.P. Lavande, J.—Heard learned Counsel for the parties at length.

2. By these three petitions, the Petitioners take exception to the judgment and order dated 19th November, 2009 passed in Mundkar Revision Application Nos. 11/2003, 12/2003 and 13/2003 respectively by the Administrative Tribunal by which the Tribunal has dismissed the revision applications filed by the Petitioners and also disposed of the application for stay.

3. Briefly, the facts relevant for disposal of these petitions are as under:

The Petitioners in Writ Petition Nos. 638 and 639/2010 and Shri Mariano Fernandes of whom the Petitioners in Writ Petition No. 665/2010 are the legal representatives filed the applications before the Mamlatdar of Bicholim seeking declaration of mundkarship in respect of their houses and also sought permanent injunction restraining the Respondents from dispossessing the Petitioners from the suit house. By orders dated 10th December, 1998 passed in all the three

applications, the Mamlatdar was pleased to grant the temporary injunction in favour of the Petitioners. Against the orders passed by the Mamlatdar, Respondent No. 1 in these petitions preferred revision applications before the Deputy Collector of Bicholim, who stayed the orders. The Petitioners preferred the revision applications before the Revenue Minister, who by order dated 15th November, 1999 set aside the order of Deputy Collector with directions to Mamlatdar to dispose of the proceedings before him on merits by 31st March, 2000. When the matter came up for hearing before the Mamlatdar, Respondent No. 1 herein filed applications dated 7th December, 1999 seeking rejection of the applications filed by the Petitioners under Rule 14(5) of the Mundkar Rules. The Mamlatdar after giving an opportunity of being heard to the parties, by orders dated 14th February, 2000 allowed the applications of Respondent No. 1 and dismissed the main application for declaration and injunction and vacated the order of injunction.

4. Aggrieved by the orders of the Mamlatdar, the Petitioners herein filed appeals before the Deputy Collector, who after giving an opportunity of being heard to the parties by judgments and orders dated 8th January, 2003 dismissed all the three appeals. Being aggrieved by both these orders, the Petitioners herein filed revision applications bearing Nos. 11/2003, 12/2003 and 13/2003 before the Administrative Tribunal at Panaji. The Administrative Tribunal by the impugned judgment and order dated 19th November, 2009 dismissed all the revision applications holding that the property in which the Petitioners claim that they are having mundkarial houses, was non-evacuee property. The Tribunal held that the applications filed by the Petitioners were barred by limitation. Consequently, the Tribunal held in favour of Respondent No. 1 and dismissed the revision applications. Before the Tribunal, reliance was placed by the Petitioners on the amendments to the Goa, Daman and Diu Administration of Evacuee Property Act, 1964 ("The Act of 1964" for short) carried out in the year 1995 and 2000.

5. Mrs. Agni, learned Counsel for the Petitioners submitted that the findings recorded by the Tribunal that the property in which the Petitioners claim that they had mundkarial house, was non-evacuee property, is patently unsustainable in law at least in so far as the Petitioners in Writ Petition Nos. 638 and 639/2010 are concerned in as much as in the Division Bench judgment of this Court dated 7th March, 1995 passed in Writ Petition No. 468/1994, the High Court had clearly negated the claim of the Petitioners that the properties were non-evacuee properties and as such, the Tribunal could not have held that these properties were non-evacuee properties. Mrs. Agni further submitted that the Tribunal appears to have relied upon the notifications dated 3rd June, 1965, 8th July, 1965 and 5th August, 1965, which were produced by Respondent No. 1 in revision applications along with the application dated 11th February, 2008. Mrs. Agni further submitted that Respondent No. 1 placed reliance upon the said three notifications which were permitted to be produced by the Tribunal by order dated 11th February, 2008 without giving an opportunity of being heard to the Petitioners herein. Learned Counsel further submitted that the said notifications

were produced after the matter was adjourned for judgment to 28th February, 2008 since the judgment was not ready. Learned Counsel further submitted that the finding recorded by the authorities below that the applications were barred by limitation is patently unsustainable in law in as much as in The Goa Daman and Diu Mundkar (Protection from Eviction) Act, 1975 ("The Act" for short) there is no provision providing for limitation for filing an application under Sections 5 and 8A of The Act. According to the learned Counsel, the provisions of the Mamlatdar Court's Act cannot be imported to hold that there is limitation of one year for filing the application u/s 8A or 5 of The Act. According to learned Counsel, the findings given by the Mamlatdar and Tribunal on merits are patently unsustainable in law and, therefore, the Mamlatdar and the Tribunal could not have dismissed the applications seeking declaration filed by the Petitioners. According to learned Counsel, the Tribunal ought to have given an opportunity of being heard to the Petitioners on the application dated 11th February, 2008 filed by Respondent No. 1 seeking to produce three notifications in support of his submission that the properties in which the Petitioners claim that their houses were situated were non-evacuee properties.

6. Per contra, Mr. Tamba submitted that the Petitioners are guilty of suppression of material facts and on this count only the Petitioners are not entitled to any relief under Article 227 of the Constitution of India. Mr. Tamba further submitted that Writ Petitions filed by the Petitioners under Articles 226 and 227 of the Constitution of India are not maintainable in as much as no relief is sought against a statutory authority or the State and the only relief's sought by the Petitioners are declaration of mundkarship and permanent injunction and as such, Writ Petitions under Article 226 of the Constitution of India are not maintainable. In support of his submissions, Mr. Tamba relied upon the judgment of this Court in the case of National Textile Corporation (SM) Limited v. Devraj Chandrabali Pai 2006 (1) BCR 765 and the judgment of the Apex Court in the case of Shalini Shyam Shetty and Anr. v. Rajendra Shankar Patil; AIR 2010 SCW 6387. Learned Counsel further submitted that the findings recorded by the Mamlatdar and Tribunal that the applications are barred by limitation cannot be faulted and in any case, even if it is held that Mamlatdar Court's Act is not attracted yet declarations sought are barred by limitation under Article 58 of the Limitation Act which provides a period of three years of limitation when the right to sue first accrues. According to the learned Counsel, the applications filed by the Petitioners in the year 1997 are clearly barred by limitation and as such, no fault can be found with the impugned judgment and order passed by the Tribunal. Learned Counsel further submitted that the finding of the Tribunal that the properties in which the Petitioners have their houses are non-evacuee properties cannot be faulted in view of the notifications produced along with the application dated 11th February, 2008. Learned Counsel further submitted that the notifications being the public documents, the Tribunal was justified in placing reliance upon the same and holding that the properties are non-evacuee properties. According to the learned Counsel, even if the petitions filed by the

Petitioners are considered to be under Article 227 of the Constitution of India yet the jurisdiction under Article 227 of Constitution of India is very limited and this Court would exercise jurisdiction under Article 227 only if the Tribunal has been guilty of gross dereliction of duties and flagrant abuse of power resulting injustice to a party and since in the present case, no such case is made out by the Petitioners, the petitions even if are considered to be under Article 227 of the Constitution of India, do not deserve to be entertained and as such the Petitioners are not entitled to any relief. Learned Counsel, therefore, submitted that no interference is warranted with the impugned judgment and order and the petitions filed deserve to be dismissed. In support of his submissions in addition to the above referred two judgments, Mr. Tamba placed reliance upon the following judgments:

- (i) Jai Singh and Others Vs. Municipal Corporation of Delhi and Another,
- (ii) Essen Deinki Vs. Rajiv Kumar,
- (iii) Ouseph Mathai and Others Vs. M. Abdul Khadir,
- (iv) K.D. Sharma Vs. Steel Authority of India Ltd. and Others, .
- (v) Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others,
- (vi) Rajkumar Gurawara (Dead) Through L Rs. v. S. K. Sarwagi and Co. Private Limited and Anr. (2008) 14 SCC 314.
- (vii) Raymond Ltd. and Another Vs. State of Chhattisgarh and Others, .
- (viii) State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another,
- (ix) Dalip Singh Vs. State of U.P. and Others,
- (x) Narender v. Pradeep Kumar, (2005) 3 SCC 372.
- (xi) Kesharlal H. Pardeshi v. Vithal S. Patole (Dead) By L.Rs. (2005) 10 SCC 249.
- (xii) State of Rajasthan and Others Vs. Jagdish Narain Chaturvedi,
- (xiii) Pralhad Banduji Lodhi Vs. The Collector and The District Magistrate and Others,
- (xiv) Radhey Shyam and Another Vs. Chhabi Nath and Others,
- (xv) Jagdish Balwantrao Abhyankar and Others Vs. State of Maharashtra and Others,
- (xvi) Mohd. Akram Ansari Vs. Chief Election Officer and Others,
- (xvii) Hardesh Ores Pvt. Ltd. Vs. Hede and Company,
- (xviii) Shankar Babani Halarnkar v. Sharayu Kauthankar and Ors. 2010 (6) BCR 105.

7. In rejoinder, Mrs. Agni, learned Counsel submitted that the petitions have been filed under Articles 226 and 227 of the Constitution of India which the Petitioners are entitled to do and once the petitions have been filed under Articles 226 and 227 of the Constitution of India, the petitions have to be treated as such as held by the Full Bench Decision of this Court in the case of Jagdish Balwantrao Abhyankar and Others Vs. State of Maharashtra and Others,

8. I have carefully considered the rival submissions, perused the record and the judgments relied upon.

9. I do not deem it necessary to refer to in detail all the judgments relied upon by Mr. Tamba, but I would take into consideration the ratio laid down in the said judgments and propose to dispose of the petitions filed.

10. At the outset, I would deal with the submissions of Mr. Tamba that the petitions are liable to be dismissed on the ground of suppression of material facts. Having considered the submissions made by the learned Counsel for the parties and having perused the record, it cannot be said that the Petitioners are guilty of suppression of such material facts that the petitions filed deserve to be dismissed summarily. Mr. Tamba is right in contending that the writ petitions filed by the Petitioners under Article 226 are not maintainable in as much as the issue is squarely covered against the Petitioners by the judgment of the Apex Court in the case of Shalini Shetty (supra). In the said case, the Apex Court, after considering the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India, has held that the jurisdiction under Articles 226 and 227 of the Constitution of India is separate and distinct and operate in different fields. After considering the provisions of Bombay High Court (Original Side Rules) 1957 and Bombay High Court Appellate Side Rules 1960, the Apex Court has held that Writ Petition is a remedy in public law which may be filed by any person but the main Respondent should be either Government, governmental agency or a State or instrumentality of State within the meaning of Article 12. Private individuals cannot be equated with the State or instrumentality of the State. All the Respondents in a Writ Petition cannot be private parties. In the said case, after considering several judgments of the Apex Court and of different High Courts, the Apex Court has held that in any dispute between the landlord and tenant where no relief was sought against the State or any State functionary, the writ petition filed under Article 226 of the Constitution of India is not maintainable. The Apex Court further held that the petition under Article 227 of the Constitution of India cannot be called as a Writ Petition and the High Court would interfere in exercise of jurisdiction under Article 227 of the Constitution of India only to keep the Tribunals and the Courts subordinate to it within the bounds of their authority or where there has been a patent perversity in the order of the Courts subordinate to it or where there has been gross and manifest failure of justice or the basic principles of natural justice have been flouted. The Apex Court further held that the High Court cannot interfere to correct mere error of law and fact and the jurisdiction under Article 227 has to be sparingly exercised

but at the same time, the jurisdiction under Article 227 of the Constitution of India cannot be curtailed by any State. In view of the ratio laid down by the Apex Court in the case of Shalini Shetty (supra), I am unable to place reliance upon the Full Bench decision in the case of Jagdish Abhyankar (supra) relied upon by Mrs. Agni. However, having regard to the grounds urged in support of the petitions, I am of the considered opinion that the petitions under Article 227 of the Constitution of India deserve to be entertained. Hence, Rule. As stated above, the learned Counsel for the parties have been heard at length and with their consent, the petitions are being finally disposed of.

11. As stated above, the Tribunal has recorded the finding that the properties involved in all the three revision applications are non-evacuee properties. The Tribunal has placed reliance upon the order dated 7th March, 1995 passed in Writ Petition No. 468/1994 in which it has been observed by the High Court that in view of the terms of the judgment of the custodian of evacuee property dated 14th November, 1967 it was seen that the property given to Chapel for its maintenance was non-evacuee, but the fact remained that although the release of property was ordered, the same was in possession of the custodian. Perusal of the record discloses that deceased Maria Walfango D'Silva of whom Respondent No. 1 is the legal representative had filed Writ Petition No. 468/1994 seeking writ of "Mandamus" against the custodian of evacuee property and the State of Goa to take action against the alleged illegal constructions carried out by the Anand Datta Ghadi and Dattaram Langaonkar Respondent Nos. 4 and 5 to the said petition, who are the Petitioners in Writ Petition Nos. 638 and 639 of 2010. The Writ petition was disposed of by judgment dated 7th March, 1995 in which the Division Bench observed that all the Respondents therein had claimed that the said property was declared non-evacuee but there was nothing on record to show that the property was declared non-evacuee by an order of the custodian. This being the position, the finding of the Tribunal that the said property was non-evacuee property at least in so far as revision applications preferred by Anand Ghadi and Dattaram Langaonkar are concerned cannot be sustained. It appears that the Tribunal has relied upon the notifications dated 3rd June, 1965, 8th July, 1965 and 5th August, 1965, which were produced by Respondent No. 1 along with an application dated 11th February, 2008 filed in all the three revision applications. Perusal of the record of the Tribunal and more particularly rojnama discloses that on 11th February, 2008, the revision applications were fixed for judgment and as the judgment was not ready, the matters were adjourned to 28th February, 2008 and accordingly that rojnama was written. Thereafter, separate rojnama was written on the same day, which discloses that Advocate for Respondent No. 1 had filed an application for production of additional documents. The record discloses that the same was allowed by the Tribunal on the same day by passing the following order:

Since the documents sought to be produced are Government gazettes and public documents production is allowed and the same are taken on record.

12. It is, therefore, clear that the Tribunal permitted production of these three notifications after the revision applications were adjourned for judgment to 28th February, 2008. There is nothing on record to establish that the Petitioners herein were given notice of the said application either before or passing of the order by the Tribunal on 11th February, 2008. Therefore, I have no hesitation to accept the submission of Mrs. Agni that the Tribunal placed reliance upon the three notifications without giving an opportunity of being heard to the Petitioners. I do not deem it appropriate to go into the question as to whether in view of the said notifications, the property in question can be termed as non-evacuee property. However, the fact remains that the Tribunal has recorded finding that the property in question was a non-evacuee property probably by placing reliance upon the three notifications. In any case, in view of the finding given by the High Court in the order dated 7th March, 1995 passed in Writ Petition No. 468/1994 in the absence of any material / evidence placed before the Tribunal that the property in question was non-evacuee property, the Tribunal could not have given a finding that the property was non-evacuee property at least in so far as the revision applications Nos. 11 and 12/2003 are concerned. In any case, the Tribunal ought to have given an opportunity to the Petitioners to make submissions on the relevance and effect of the notifications dated 3rd June, 1965, 8th July, 1965 and 5th August, 1965 upon which reliance was placed by Respondent No. 1 in the revision applications filed by the Petitioners. Admittedly, such an exercise was not undertaken by the Tribunal. At this stage, it is pertinent to note that before the Tribunal the Petitioners have relied upon the notifications in the year 1995 and 2000 by which amendments were carried out to The Act of 1964. The Petitioners have also placed reliance upon the said notifications in the present petitions. In terms of amendment Act, 1995, The Mundkar Act has been extended to evacuee property. In terms of Section 3(2) as amended by the Act of 2000, every person who is in occupation as on the 30th day of June 2000 of any dwelling house situated on the evacuee property vested in the custodian of the property, shall be deemed to be mundkar of dwelling house and is entitled for certificate for purchase in respect of dwelling house on payment of price determined in accordance with the provisions of The Act and shall also be deemed as purchaser for the purpose of this Act. Sub-section (3) of Section 7 provides that no such force as is referred to in Sub-section (2) shall be used against any person who as on 30th day of June, 2000 is in occupation of dwelling house situated on the evacuee property vested in the custodian under the Principal Act. On the footing that the property in question was non-evacuee property, the Tribunal did not consider the effect of the amendments carried out in the year 1995 and 2000 to The Act of 1964. Therefore, in my considered opinion, it would be just and proper to set aside the judgment and order dated 19th November, 2009 passed by the Administrative Tribunal by which Revision Application Nos. 11, 12 and 13 of 2003 have been dismissed, with a direction to the Tribunal to give an opportunity of being heard to the Petitioners in so far as the notifications dated 3rd June, 1965, 8th July, 1965 and 5th August, 1965 are concerned. No doubt, the Tribunal ought to have heard the Petitioners before

permitting Respondent No. 1 to rely upon and produce the said notifications. However since they are public documents, I do not deem it necessary to set aside the order dated 11th February, 2008 passed by the Tribunal in all the three revision applications permitting Respondent No. 1 to place the notifications on record. However, I deem it appropriate to direct the Tribunal to give an opportunity to the Petitioners to make submissions on the relevancy of the three notifications in support of their contention that the property in question was a non-evacuee property. The Tribunal shall also consider the effect of the amendments carried out to The Act of 1964 in the year 1995 and 2000 which has admittedly not been done by the Tribunal as is evident from the impugned order.

13. Since the impugned judgment is liable to be set aside for the reasons stated herein above, I do not deem it necessary to refer to the various authorities relied upon by Mr. Tamba in support of his contentions on merits of the matters. It is made clear that I have not expressed any opinion on merits of the rival claims and all the contentions of the parties are kept open.

14. In the result, therefore, the impugned judgment and order dated 19th November, 2009 passed by the Administrative Tribunal in dismissing the revision application Nos. 11,12 and 13 of 2009 is quashed and set aside and the Tribunal is directed to decide the revision applications afresh on their own merits in the light of the observations made above. The parties shall appear before the Tribunal on 21st June, 2011 at 10.30 a.m. The Tribunal shall dispose of the revision applications expeditiously and in any case on or before 30th September, 2011.

15. The petitions stand disposed of in aforesaid terms with no order as to costs.