
(2000) 10 RAJ CK 0022

In the Rajasthan High Court

Case No : Civil Special Appeal No. 1308 of 1997

Smt. Govind Kanwar

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 12-10-2000

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226, 227, 300

Land Acquisition Act, 1894 — Section 4

Limitation (Amendment) Act, 1972 — Section 17, 5, 6

Citation : (2001) 1 RLW 335 : (2001) 1 WLC 64 : (2001) 2 WLN 71

Hon'ble Judges : A.R. Lakshmanan, C.J.;Rajesh Balia, J

Bench : Division Bench

Advocate : M.S. Singhvi, for the Appellant; Rajendra Vyas, Additional G.A., for the Respondent

Judgement

Lakshmanan, CJ.

1. Heard both the sides.

(2). This appeal is directed against the judgment dated 4th November, 1997 delivered by the learned Single Judge of this Court in S.B. Civil Writ Petition No. 4028 of 1995. The appellant, wife of the deceased land-owner, filed the writ petition claiming compensation for the land measuring 5 bighas 10 biswas which has been utilised by the State of Rajasthan for construction of the road.

(3). The short facts of the case are as follows:

The appellant's husband purchased land measuring 21 bighas and 17 biswas falling in Khasra No. 57 of Village Chopasani District Jodhpur (Annex. 1). After purchase of the land in question the mutation was entered in the name of the husband of the appellant. In the year 1977-78 during the famine operations the respondents constructed a road through the land of the appellant in which the land to the extent of 5 bighas and 10 biswas was covered by the road. After construction of the road the mutation in the record was made in the name of he

Public Works Department to the extent of 5 bighas and 10 biswas (Annex.2). Thus, the land stood in the name of the appellant's husband was reduced to that of 16 biswas and 7 biswas (Annex.3). The husband of the appellant died in the year 1982. Though the respondents have constructed the road through the land in question taking away 5 bighas and 10 biswas of land, neither the land acquisition proceedings were initiated nor any compensation was determined and paid to the husband of the appellant. Along with the appellant the land of the other persons was also taken away in the process of construction of the road. All these persons approached the respondents for determination of payment of compensation. They also sent notice for demand of justice. But there was no response. Respondents proposed to construct Jodhpur Bye-pass and this bye-pass was also to be constructed covering the road which was already constructed in the year 1977-78. A Notification u/S. 4 of the Land Acquisition Act, 1894 (hereinafter to be referred as the Act) was issued by the respondent No. 1 under Annex.5. This notification did not include the land of the appellant. However, another notification was issued u/S.6 read with Sec. 17 sub- clause 4 of the Act which included the land of the appellant to the extent of 6 bighas and 15 biswas (Annex.6). The appellant submitted objection to the respondent No.4 on 6.5.91 (Annex.7). On the objection of the appellant the proposed compensation of the land was determined and paid to the appellant in the year 1992. Although the compensation for additional land acquired by these notifications was paid to the appellant but no compensation for the land taken in the year 1977-78 had been paid to the appellant so far. The appellant made a representation to the Governor of Rajasthan and also to the Minister for Public Works Department. It was accepted by the respondents No.2 to 4 that road was constructed on the land of the appellant but since it was done under the famine operations, therefore, no compensation was paid. The appellant sent notice for demand of justice to the respondent through her counsel on 2.10.95. Thereafter, the writ petition was filed by the appellant directing the respondents to acquire the land measuring 5 bighas 10 biswas of the appellant used for construction of the road in the year 1977-78 in accordance with the provisions of the Act and further be directed to determine and pay the compensation thereunder to the appellant and also direct the respondent to pay special damages etc.

(4). In the writ petition show cause notices were issued to the respondents on 8.12.95 but no reply was filed.

(5). On 17.10.97, the learned Single Judge called upon the appellant to explain the delay in filing the writ petition. Explanation to the delay was also submitted on 4.11.97. Further it was submitted that the writ petition was disposed of without taking written reply from the respondents. No opportunity to meet the verbal allegations of the respondents was given to the appellant and the learned Judge had dismissed the writ petition by his judgment dated 4.11.97. Aggrieved by the said judgment, the appellant has preferred this appeal.

(6). During the pendency of the appeal a reply to the writ petition was filed on

behalf of the respondents on 23.3.99. In para 3 of the said reply it is stated as under:-

"That the contents of para No.3 of the writ petition are admitted to the extent that during famine operations in the year 1977-78 the answering respondents constructed a road and a part of the land belonging to Late husband of the petitioner was also covered for the purpose of road. However, it will be pertinent to mention here that the land as referred in this para was agreed to be utilized by the respondents by way of mutual consent and Late husband of the petitioner never raised any objection at the time of construction of the road nor subsequently during his life time that land has been utilized for the purpose of road without his consent. Thus for all purposes it shall be deemed that part of the land belonging to Late Shri Madan Pal Singh was utilized by mutual consent".

(7). It is further submitted that the appellant-petitioner who had only stepped into the shoes of her Late husband has no right to question the same after a lapse of about 18 years i.e. in the year 1995 by way of filing the present writ petition. It is stated in para 6 of the reply that there was no necessity to initiate the said land acquisition proceedings because the entire process of constructing the road was completed by mutual consent of the parties. In the year 1970-71 the Relief Department issued a circular with regard to the acquisition of land for relief works. In this circular it is provided that whatever land is required for the purpose of relief works, the same be obtained without payment of any cost by mutual consent. It was provided that the normal procedure for payment of compensation will not be applicable in respect of relief works. A decision was also taken by the government in regard to payment of compensation. When some dispute arose, it was made clear that there is no budgetary provisions in the Relief Department nor any such compensation has ever been paid by the Relief Department and, therefore, no compensation can be paid by the Relief Department. The appellant's husband has not raised any objection as per circular Ex.R1 and no objection was raised by him at the time of construction of the road nor at a subsequent stage during his lifetime and therefore, writ petition is an afterthought.

(8). Rejoinder to the reply was filed by the appellant on 8.4.99.

(9). A reply to the rejoinder was also filed on behalf of the respondents on 15.3.2000.

(10). Mr. M.S. Singvi, learned counsel appearing for the appellant submitted that the learned Single Judge has committed error in dismissing the writ petition on the ground of delay and that the writ petition was dismissed without taking a reply from the respondents. Shri Singhvi further submitted that the learned single Judge has committed serious error in holding that there were three co-sharers of the land and two did not object to the construction of the road. In this regard, it is submitted that this finding is erroneous and is not based on any materials and that the land in question was exclusively in the Khatedari of the

appellant's husband and there was no other co- sharer in the land. In support of his contention Mr. Singhvi invited our attention to Annex.3 appended to the writ petition. That being so, there was no question of no objection being made by two other co-khatedars. It is submitted that in the absence of any consent being given in writing by the appellant's husband, to acquire the land or used the land for construction of the road, the respondents cannot now deprive the appellant of her right to claim compensation for the property when the appellant's right to property was guaranteed by Article 19(1)(f) of Constitution of India. Mr. Singhvi has submitted that even after deletion of Article 19(1)(f) by the 44th Amendment with effect from 20.6.1979, right to property has been maintained as constitutional right under Article 300A of the Constitution of India. Unless there is anything in writing by the husband or the appellant for giving the land in question free of cost to the State Government, the presumption would be against the State Government and not against the appellant and however, the learned single Judge has proceeded other way round and he has denied the relief to the appellant.

(11). Mr. Rajendra Vyas, learned Additional Advocate General, in reply, has submitted that since the late husband of the appellant never raised any objection at the time of construction of the road nor subsequently during his lifetime, that land has been utilised for the purpose of construction of road without his consent. Thus, for all purposes it shall be deemed that part of the land belonging to late husband of the appellant was utilised by mutual consent. He has further submitted that there was no necessity to initiate the land acquisition proceedings because the entire process of constructing the road was completed by mutual consent of the parties and therefore, normal procedure for payment of compensation will not be applicable in respect of relief works. He has further submitted that there is also no budgetary provisions in the Relief Department nor any such compensation has ever been paid by the Relief Department to any one and, therefore, no compensation can be paid by the Department to the appellant.

(12). It is the case of the Department that since the land was required for relief works, and that the husband of the appellant has never raised any objection at the time of construction of the road, no compensation is payable to the appellant and that the writ petition filed after 18 years was liable to be dismissed on the question of delay and latches.

(13). In this background of the case we have to see whether any consent in writing was given by the appellant's husband or obtained by the department and that the department has proceeded with the construction of the road through the land in question taking away 5 bighas and 10 biswas of the land by mutual consent.

(14). In our opinion, the case of mutual consent put forward by the Department cannot be accepted as it is not based on any material records, it has been specifically denied by the appellant that her husband gave any consent in writing. No record was produced by the respondents in support of their allegation that

the husband of the appellant has consented to the construction of the road of the land in dispute. In our view, the appellant being a widow and an illiterate has been compelled to approach this court for compensation. The burden of proof in the said case is that of the State Government and that consent in writing was required to be produced. In order to deprive the appellant of her right to claim the compensation for the property there had been anything in writing. We are of the opinion that it cannot be presumed against the appellant that her husband did not take any objection to the construction of the road. The burden in the circumstances of the case is only on the Department. In our view, a citizen cannot be deprived of his property right without any authority of law. The right of property has to be maintained as constitutional right under the provisions of Constitution of India and unless there is anything in writing by the husband of the appellant for giving the land in question free of cost to the State Government for construction of the road, the presumption would be against the State and not against the appellant.

(15). It is submitted by Shri Rajendra Vyas that the writ petition was liable to be dismissed and was rightly dismissed so by the learned single Judge on the question of delay and laches. We are unable to agree with the said contention. It is true that the appellant has approached this court after a lapse of 18 years but that does not in our opinion disable the appellant from the claim of compensation for the land used by the department for the construction of the road. It is seen from the records that the appellant has been requesting the department demanding justice and there was no response either from the Governor or from the Minister concerned. We are also unable to agree with the submission made by the learned Additional Advocate General in regard to mutual consent given by the appellant's husband. If the case of respondents is accepted that the land was given by the late husband of the appellant by mutual consent, then there has to be some document to this effect. No such document is made available to the court obviously because no such consent was given by the late husband of the appellant. Further the mutation of the land in question was made in the name of State Government after construction of the road meaning thereby that at the time of construction of the road, the land stood in the name of the husband of the appellant. This fact itself shows that the land in question was never utilised by mutual consent. In our view, the respondents are under obligation to pay compensation. No law of land permits the State Government to utilise the land of a citizen without any compensation. Record produced by the appellant makes very clear that the land in question belonging to the husband of the appellant and the same was utilised by the respondents for construction of the road for which they are under obligation to pay compensation to her.

(16). The learned Additional Advocate General placed reliance on some of the documents/circulars issued by the State Government. We have perused these circulars. These circulars are issued by the Government in exercise of its administrative power. These documents in our opinion cannot over ride the provisions of the Act which obliges the State Government to pay compensation

for the land acquired. As already noticed right to property has been a fundamental right upto 19th June, 1979 as enshrined under Article 19(1)(f) which existed then. From 20th June, 79, the right of property has become constitutional right. Hence, the appellant could not be deprived of his land without payment of compensation.

(17). The Supreme Court in the decision of *M/s. Shiv Shankar Dal Mill etc. etc. vs. State of Haryana & ors. etc.* (1) decided on 9.11.79, held that "there is no period of limitation to refund the erroneous levy".

(18). In the said case the appellants had paid market fees at the increased rate of 3 per cent from the original 2 per cent under Haryana Act. The dealers challenged the levy as unconstitutional and the Supreme Court in a series of appeals ruled that excess of 1 per cent over the original rate of 2 per cent was ultra vires. This cast a consequential liability on the market committees to refund the illegal portion. However, the refund was not made. Writ petitioners who had, under mistake, paid larger sums which, after the decision of the Supreme Court holding the levy illegal, have become refundable, demanded direction to that effect to the market committees concerned. While considering the question regarding the period of limitation and whether the said period of limitation will apply for proceedings under Article 226, the Supreme Court held that "where public bodies under colour of public laws, recover people's money, later discovered to be an erroneous levies, the Dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies on the virtue of returning what was wrongly recovered to whom it belongs. Nor it is palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of "alternative remedy" since the root principle of law married to justice, is ubi jus ibi remedium". The Supreme Court ordered refund of the sums collected by various market committees within the specified time and disposed of the appeals on the lines indicated in the judgment.

(19). Learned Additional Advocate General in support of his contention has relied upon the judgment *State of Maharashtra vs. Digambar* (2) wherein it was held that "the writ petitioner-appellant is not entitled to the relief against anybody including the State since he is not justified in approaching this court without undue delay and that grant of relief otherwise would be unsustainable",

(20). In the above judgment the Supreme Court itself has said mat "the power of the High Court could be exercised under Article 226 of the Constitution, if it is discretionary, its exercise must be judicious and reasonable." The Court held that "the persons seeking relief against the State under Article 226 of the Constitution of India, be they citizens or otherwise, cannot get discretionary relief obtainable thereunder unless they fully satisfy the. High Court that the facts and circumstances of the case clearly justified the laches or undue delay on their part in approaching the court for grant of such discretionary relief".

(21). In the instant case as already discussed in paragraphs above, the appellant

while approaching this Court under Article 226 of the Constitution of India has explained the entire facts and circumstances of the case that as to why she filed this writ petition in this Court belatedly. In this appeal she has also clearly established that the case put forward by the respondents that construction on the road was made by mutual consent of the parties has not been established at all.

(22). Under these circumstances, we are of the opinion that the learned Single Judge who ought to have granted relief to the appellant and against the State has not considered the oilier aspects of the matter but considered only the laches and acquiescence. In the instant case the appellant has proved that she has been deprived of her legal right by the State. No documentary proof has been filed in support of the mutual consent. As pointed out the Supreme Court in Shiv Shanker Dal Mills case held that there is no law of limitation especially for public bodies on the virtue of returning what was wrongly recovered to whom it belongs. Likewise in the instant case, the appellant was deprived of her property right by not refunding the compensation from the State on the allegation that she is not entitled for compensation because the land was utilised by mutual consent which, in our opinion has not been proved at all.

(23). We are unable to give countenance on technical plea raised by the learned counsel for the respondents and, therefore, we have no hesitation in rejecting the same.

(24). For the foregoing decisions, we are of the opinion that the appellant is entitled to succeed in her writ petition as prayed for. The Government shall determine the compensation payable to the appellant for the land in question in accordance with the provisions of the Land Acquisition Act, 1894 within three months from the date of the receipt of the judgment and shall pay the same to the appellant. However, we order no costs.

Rajesh Balia, J.

(25). I am in entire agreement with the order proposed by My Lord the Chief Justice. However, I would like to add my opinion in brief.

(26). The petitioner-appellant has clearly stated in rejoinder to the reply to the writ petition as reply to the petition was also allowed to be filed in this appeal that the respondent State has not only acted arbitrarily in not paying even the compensation for land utilised by the State for its own purpose and deprived the petitioner of the same without authority of law, has also acted with discrimination. It was pointed out by the petitioner that the land of the petitioner admeasuring 5 bighas 10 biswas, out of his total holdings under Khasra No. 57, was utilised by the State during famine work in 1977-78, without resorting to acquisition proceedings and without payment of any compensation. Likewise, land falling in adjoining Khasra No. 58 and 59 were also utilised for construction of the road in 1977-78 during family relief work. In 1991, acquisition proceedings were initialed under Land Acquisition Act. In those proceedings, total 6 bighas 15 biswas land of Khasra No. 57 was included in the notification, which included

additional land admeasuring 3 bighas & 7 biswas. The petitioner was paid compensation under those proceedings only for additional land acquired viz., for 3 bighas and 7 biswas. In contrast, under the very same proceedings, Khatedars of Khasra No. 58 were paid compensation for 3 bighas and 1 biswa of land already covered under road during famine operation in 1977-78. Khatedars of Khasra No. 57 were paid compensation for 4 bighas and 1 biswa of such land that has been covered under road in 1977-78 like the petitioner's land during the very same land acquisition proceedings under Notification dated 10.4.1991, whereas the notification was only for 2 bighas and 10 biswas of land from Khasra No. 59. Thus, Khatedars of Khasra No. 58 and 59 have been paid compensation in respect of land covered under road during famine operations in 1977-78, even by granting compensation to Khatedars of Khasra No. 59 in excess of land notified. This denial of just treatment even in 1991 to the petitioner under land acquisition proceedings of 1991, while similar wrong has been remedied under the same Notification in connection with the lands held by Khatedars of Khasra No. 58 and 59, who were similarly situated, is a case of hostile discrimination.

(27). There facts are not denied by the respondents. However, it has now been stated by the learned Additional Advocate General that such payments have been wrongly paid to Khatedars of Khasras No. 58 and 59 and efforts are being made to recover the same.

(28). We are not impressed with this contention of the respondents. Firstly it is not in dispute that compensation has been paid to Khatedars of Khasra No. 58 and 59 in respect of land covered under road in 1977-78 alongwith petitioner's land in question, while the petitioner was not paid such compensation alongwith these khatedars under acquisition proceedings of 1991. This is a case of irrational classification resulting in hostile discrimination. Secondly merely because compensation has been paid belatedly in respect of land of a citizen utilised by the State of its own purposes some time in past does not make such payment to wrongful, Even under Limitation Act, a remedy may be barred if action is not taken within time but, the right is not destroyed. An amount received by a creditor without specific instructions can be lawfully adjusted against a time barred debt without incurring any liability to refund. So also a man whose suit for possession has become barred by time if for any reason comes back to his possession, can successfully defend the same on the basis of his title, he cannot be dispossessed merely because sometime before securing possession, for him the suit for recovery and possession had become barred by time and he has lost his remedy to recover the possession by filing a suit. It is not a case of perpetuating an illegality, by granting similar treatment as has been granted to others. An action which is contrary to law may not give a cause to perpetuate the same under cover of irrational classification but where there is no breach of law in treating two persons similarly situated in similar manner, such similar treatment cannot be denied. I am therefore, of the opinion that the petitioner is entitled to the relief on this ground also.

BY THE COURT:

For the foregoing decisions, we are of the opinion that the appellant is entitled to succeed in the writ petition as prayed for. The Government shall determine the compensation payable to the appellant for the land in question in accordance with the provisions of the Land Acquisition Act, 1894 within three months from the date of the receipt of the judgment and shall pay the same of the appellant. However, we order no costs.