

(2011) 11 BOM CK 0132

In the Bombay High Court

Case No : Civil Application (Review) No. 14 of 2011 in Writ Petition No. 639 of 2010

Smt. Maria Wolfango D'Silva Since deceased through her L/ R. Shri Antonio S.C. Pereira APPELLANT

Vs

Shri Datta Lamgaonkar and Others RESPONDENT

Date of Decision : 24-11-2011

Acts Referred:

Citation : (2011) 11 BOM CK 0132

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

Bench : Single Bench

Advocate : S.G. Bhobe, for the Appellant; A. A. Agni, Advocate for respondent No. 1. Mr. V. Rodrigues, Additional Government Advocate for respondent nos. 2 to 4., for the Respondent

Judgement

A.P. Lavande, J.—Heard Mr. Bhobe, learned Counsel for the applicants, Mrs. Agni, learned Counsel for respondent No. 1 and Mr. Rodrigues, learned Additional Government Advocate for respondent nos. 2 to 4.

2. Rule. By consent of the learned Counsel for the parties, heard forthwith.

3. By these applications, the applicants, who are petitioners in Writ Petition nos. 638/2010, 639/2010 and 665/2010 seek review of the common judgment and order dated 7th June, 2011 passed in the said writ petitions by which the common judgment and order dated 19th November, 2009 passed by the Administrative Tribunal dismissing the Revision Application nos. 11/2003, 12/2003 and 13/2003 was quashed and set aside and the matters were remanded and the Tribunal was directed to decide the revision applications on merits in the light of the observations made in the order.

4. In the writ petitions, the judgment and order dated 19th November, 2009 passed in three review applications, was challenged. By the said judgment and order, the Tribunal had dismissed three revision applications filed by the

petitioners challenging the orders passed by the Deputy Collector and SDO, Bicholim in Mundkar Appeals. The Tribunal upheld the findings of the both the authorities below that the applications filed by the petitioners before the Mamlatdar were barred by limitation and that the applications were filed in breach of Rule 14(5) of the Rules framed under the Mundkar Act. The Tribunal in the impugned order had held that the properties in respect of which the petitioners claimed mundkarship were non-evacuee properties.

5. It was the case of the petitioners that this finding of the Tribunal that the properties were non-evacuee properties, was not based on any material on record and in the course of the hearing, it was noticed that before the Tribunal three notifications dated 3rd June, 1965, 8th July, 1965 and 5th August, 1965 were produced by the applicants herein and notice of the same was not given to respondent No. 1 herein. Therefore, this Court by the judgment and order dated 7th June, 2011 allowed all these three writ petitions and directed the Tribunal to decide the review applications afresh on their own merits in the light of the observations made in the said order.

6. Mr. Bhohe, learned Counsel for the applicants in support of the review applications made the following

submissions :

(i) Respondent No. 1 had not specifically taken the ground in the writ petitions that the properties in which they were residing were non-evacuee properties and as such, this Court ought not to have set aside the order and directed the Tribunal to decide the revision applications afresh.

(ii) This Court ought to have dealt with the issue of limitation upon which three Tribunals below had given concurrent finding that the applications filed by respondent No. 1 were barred by limitation.

(iii) The impugned judgment and order is contrary to the judgment of the Apex Court in the case of Anil Rai Vs. State of Bihar, (2001) 7 SCC 318.

(iv) In any case the order passed by the Tribunal, which was challenged in Writ Petition No. 665/2010 by the legal representatives of Mariano Fernandes could not have been set aside inasmuch as the Tribunal had not specifically relied upon the three notifications, but had relied upon the affidavit filed by Mariano Fernandes stating therein that the property in respect of which he claimed mundkarship was non-evacuee property. Moreover, no such argument appears to have advanced before this Court.

7. Mrs. Agni, learned Counsel appearing for respondent No. 1 submitted that insofar as Writ Petition nos. 638/2010 and 639/2010 are concerned, there was a clear finding recorded by this Court that the property was evacuee property and as such, this Court was perfectly justified in remanding the matter to the Tribunal since the Tribunal appears to have relied upon above referred three notifications and held that the property was non-evacuee property, without giving any

opportunity to make submissions on the said notifications. Insofar as the issue of limitation is concerned, Mrs. Agni submitted that since the matters were remanded to the Tribunal to decide the issue as to whether the properties were evacuee properties or non-evacuee properties, after giving opportunity of being heard to the petitioners in respect of the three notifications which were placed on record, no fault could be found with the judgment and order passed by this Court. Learned Counsel further submitted that the matter having been remanded by this Court, this Court was not bound to deal with the issue of limitation raised in the petition since the issue as to whether the property was evacuee property or not was going to the root of the matter. Insofar as the delivery of judgment by this Court after three months is concerned, Mrs. Agni, submitted that this cannot be a ground for review. Even in terms of the judgment in the case of Anil Rai (supra) delivery of judgment after three months only gives an opportunity to the party to make an appropriate application before the learned Chief Justice to place the matter for fresh hearing and, therefore, no review can be sought on this ground. Insofar as the writ petition filed by Mariano Fernandes is concerned, Mrs. Agni submitted that as to whether the property in respect of which he claimed mundkarship was evacuee property or not, was also the issue and as such no fault can be found with the order passed by this Court and as such, no review deserves to be granted even in respect of the order passed in Writ Petition No. 665/2010.

8. Mr. Rodrigues, learned Additional Government Advocate for respondent nos. 2 to 4 submitted that there is absolutely no case made out for grant of review insofar as Writ Petition nos. 638/2010 and 639/2010 are concerned and at the most the applicant in Writ Petition No. 665/2010 has made out the case for grant of review.

9. I have carefully considered the rival submissions, perused the record and the judgment relief upon.

10. Insofar as the first submission made by Mr. Bhohe that the petitioners in Writ Petition nos. 638/2010 and 639/2010 had not specifically taken a ground that the finding recorded by the Tribunal that the property was non-evacuee property is concerned, I do not find any merit inasmuch as the said petitioners had taken a ground in the petitions that the property was held to be evacuee property by this Court. Moreover, both parties were extensively heard on this aspect and as such, after advancing elaborate arguments on the said issue it is not open for the applicants now to contend in review applications that such a ground was not taken in the writ petitions. It is pertinent to note that to test the argument advanced on behalf of the petitioners that the finding given by the Administrative Tribunal that the said properties were non-evacuee properties, records were called and it was noticed that the three notifications were placed on record by the applicants herein and no notice of the same was given to respondent No. 1 in all the three applications. Therefore, the finding given by this Court insofar as the two Writ Petition nos. 638/2010 and 639/2010 are concerned that the Tribunal

could not have given a finding that the properties were non-evacuee properties without giving opportunity of being heard to respondent No. 1 in respect of the three notifications, cannot be said to be an error apparent on the face of record.

11. Insofar as the issue regarding the limitation is concerned since this Court was inclined to remand the matters on the issue as to whether the property was evacuee property or non-evacuee property, it was not necessary for this Court to decide this issue and thereafter to remand the matters. Moreover all the contentions of the parties were also kept open before the Administrative Tribunal as is evident from paragraph nos. 13 and 14 of the order which is sought to be reviewed.

12. Insofar as the submission regarding delivery of judgment after three months is concerned, the judgment in the case of Anil Rai (*supra*) only gives an opportunity to the party to move the learned Chief justice with a prayer for early judgment in the event the judgment is not delivered within three months. Obviously, therefore, this cannot be the ground for review.

13. Coming to Writ Petition No. 665/2010, perusal of the order passed by the Tribunal discloses that the Tribunal had relied upon the affidavit filed by the Mariano Fernandes in the High Court stating that the property "BOROD MOLIO" in which house was situated was declared non-evacuee property by the Custodian of Evacuee Property by order dated 14th November, 1967. The Tribunal also made reference to the judgment dated 7th March, 1995 in Writ Petition No. 467/1994 in which it was recorded that the applicant Mariano Fernandes had indeed filed certified copy of the judgment and order dated 14th November, 1967 of the Custodian of Evacuee Property wherefrom it was seen that the property given to chapel for maintenance was held to be non-evacuee property. This being the position, I find merit in the submission of Mr. Bhobe that even if the remand in other two writ petitions is held to be justified, W.P. No. 665/2010 could not have been remanded to the Tribunal to decide the issue as to whether the property in which the respondent claimed to be mundkar was evacuee property or non-evacuee property. This discloses an error apparent on the face of record and, therefore, the judgment and order dated 7th June, 2011 passed by this Court in Writ Petition No. 665/2010 deserves to be recalled. The order is liable to be set aside insofar as Writ Petition No. 665/2010 is concerned. The judgment and order in respect of the other two writ petitions is liable to be maintained. The net result would be that Writ Petition No. 665/2010 will have to be placed for admission before the appropriate Bench.

14. For the reasons aforesaid, Civil Application (Review) nos. 14 /2011, 15/2011 are dismissed. Civil Application (Review) No. 16/2011 is allowed. Writ Petition No. 665/2010 be placed before the appropriate Bench.

15. It is made clear that insofar as Revision Application nos. 11/2003 and 12/2003 pending before the Administrative Tribunal are concerned, all the contentions of the rival parties are kept open and the Tribunal shall dispose of

the revision applications in the light of the observations made in the judgment dated 7th June, 2011 expeditiously and in any case on or before 31st March, 2012.

16. The applications stand disposed of.