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Court : Madhya Pradesh

Decided On : Dec-16-2014

Judge : S.K. Gangele & Sheel Nagu

Appeal No. : Review Petition No. 390 of 2014

Appellant : Kalpana Shivhare and Another

Respondent : State of M.P. and Others

Judgement :

S.K. Gangele, J.

1. Petitioners have filed this review petition for review of the order dated 19/3/2013 passed by this Court in Writ Petition No.1635/2013.

2. This Court disposed of the aforesaid writ petition with the following observations :

"It is observed by the Commissioner in the order under challenge (Annexure P/1) that the Gwalior Development Authority published a lay out plan/scheme in regard to development of the area. Gazette notification was also published and in accordance with the aforesaid scheme, the land is reserved for construction of road. The petitioners had purchased the land as agriculture land after the notification of the scheme and thereafter petitioners encroached over the area, which is reserved for construction of road. On the basis of the aforesaid finding, the representation of the petitioners has been rejected vide impugned order.

Learned senior counsel appearing on behalf of the petitioners contended that the scheme published by the Gwalior Development Authority was lapsed after a period of three years in accordance with the provisions of Section 54 of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973. Learned Senior Counsel further contended that the petitioners are owners of the land because they purchased the land from valid owner. Hence, the Municipal Corporation has no right to remove or disturb the possession of the petitioners over the land.

In the present case, the Commissioner, Municipal Corporation considered the representation of the petitioners and rejected the same after observing that in accordance with the scheme the land is reserved for construction of road. Scheme is statutory one. In our opinion, in the present petition there is a dispute in which question of facts is involved for determination to the effect that whether petitioners tried to make construction over the land, which is reserved for road in accordance with lay out plan. The aforesaid question could not be decided in the writ petition. It can be decided effectively in a civil suit. Hence, the petition at this stage can not be entertained. The petitioners are at liberty to file appropriate proceedings including the civil suit in accordance with law.

With the aforesaid observations, Writ Petition is disposed of. No order as to costs."

3. Four persons namely Shrimati Bhagwati, Shrimati Bekunti, Shrimati Triveni and Shrimati Shakuntala filed a writ petition before this Court which was registered as Misc.Petition No.1561/1993. They pleaded in the said petition that they are the owners of the land bearing survey numbers 697/1, 697/2 and 697/3 situated at village Mahalgaon, Tahsil and District Gwalior and they acquired Bhumiswami rights. This Court vide order dated 8/12/1993 declared that the petitioners acquired Bhumiswami rights by operation of law in accordance with the provisions of MP Land Revenue Code, 1959. The Division Bench passed the following order :

"Heard Shri Agrawal, for the petitioners.

G. A. for the State.

A show cause notice was issued and despite service no reply so far has been filed.

The petitioners pray for issuance of a Writ of Mandamus and Certiorari. The dispute relates to land bearing Survey numbers 697/1, 697/2 and 697/3 situated in village Mahalgaon Tahsil and District Gwalior.

Petitioners are in possession of the land in question. Indisputably name of Dhundsingh, the predecessor-in-title and elder brother of respective husband of petitioners 1, 2 and 3, was in cultivating possession of the land in question whose name also stands recorded as 'Mamuli- Maurusi' for Samvat year 2007 as per Anx.P.I. There is no denying fact that petitioners are in settled possession of the land in question and by operation of law they have acquired Bhumiswami rights.

While filing no reply, learned G.A. contended that it is a title dispute, which stands negated by the documents placed on record, the Revenue Entries Anx. P.1 and P.4 to P.15. Dhundsingh, the predecessor-in-title, having recorded a 'Mamuli Maurusi' for Sam. Year 2007 was a PAKKA tenant, as defined u/s 54 (vii) of the M. P. Land Revenue and Tenancy Act, 1950 and on coming into force of M. P. land Revenue Code, the BHUMISWAMI rights have been acquired by operation of law.

Rule issued on 20.11.93 is made absolute.

The petition stands finally disposed."

4. Subsequently, Shrikrishna Grah Nirman Sahakari Sanstha became owner of the land comprising survey No.697/2 of the same land and the review petitioners (hereinafter referred to as the "petitioners") purchased a part of the land of survey no.697/2 admeasuring 21,389 sq.ft. vide registered sale deed dated 28/6/2003. Their names were mutated in the revenue record and entry was made in the khasra to this effect in the years 2003-04 onwards. The petitioners applied for diversion of the land. The Sub Divisional Officer vide order dated 18/3/2005 ordered diversion of the land in favour of the petitioners. The petitioners were permitted to change the land use from agriculture to commercial. Petitioners applied for Nazul NOC and that was also granted to them on 24/10/2005.

5. As per the petitioners, on 24/6/2012 officers of the Municipal Corporation, Gwalior came on the spot and demolished the boundary wall erected by the petitioners surrounding the plot and they informed the petitioners that they want to construct a bituminous road on some portion of the land. Thereafter, the petitioners filed writ petitions before this Court which were registered as WP 4419/2012 and WP 4496/2012. In Writ Petition No.4419/2012, Gwalior Development Authority (for brevity "GDA") [respondent No.5 therein] filed return. GDA pleaded in the return that the Town and Country Planning Department notified "Brahhatar City Centre Project" in the Official Gazette on 16/8/1985. In the aforesaid project, land of survey number 697/2 situated at village Mahalgaon, Tahsil and District Gwalior was included. The project was for development of the city. In the layout plan of 1990, certain land was earmarked as public road. Copy of the map was filed along with the reply. The Town and Country Planning Department approved the plan vide memo No.2512 dated 14/8/1990 and there was a road of nine meter width. The GDA further pleaded that the land which was earmarked for the road could not be sold to the petitioners. It was also pleaded by the GDA in para 5.7A of the return that the GDA had not acquired the land in question, but it was included in the Official Gazette

under Section 50(7) of the Adhiniyam of 1973 and the GDA has no concern with the land in question. The petitioners had no right on the land in question.

6. Municipal Corporation, Gwalior, (respondent No.4 in WP 4419/2012) in reply to the aforesaid writ petition, pleaded that a complaint was made to the District Administration and on the directions of the District Administration, joint survey of the land was made by the Municipal Corporation and the GDA and it was found that the property was situated in Phase -III, City Centre which was developed by the GDA and it was not handed over to the Municipal Corporation, Gwalior. However, being public body, it was the duty of the Municipal Corporation to remove obstruction from the road because the petitioners had made encroachment on the road. Hence, obstruction and encroachment of the petitioners were removed. It was done on 9/6/2012.

7. Division Bench of this Court after considering the submissions of the petitioners and reply filed by the respondents Municipal Corporation and GDA disposed of Writ Petitions No.4496/2012 and 4419/2012, vide order dated 3/1/2013 with the following directions :

"The petitioners filed a copy of the order, which was passed in M.P.No. 1561 of 1993. The aforesaid petition was disposed of with the following observations:-

"While filing no reply, learned G.A. contended that it is a title dispute, which stands negated by the documents placed on record, the Revenue Entries Anx.P.1 and P.4 to P.15. Dhund Singh, the predecessor-in-title, having recorded as 'Mamuli Maurusi' for Sam. Year 2007 was a PAKKA tenant, as defined u/s 54 (vii) of the M.P. Land Revenue and Tenancy Act, 1950 and on coming into force of M.P. Land Revenue Code, the BHUMISWAMI rights have been acquired by the operation of law.

Rule issued on 20.11.93 is made absolute."

Admittedly, the Municipal Corporation or Gwalior Development Authority has not decided the question of ownership of the land. It is also a fact that without permission from the Municipal Corporation or Town and Country Planning, the petitioners could not make any construction over the land, even if it be assumed that they are the owners of the land.

In this view of the matter, both the petitions are disposed of with the following directions:-

(a) That, the respondent - Municipal Corporation or Gwalior Development Authority shall decide the question of ownership and other legal issues about the land in dispute after giving opportunity of hearing to the petitioners and the petitioners are at liberty to place all the materials before the authorities in this regard.

(b) That, if any adverse order be passed against the petitioners, then the adverse order be kept in abeyance for a period of two weeks and the same be communicated to the petitioners by a registered post, so the petitioners can file appropriate proceedings for assertion of their rights, if they think it proper, or the authorities are at liberty to take appropriate action in accordance with law.

(c) Upto the aforesaid period, both the parties are restrained to make any construction over the land in dispute.

No order as to costs."

8. In pursuance to the directions issued by this Court, the Commissioner, Municipal Corporation, Gwalior vide order dated 28/2/2013 decided the representation of the petitioners. The Commissioner held that in pursuance to the order passed by this Court in Misc. Petition No.1561/1993, Bhagwati Bai and others acquired Bhumiswami rights in the land. The GDA developed the City Centre and as per the map approved by the Town and Country Planning Department in the year 1997, there was a road. The petitioners could not purchase the land which was shown in the layout plan as road, hence, upto that extent, sale deed executed in favour of the petitioners by the Cooperative Society was void.

9. Petitioners challenged the aforesaid order passed by the Commissioner, Municipal Corporation by filing a writ petition, viz WP 1635/2013. They had taken a ground in the writ petition that they were the owners of the land because they purchased the land from the earlier owners and the land was not acquired by the GDA nor after development of the scheme the area was handed over to the Municipal Corporation. Hence, the Municipal Corporation had no power and authority to construct a road on the land of the petitioners and the petitioners could not be treated as encroachers. The petitioners further pleaded that in view of Section 54 of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973, the scheme lapsed after expiry of two years or five years because the possession of the land was not taken by the GDA from the petitioners or their predecessors-in-title and the land was also not acquired. Hence, right of ownership of the petitioners on the land remained intact. Petitioners prayed a relief that the respondents be directed not to interfere with the possession of the petitioners on the land admeasuring 21,389 sq.ft.

10. The said petition was opposed by the respondents. This Court disposed of the aforesaid writ petition dated 19/3/2013 which order is sought to be reviewed by the petitioners by filing the present review petition.

11. Against the order passed in WP 1635/2013, a Special Leave Petition was filed before the Supreme Court, which was registered as SLP (C) No.19822/2013. The Supreme Court issued notices and thereafter the SLP was disposed of vide order dated 10/10/2014 with the following observation :

"Learned senior counsel for the petitioners, on instructions, seeks permission of this Court to withdraw this petition with a liberty to file review petition before the High Court.

"Permission sought for is granted. The special leave petition is disposed of as withdrawn with liberty to the petitioner to file a review petition before the High Court.

If and when such a review petition is filed, the High Court will consider the same in accordance with law."

12. Learned Senior Advocate appearing on behalf of the petitioners has submitted that the petitioners had raised serious points in the writ petition that they are the owners of the land in question, their right of ownership remained intact throughout and the land in question was not acquired by GDA which is the admission of the GDA in the return. The City Centre Scheme was not handed over to the Municipal Corporation, hence, the Corporation had no power and authority to construct road. It has further been submitted by learned Senior Advocate that it is an undisputed fact that the petitioners are the owners of the land. Simply mentioning road on certain portion of the land of the petitioners would not extinguish right of the petitioners as owners of the land and these points have not been considered by this Court while passing the order under review. There is no question of filing any civil suit by the petitioners because right of ownership of the petitioners is undisputed. There are no disputed questions of fact involved for determination. This Court while passing the order has not considered the admissions made by the respondents in the reply in the earlier round of litigation, nor the question of law has been considered by this Court. Hence, the review petition is maintainable and it be allowed. It is an error apparent on the face of record. In support of his contentions, learned Senior Advocate relied upon the judgments in the cases of Live Oak Resort (P) Ltd Vs. Panchgani Hill Station Municipal Corporation, (2001) 8 SCC 329, S.R.Ejaz Vs. T.N.Handloom Weavers' Cooperative Society Ltd, (2002)3 SCC 137, Collector, District Gwalior Vs. Cine Exhibitors Pvt. Ltd., (2012) 4 SCC 441, Tukaram Kana Joshi Vs. Maharashtra Industrial Development Corporation, (2013) 1 SCC 353,

13. Replying to this, Shri Raghvendra Dixit, learned GA appearing on behalf of the respondents No. 1 to 3/ State has contended that the land was earmarked and notified in the approved layout plan which was approved by the Town and Country Planning Department as a road. It is a part and parcel of the road, hence, the petitioners have no right to create obstruction on the road. The GDA has not been made a party in the petition. It is a necessary party. There is no error apparent on the face of record. In support of the contentions learned GA relied upon the judgments of the Supreme Court in Dr.Subramanian Swamy Vs. State of Tamil Nadu, (2014) 5 SCC 75, Kamlesh Verma Vs. Mayawati, (2013) 8 SCC 320, Antonio SC Pereira Vs. Richardina

Noronha, (2006) 7 SCC 740, and of this Court in Maa Kaila Devi Enterprises Vs. State of MP, 2012 (4) MPHT 263 (DB) and Rajesh Kumar Gupta Vs. State of MP, [2013(2) MPLJ 707].

14. Shri Deepak Khot, learned counsel appearing on behalf of the respondent Municipal Corporation has contended that the Municipal Corporation on a complaint removed the encroachment and it constructed a road. It is earmarked as road in the layout plan. Petitioners cannot claim right of ownership on the portion of the land which is earmarked as road. There is no apparent error on the face of record, hence, the writ petition had rightly been dismissed.

15. Undisputed facts of the case are that in pursuance to the order passed by this Court in Misc.Petition No.1561/1993 Shrimati Bhagwatibai and others got Bhumiswami rights of the land belonging to Khasra Nos.697/2 situated at Mahalgaon, Tahsil and District Gwalior. Petitioners purchased a portion of the land of Khasra No.697/2 area 21,389 sq.ft. from the Cooperative Society. Thereafter, they got order of diversion of the land and NOC from the Nazul Department. They had been paying property tax. GDA with the approval of Town and Country Planning Department promulgated a scheme known as City Centre Project Phase-3. Approval was granted by the Authority in accordance with the provisions of MP Nagar Tatha Gram Nivesh Adhinyam and in the layout plan revised road of nine meter was mentioned. However, one fact is clear from the pleading of the GDA from their return (para 5.7A) filed in WP 4419/2012 by Shrimati Kalpana Shivhare and others is that the GDA did not acquire the land in question. Relevant pleadings in the return filed by the GDA in WP 4419/2012 are as under :

"5.7A. That, the contents of para 5.7A of the petition are highly misconceived, hence not admitted. Though G. D. A. has not acquired the land in question, but it is included in the official gazette U/s 50(7) of the Adhinyam 1973. Though the GDA has not concerned with the land in question, but from the averments taken by the Municipal Corporation, it appears that the land in question is the road as per layout plan, hence petitioners have no right to make encroachment over it. Apart from it, as on date when writ petition was filed, the petitioners were not in possession."

16. Municipal Corporation also pleaded in its return filed in WP 4419/2012 that City Centre Phase-3 developed by the GDA was not handed over to the Municipal Corporation. Relevant pleadings of the Municipal Corporation are as under :

"In view of the above facts and circumstances, it is most humbly and respectfully submitted that the facts mentioned in the memorandum of petition are incorrect, hence denied. The petitioners have not come before this Hon'ble Court with clean hands and have concealed the material facts and, therefore the petition of the petitioners deserves to be dismissed on this sole ground. It is most humbly submitted that the petitioners have come before this Hon'ble Court against the action of the respondents, whereby it has been alleged that the boundary wall of the plot of the petitioners has been demolished. However, it is humbly submitted that a complaint has been made to District Administration and upon the directions of District Administration, a joint survey by Gwalior Development Authority has been made as the property said to be of the petitioners is situated in City Centre, Phase-III, which has been developed by the Gwalior Development Authority and still it has not been handed over to the Municipal Corporation, Gwalior, however being public body having the power and authority under the provisions of Municipal Corporation Act, 1956 to remove obstruction from the road when the complaint has been made a joint survey by the officials of the Gwalior Development Authority has been ordered to be made and upon the survey having been made by the Gwalior Development Authority."

17. From the pleadings of the Municipal Corporation and the GDA quoted above, it is clear that the GDA did not acquire the land in question, although it was included in the development plan, which was approved under section 50(7) of the Adhinyam of 1973. The Municipal Corporation also pleaded that the GDA had not handed over the area to the Municipal Corporation. Prima facie it appears that there may be a proposed road shown in the approved map of the plan in the City Centre Development Scheme Phase-3 by GDA, but

ownership of the land was not transferred because the land was not acquired. These facts have not been considered by this Court while passing the order under review, nor this Court had considered the fact whether the development scheme was lapsed or not as pleaded by the petitioners in the writ petition in view of section 54 of the Adhinyam of 1973.

18. The Supreme Court in the case of Kamlesh Verma Vs. Mayawati and others,(2013)8 SCC 320, has considered maintainability of a review petition. It has held as under in regard to maintainability of a review petition :

"The principles relating to review jurisdiction may be summarised as follows :

When the review will be maintainable :

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram, (1921-22) 49 IA 144 and approved by this Court in Moran Mar Basselios Catholicos, AIR 1954 SC 526 to mean " a reason sufficient on grounds at least analogous to those specified in the rule"

19. In the present case, it is clear that the admissions made by the Municipal Corporation and GDA in the earlier round of litigation have not been considered. In the aforesaid admissions, the GDA had admitted the fact in its pleadings that it did not acquire the land. The Municipal Corporation also admitted the fact that the area was not handed over to the Corporation. In such circumstances, ownership of the petitioners on the land in question remains intact and that right can only be acquired by paying appropriate compensation after acquisition of the land in accordance with law.

20. Learned counsel appearing on behalf of respondent Municipal Corporation has contended that in accordance with section 5(49) of the Municipal Corporation Act, 1956 the Municipal Corporation has a right to maintain the street. However, aforesaid argument could not be accepted because in the map of the Scheme approved by Town and Country Planning Department a road was proposed. It means that the land for road could be acquired in accordance with law.

21. The Supreme Court in the case of Laxman Lal (Dead) through LRs. and another Vs. State of Rajasthan and Others, reported in (2013) 3 SCC 764 has held that right to property is a constitutional right under Article 300A of the Constitution of India and it cannot be taken away without due process of law. The Supreme Court has held as under :

"15. The statutory provisions of compulsory acquisition contained in the 1953 Act are not materially different from the 1894 Act. This Court has explained the doctrine of eminent domain in a series of cases. Eminent domain is the right or power of a sovereign State to appropriate the private property within the territorial sovereignty to public uses or purposes. It is an attribute of sovereignty and essential to the sovereign government. The power of eminent domain, being inherent in the Government, is exercisable in the public interest, general welfare and for public purpose. The sovereign is entitled to reassert its dominion over any portion of the soil of the State, including private property without its owner's consent provided that such assertion is on account of public exigency and for public good.

16. Article 300 of the Constitution mandates that:-

"300-A. Persons not to be deprived of property save by authority of law.-No person shall be deprived of his property save by authority of law."

Though the right to property is no longer a fundamental right but the constitutional protection continues inasmuch as without the authority of law, a person cannot be deprived of his property. Accordingly, if the State intends to appropriate the private property without the owners' consent by acting under the statutory provisions for compulsory acquisition, the procedure authorized by law has to be mandatorily and compulsorily followed. The power of urgency which takes away the right to file objections can only be exercised by the State Government for such public purpose of real urgency which cannot brook delay of few weeks or few months. This Court as early as in 1964 said that the right to file objections under Section 5-A is a substantial right when a person's property is being threatened with acquisition; such right cannot be taken away as if by a side wind (Nandeshwar Prasad v. State of UP AIR 1964 SC 1217)."

22. Further the Supreme Court in the case of N.Padmamma and Others Vs. S.Ramakrishna Reddy and Others reported in (2008) 15 SCC 517, held as under :-

"21. If a right of property is a human right as also a constitutional right, the same cannot be taken away except in accordance with law. Article 300-A of the Constitution protects such right. The provisions of the Act seeking to divest such right, keeping in view of the provisions of Article 300-A of the Constitution of India, must be strictly construed. [See Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai (2005) 7 SCC 627)]. The principle laid down in the said decision, having regard to the concept of Article 300-A of the Constitution of India may be held to have some application in a case of this nature."

23. It appears that without due process of law, the Municipal Corporation constructed the road. Plea of the petitioners that the Scheme was lapsed had also not been considered by this Court in the order under review. In this view of the matter, in our opinion, the review petition is maintainable. Controversy raised in Writ Petition No.1635/2013 requires adjudication.

24. Consequently, this review petition succeeds and is hereby allowed. Order dated 19/3/2013 passed by this Court in WP 1635/2013 is hereby recalled. Writ Petition No.1635/203 is restored to its original number. It be listed for hearing.

No order as to costs.

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