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Court : Rajasthan

Decided On : Sep-14-1993

Reported in : 1994(3)WLC569; 1993WLN(UC)359

Judge : Jasraj Chopra and; Rajesh Balia, JJ.

Appeal No. : D.B. Civil Writ Petition No. 1758 of 1991

Appellant : Aad Ram and anr.

Respondent : The State of Rajasthan and ors.

Advocate for Def. : Mr. S.N. Sharma

Disposition : Petition allowed

Judgement :

Rajesh Balia, J.

1. The petitioners are the Khatedars of lands in Square No. 54 and 55 and Killas No. 1, 2, 4, 9 and 10 in Square No. 61 of Chak 23-HMH, Tehsil-Hanumangarh. The Collector vide his Order dated November 17, 1971 (Annexure/1) sanctioned a way in favour of the petitioners through the land situated at Stone N. 100/291 parallel to canal for going to aabadi of Chak 23-22 HMH. In pursuance of the said Order the way was opened and mutation was made in the revenue-records. The land admeasuring 5 Bighas situated at No. 100/291 at Chak No. 23 HMH was

allotted to respondents No. 3 and 4 in December 1982.

2. On June 17, 1983 on behalf of respondents No. 3 and 4 an application was moved before the S.D.O. Hanumangarh alleging that the present petitioners, by securing cancellation of already existing way have got a new way sanctioned in their favour through their land and has opened its way on June 12, 1983. They prayed that the newly opened way be closed.

3. In reply to the said application it was stated that the petitioners had got the way opened through the land in dispute long ago vide Order dated November 17, 1971 passed by the Collector, Sri-Ganganagar, who was competent authority in this regard and the way is in existence since then. After obtaining the allotment of land, through which the way existed in his favour, the applicants-respondents No. 3 and 4 had cultivated the same partly blocking the way, therefore, on June 12, 1983, the blocked way was got opened. The petitioners also raised objection about the validity of allotment of the land to respondents No. 3 and 4 with which we are not presently concerned.

4. The S.D.O. by his Order dated September 17, 1983 held that the disputed way was sanctioned in the year 1971 and exists on the site whereas the applicants respondents No. 3 and 4 were allotted the land in question in December 1982 and thereafter, the applicant's have closed the way. On June 12, 1983, the already sanctioned way was reopened. In view of these findings, the application of the respondents No. 3 and 4 was rejected vide Order dated September 17, 1983 (Annexure/6).

5. The appeal against the Order dated September 17, 1983 (Annexure/6) was rejected by the Revenue Appellate Authority, Bikaner vide its Order dated March 24, 1984 (Annexure/7).

6 On further Revision by the respondents No. 3 and 4 before the Board of Revenue, the Board set aside the Orders dated September, 17, 1983 and March 24, 1984 (Annexures 6 and 7 respectively) and allowed the revision by holding that the object of the Colony Rules is to make the fields 'square' and it is contrary to the object of the Colony Rules to divide the land by providing way through it. It was

also held that the Order dated September 17, 1971 sanctioning the way through the field in dispute is not binding on the respondents No. 3 and 4. It also presumed that from the fact that the land in dispute, through which the way existed, was allotted to the applicants-respondents, therefore, the said way must have been declared as [^]xSj eqedhu[^] and only thereafter, the same may have been allotted. However, it did not pass any order about allowing the application or how to proceed with the application.

7. Aggrieved with the aforesaid Order of the Board dated March 21, 1991 (Annexure/8), the petitioners have approached this Court under Article 226 of the Constitution of India.

8. So far as the basic facts are concerned, it is undisputed that the way was sanctioned in favour of the petitioners on November, 17, 1971 by the Collector, Sri-Ganganagar, and the land in dispute, through which the said sanctioned way was allowed to pass was allotted in favour of respondents No. 3 and 4 in December, 1982.

9. On the premises of these two basic facts, it was contended by the learned Counsel for the petitioners that Board has committed an error apparent on the face of record by ignoring the fact that since there is no dispute that the way in favour of the petitioners was sanctioned through the disputed land much before the land was allotted to the respondents No. 3 and 4, whatever rights they got in the land were subject to encumbrances already existing. It was also contended that the Order dated November 17, 1971 which was passed by the competent authority was never challenged before any authority and the Order is still subsisting and unless that Order is set aside and the sanctioned way is cancelled, the right of way which accrued to the petitioners under the Order cannot be affected.

10. Contesting the petition Mr. S.N. Sharma, learned Counsel for the respondents No. 3 and 4 in the first place raised a preliminary objection that the petitioners are guilty of suppression vari inasmuch as they obtained the Order dated November 17, 1971 (Annexure/1) from the Collector by concealing the material fact that an application for sanctioning the very same way by the petitioners was rejected by S.D.O. on June 28, 1971. The S.D.O. having already rejected the petitioner's

application for sanctioning a way through the disputed land on June 28, 1971, the Collector had no jurisdiction to sanction the way by the Order dated November, 17, 1971 (Annexure/1). The order was obtained by concealing the facts about earlier rejection of application on June 28, 1971. In this connection it was also argued that SDO was authorised to exercise the powers of Collector under Condition 8 (2) of the Rajasthan Colonisation (General Colony) Conditions, 1955 (hereinafter to be referred as 'the Condition'). The power to sanction way in favour of any person through or across the land came to be vested exclusively in SDO, through delegation and Collector was left with no jurisdiction or authority to sanction the way under law. Therefore, the Order dated November 17, 1971 (Annexure/1) which having been passed by the Collector, Sri Ganganagar who lacked inherent jurisdiction to pass such order, is void ab-initio. Such Order did not confer any right on the petitioners and deserves to be ignored.

11. Lastly, it was also contended that while right of way through the land in which mineral rights were granted were protected under Condition-7(3) of the Conditions 1955, no such right of way was protected in respect of grant of tenancy right under Condition-8(2) of the Conditions 1955. Hence on grant of tenancy rights or allotment of land in favour of respondents, the right of way through such allotted land automatically came to an end on vesting of such, right in allottee.

12. We have carefully considered the rival contentions and perused the record made available to us.

13. Coming to the preliminary objection raised on behalf of respondents No. 3 and 4, it may be stated at the out-set that no factual foundation exists for the assumption by the learned Counsel for the respondents that the petitioners had obtained Order Annexure/1 in their favour by concealing the order of the SDO dated June 28, 1971 rejecting their earlier application. From Annexure/1, it is apparent that on the application of the petitioner for sanctioning the way, the Tehsildar in his report recommending the way through the disputed land has clearly reported that the petitioners had earlier moved an application before the SDO which has been rejected and the record of proceedings before the SDO is also annexed for the perusal of the Collector. It is after the perusal of the record

and report submitted by the Tehsildar, the way was sanctioned by the Order dated November 17, 1971. In the fact of this the objection raised by the respondents if factually incorrect.

14. The preliminary objection has thus no force and is hereby over-ruled.

15. The contention on behalf of the respondents that the power of the Collector for sanctioning the way in terms of Condition-8(2) of the Conditions, 1955 vested is SDO and therefore, Collector had no jurisdiction to pass the Order dated November 17, 1971 (Annexure/1) both on the grounds because the SDO had already passed the Order and because the Collector had no jurisdiction otherwise after the power was delegated to the SDO in that regard, is also not well founded. In this connection, it may be noticed that the concerned SDO was authorised to exercise power of the Collector under Condition 8 (2) of the Conditions 1955, by Notification No. 3 (KH)(12)/RAJ/UP/73 dated November 8, 1973 published in Rajasthan Gazette dated November 15, 1973. Thus the SDO concerned of the area had no power to discharge the function of the Collector under Condition 8(2) prior to November 15, 1973. On June 28, 1971, the SDO had no jurisdiction to entertain and pass any Order for sanctioning or not sanctioning of way applied for through the disputed field. The Order at best can be said to be recommendatory in nature for competent authority to consider it when the matter ultimately reached him. Therefore, even on respondents own contention, if the SDO had no jurisdiction to pass an order under Condition 8 (2) on June 28, 1971, the said Order had to be ignored and making of such Order did not affect the jurisdiction of the Collector to make appropriate Order on November 17, 1971 on an application moved in this regard.

16. In this view of the matter, it can not be said that the Collector lacked jurisdiction to pass order dated November 17, 1971 Annexure/1). Therefore, the said Order cannot be ignored unless it is set aside or rescinded by the competent authority in appropriate proceedings in this regard.

17. Coming to the last contention, it would be appropriate to reproduce the Conditions 6, 7 and 8 of the Conditions 1955:

6. Selection of tenants.-(1) No person shall be entitled as of right to a grant or to become a tenant and the Government of Rajasthan hereby reserves to itself and retains absolute discretion in the selection of tenants for the land referred to in this statement.

(2) All grants, whether by way of Ghair-Khatedari tenancy or conferment of Khatedari rights or otherwise, shall be subject to the following exceptions and reservations and the Government hereby absolutely excepts and reserves to itself out of and In respect of the lands.

7. Mineral Rights. - (1) All existing rights to and over all mines and quarries in our under the said lands or any part thereof together with all easements therefore enjoyed by the Government In respect of the said lands or any part thereof, and no grant, unless it is otherwise specifically provided shall be Interpreted as creating or transferring any rights in minerals whatsoever, but such rights shall be deemed to have been expressly excepted and reserved to the Government with liberty to search for, work and remove any minerals existing on, over or below the land to which the grant relates, in as full and ample a way as if the grant had not been made; and for the full discovery; enjoyment and use of the rights in minerals so reserved, it shall be lawful for Government through its authorised agents or assigns or for any officer of the Government duly authorised in that behalf to enter upon the land and occupy It temporarily.

(2) Area excluded-All rivers and streams and canals, water courses and drainage channels, excavated or otherwise utilised therefore, together with their beds and banks and all grounds situated in the said lands or any part thereof as are or may be marked out as or for any distributory channel or channels.

(3) All public through fares existing on the land at the time when the grant is made together with any roads or paths, upto the width of 4 gathas which, though not yet made, have been marked out upon the ground or delincated in the plan or plans kept in the office of the Collector or the Colonisation Department.

8. Right to construct or alter a water-course-To create a right of way and construct village roads when the grant Is made for agricultural purposes, the Government

reserves and excepts to itself the following rights:

(1) The right to construct a water-course or alter an existing water--course, whenever this may be considered desirable by the Collector after consultation with the Divisional irrigation Officer.

(2) The right to create or reserve a right of way in favour of the Government or any person or persons or any class of persons or of the public generally, and the right to construct inter or intra village roads, through or across the said land or any part thereof and not over a strip exceeding at any point 4 gathas In width, as the Collector, may, from time to time, in public landholders of the Chak or village or for the protection and maintenance of any property or exercise of any right reserved to the Government, consider desirable and may by an order in writing, direct.

Provided that no compensation of any kind shall be claimable by the grantee or any other person in respect of any area acquired or reserved in exercise thereof but in respect of such area no water rate, soil advantage rate, betterment fee, land revenue taxes or casses shall be payable by the tenant.

18. On the anvil of aforesaid provisions, the counsel for the petitioners has urged that the petitioner's rights are saved by the specific provision of Condition-7(3), while it has been the contention of the learned Counsel for the respondents that the Condition 7(3) only relates to protection of rights concerning, the grant relating to mineral rights and no such reservation or exception in respect of right of way through the land under tenancy has been intended because no such provision like Condition 7(3) has been incorporated in Condition-8.

19. We are afraid, on a plain reading of the Conditions reproduced above, the contention of the learned Counsel for the respondents cannot be accepted. From the perusal of the aforesaid provisions, it is apparent that all grants by the State whether by way of 'Ghair-Khatedari' tenancy or by conferment of 'Khatedari' rights or otherwise, such grants are subjected to certain exceptions and reservations concerning certain rights existing or which may come into existence after the grant is made.

20. Condition - 6 declares that no person is entitled as of right to secure any grants or to become a tenant of the State in whom the land vests absolutely. Grant of tenancy right is in the discretion of the State.

21. Condition 7(1) envisages reservation of rights to and over all mines and quarries in or under the said lands or any part thereof together with all easement therefore enjoyed by the Government in respect of the said lands or any part thereof which have been made subject of grant. Likewise Condition 7(2) concerns saving of existing rights in all rivers streams and canals, water courses, drainage, channels together with their bedi and banks. Condition 7(3) protects all existing rights in respect of public through fares existing on the land at the time when the grant is made together with any roads or paths, to the extent prescribed have already existing on the land has been subjected to grant. That is to say, mineral rights, rights to water course in any form and the way existing in any form at the time of grant remain unaffected by the grant of tenancy rights over the land.

22. Condition 8 reserves the right of the State to create further right of constructing water course or altering existing water course and to sanction way on the land in respect of which tenancy rights of any type have been accrued.

23. Therefore Conditions 7 and 8 are operating in different fields. Condition 7 deals with saving rights as are existing at the time of grant. Condition 8 deals with creation of further encumbrances on the land after it has been subjected to grant by way of sanctioning water course or a way through it as the case may be.

24. Each sub-clause of Condition 7 is independent by itself and is not restricted to the lands covered by grant of minerals rights. It may also be noticed in this connection that grant of mineral rights is not the subject-matter with which Colonisation Act or Rules framed thereunder deals with. The mineral rights are granted under the provisions of Mines and Minerals (Regulations and Development), Act and Rules framed thereunder. Sub-condition (3) of Condition 7 is therefore, independent and clearly saves the rights of the petitioners in respect of way sanctioned vide Order dated November 17, 1971 (Annexure/1) which were already existing on the date when the allotment was made in favour of the respondents No. 3 and 4.

25. Moreover, it may be noticed that Board of Revenue has obviously gone beyond its jurisdiction in examining the validity of the Order dated November 17, 1971 which was not the subject-matter of revision. The subject-matter of revision was only whether the rights which had come into existence through the Order date November 17, 1971 (Annexure/1) remain protected after the grant was made in favour of respondents No. 3 and 4 of the land, through which they way was sanctioned by the said order was allotted to respondents No. 3 and 4. The only question germane before the Board of Revenue for consideration was as to what is the effect of grant in favour of respondents No. 3 and 4 in December 1982 over the rights which accrued the petitioners over the said land which undoubtedly was the Government land on November 17, 1971. Condition 7(3) referred above directed a clear answer that the latter allotment is subject to pre-existing through fare, roads or paths on the land. To say in other words rights of allottees or grantees under Colonisation Act and Rules made therein are subject to pre-existing right mentioned in Condition 7 and such pre-existing rights remain unaffected by subsequent grant.

26. The Board of Revenue has thus apparently committed an error in not taking notice of the relevant statutory provisions and Notification issued thereunder but has founded its decision on wholly extraneous and irrelevant considerations by holding the Order dated November 17, 1971 as not binding on the respondents No. 3 and 4.

27. As a result of the aforesaid discussion, the petition is allowed. The Order of the Board of Revenue dated March 21, 1991 (Annexure/8) is set aside. No order as to costs.