

Mangalsen Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Feb-15-2011

Judge : D.S.R. Varma; Abhinava Upadhya, JJ.

Acts : Urban Land (Ceiling & Regulation) Act, 1976, - Section 6 (1); Principal Act - Section 6 (1), 8 (1), 9, 10 (1) (3) (5), 33, 11, 12, 13 and 14; Repeal Act - Section 4

Appeal No. : WRIT - C No. - 23229 of 2008

Appellant : Mangalsen

Respondent : State of U.P. and Others

Advocate for Def. : C.S.C. Adv

Advocate for Pet/Ap. : Smt. Priyanka Srivastava; R.K. Srivastava, Advs

Judgement :

1. We have heard Sri Ved Mani Sharma, learned counsel for the petitioner and Sri D.K.Tripathi, learned Standing Counsel appearing for the State-respondents.
2. By this writ petition we have been asked to consider the grant of the following prayers:

i)issue a writ order or direction in the nature of certiorari quashing the impugned order dated 18.5.82(Annexure-4) passed by respondent no.3.

ii) issue a writ order or direction in the nature of mandamus commanding the respondent no.3, not to dispossess the petitioner from the land and the parties may be directed to maintain status quo over the land.

iii) issue any other and further writ order or direction which this Hon'ble Court may deem fit and proper under the aforesaid facts and circumstances of the present writ petition.

iv) Award the costs to the writ petition in favour of the petitioner.

3. The facts, in brief, as submitted by the learned counsel for the petitioner are that the petitioner was a recorded tenure holder in Village Harunagala of Plots No.535, 559, 296 and 534. Out of the said holding the vacant land of the petitioner was 8837.39 Sq.Meter. The statement under Section 6 (1) of the Urban Land (Ceiling & Regulation) Act, 1976, (hereinafter referred to as the Principal Act), was filed by the petitioner before the competent authority having jurisdiction specifying therein the location, extent, value and other particulars as prescribed, of all the vacant land. Pursuant to filing of the aforesaid statement under Section 6 (1) of the Principal Act, an enquiry is said to have been made after survey etc. and a draft statement was prepared by the competent authority under Section 8 (1) of the Principal Act and a notice to that effect was served on 17.11.1981 in which 7337.39 sq.mtrs. Of land was determined to be in excess to the ceiling limit as prescribed under the Act. Pursuant to the aforesaid notice the petitioner filed his objection along with an application under Section 20 of the Act. The objection of the petitioner was considered and vide the impugned order dated 18.5.1982 the draft statement filed under Section 8 (1) of the Principal Act was considered and 7337.39 sq. mtrs. of vacant land was declared to be in excess of the ceiling limit and a notice under Section 9 was issued for preparation of final statement and thereafter the notification under section 10 (1) of the Act was directed to be issued. Challenging the said order, the present writ petition has been filed.

4. We have heard learned counsel for the petitioner extensively, who submits that the entire proceedings have been initiated ex parte and the property as contemplated in view of 10(3) of the Act, has not been acquired. The main contention of the learned counsel for the petitioner is that the possession of the

declared excess land having not been taken over by the competent authority, there was no vesting of the same with the State Government. Therefore, at the time of coming into force of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (in short the Repeal Act) with effect from 18th March, 1999, in view of Section 4 of the said Repeal Act, the petitioner being in continuous possession of the property, the competent authority has now no jurisdiction to interfere in any manner with the possession of the petitioner. Learned counsel further contends that even if it is presumed that the possession was taken on the possession memo, but his signature has not been obtained on the same and, therefore, in view of various judgments the 'actual physical possession' cannot be construed as having been taken and in view of the Repeal Act no further action can be initiated by the authorities pursuant to the impugned order. Learned counsel, therefore, submits that the authorities be restrained from interfering with the peaceful possession over the property in question. Except the above no other points were adverted to.

5. On the other hand, learned Standing Counsel defending the action of the State authorities, submits that the order which has been impugned in this writ petition is that of 18.5.1982 and now in the year 2008, i.e., after more than 26 years the same cannot be allowed to be challenged. It has further been argued that no plausible explanation has been given in the writ petition for this inordinate delay in challenging the order impugned. Learned Standing Counsel further submits that the petitioner had an alternative remedy of challenging the order impugned by filing an appeal under Section 33 of the Principal Act and that having not been done by the petitioner, the writ jurisdiction of this Court cannot be invoked after such long delay. Learned Standing Counsel further contends that the initiation proceedings under the Principal Act and the declaration of the excess land of the petitioner has been made in accordance with law and according to the procedure prescribed by the Act and after full opportunity to the petitioner as would be evident from the impugned order itself. The land now vests with the State Government free from all encumbrances and no interference is called for by this Hon'ble Court.

6. Pursuant to an earlier direction to produce all the records before this Court, learned Standing Counsel has produced the same for the perusal of this Court today. He points out from the record that after Notification under Section 10(1) on 6.4.1985 and declaration of excess land under Section 10(3) dated 6.11.1985, notice for taking over possession under Section 10(5) of the Act was served on the petitioner on 20.2.1986 seeking delivery of possession of the excess land. It is also clear from the record that prior to notice under Section 10(5) of the Act the District Magistrate, which is the competent authority to take over possession, had authorized the Tehsildar of the area to take possession by an order dated 17.7.1985 and pursuant thereto the Tehsildar had taken over possession of the property under the cover of Dakhalnama (possession memo) dated 30.1.1990, duly signed by the respective authorities as well as an independent witness by the name of Hori Lal after due notice to the petitioner. Learned Standing Counsel contends that after the notice issued under sub-section 5 of Section 10 of the Act the only option left with the petitioner was to avail the remedy of appeal as envisaged under Section 33 of the Principal Act which was the effective alternative remedy but the said remedy was not availed of by the petitioner, therefore, the property as declared excess has conclusively vested with the State not only as contemplated under Section 10(3) of the Act but also pursuant to the procedure followed under sub-Section 5 of Section 10 of the Principal Act.

7. Now in view of the rival contention the only point that falls for our consideration is as to whether the alleged possession of the petitioner is saved by the provisions of the Repeal Act, 1999?

In this regard, it is to be noted that Section 3 and also Section 4 of the Repeal Act deals with the abatement of legal proceedings and the said two provisions are extracted herein below for ready reference:

"3. Saving.-(1) The repeal of the principal Act shall not affect-

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government

or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment or any court to the contrary.

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2)Where-

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land

then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4.Abatement of legal proceedings.- All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:

Provided that this Section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

8. Section 3 of the aforesaid Repeal Act clearly provides that such repeal would not affect any proceeding initiated or concluded under Section 10(3) of the Act. Under Section 4 of the said Repeal Act it is provided that all pending proceedings shall abate except the proceedings initiated and pending under Sections 11, 12, 13 and 14 of the Principal Act. At this juncture now what is to be seen is whether the proceeding under Section 10 of the Principal Act stood concluded at the time when the Repeal Act came into effect, if not, would they abate by virtue of Section 4 of the Repeal Act?

9. Learned counsel for the petitioner has submitted that the actual possession having not been taken by the authorities concerned and the possession being allowed to continue with the petitioner, his possession is saved by the provisions of the Repeal Act notwithstanding the fact that the land was declared excess under the Principal Act. In other words, even on the date when the Repeal Act came into effect, since possession of the excess land was not taken over by the Government or the governmental authorities, the said possession of the petitioner shall not be disturbed.

10. It is further contention of the learned counsel for the petitioner that even after declaration of land in excess, the possession memo has not been signed by the petitioner himself, therefore, it cannot be construed that the 'actual physical possession' has been taken over by the State authorities as of today. In this regard he lays much stress on the expression 'actual physical possession'.

11. In order to substantiate the contention, he placed reliance on a judgment of the Apex Court reported in 2007 (4) AWC 3519(Supreme Court) in Mukarram Ali Khan v. State of U.P. And others.

12. In the said case it was pointed out by their Lordships that an affidavit has been filed by the appellant indicating that the possession of the land has not been taken and the land in question continued to be in possession of the appellant and his sons. Eventually their Lordships observed that in view of the fact that "the affidavit filed by the appellant to which no objection has been filed, undisputed position that emerges is that the State has not taken the possession over the surplus land. Therefore, the proceedings have to be treated to have abated under Section 4 of

the Repeal Act."

13. From the above what appears is that in the said case, inspite of the specific averment made by the petitioner regarding his possession as on the date during the sustenance even after the Repeal Act came into force. Since the said averment was not refuted in the counter affidavit nor any sort of objection was taken, the Supreme Court accepted the contention of the petitioner treating his averment as uncontested and upheld the case of the petitioner.

14. Learned counsel for the petitioner further relies on the judgment rendered by a Division Bench of this Court in the case of Babu Chand and others v. State of U.P. & others reported in 2009(75) ALR 873 wherein the Scope of Section 3 of the Repeal Act has been considered and the following observations was made.

" A perusal of Clause (a) of sub-section (2) of section 3 clearly provides where the possession of the land has not been taken over the said land shall not vest in the State despite the proceedings having drawn. Here the possession will mean the actual physical possession. The categorical statement has been made in all the writ petitions that the possession has not been taken over by the State till date and petitioners are in possession. In few of the writ petition counter has been filed in which this fact has not been denied and in some cases in counter affidavit it has been stated that possession has been taken over but it has not been substantiated by evidence whether actual physical possession has been taken over or not. There is no receipt obtained by the Collector concerned from the owner of the land handing over the possession. In the case of State of Tamil Nadu and another v. Mahalakshmi Ammal and others has categorically held that "possession of the acquired land would be taken only by way of memorandum, panchnama, which is a legally accepted norm." There is no such document with counter affidavit filed by the State of U.P. on record." (para-4)

15. From the above, it is obvious that in some of the matters there was no denial about the averment made by some of the petitioners regarding continuance of their possession even after repeal of the Principal Act.

16. In the above set of facts, their Lordships had used the expression the 'actual physical possession'. Otherwise such an expression 'actual physical possession' is not available anywhere under the Principal Act or under the Repeal Act. However, the said expression is significant in view of the specific advantage/benefit it confers upon such persons whose lands were though declared excess but still the possession thereof was not taken over by the Government as on the date of the introduction of the Repeal Act.

17. Another Division Bench also in the case of Kailash and another v. State of U.P. And others, reported in 2006 (1) AWC 497 express the view as under:

"Learned Standing Counsel lastly contended that it is impossible for the State to keep actual physical possession of all the lands in question, where were previously vested by virtue of the surplus land under the Principal Act. The answer is hidden in such submission. The obvious inference is that when vesting of land is lifted by the evaporation of law and the land under vesting has not been utilized for any purpose save and except putting sign board, if any, to show that it was earlier vested under the Principal Act, cannot be held by the State." (Para-9)

18. Same is the view taken by another Division Bench.

19. Therefore, on facts, the decision of the said cases and the conclusion arrived at by the Division Bench of this Court in the afore mentioned judgment are absolutely justified and the same are unexceptionable.

20. Coming to the case in hand, the factual background is altogether different, inasmuch as, there is a categorical averment made in para-6 of the counter affidavit that the excess land so declared has been taken possession of by the State Government and as a proof thereof the possession memo duly signed by the

State authorities and an independent witness has been shown from the record so called for by us.

21. We may have to test the present facts of the case from the anvil of Sections 10(3), 10(5) and 10(6) of the Act.

22. Section 10(3) of the Act deals with the vesting of possession of the excess land absolutely. However, sub-section (5) of Section 10 of the Act postulates that whenever any vacant land vested with the State Government as envisaged under sub-section (3) of Section 10 of the Act, the competent authority may order any person whose land has been declared as excess to surrender or deliver the possession thereof to the State Government or to any person duly authorized by the State Government after service of notice. Sub-section (6) of Section 10 envisages that in case of any resistance by such person and who did not respond to the notice issued to him under sub-section (5) of Section 10, the competent authority may take possession of the said land by using such force as is required.

23. Now the question would be whether the said procedure has been followed or not as already noticed.

24. From a perusal of the record it appears that after due Notification under Section 10(1) dated 6.4.1985 and declaration under Section 10(3) on 6.11.1985 a notice for possession under Section 10(5) of the Act was issued on 20.2.1986 and an authorization to the Tehsildar by the competent authority was also given in this regard on 17.7.1985 itself. So the procedure prescribed under Section 10 of the Principal Act has been fully complied with. The possession has been taken without any resistance by the petitioner, obviously under the cover of Dakhalnama (possession memo) signed by a witness and authorized officer concerned on 30.1.1990.

25. Therefore, we are of the considered view that according to the procedure prescribed the circle has been completed and the proceeding for declaration of the excess land and taking over possession, deemed as well as actual physical possession also stood concluded much before the Repeal Act came into force.

26. The incidental question that crops up here is what could have been done by the petitioner. In other words, what was the remedy available to the petitioner when the proceedings under Section 10 of the Act were in progress or even after taking over the actual physical possession of the declared excess land. The answer is available in the shape of Section 33 of the Act which provides for an appeal. Section 33 of the Act specifically implies that an appeal lies against an order except the orders passed under Sections 11, 12, 13, 14 and 15. It is further clear from the said provision that the said appeal is provided against any order passed by the Government or Governmental authorities relating to the possession of the excess land.

27. Obviously, despite the fact that actual physical possession after following the due process of law prescribed under Section 10 of the Act having been taken, the petitioner acquiesced to the proceedings as at no point of time the same was challenged by availing the effective remedy available under the Statute and having kept quiet for almost two decades, impliedly the petitioner abandoned his right, if any. This conduct of the petitioner in invoking writ jurisdiction of this Court now, apparently attracts the principles of laches and also renders this writ petition as not maintainable.

28. A feeble attempt has been made by the counsel for the petitioner to assert that in the proceeding purported to have been initiated under Section 11 regarding payment of compensation, a separate stand regarding the year of taking possession was wrongly mentioned and, therefore, it was contended that the alleged taking of 'actual physical possession' cannot be believed. This contention also cannot be sustained for the simple reason that as against any proceeding initiated under Section 11, which deals with the determination and payment of compensation, again a statutory appeal has been provided under Section 12 of the Principal Act before the Tribunal. Admittedly, even this remedy was also not availed of. However, we may point out that the compensation is not the subject matter in this writ petition and, therefore, we need not to dwell upon this aspect any further.

29. It is well settled law that once the land is vested in the State free from all encumbrances, there cannot be any rider on the power of the State Government to change the entry relating to the user of the land in the manner it chooses, meaning thereby the possession must be free from all encumbrances and there cannot be any further rider to it. However, as we have already noticed and pointed out that since a further provision has been made in the Principal Act and in sub-section (3) & (5) of Section 10 of the Act and also, inasmuch as, the procedures thereunder have been scrupulously followed, we cannot hold that the petitioner can be brought out of the clutches of the provisions of the Principal Act and thus cannot take shelter under the Repeal Act, on the ground, that the possession of the excess land was not taken by the Government or the Competent Authority and the same continued with him as on the date of Repeal Act, 1999 came into force.

30. We are further fortified by the judgment rendered by the Apex Court in the case of Smt. Sulochama Chandrakant Galande v. Pune Municipal Transport and others, reported in AIR 2010 Supreme Court, 2962 (paragraphs no.8, 9, 10, 12, 13 and 31) wherein the Apex Court while dealing with the aspect of Section 10(3) held that the effect of Section 10(3) which deals with the vesting of the property with the Government is to be equated with Section 16 of the Land Acquisition Act and has gone on to hold that once the land vests in the State free from all encumbrances it cannot be divested and the person so interested cannot claim the right of restoration of such land on any ground whatsoever.

31. We have no hesitation to say that the respondents have successfully demonstrated before us that the procedure prescribed under the Urban land (Ceiling and Regulation) Act, 1976 has been strictly followed and the land has vested with the Government free from all encumbrances and inspite of effective remedy being available to the petitioner, it was never availed of, and now it is too late for him to agitate the issue at this point of time.

32. Under these circumstances, the writ petition is not only to be dismissed on the ground of delay but also on the ground that the petitioner acquiesced to the proceedings initiated against him under the Act without raising any objection, whatsoever.

33. In view of the aforesaid discussions, there is no merit in the writ petition and the same is liable to be dismissed. It is, accordingly, dismissed. No order as to costs.

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