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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2893 OF 2023

Yunuskha Mahemudkha Golandaj and Others PETITIONERS

VERSUS

The Municipal Council, Ahmedpur and Another RESPONDENTS

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Mr. Mukul Kulkarni h/f Mr. S. B. Madde, Advocate for petitioners

Mr. V. D. Sapkal, Senior Advocate i/b Mr. V. P. Latange, Advocate
for respondent No.1

Mr. R. B. Bagul, Assistant Government Pleader for respondent
No.2 – State

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 18th APRIL, 2023

PRONOUNCED ON : 27th APRIL, 2023

ORDER :

1. By this petition, filed under Article 227 of the Constitution of India, the petitioners take exception to the judgment and order passed by the learned 2nd Joint Civil Judge, Junior Division, Ahmedpur below Exhibit-60 in Regular Civil Suit No. 1091 of 2022, which is confirmed by the learned District Judge - 1, Ahmedpur in Miscellaneous Civil Appeal No. 4 of 2023.

2. The petitioners are lessees and respondent No.1 –

Municipal Council is the lessor. It is the case of the petitioners that they were given vacant plots on lease between 1982 and 1992 in Survey No. 39, situated within the limits of Ahmedpur Municipal Council. After the allotment of the said plots, the petitioners constructed tenements on it. In the year 1997, respondent No.1 Municipal Council issued notice of eviction to the petitioners and directed them to vacate the leased lands, within ten days of the notice. These notices were challenged by the petitioners, by filing Civil Suits seeking perpetual injunction, in the Court of Civil Judge, Senior Division, Ahmedpur. The said suits were decreed and the defendant Municipal Council was restrained from causing obstruction and interference in the petitioners' leased lands, without taking recourse to law.

3. Thereafter, the petitioners continued to be in possession of the leased lands and continued to pay rent to the Municipal Council, which took no action against the petitioners.

4. The Municipal Council, thereafter, issued notices dated 27th May, 2002 informing the petitioners that the Municipal Council intends to construct commercial complex at the place, where the tenements of the petitioners are located and the possession of the premises given to the petitioners on rental basis, is quashed. The original lease agreement has expired and the petitioners

were directed to vacate the lands and restore it to its original position and hand it over to the Municipal Council within seven days.

5. The petitioners challenged the said notice, by filing Writ Petitions No. 5620 of 2022, 5772 of 2022 and 5890 of 2022. By a common order dated 20th August, 2022, while quashing the eviction notice dated 27th May, 2022, Division Bench of this Court has observed :

“However, we leave it to respondent No.3 to follow the due process of law as stipulated in the order of the Civil Judge, Senior Division, Ahmedpur, in the event it desires to vacate the tenants on the leased property. We also leave open all the lawful remedies available to the petitioners in the event of termination of tenancy is undertaken by the respondent Municipal Council. The petitions are disposed off. Rule made absolute in the above terms.”

6. The Municipal Council thereafter issued notices dated 14th and 16th September, 2022, under section 106 of the Transfer of Property Act (for short “T.P.Act”) asking the petitioners to vacate the premises within fifteen days, as the Municipal Council intends to construct commercial complex there.

7. By filing Regular Civil Suit No. 1091 of 2022, against the Municipal Council and the State, the petitioners claimed following relief -

“The defendant may kindly be restrained perpetually for terminating the lease of each of the plaintiffs from and out of site No. 41 of D. P. of the defendant without following due process of law on the basis of concrete proposal.”

8. Along with the suit, the petitioners also preferred application Exhibit-5 for temporary injunction.

9. The Municipal Council opposed the suit and application Exhibit-5, by filing written statement and say. The Trial Court initially granted temporary injunction in favour of the petitioners by order dated 18th October, 2022, however, rejected the application Exhibit-5 by order dated 4th January, 2023.

10. The petitioners challenged the order of the Trial Court, by filing Miscellaneous Civil Appeal No. 1 of 2023, which is rejected by the Appellate Court, by order dated 25th January, 2023.

11. The petitioners then approached this Court by filing writ petition No. 1185 of 2023, challenging both the orders passed by the Trial Court and the Appellate Court. As this Court was not inclined to grant relief in favour of the petitioners, the said writ petition was withdrawn by the petitioners. At that time, it was pointed out by the learned advocate for the petitioners that by communication dated 17th January, 2023, the Municipal Council has sought police protection on 21st January, 2023 for evicting

the petitioners and that they will move the Trial Court in Regular Civil Suit No. 1091 of 2022 for appropriate relief and hence, this Court had granted protection for one week to the petitioners.

12. The petitioners thereafter filed Application Exhibit-49 for amendment to the plaint seeking incorporation of prayer that the they may not be evicted by force and they should not be dispossessed illegally. The said application was rejected by the Trial Court.

13. The petitioners thereafter filed application Exhibit-60 for the following relief :

“The T.I. application of the plaintiffs may kindly be allowed by restraining the defendant temporarily from terminating the lease of the plaintiffs without following due process of law and evicting or dispossessing the plaintiffs from their leased premises with the help of Police forcibly till the disposal of the suit.”

14. After hearing the parties, the said application is rejected by the Trial Court and the order of the Trial Court is confirmed in Miscellaneous Civil Appeal No. 4 of 2023 by the learned District Judge. Hence, the present petition.

15. Heard learned advocate for the petitioners, learned senior advocate for the respondent No.1 Municipal Council and learned

Assistant Government Pleader for respondent No.2 – State. Perused the petition memo, annexures and the impugned orders so also the citations relied upon by the learned advocates for the parties.

16. It is a matter of record that this is the third round of litigation initiated by the petitioners. In the first round, in the year 1996, some of the petitioners had filed suit for declaration that the notice issued by the Municipal Council under section 106 of the TP Act is null and void. The said suit was decreed in favour of the petitioners. In the second round of litigation, eviction notices issued by the Municipal Council, in February, 2022 were challenged before this Court in Writ Petitions No. 5620 of 2022, 5772 of 2022 and 5890 of 2022. These petitions were allowed by this Court, by granting liberty to the Municipal Council to follow due procedure of law for evicting the petitioners. This is the third round of litigation by the petitioners, challenging the eviction notices issued to them by the Municipal Council under section 106 of the TP Act.

17. Indisputably, the petitioners' temporary injunction application, Exhibit-5 is rejected by the Trial Court. The petitioners unsuccessfully challenged the said order before the District Court. The Writ Petition filed by the petitioners

challenging order passed below Exhibit-5 by the Trial Court, confirmed by the Appellate Court was withdrawn by the petitioners, as this Court was not inclined to entertain the said writ petition. At the time of withdrawal of the said writ petition, liberty was sought by the petitioners to seek appropriate relief from the Trial Court in respect of communication dated 17th January, 2023, whereby Municipal Council had sought police protection for evicting the petitioners. This Court granted one week's protection to the petitioners to enable them to approach the Trial Court.

18. The Petitioners, thereafter filed application Exhibit-60 seeking a relief that the defendant Municipal Council be temporarily restrained from terminating lease of the petitioners, without following due process of law and the petitioners should not be evicted or dispossessed from the leased premises forcibly with the help of the police, till disposal of the suit. This application is rightly rejected by the Trial Court. It is obvious from the record that after the petitioners were unsuccessful in getting temporary injunction against the Municipal Council, by a differently worded prayer, the petitioners are trying to seek the same relief of temporary injunction, which is already refused to them.

19. The Municipal Council has followed due process of law by issuing notices under section 106 of the TP Act for eviction of the petitioners. Admittedly, the period for which the land was leased out to the petitioners, is over long back.

20. Considering the fact that temporary injunction application of the petitioners is rejected and the said order is confirmed by the Appellate Court and this Court refused to entertain the writ petition challenging both these orders, present application Exhibit-60 filed by the petitioners appears to be another attempt of the petitioners seeking stay to the eviction process. Admittedly, open plots were leased out to the petitioners for 11 months in the year 1982, 1987, 1992, there is nothing on record to show that the said lease was extended thereafter at any point of time. There is no record to show that the tenements were raised by the petitioners with permission of the lessor – Municipal Council. The petitioners are enjoying the tenements, which are on the public property, since last more than 30 years. There is also nothing on record to show that the petitioners paid rent after the lease period was over. Therefore, as per section 111 (a) of the TP Act, the tenancy can be said to be determined by efflux of time.

21. Indisputably, eviction notices challenged by the petitioners are 15 days notices issued under section 106 of the TP Act.

22. It is a matter of record that application Exhibit-5 filed by the petitioners is rejected by a reasoned order, by the Trial Court and the said order is confirmed by the Appellate Court. Challenge of the petitioners to both these orders is not entertained by this Court. In these facts it has to be held that the petitioners have failed to make out a *prima facie* case in their favour and balance of convenience is also not in their favour. Irreparable loss would be caused to the public at large and to the Municipal Council, if application Exhibit-60 is allowed. Municipal Council cannot be prevented from following due process of law seeking eviction of the petitioners. In this view of the matter, there is no substance in the challenge raised by the petitioners in present writ petition.

23. In support of his arguments, learned advocate for the petitioners has relied on "***Bishan Das and Others V/s The State of Punjab and Others***" AIR 1961 SC 1570. In that case, Constitutional validity of eviction by the executive action on the joint family members, who were *bona fide* in possession and management of the dharmasala constructed by raising family funds on the government land with the government's permission,

was debated. In paras No. 16 and 17, it is held :

“16. As to the second argument, it is enough to say that it is unnecessary in this case to determine any disputed questions of fact or even to determine what precise right the petitioners obtained by the sanction granted to their firm in 1909. It is enough to say that they are bona fide in possession of the constructions in question and could not be removed except under authority of law. The respondents clearly violated their fundamental rights by depriving them of possession of the dharmasala by executive orders. Those orders must be quashed and the respondents must now be restrained from interfering with the petitioners in the management of the dharmasala, temple and shops. A writ will now issue accordingly.

17. Before we part with this case, we feel it our duty to say that the executive action taken in this case by the State and its officers is destructive of the basic principle of the rule of law. The facts and the position in law thus clearly are (1) that the buildings constructed on this piece of Government land did not belong to Government, (2) that the petitioners were in possession and occupation of the buildings and (3) that by virtue of enactments binding on the Government, the petitioners could be dispossessed, if at all, only in pursuance of a decree of Civil Court obtained in proceedings properly initiated. In these circumstances the action of the Government in taking the law into their hands and dispossessing the petitioners by the display of force, exhibits a callous disregard of the normal requirements of the rule of law apart from what might legitimately and reasonably be expected from a Government functioning in a society governed by a Constitution which guarantees to its citizens against arbitrary invasion by the executive of peaceful possession of property. As pointed out by this Court in Wazir Chand V The State of Himachal Pradesh MANU/SC/007/1954: 1954 Cri.L.J. 1029, the State or its executive officers cannot interfere with the rights of others

unless they can point to some specific rule of law which authorises their acts. In Ram Prasad Narayan Sahi V. The State of Bihar MANU/SC/0013/1953 : [1953] 4SCR1129 this Court said that nothing is more likely to drain the vitality from the rule of law than legislation which singles out a particular individual from his fellow subjects and visits him with a disability which is not imposed upon the others. We have here a highly discriminatory and autocratic act which deprives a person of the possession of property without reference to any law or legal authority. Even if the property was trust property it is difficult to see how the Municipal Committee, Barnala, can step in as trustee on an executive determination only. The reasons given for this extraordinary action are, to quote what we said in Sahi's case (supra), remarkable for their disturbing implications."

24. Facts of the case in hand are totally different. Indisputably, 11 months' lease was granted to the petitioners in the year 1982, 1987 and 1992, which was not extended at any point of time. The petitioners cannot claim that their fundamental right is being violated. Hence, this ruling does not further the case of the petitioners.

25. The petitioners also relied on a decision in **"State of Uttar Pradesh and Others V/s Dharmander Prasad Singh and Others"** (1988) 2 SCC 505, wherein it is held :

"A lessor, with the best of title, has no right to resume possession extra-judicially by use of force, from a lessee, even after the expiry of earlier termination of the lease by forfeiture or otherwise. The use of the

expression 're-entry' in the lease-deed does not authorize extra-judicial methods to resume possession. Under law, the possession of a lessee, even after the expiry of its earlier termination is judicial possession and forcible dispossession is prohibited; a lessee cannot be dispossessed otherwise than in due course of law. In the present case, the fact that the lessor is the State does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of Government and Government authorities should have a 'legal pedigree'. In Bishandas V State of Punjab (1962) 2 SCR 69, this Court said :

We must, therefore, repel the argument based on the contention that the petitioners were trespassers and could be removed by an executive order. The argument is not only specious but highly dangerous by reason of its implications and impact on law and order.

Before we part with this case, we feel it our duty to say that the executive action taken in this case by the State and its officers is destructive of the basic principle of the rule of law.

Therefore, there is no question in the present case of the Government thinking of appropriating to itself an extra-judicial right of re-entry. Possession can be resumed by Government only in a manner known to or recognized by law. It cannot resume possession otherwise than in accordance with law. Government is, accordingly, prohibited from taking possession otherwise than in due course of law."

26. In the present case, by issuing eviction notices under section 106 of the TP Act, the Municipal Council has followed due process of law. Hence, the above ruling does not help the petitioners.

27. Learned Senior Advocate for the Municipal Council has rightly relied on the decision of learned Single Judge of this Court at Nagpur, in "**Municipal Council V/s Kundanlal Mohanlal Jaiswal and Others**" MANU/MH/0235/2007, wherein it is held :

"7. In this background, it will now be appropriate to find out what is the case pleaded by respondents / plaintiffs. Suit is filed for grant of the prohibitory injunction to protect their possession by restraining petitioner from interfering with it in any manner and for declaration that notice dated 5-10-2005 issued by the petitioner is wrong and illegal. Respondents state description of respective plots in their possession and further state that it is in their possession since 1971 on temporary lease. They also point out that they are doing business on this plots and are paying rent regularly in the office of petitioner and have receipts therefor. They further state tht they are paying tax also and respondent No.1 has stated that his country liquor shop is duly licensed under provisions of Bombay Prohibition Act and also under Shops and Establishment Act. All state that they have electric connection and water connection, and are paying charges therefore regularly. They state that their possession is legal and they are small traders with no other place to run their business. They also mention that land is recorded as Government land with nazul and petitioner has no rights over it. Thereafter they point out service of notices dated 5-10-2005 upon them and further state that when they visited office of petitioner to deposit rent, petitioner refused to accept it. They have thereafter pointed out their long possession and certain judgments to support their contention that said possession is legal and needs to be protected. It is therefore clear that they have not pointed out any written contract with municipal Council enabling them to occupy this plot or any resolution of municipal Council permitting them to occupy these plots. They have not pointed out any provision of Municipal Act in support of their stand. It is therefore clear

that above-mentioned provisions of Section 92 have not been shown as fulfilled by them to claim any legal right to continue to occupy suit plots. Mere act of depositing monthly certain amount as rent cannot cloth respondents with status as lessee or tenant. Even if contention fo respondents about temporary lease is taken up for scrutiny, it is apparent that it is Council who can grant such lease for period not exceeding three years and there has to be resolution of Council for that purpose. Section 92 expressly states that total period of such temporary lease with its renewals cannot exceed nine years. Respondents have not pleaded any compliance with these requirements of law. No resolution of petitioner Council fixing any amount as monthly rent has been pleaded.”

“...It is apparent that their individual grievance cannot be compared with public injury and in absence of even a prima facie right in their favour, they are not entitled to grant of temporary injunction. Insistence upon observance of “due procedure” by tehse respondents fall short to make out any case of legal injury in their favour.....Procuring of some trading licence or no objection from Municipal Council, paying some charges to it towards such occupation of land does not create any legal relationship between Municipal Council and such person. Influential traders or businessmen may try to take undue advantage of their position by getting any orders or resolutions from such bodies and therefore only, legislature has circumscribed those powers by providing for appropriate measures by way of control. It is apparent that Appellate Court has exercised jurisdiction not available to it in the matter by protecting unauthorised and apparently illegal possession of respondents to the prejudice of public at large and has hampered the development work specified by Development Plan. It is further to be noticed that respondents after receipt of notice to remove encroachment from Municipal Council, till today got sufficient time to make alternate arrangements bu then as already stated above the wish to prosper at the cost of general public which cannot be tolerated at all.”

28. The above observations are squarely applicable to the facts of the present case.

29. The claim of the petitioners that action under section 106 of the TP Act is not sustainable and the Municipal Council ought to have initiated action under section 92 of the Municipal Act and Rules of 1983 is also unacceptable, as in the earlier round of litigation the said issue is already adjudicated against the petitioners.

30. The Trial Court as well as the Appellate Court have recorded concurrent findings of fact and have passed well reasoned orders, which are not liable to be interfered with in extraordinary writ jurisdiction. The petitioners have failed to make out any case to exercise extraordinary writ jurisdiction in their favour. Writ petition being devoid of merit is dismissed.

31. In view of disposal of the writ petition, civil application No. 3852 of 2023 is also disposed of.

32. At this stage, learned advocate for the petitioners prays for stay to this order for a period of four weeks so as to enable the petitioners to approach to the Hon'ble Supreme Court. This order shall not take effect for a period of four weeks from today.