

(2015) 05 RAJ CK 0131

Rajasthan High Court (Jaipur Bench)

Case No: Civil Writ Petition Nos. 3789 and 6012 of 2009

Jabir Hussain and Others

APPELLANT

Vs

The State of Rajasthan and
Others

RESPONDENT

Date of Decision: May 15, 2015

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 39 Rule 1, Order 39 Rule 2, Order 40 Rule 1, 144
- Constitution of India, 1950 - Article 227
- Mines and Minerals (Development and Regulation) Act, 1957 - Section 21

Hon'ble Judges: Alok Sharma, J

Bench: Single Bench

Advocate: Kamlakar Sharma, Senior Advocate, Sahid Hasasn and Madhu Sudan S. Rajpurohit, for the Appellant; Anurag Sharma, AAG, Advocates for the Respondent

Judgement

Alok Sharma, J.

The two writ petitions are being decided by this common Judgment as they arise from the same proceedings pertaining to cancellation of quarry licence No. 70/2002 vide order dated 21.4.2007 passed by the Mining Engineer, Makrana for alleged deficiencies in the course of mining operations by the licensee Jabir Hussain following the transfer of quarry licence to him from Abdul Jabbar and endorsed at the relevant time by the Mining Department on 3.12.1988.

2. The facts of the case are that in respect of quarry licence No. 70/2002 on an application for transfer of quarry licence at the instance of Abdul Jabbar, it was transferred in the name of Jabir Hussain on 3.12.1988. The said transfer of the quarry licence was put to challenge by Abdul Jabbar after about 18 years by filing a suit No. 5/2006 for declaration and permanent injunction before the Civil Judge (Sr. Division), Makrana. An accompanying application for appointment of Receiver under

Order 40 Rule 1 CPC was dismissed on 5.5.2006. The suit is pending.

3. Thereafter on a notice dated 28.10.2006 issued by the Mining Department to Jabir Hussain to show cause as to why the transfer of the quarry licence on 3.12.1988 not be cancelled for the purported reason of the application for transfer of quarry licence prima facie not bearing Abdul Jabbar's signature, Jabir Hussain in his turn laid a suit No. 11/2006 for permanent injunction before the Civil Judge (Sr. Division) Makrana. His accompanying application under Order 39 Rules 1 and 2 CPC was allowed on 20.1.2007 and an order of injunction passed in his favour. The said order however, clarified that in the event of deficiencies in the mining operations pursuant to the quarry licence standing to Jabir Hussain's name, resort to MMCR, 1986 could be had by the Mining Department. The order dated 20.1.2007 was put to challenge in a civil misc. appeal, a writ petition under Article 227 of the Constitution of India and a SLP before the Hon'ble Apex Court but to no avail.

4. However pursuant to the liberty granted by the Civil Judge (Sr. Division), Makrana in the order dated 20.1.2007, a notice dated 30.3.2007 was issued by the Mining Engineer, Makrana to Jabir Hussain alleging deficiencies in the mining operations in the quarry licence operation. A reminder was sent on 4.4.2007. Reply to the notice was filed on 17.4.2007. However vide order dated 21.4.2007 the Mining Engineer, Makrana finding the reply unsatisfactory cancelled the quarry licence. It is the case of the Mining Department that the possession of the quarry licence area was consequently taken on 23.4.2007, although Jabir Hussain states that the prescribed procedure for taking possession of the quarry licence area was not followed, no notice was given to him, that he continued in possession and he was not physically dispossessed from the quarry licence area.

5. Jabir Hussain aggrieved of the cancellation order dated 21.4.2007 filed an appeal before the Addl. Director, Mines under Rule 43(1) of the MMCR 1986. (Appeal No. 209/2007) Abdul Jabbar sought impleadment in the said appeal but his application was dismissed on 23.5.2007. The order dated 23.5.2007 was challenged by Abdul Jabbar in a revision petition under Rule 47 of the MMCR, 1986.

6. In the meantime, the transfer of the quarry licence on 3.12.1988 in favour of Jabir Hussain came to be cancelled by the Mining Engineer, Makrana on 3.3.2008 on the directions of the Director, Mines issued on 21.2.2008 made as required by the Dy. Secretary, Mines under his letter dated 18.2.2008. In the circumstances, the revising authority hearing Abdul Jabbar's revision against the dismissal of his application for impleadment on 23.5.2007 set aside the said order and directed the Appellate Authority to decide the application for impleadment under Order 1 Rule 10 CPC afresh in appeal No. 209/2007 filed by Jabir Hussain. The Revising Authority in its order dated 27.3.2008 observed that further proceedings in the appeal before the Appellate Authority be taken considering the consequence of the cancellation of the transfer of quarry licence in favour of Jabir Hussain vide order dated 3.3.2008.

7. Now Abdul Jabbar also filed an appeal (213/2008) on 19.8.2008 against the order of cancellation of the quarry licence passed by the Mining Engineer, Makrana on 21.4.2007 apparently basing his case and right to appeal on the cancellation of the transfer of quarry licence to Zahir Hussain on 3.3.2008. The delay in filing the appeal was condoned. The application for impleadment in Zahir Hussain's appeal (No. 209/2007) at the instance of Abdul Jabbar in the circumstances was again dismissed on 17.12.2008.

8. Two appeals (209/2007 filed by Zahir Hussain and 213/2009 filed by Abdul Jabbar) against the cancellation order dated 21.4.2007 passed by the Mining Engineer, Makrana were tagged and heard together by the Appellate Authority together.

9. On consideration of the two appeals aforesaid, the Addl. Director, Mines vide order dated 30.12.2008 set-aside the order of cancellation of the quarry licence passed on 21.4.2007 by the Mining Engineer, Makrana. However, taking into consideration the cancellation of the transfer of quarry licence in favour of Zahir Hussain on 3.12.1988 vide order dated 3.3.2008, even though it was stayed in S.B. Civil Writ Petition No. 2893/2008 on 26.3.2008, the Appellate Authority took the view that the possession of the quarry licence area taken as per the records of the Mining Department of 23.4.2007 be handed over either to Zahir Hussain or Abdul Jabbar considering the various orders passed by the Civil Judge (Sr. Division) Makrana in Suit No. 5/2006 on 5.5.2006 and suit No. 11/2006 on 21.7.2007 as also the order qua the quarry licence by the State Government. It was further directed that in the event the Mining Department were to find any deficiency in the working of the quarry licence area, it would be free to proceed thereon on merits after giving the licensee an opportunity of filing reply and being heard in support thereof.

10. Aggrieved of the order dated 30.12.2008 both Zahir Hussain and Abdul Jabbar filed revision petitions under Rule 47 MMCR, 1986. Zahir Hussain was aggrieved of the directions by the Appellate Authority to hand over possession of the quarry licence area on an inquiry to be made by the Mining Engineer and not to him from whom paper possession was purportedly taken on 23.4.2007. Abdul Jabbar was aggrieved of Zahir Hussain's appeal (No. 209/2007) being accepted and allowed by the Appellate Authority. Both the revision petitions however came to be dismissed by the Dy. Secretary, Mines vide order dated 20.3.2009. The said order as also the underling orders to the extent of the petitioner's grievance are under challenge by Zahir Hussain in SBCW P. No. 3789/2009 and Abdul Jabbar in SBCW P. No. 6012/2009.

11. The dispute between Zahir Hussain and Abdul Jabbar with regard to the validity of the transfer of the quarry licence on 3.12.1988 has been considered in detail by this Court while deciding SBCW P. No. 2893/2008 today. The Court in its judgment aforesaid has set aside the impugned order of cancellation of the transfer of quarry licence on 3.12.1988 by the Mining Engineer's order dated 3.3.2008.

12. For the purpose of the present writ petitions suffice it to state that the only question which arises is as to who amongst Jabir Hussain or Abdul Jabbar was entitled to possession of the quarry licence area consequent to the setting aside on 30.12.2007 by the Appellate Authority of the order of cancellation of the quarry licence on 21.4.2007 by the Mining Engineer, Makrana.

13. Section 144 CPC provides as under:

"144. Application for restitution (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified ii any suit instituted for the purpose, the court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are property consequential on such variation; reversal, setting aside or modification of the decree of the decree or order."

14. In the case of [Binayak Swain Vs. Ramesh Chandra Panigrahi and Another](#), AIR 1966 SC 948 : (1966) 3 SCR 24 , a Four Judge Bench of the Hon"ble Apex Court has reiterated that the doctrine of restitution is that on reversal of a decree, law imposes an obligation on the parties to the suit who receive the benefit of an erroneous decree to make restitution to the other party for what it has lost. The said obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been lost under the erroneous decree. It has been held that the Courts are bound to restore the parties, so far as they can be restored, to the same position that they were at the time when the Court by its erroneous action had displaced them from. It has been held that even subsequent collateral events cannot be taken into consideration for applying the doctrine of restitution and its inexorable consequences when a decree is set aside in appeal. On the principle enunciated by the Hon"ble Apex Court it is thus apparent that on Jabir Hussain's appeal under section 43(1) of the MMCR 1986 having been allowed against the order of cancellation of quarry licence dated 21.4.2007 and the cancellation of order dated 3.3.2008 qua the transfer of the licence on 3.12.1988 having been stayed in S.B. Civil Writ Petition No. 2893/2008 on 26.3.2008, he alone, to the exclusion of any other under whatever right, title or interest claimed, was per-force entitled to restoration of possession of the quarry licence. The Appellate Authority in my considered opinion failed to apply the just and equitable doctrine of restitution and appears to have been distracted and misguided by the cancellation order dated 3.3.2008 albeit stayed on 26.3.2008. This aside, Jabir Hussain's case throughout was that his purported dispossession from the quarry licence area on 23.4.2007 was only paper dispossession while he continued to be in de-facto

possession as evidenced from the fact that no proceedings such as notice for taking possession or formal taking of possession by the Mining Engineer on 23.4.2007 or at any time was recorded as required in law. And the fact of Jabir Hussain's de-facto possession was buttressed by the Civil Court's interlocutory order dated 21.4.2007 on his application under Order 39 Rules 1 and 2 CPC and so recognized in the dropping of criminal proceedings against him by the Mining Department under section 21 of MMRD Act, 1957 and Rule 48 of MMCR 1986 alleging unauthorized mining.

15. Aside of the aforesaid in my considered opinion even if actual possession had been taken by the Mining Department from Jabir Hussain on 23.4.2007, the inevitable consequences of the setting aside of the order of cancellation passed on 21.4.2007 by the Appellate Authority on 30.12.2007 was that Jabir Hussain had to be put back in possession as possession, was admittedly stated to have been taken from him and not from Abdul Jabbar. This conclusion is further strengthened by the fact that the order of cancellation of the transfer of mining lease on 3.3.2008 passed by the Mining Engineer on the askance of the Dy. Secretary, Mines under his order dated 18.2.2008 as conveyed to the Mining Engineer under the Director, Mines vide letter dated 21.2.2008 has been set aside today on various grounds in SBCW P. No. 2893/2008.

16. Consequently, in the facts of the case I would set aside the order dated 30.12.2008 passed by the Addl. Director, Mines Jaipur as upheld by the Dy. Secretary, Mines on 20.3.2009 to the extent of holding that the possession of the quarry licence area was to be handed over by the Mining Engineer, Makrana on an inquiry made as to who was entitled to possession i.e. Jabir Hussain or Abdul Jabbar. It is directed that the possession of the quarry licence area be formalized in favour of Jabir Hussain in the records of the Mining Department or otherwise handed over back to him consequent to his appeal, against the order of cancellation of quarry licence passed on 21.4.2007 by the Mining Engineer, Makrana having been allowed on merits by the Appellate Authority i.e. Addl. Director, Mines under its order dated 30.12.2008.

17. The writ petition No. 3789/2009 filed by Jabir Hussain is allowed. That filed by Abdul Jabbar i.e. S.B. Civil Writ Petition No. 6012/2009 is dismissed.