M/s. Anwar Khan Mehboob & Co.

Vs

State of Madhya Pradesh and Others

Writ Petition No. 38 of 1965

(CJI P. B. Gajendragadkar, M. Hidayatullah, K. N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

06.10.1965

JUDGMENT

HIDAYATULLAH, J. –

The petitioner is a partnership firm which manufactures and sells bidis, under the name and style of Anwarkhan Mehboob and Co., Jabalpur. In 1948 the petitioner firm, with a view to securing a supply of tendu leaves over the years acquired for a term of 25 years, the right to pluck and carry away tendu leaves from plants in ninety-nine villages in the former Imlai Estate from the Malguzar Raja Raghuraj Singh. The period of 25 years, was to run from 1948 to 1973. The document, which was not registered (annexure I), was executed by the Raja on August 22, 1948. It is a very brief document and all that it says is that tendu leaves in 99 villages have been "sold" for 25 years for a consideration of Rs. 9,000 per year which must be paid after each tendu leaf crop is over but before the expiry of three months, that only the leaves should be plucked and that no bushes should be cut down.

In 1950 the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals and Alienated Lands) Act (No. 1 of 1951) was passed. Under the Act (which may briefly called the Abolition Act) all right, title and interest vesting in the proprietor or any person having interest in such proprietary right through the proprietor, in an area to which the Abolition Act was extended, including land (cultivable or barren), grass land, scrub-jungle, forest, trees etc., ceased and vested in the State for purpose of State, free from all encumbrances. The Government of Madhya Pradesh obstructed the person who held contracts for tendu leaves, lac, wood, timber or other forest produce, including the petitioner firm. The petitioner firm and many others petitioned to this Court under Art. 32 of the Constitution to enforce what they described as 'fundamental right to property', and asked for writs or orders to restrain the State Government from enforcing the Abolition Act generally and in particular so as to interfere with the right of the petitioner firm to pick, gather and carry away the kind of forest produce for which they held agreements. A dozen such petitions were heard together, that of the petitioner being W.P. No. 309 of 1951 (Firm Anwar Khan Mehboob & Co. v. State of Madhya Pradesh), and were decided on December 23, 1952. The main judgment of this Court was pronounced in a petition filed by one Chhotabhai Jethabhai and his report in Chhotabhai Jethabhai v. State of Madhya Pradesh ([1953] S.C.R. 476]. A Divisional Bench of this Court held that contract and agreements, such as the one held by the petitioner firm, were "in essence and effect licenses granted to the transferees to cut, gather and carry away, the produce in the shape of tendu leaves, lac, or timber or wood." Holding further that there was nothing in the Abolition Act to affect their validity to extinguish such right in favour of the State, the Divisional Bench ruled that the State has no right to interfere with the right under the contracts and agreements. A "writ of prohibition" was issued, prohibition the State "from interfering in any manner whatsoever with the enjoyment of

those rights". In case where the periods under the contracts had expired or where the proprietors had still to recover anything from transferees after the date of vesting, the State was held entitled "to assert and enforce its right standing in the shoes of the proprietors."

The petitioner firm, in common with the other petitioners on that occasion obtained a "writ of prohibition" also. It could have enjoyed the fruits of its agreement with the Raja till the year 1973 but other events followed. In 1964 the Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Adhiniyam, 1964 (29 of 1964), (conveniently called the Adhiniyam) was passed, as the preamble openly professes "to make provision for regulating in the public interest the trade of Tendu leaves by creation of State monopoly in such trade." The Adhiniyam conferred power on the State Government to device specified areas into units, to appoint its own agents for purchase and trade in tendu leaves, to set up advisory committees especially for the fixation of prices at which Government would purchase tendu leaves from growers of tendu leaves other than Government, to open depots and to purchase there tendu leaves at prices in the lists exhibited there. The Adhiniyam also required growers of tendu leaves, the manufacturers of bidis and exporters of tendu leaves to register. With a view to creating monopoly in favour of Government section 5 of the Adhiniyam imposed a complete restriction on purchase and transport of tendu leaves contrary to the provisions of the Adhiniyam and contravention of any provision was punishable with imprisonment or fine and power was also given to forfeit the whole or any part of tendu leaves in respect of which there was contravention. A power of entry, search and seizure was conferred on police officers of the rank of Assistant Sub-Inspectors and above.

We have given a assume of the provisions of the Adhiniyam but we must set our s. 5, because it is the heart of the Adhiniyam and also of the problem us. Before we do so, a few definitions material to its construction and understanding may be noted." An agent" in the Adhiniyam means the agent of Government and "a grower of tendu leave" means in respect of leaves grown :

> (a) in a reserved or protected forest, or on unoccupied land as defined in the Madhya Pradesh Land Revenue Code 1959, the State Government;
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> (b) on lands with the Bhoodan holder or the Bhoodan tenant or lessee or grantee under certain Madhya Pradesh, Madhya Bharat, Vindhya Pradesh and Rajasthan Acts, those persons; and
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> (c) on other lands the tenure holder or a tenant or a Government lessee of the holding or the holder of service land, as the case may be, in any unit on which tendu leaves grow.

Each of the terms holder of a service land, Government lessee, tenant and tenure holder is separately defined but as it was admitted before us that the petitioner firm is not one of them, the definitions need not detain us. Section 5 of the Adhiniyam provides as follows :-

> "5. Restriction on purchase or transport of tendu leaves.
>
> (1) On the issue of a notification under sub-section (3) of section 1 in any area no person other than, -
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> (a) the State Government;
>
> (b) an officer of State Government authorised in writing in that behalf; or

(c) an agent in respect of the unit in which the leaves have grown;

shall purchase or transport tendu leaves.

Explanation I. Purchase of tendu leaves from the State Government or the aforesaid Government officer agent shall not be deemed to be a purchase in contravention of the provisions of this Act.

Explanation II. A person having no interest in the holding who has acquired the right to collect tendu leaves grown on such holding shall be deemed to have purchased such leaves in contravention of the provisions of this Act.

(2) Notwithstanding anything contained in sub-section (1), -

(a) a grower of tendu leaves may transport his leaves from any place within the unit wherein such leaves have grown to any place in that unit; and

(b) tendu leaves purchased from the State Government or any officer or agent in the said sub-section by any person for manufacture of bidis within the State or by any person for sale outside the State may be transported by such person outside the unit in accordance with the terms and conditions of a permit to be issued in that behalf by such authority and in such manner as may be prescribed.

(3) Any person desiring to sell tendu leaves may sell them to the aforesaid Government officer or agent at any depot situated within the said unit."

We shall analyst the provisions of this section later. For the present we must follow up the narrative of events. By notification the State of Madhya Pradesh, declared the areas to which the Adhiniyam extended and subdivided the area into units. The Imlai Estate, in respect of which the petitioner firm held its agreement, was divided up into :

(i) unit No. 3 Baghraji leased area,

(ii) unit No. 5 Kundam leased area, and

(iii) unit No. 11 Umaria leased area.

Pursuant to the provisions of the Adhiniyam, the State Government set up Advisory Committees under the Madhya Pradesh Tendu Patta Mantrana Samiti Mulya Prakashan Niyam, 1964 and framed rules called Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamavali 1965. If it is necessary to name them again, the former will be called the Niyam and the latter the Niyamavali.

The State Government then invited tenders for the areas including the three units but the remarks column showed that these units were leased by the Malguzar to the petitioner firm up to the year 1973. No tender were received for units 5 and 11 but there was a tender for unit 3. On March 20, 1965 the Minister for Forests in a Meeting, informed the representatives of the petitioner firm that their leases stood extinguished by reason of the Adhiniyam and that time was extended for submission of fresh tenders in respect of the units left our. On March 23, 1965 tenders made by two persons in respect of unit 3 (Baghraji) and unit 11 (Umaria) were accepted and the next day the petitioner firm was informed, by letter from the Divisional Forest Officer, Jabalpur Division, that

the right to collect tendu leaves in all the 99 villages of Imlai Estate was abrogated by the State Government under the Adhiniyam. The present petition was them filed.

The arguments of Mr. G. S. Pathak in support of the petition were really two although they covered a good deal of ground. His first contention was that the Adhiniyam did not touch the rights of the petitioner firm as recognized and enforced by this Court by its "writ of prohibition" in the earlier case and that the Adhiniyam had not attempted to nullify the decision of this Court either expressly or even indirectly by marking the law restrospective. His next contention was that the Adhiniyam in terms did not apply to the petitioner firm because of Explanation I to s. 5 of the Adhiniyam. He claimed that the petitioner firm was entitled to move this Court for the enforcement of the same fundamental right in property which has been recognized by this Court on the earlier occasion and the former decision was binding in this case as res judicata. On behalf of the State the learned Attorney-General contended that there was no right in property which could be claimed and the petition was incompetent in view of the later decisions of this Court which has dissented from Chhotabhai Jethabhai's case ([1953] S.C.R. 476.) and that, in any event, the matter than decided could not have taken note of the Adhiniyam which was not in existence. He further submitted that the petitioner firms was as much affected by s. 5 of the Adhiniyam as any other person, the decision of this Court in its favour notwithstanding.

We may begin by considering the correctness of the contention that the earlier decision operates as Ares judicata in this case. The history of the ruling in Chhotabhai Jethabhai's case ([1953] S.C.R. 476.) is well-known. That case has now no binding force as a precedent. In Shantabai v. State of Bombay petitions similar no those in Chhotabhai Jethabhai's case ([1953] S.C.R. 476) met a different fate. Shantabai, who claimed the benefit of Art. 19(1)(f) and (g) had been given a right by her husband to take and appropriate all kinds of wood from his Zamindari forests. The document was unregistered. After the Abolition Act came into force the right was interfered with. A petition under Art. 32 of the Constitution was moved in this Court but it failed. Chhotabhai Jethabhai's case was cited in support of the petition but it was not followed. Many circumstances not noticed in Chhotabhai Jethabhai's case ([1953] S.C.R. 476.) were pointed out. As they have been summarized once before in Mahadeo v. State of Bombay we may quote from that case. Speaking of the unregistered agreement, it was said :

> "..... if it conferred a part or share in the proprietary right, or even a bright to profit a prendre - (it) needed registration to convey the right. If it created a bare licence, the licence came to an end the interest of the licensors in the forests. If proprietary right was otherwise acquired, it vested in the State, and lastly, if the agreements created a purely personal right by contract, there was no deprivation of property, because the contract did not run with the land."

Mahadeo's case ([1959] Supp. 2 S.C.R. 339 at 343.) took the same view of Chhotabhai Jethabhai's ([1953] S.C.R. 476.) case. The Constitution Bench declined to accept that such rights were 'property rights' and the petitioners in Mahadeo's case ([1959] Supp. 2 S.C.R. 339 at 343.) admitted that they were only contractual rights. This Court in Mahadeo's case ([1959] Supp. 2 S.C.R. 339 at 343.) observed that if they were contractual rights -

> "..... then also, as pointed out in the second of the two cases cited, the licenses came to an end on the extinction of the title of to licensors. In either case there was no question of the breach of any fundamental right of the petitioner which could support the petitions which were presented under Art. 32 of the Constitution. It is this aspect

> of the matter which not brought to the notice of the Court, and the resulting omission to advert to it has seriously impaired, if not completely nullified, the effect and weight of the decision in Chhotabhai's case as a precedent".

It was, therefore, laid done that the decision in Chhotabhai Jethabhai's case ([1953] S.C.R. 476.), which treated the agreements as bare licenses and yet considered that a fundamental right to property was conferred by them, "was apparently given per incuriam" and could not therefore be followed.

If Chhotabhai Jethabhai's case ([1953] S.C.R. 476.) reliance was placed on a passage from the judgment of the Judicial Committee in Mohanlal Hargovind v. C.I.T. to find out the nature of the agreements. The judicial Committee was discussing the matter to find out whether the amounts spent in buying tendu leaves, which were the raw materials for manufacture of bidis, because capital expenditure simply because crops of a number of years were presently purchased. So long as crops were purchased and no interest in anything else was obtained, it was held the payment was on revenue and not capital account. The observations were, therefore, made in a very different context. Similarly, reliance on a passage from Baden Powell's book on the Land Systems of British India was not helpful because Baden Powell was merely discussing the division of proprietary right between different layers created by subinfeudation. Not was the reference to Benjamin on Sale quite happy because the author was referring to mediaeval law and had discussed the modern law on the succeeding page. It was for this reason that in a succession of cases, Chhotabhai Jethabhai's case ([1953] S.C.R. 476.) was not relied upon. That ruling must be held not binding.

Mr. Pathak, however, contended that whatever might be the position vis-a-vis other case, since the decision was given in respect of the agreement in favour of the petitioner firm, it must control subsequent case by the rule do res judicata. He conceded that the decision was such agreement betokened licences but he pointed out the this Court must have treated these licences as conveying right to property because otherwise a writ could not be granted under Act. 32. There can be no doubt that a right to contracts is not right to property and it is a little doubtful whether it was really treated as such in Chhotabhai Jethabhai's case ([1953] S.C.R. 476.). The Court while narrating the facts did mention that the petitions were "to enforce the fundamental right of the petitioners to property, "but their Lordships were mindful of the tendu leaves, lac, timber and wood which once plucked, detached or cut would have become the property of the petitioners. Hence the discussion of the definition of goods and future goods in the India Sale of Goods Act. But there is no ruling that the contracts themselves were property. Their Lordships did not even once characterize the contracts as such, as property. Indeed, the prayer in the former case was :

> "The applicants, therefore, pray that a writ or direction or order made prohibition or restraining the State Government from interfering with the right of the applicants to pick, gather and carry away the crop of tendu leaves, and for making any claim in respect of the crop by virtue of Act. No. 1 of 1951."

This is not claiming a right to property but to the continued acceptance of a contract.

Mr. Pathak, however, argued that the earlier decision of this Court involved the assumption of the fundamental fact that petitioner firm's right to property was invaded. He argued on the authority go Hoystead v. Commissioner if Taxation ([1926] A.C. 155.) that such a fundamental fact cannot, in a fresh litigation, be allowed to be ignored. He submitted that it was open too the Government to have demurred to the claim on the ground that no right of property was invaded, but it did not. This be

right but it does not solve our problem. If the Adhiniyam had not been passed and the rights recognised by this Court were again interfered with, it would have been impossible for Government to ask that Chhotabhai Jethabhai's case ([1953] S.C.R. 476.) be reconsidered from the point to view whether a fundamental right to property was involved or not. The fresh litigation would in such a case have been on an identical or similar case of action and because of the decision in favour of the petitioner firm Government would have been bound by the rule of res judicata. The situation today is not the same as existed in 1952. The cause of action then was based upon the invasion of the rights of the petitioner firm by and under the authority of the Abolition Act. Today the invasion is by and under the authority of the Adhiniyam and manifestly the two causes of action are not alike. It is worth mentioning that Hoystead's case ([1926] A.C. 155.) was cited before the House of Lord of Medical Officers of Health v. Hope ([1960] A.C. 551.) but was not followed. It may also be mentioned that in the volume which contains Hoystead's case there is to be found another case of the Judicial Committee (Broken Hill Proprietary Company Limited v. Municipal Council of Broken Hill ([1926] A.C. 94.) which seems to be conflict with Hoystead's case ([1926] A.C. 155.). It was argued before the House of Lords that Hoystead's case ([1926] A.C. 155.) was wrongly decided. The House did not pronounce their opinion on this submission but noted the fact that there was this conflict. They did point out that a decision of the Judicial Committee was not binding on the House of Lords. Lord Radcliffe distinguished Hoystead's case ([1926] A.C. 155.) and start that it was useless to illuminate the only point which was before the House of Lords, namely, the effect of a succeeding valuation list on a decision given with regard to an earlier valuation list. The same reason obtains here also. The earlier case of this Court is useless to illuminate the only point which arises before us, namely, whether by the provisions of the Adhiniyam any right to property as such is being offended. On this question we cannot get any guidance from the earlier decision party because it did not in express terms decide even on the facts existing in 1952 that a right to property was in jeopardy and mainly because the effect of the new law upon the right such as they are today must be worked out afresh. The cause of action is entirely distinct. For this reason we do not think that the earlier decision operates as res judicata, even if it might have been assumed in that case that a right to property was involved.

We have explained above that the Divisional Bench did not refer to right of property although it is possible that it thought in terms of property in leaves, timber etc., on their being severed from earth as existing even before leaves, timber etc., were so severed. This was not the true position in law because the agreement them considered betokened a licence coupled with a grant. The petitioner firm like the others had a licence to go to the forests to pick and carry away tendu leaves but had no other right. The attention of the Divisional Bench was not directed to this difference. Such a decision cannot constitute a bar on the principle of res judicata when new circumstances have come to exist which require a reappraisal of the true legal position.

Mr. Pathak next argued that the Adhiniyam said nothing about the earlier decision in favour of the petitioner firm and pointed out that the usual formula by which decisions of courts are vacated by subsequent legislation is not to be found in the Adhiniyam. Mr. Pathak has in mind provisions which begin with the words "not with standing anything contained in a judgment of any court etc." Such a provision is, of course, not there. It is, however, not correct to stay that a decision may be evaded only by the use of these words or some such words. If a statute creates new circumstances which render the earlier decision inapplicable, the effect must be to evade the earlier decision of the court. The earlier decision them cannot operate because the new statute alters the circumstances to which the old decision applied, and as the cause of action is different, the earlier decision ceases to play a part. The earlier decision of this Court does not play any part, even indirectly, as was suggested by Mr. Pathak.

The core of the problem thus is : what is the effect of the Adhiniyam upon the right of the petitioner firm under the agreement it had obtained from Raja ? For this purpose, we have to go to the terms of s. 5 of the Adhiniyam already set out. The operative provision is to be found in the first sub-section which says that after a notification is issued under sub-s. (3) of s. 1 (which extends the Adhiniyam to any area) no person shall purchase of transport tendu leaves except the State Government or officer authorised in writing is this behalf or an agent of that Government in respect of any unit on which the leaves are grown. The expression "no person" is wide enough to exclude any person whatsoever unless the right of any party have been expressly saved. Sub-section (1) is intended to be understood with the aid of two Explanations each providing for a different subject-matter. By the first Explanation purchase of tendu leaves from any of the three persons mentioned in sub-s. (1) is not be deemed to be a purchase in contravention of this Adhiniyam. Government or its officers and agent in this way become the sole sellers of tendu leaves, and the sub-section confers on the Government exclusively the monopoly of sale of tendu leaves from an area to which the Adhiniyam is extended. The second Explanation says that person having no interest in a holding but who has acquired the right to collect tendu leaves grown on such holding shall be deemed to have purchased such leaves in contravention of the Adhiniyam. This Explanation states in the negative from that a person having an interest in the holding may himself collect the leaves but no person can obtain from the person having interest in the holding, a right to collect tendu leaves from his holding. The right to collect tendu leaves from the area to which the Adhiniyam extend belongs to the State Government, its officers and its agents or under the second Explanation to a person having interest in a holding. No purchase of tendu leaves, except from Government, its officers and agents, is legal by reason of the first sub-section read with the first Explanation. The second sub-section deals with transport. It allows a grower of tendu leaves to transport his leaves from any place within the unit wherein such leaves are grown to any other place in that unit, and tendu leaves purchased from the State Government or its officers or agents by any person for manufacture of bidis within the State or by any person for sale outside the State may be transport outside the unit. No other person can at all transport tendu leaves. The second sub-section has the effect of keeping the tendu leaves within the unit they have been purchased by or from Government. On purchased they can be transported either to a place within the State for the manufacture of bidis or exported outside the unit. Under the third sub-section any person who desires to sell tendu leaves may sell them to a Government officers or agent at any depot situated within his unit. By reason of these provisions growers of tendu leaves, other than Government, are compelled to sell them to Government, its officers and agents, at the various depots at the prices settled by the Advisory Committee under the Niyam. The Niyamavali lays down the procedure to be followed. Once all tendu leaves have come into the possession of Government, purchase of tendu leaves must be from the Government and its officers and agent because only purchase is not an offence under the Adhiniyam.

The position of the petitioner firm is this : it does not seek to justify its acquisition of tendu leaves by reason of a purchase from Government. It says that is has already purchase the tendu leaves from the Raja by an agreement made with the Raja in 1948 and that that agreement is binding upon Government because of a decision of this Court. But the decision of this Court merely decided that there was nothing in the Abolition Act by which the agreement could be said to be affected. That decision had nothing to say about those right of the petitioner firm, viewed in the light of the Adhiniyam. The Adhiniyam is challenged only on the ground that it cannot operate against the petitioner firm which holds a decree of this Court. The decree of this Court only said that Government must not interfere with the petitioner firm by reason of anything contained in the Abolition Act. To the Abolition Act must now be added the Adhiniyam and we must see what is the joint effect of the two Acts. The Abolition Act vested the forest and tendu plants in Government and

they become the property of Government. This was decided a long time ago and there is no quarrel on this account. By the Adhiniyam Government gets the sole right to purchase tendu leaves from any area to which the Adhiniyam extends and no person can buy tendu leaves except from Government, its officers and agents. Government obtains there monopoly of trade in tendu leaves in those areas of the State to which the Adhiniyam applies. The purchase of tendu leaves must now be in accordance with the Adhiniyam. Since there is no right to property the leaves are plucked, no such right can be said to be invaded by the Adhiniyam. It cannot be said either by reason of nay rule of res judicata or on analogy that the parity owner firm is entitled to invoke Art. 32 of the Constitution when it possesses no right of property in the leaves. It has only a contract in its favour and that is to a right of property. No doubt the Adhiniyam indirectly overreaches the decision of this Court but that, in any open to he State Legislature provided it passes a valid law to that effect. The law is not challenged as invalid and it must therefore apply to the petitioner firm, as to any other person. The petitioner firm cannot take shelter of Explanation I till it buys leaves from Government under the Adhiniyam and the Niyamavali.

In our judgment the rights of the petitioner firm such as they were, must be held to be no available to it. The petitioner firm must buy its leaves like any person. The petition must, therefore, fail. It will be dismissed, but in the circumstances of the case there will be no orders as to cost.

Petition dismissed.

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