
(1995) 01 PAT CK 0006

In the Patna High Court

Case No : Letters Patent Appeal No. 21 of 1994

Arun Kumar Jain

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 18-01-1995

Acts Referred:

Citation : (1995) 01 PAT CK 0006

Final Decision : Allowed

Judgement

K. Venkataswami, C.J.—This L.P.A. is preferred against the judgment and order dated 9.2.1994 passed in C.W.J.C. No. 8745 of 1993.

2. The appellant in this appeal is respondent No. 6 in C.W.J.C. No. 8745/93. Respondent No. 6 to 10 herein were the petitioners in the said G.W.J.C. Before the learned single Judge and orders passed by the fourth respondent herein in Municipal Survey Appeal Nos. 171 and 172 of 1988 dated 24.9.1989 were challenged. The learned single Judge found that at the relevant time when the impugned orders were passed on the appeals the fourth respondent had no power to pass the same. On that ground alone, without going into the merits of the case, the learned single Judge allowed the writ application with liberty to the parties to prefer Municipal Survey appeals before an appropriate authority if so advised. Aggrieved by the above decision of the learned single Judge the present appeal is filed.

3. As the only question that has to be decided in this appeal is with reference to the competency of the fourth respondent to deal with the appeals placed before him, it is not necessary to set out in detail the facts involved in this case. However, brief facts need be stated to appreciated the question of law raised before us.

4. In the year 1984-85 the municipal survey was started in the district of Bhojpur. We are concerned here with the lands appertaining to Khata Nos. 1520, 1521 and 1539 measuring a total area of 9.76 acres of Mouza Hamidpur, Motitola

of Arrah town under Tauzi No. 291 (vide para 5 of writ application). The lands in question were recorded in survey proceedings as "Anabad Bihar Sarkar" land. Aggrieved by that both the father of the appellant as well as respondent Nos. 6 to 10 (rival parties) preferred objection cases under Rule 9 of Bihar and Orissa Municipal Survey Rules (hereinafter called as "the Rule"). Those objection cases were numbered as 90 of 86 and 47 of 85 respectively. Those objection cases were disposed of by the first authority on 14.6.1988 confirming the survey entry as mentioned above and consequently rejecting the objection cases. Aggrieved by the above mentioned order of the first authority both the father of the appellant, as well as respondent Nos. 6 to 10 preferred the appeals to the appellate authority appointed under Bihar & Orissa Municipal Survey Act, 1920 (hereinafter called as "the Act") read with the rules framed thereunder. The appeals preferred by the father of the appellant was numbered as Municipal Survey No. 172 of 1988 and appeals preferred by respondent No. 6 to 10 was numbered as Municipal Survey No. 171 of 1988. It may be mentioned here at this juncture that counsel on both sides agreed that the appeals were filed before the then Collector of Bhojpur who was appointed as Superintended of Municipal Survey cum Collector, Bhojpur by a notification issued u/s 41(1) of the Act dated 24.11.1988 who will be the Appellate authority constituted as per Rule 15 of the Rules. He, however, forwarded those appeals to the fourth respondent, who was also appointed as Superintendent of Municipal Survey cum Charge Officer under an earlier notification issued u/s 4(1) of the Act dated 29.9.1986. It is also common ground and accepted by counsel on both the parties that neither the appellant nor respondent Nos. 6 to 10 raised any objection before the fourth respondent challenging his jurisdiction to hear the appeals. On the other hand both the parties, it must be said, took a chance before the fourth respondent by arguing their respective cases. One more factor also must be stated here, namely, that before the orders impugned in the writ application were passed by the fourth respondent on 23.5.1989 the third respondent, who on earlier occasion forwarded the appeals for disposal, recalled the files from the fourth respondent by proceedings dated 23.5.1989. However, without giving effect to the recall order of the third respondent the fourth respondent disposed of the appeal on 24.5.1989.

5. The only point for consideration in this appeal is whether the fourth respondent had the power to dispose of the appeals on 24.5.1989 as contended on behalf of appellant or he had no power on 24.5.1989 as contended on behalf of respondent Nos.6 to 10.

6. To appreciate the rival submission it is necessary to set out the relevant section, the Rule as well as the notifications issued u/s 4 of the Act. Section 4 of the Act reads as follows:

Appointment--(1) For the purpose of making such survey and record, the Local Government shall, appoint a Superintendent of Survey (hereinafter called the Superintendent), and may appoint one or more Assistant Superintendents of

Survey.

(2) An Assistant Superintendent of Survey shall exercise such of the powers of a Superintendent as may be delegated to him by the Superintendent.

(3) The Superintendent and every officer employed in making the survey and record shall be deemed to be a public servant within the meaning of the Indian Penal Code.

Rule 15 of the Rules reads as follows:

(1) Every appeal against the order of an Assistant Superintendent of Survey (a) disposing of an objection under Rule 9 and (b) imposing a fine under the Act, if presented within one month of the date of the order appealed against, shall lie to the Superintendent.

(2) An appeal against the order of the Superintendent of Survey disposing of an objection under Rule 9 shall lie to the Collector, or if the Collector is the Superintendent of Survey to the Commissioner. The appeal shall be presented within one month of the date of the order appealed against.

The first notification appointing the fourth respondent u/s 4(1) of the Act as Superintendent of Surveys reads as follows:

"NOTIFICATION

S.O. _____ /in exercise of powers conferred by Sub-section 4(1) of the Bihar and Orissa Municipal Act, 1920 (Bihar and Orissa Act 1 of 1920) the Governor of Bihar is pleased to appoint Shri Ram Punit Kumar, Charge Officer, Bhojpur Rohtas settlement, as Superintendent of Surveys for the purpose of Survey and preparation of records of rights of all municipalities in the districts of Bhojpur and Rohtas in addition of his duties with effect from date of his joining as charge Officer, Bhojpur-Rohtas, the 31st July, 86.

(9/Survey-Stha (Ra) 69/86) By Order of the Governor of Bihar, Sd/- Ram Kumar Prasad Under Secretary to Government

The next relevant notification dated 24/25.11.88 issued u/s 4(1) of the Act reads as follows: (English translation)

Government of Bihar Revenue and Land Reforms Department Notification

Patna-15, dated 24.11.1988.

No. 9/Survey. East.(R)-6/88 (Part) R.

In exercise of the powers conferred under Sub-section (1) of Section 4 of the Bihar and Orissa Municipal Survey Act, 1920 (Bihar and Orissa Act-1, 1920), The Governor of Bihar is pleased to appoint of Nagendra Tiwary, Collector, Bhojpur to discharge the duties of the Superintendent, Land Survey, to survey the Municipality of Bhojpur and Rohtas District and to prepare the record of right of

the said district from the date of assuming charge in addition to his own duties.

2. Sri Nagendra Tiwary, I.A.S., at present Collector, Bhojpur is appointed as Settlement Officer for discharging the settlement work of Bhojpur and Rohtas district respectively from the date of assuming charge in addition to his own duties.

3. In this regard, Notification No. 3018 dated 29.10.1988 issued earlier may be treated as amended as such.

(No. 9/Survey. Est. (R)-6/88) By the Order of the Governor, Bihar. Sd/- K.K. Prasad Joint Secretary to the Govt.

7. It must be noted that in the later notification issued u/s 4(1) of the Act, namely, on 24/25.11.1988 there is nothing to suggest that the power already conferred on the fourth respondent has been withdrawn or there is anything to suggest that the latter notification was in supersession of the earlier notification. It is in this background the validity of the orders have to be adjudicated.

8. The learned single Judge was of the view that the earlier notification appointing fourth respondent as Superintendent of Surveys stands superseded by the later notification in view of Section 4 of the Act which contemplates appointment of "a Superintendent of Survey" while in the case of Assistant Superintendent of Survey providing for one or more Assistant Superintendents of Survey.

9. Learned Counsel appearing for the appellant submitted that "a Superintendent of Survey" contemplated u/s 4 of the Act has to be read as one or more. Superintendents of Survey conferring concurrent powers on them. The next limb of argument of the learned Counsel for the appellant is that inasmuch as the earlier notification having not been withdrawn or superseded creating a vacancy in the post of Superintendent of Surveys for Bhojpur district enabling the Government to appoint another Superintendent the latter notification must be held to be nonest in the eye of law. The third limb of argument is that assuming that in view of the latter notification the exercise of power by the fourth respondent pursuant to the earlier notification was illegal that will not vitiate the orders passed by him for two reasons:

(a) that both the parties have acquiesced in the jurisdiction of the fourth respondent and took a chance by arguing the case before him and thereafter it is not open to the aggrieved party to challenge the jurisdiction.

(b) that the appeals were filed before the third respondent who transferred the appeals for disposal to the fourth respondent on the ground that the fourth respondent also had concurrent jurisdiction.

10. In any event according to the learned Counsel for the appellant, it is not open to the respondent Nos. 6 to 10 to raise the question of jurisdiction as they have taken a chance and failed before the fourth respondent.

11. Learned Counsel appearing for respondent Nos. 6 to 10 contended that the latter notification appointing the third respondent as Superintendent of Surveys automatically supersedes the earlier notification appointing the fourth respondent as Superintendent of Surveys for Bhojpur district. Hence the learned single Judge was right in holding that the fourth respondent at the relevant time had no power of Appellate authority under the Act read with Rules. He also submitted that u/s 4 of the Act there can be only one Superintendent of Surveys and it is clear from the language employed in the section itself and the learned single Judge was right in construing like that. He also submitted that the fourth respondent ought not to have disposed of the appeals on 24.5.1989 when the third respondent on 23.5.1989 recalled the papers from the fourth respondent. On that ground also the orders passed by the fourth respondent are bad according to the learned Counsel for respondent Nos. 6 to 10.

12. We expected the counsel appearing for the State to help us to resolve the dispute but to our utter despair he did not argue the matter and, therefore, we could not get any assistance from him.

13. Certain decisions were referred to at the Bar which we will refer at relevant places.

14. Let us now take up the first contention of the learned Counsel for the appellants, namely that "a Superintendent of Survey" contemplated u/s 4 of the Act has to be read as one or more Superintendent of Survey conferring concurrent appeals on them. The allied argument of the first argument is that the notification dated 29.8.1986 having not been superseded by the subsequent notification dated 24.11.1988, the latter notification appointing the third respondent as appellate authority is nonesi in law. We presume the above argument is based on Section 15 of the Bihar and Orissa General Clauses Act, 1917 which corresponds to Section 13 of the Central General Clauses Act, 1897. The principle is that the words in the singular include the plural and Vice Versa but this general rule is subject to one condition, namely, that if there is anything repugnant in the subject or context such construction should not be followed. Therefore, we have to find out whether there is anything impediment in the subject or context in accepting the main first contention of the learned Counsel for the appellant. We have extracted relevant Section 4(1) of the Act. It contemplates the appointment of the Superintendent of Survey", (hereinafter referred to as "the Superintendent"). The later portion to Sub-section (1) of Section 4 enables the local government to appoint one or more Assistant Superintendent of Survey. The relevant rule naming the Superintendent of Survey as appellate authority, namely, Rule 15(1) also contemplates under Sub-rule (2) that the original power to dispose of objection cases under Rule 9 can be exercised by the Collector-cum.-Superintendent of Survey and in such cases the appeal lies to the Commissioner. On a conjoint reading of Section 4(1) read with Rule 15 of the Rules we are of the view that the construction placed on Section 4(1) by the learned Counsel for the appellant would lead to repugnancy having

regard to the context and, therefore, we reject that contention and hold that Section 4(1) contemplates appointment of one Superintendent of Survey and not more than one. We have derived support for the above conclusion from the judgment of the Supreme Court in *Dhandhaniah Kedia and Co. Vs. The Commissioner of Income Tax*, wherein the learned Judges while construing the words "previous year" defined in Income Tax Act, 1922 as per Section 2(11) vis-a-vis "six previous years" occurring in proviso to Section 2 (6A)(c) in the same Act, hold as follows:

Turning to the language of Section 2(11), we have this that according to the definition contained therein, "previous year" is the year which is previous to the year of assessment, and that means that there can be Only one previous year to a given year of assessment. When Section 2(6A)(c) speaks of six previous years, it is obvious that it uses the expression "previous year" in a sense different from that which is given to it in Section 2(11), because it would be a contradiction in terms to speak of six previous years in relation to any specified assessment year. It was argued that u/s 13(2) of the General Clauses Act, 1897, words in the singular should be read as including the plural and that, therefore, the definition of "previous year" in Section 2(11) could be read as meaning "previous years". But Section 13 only enacts a rule of construction which is to apply "unless there is anything repugnant in the subject or context", and to read as "previous year" as "previous years" in Section (11) would be to nullify the very definition of a "previous year" enacted therein, and such a construction must therefore be rejected as repugnant to the context. It was then suggested that all the six previous years might be regarded as previous each in the next following year if that was itself a year of assessment, and that such a construction would, consistently with the contention of the appellant, give full effect to the definition in Section 2(11) of the Act, But this argument overlooks that while there may be several preceding years to a given year of assessment there can be only one previous year in relation to it, and that it would make no sense to speak of six previous years with reference to a year of assessment. We are satisfied that it would be repugnant to the definition of "dividend" in Section 2(6A)(c) to import into the words "six previous years" the definition of "previous year" in Section 2(11) of the Act.

15. The allied contention to the main contention also does not appeal to us. In the absence of assistance from the counsel for the State we are inclined to take it that the notification dated 29.8.1986 appointing the fourth respondent as a Superintendent of Survey for Bhojpur district was stop gap arrangement. Therefore, when a notification appointing the Collector-of the said district as a Superintendent of Survey u/s 4(1) it must be taken that the earlier notification dated 29.8.1986 ceases to have any effect. To this extent the learned single Judge, in our view, is right.

16. The further question is whether the orders passed by the fourth respondent in the purported exercise of the appellate power pursuant to the notification

dated 29.8.1986 thinking that he continues to be the appellate authority is nonest in law. In this context at the risk of repetition we may point out that the parties had rightly filed the appeals before the third respondent and it is he who transferred the appeals to the fourth respondent for disposal thinking that the fourth respondent also possessed concurrent jurisdiction as an appellate authority. That being the position can it be said that the fourth respondent is a usurper or intruder to declare the orders passed by him nonest in law. We are of the view the fourth respondent when exercised the power of appellate authority held the office under colour of lawful authority holding over under claim of right after his legal right has been terminated.

17. At this juncture we may usefully quote the judgment of the Supreme Court reported in *Gokaraju Rangaraju Vs. State of Andhra Pradesh*, . In that case their Lordships were considering a question what is the effect of declaration by the Supreme Court that the appointment of an Additional Sessions Judge was invalid on judgments pronounced by the Judge prior to such declaration. After an elaborate discussion and after noticing various judgments of English, American and our Courts it has been held as follows:

A Judge, *de facto*, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority though his appointment is defective and may later be found to be defective whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a Judge *de jure*. Such is the *de facto* doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a *de facto* judge may be questioned directly in a proceeding to which he may be a party but it cannot be permitted to be questioned in a litigation between the private litigants, a litigation which is of no concern or consequence to the Judge except as a Judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a Judge to his office. Otherwise so soon as a Judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the Judge is no Judge. A Judge's title to his office cannot be brought into jeopardy in that fashion. Hence, the rule against collateral attack on validity of judicial appointments. To question a Judge's appointment in an appeal against his judgment is, of course, such a collateral attack.

The learned Judges quoted with approval in *Cooly's Constitutional Limitations*", Eighth Edition, Volume II p. 1355 as follows:

An officer *de facto* is one who by some colour or right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His colour of right may come from an election or appointment made by some officer or body having colourable but no actual right to make it; or made in such disregard of legal requirements as to be ineffectual

in law; or made to fill the place of an officer illegally removed or made in favour of a party not having the legal qualifications; or it may come from public acquiescence in the qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions; or holding over under claim of right after his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be. An intruder is one who attempts to perform the duties of an office without authority of law, and without the support of public acquiescence.

No one is under obligation to recognise or respect the acts of an intruder and for all legal purposes they are absolutely void. But for the sake of order or regularity and to prevent confusion in the conduct of public business and in security of private rights, the acts of officers *de facto* are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by some one claiming the office *de jure*, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be, in all other cases the acts of an officer *de facto* are as valid and effectual while he is suffered to retain the office as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. There is an important principle, which finds concise expression in the legal maxim that the acts of officers *de facto* cannot be questioned collaterally.

To get support to our view from the above extracted portion in particular the underlined portion. We do not want to multiply authorities except to state that the decision of the Supreme Court in *Gokaraju Rangaraju Vs. State of Andhra Pradesh*, has been cited with approval in *State of U.P. Vs. Rafiquddin and Others*, .

18. We have noticed above that the fourth respondent was duly appointed as Superintendent of Survey as per notification u/s 4(1) on 29.8.86. Both the third and fourth respondents were under the wrong impression that the fourth respondent continued to hold office as appellate authority notwithstanding the regular appointment of the third respondent as Superintendent of Survey u/s 4(1) of the Act. Applying the ratio Laid down by the Supreme Court in *Gokaraju Rangaraju Vs. State of Andhra Pradesh*, we hold that the orders passed by the fourth respondent cannot be treated as nullity or nonest in law as the fourth respondent must be deemed to be a *de facto* authority when he passed the impugned orders.

19. The learned Counsel for the respondents placing reliance on a judgment of this Court reported in 1981 BLJR 611 and *Kamakhya Narain Singh Vs. State of Bihar and Others*, submitted that the orders passed by the fourth respondent cannot be sustained in law. We do not think there is anything to support him in

the judgment on the facts of this case. We are of the view that the principle Laid down by the Supreme Court in Gokaraju Rangaraju Vs. State of Andhra Pradesh, will govern the issue raised on the basis of facts and circumstances of this case.

20. One other argument advanced by the learned Counsel for the appellant is based on the principle of acquiescence. In other words the parties having not raised any objection regarding jurisdiction of the fourth respondent when the matter was argued and having acquiesced in his jurisdiction cannot be permitted to challenge the jurisdiction when the matter was decided against him. In support of that he placed reliance on a judgment of this Court reported in Arjun Ho and Others Vs. The Commissioner, Chotanagpur Division and Others, wherein a Division Bench of this Court has observed as follows:

...While exercising writ jurisdiction we cannot forget that the parties including the petitioners submitted to the jurisdiction of the Panches, appeared before them and placed their cases before them and the petitioner are challenging the validity of the award only after it has gone against them.

In Manak Lal Vs. Dr. Prem Chand, the Supreme Court observed as follows:

Since we have no doubt that the appellant knew the material facts and must be deemed to have been conscious of his legal right in that matter, his failure to take the present plea at the earlier stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.

In AIR 1978 S.C. 28 the Supreme Court observed as follows:

...the fact that the appellant acquiesced to the 1970 Rules by applying for the post of the Village Accountant, appearing before the Recruitment Committee for interview in 1972 and 1974 and taking a chance of being selected, the present appeal which question the constitutionality of Rules 4 and 5 of the 1970 Rules cannot be allowed.

In the light of above passages extracted there is force in the argument of the learned Counsel for the appellant and we hold that it is not open to respondent Nos. 6 to 10 to challenge the jurisdiction of the fourth respondent after having taken a chance before him.

21. The other argument of the learned Counsel for respondents Nos. 6 to 10 is that the fourth respondent was not right in disposing of the appeals when the third respondent recalled the papers from the fourth respondent by proceedings dated 23.5.1989. We have not been shown any statutory rule or other powers enabling the third respondent to withdraw appeals pending before the fourth respondent. Therefore, we do not think that there is any force in this arguments.

22. In the result, we agree with the learned single Judge that by virtue of the

notification appointing third respondent as Superintendent of Survey for Bhojpur district, the notification appointing the fourth respondent as Assistant Superintendent of Surveys for the same district ceases to have any effect. We hold that the learned Single Judge was not right in further holding that the orders passed by the fourth respondent was without jurisdiction and liable to be quashed.

23. For the reasons stated above, we hold that the fourth respondent has passed the orders as de facto authority and, therefore, the same cannot be quashed on the ground of want of jurisdiction. The learned single Judge has not decided on merits, hence, we remand the case for a decision on merits to the learned single Judge.

24. Accordingly, the appeal is allowed. There will be no order as to costs.

S.J. Mukhopathaya, J.

25. I agree.