

(2007) 08 PAT CK 0057
In the Patna High Court
Case No : CWJC No. 7763 of 1988

Baij Nath Upadhya and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 20-08-2007

Acts Referred:

Bihar Tenancy Act, 1885 — Section 49C, 87, 87(2)
Bihar Privileged Persons Homestead Tenancy Act, 1947 — Section 2(d), 2(g), 2(i), 2(i)(1), 2(i)(2), 2(j)
Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 — Section 20
Chotanagpur Tenancy Act, 1908 — Section 46
Bihar Privileged Persons Homestead Tenancy Rules, 1948 — Rule 3, 4, 5, 5(i), 5(1)
Constitution of India, 1950 — Article 226, 227

Citation : (2008) 1 PLJR 39

Hon'ble Judges : J.N. Bhatt, C.J

Bench : Single Bench

Advocate : Ishwari Singh and Punita Kumari Singh, for the Appellant; N.K. Sinha and V.B. Ambastha for the State None for the Pvt. Respdts, for the Respondent

Final Decision : Allowed

Judgement

Dr. J.N. Bhatt, C.J.—The challenge in this writ application under Articles 226 and 227 of the Constitution of India, is against the order of the Anchaladhikari, dated 20.6.1988 (Annexure-1) directing for initiation of proceedings u/s 87(2) of the Bihar Tenancy Act, 1885 (Act 8 of 1885) ("B.T. Act") in respect of 12 decimals of land bearing plot No. 2705/3717, khata No. 747, and also for issuance of a privileged persons homestead raiyati parcha to respondent No. 3 in respect of 3 decimals of land of the said plots out of 15 decimals. A further prayer has been made for cancellation of parcha (Annexure 2). The following facts are virtually no longer in dispute:--

(i) the petitioners claimed issuance of parcha (certificate) alleging that he is the purchaser of the disputed property. Therefore, he initiated proceedings, in

respect of the disputed land which was opposed by respondent No. 3. The respondent-State claimed that the disputed land belongs to the State of Bihar as the original owner has abandoned the disputed land after vesting of Zamindari and, therefore, it stood vested with the State of Bihar and, thus, the land in question has been a parti piece of the land (uncultivated land);

(ii) the respondent No. 3 was the resident of village Ghaghar and he had two brothers who separated and entire house in village Ghaghar came to the share of his father and brothers and he left the village and came to village Saraiya about 25 years before and began to live with his wife and children in a portion of the disputed land measuring about 3 decimals after constructing a small hut and for his livelihood he was doing tea selling work;

(iii) the respondent No. 3 having no house in village Saraiya or at his village house, had filed an application for grant of parcha under the provisions of the Bihar Privileged Persons Homestead Tenancy Act, 1947 (Bihar Act IV of 1948) ("Act of 1947") before the Anchaladhikari, Barahara;

(iv) the application of respondent No. 3 was sent for inquiry and the Karamchari recommended for grant of parcha in the name of respondent No. 3 in respect of 3 decimal out of the disputed land of the said plot;

(v) in the meantime, the petitioners had filed a petition for mutation of their names on the basis of the sale deed alleged to have been executed by Tarkeshwar Sahu son of Lakshmi Sah of village Saraiya;

(vi) as the respondent No. 3 alleged that the said sale deed was forged and fabricated and was created by setting up fictitious persons, the petitioners were directed by the Circle Officer, by order, dated 7.9.1984, to produce the vendor of the petitioner;

(vii) after local investigation, it was found that the alleged vendor of the petitioners is a fictitious person and is not the real owner and the vendor never sold the land and the sale deed was not reliable. That is how, the petitioners lost and respondent No. 3 succeeded;

(viii) mutation of the name of the petitioners came to be rejected and parcha under the privileged persons came to be granted in the name of respondent No. 3 in case No. 2 of 1986-87, with respect to three decimals of land out of plot No. 2705/3717 and the rent receipts were, accordingly, granted to respondent No. 3 and the rent was realised with effect from 1982 to 1989 and the remaining 12 decimals of land of the said plot remained in the name of the State of Bihar.

2. The learned counsel for the parties are heard. Factual profile is examined. The impugned orders are evaluated. The relevant provisions of law are also considered.

3. The Act of 1947 aims at to make better provisions on certain subjects relating to the Law of Landlord and Tenant in respect of Homestead held by certain

classes of persons in Rural Areas of the State of Bihar. Therefore, this Act is designed to provide certain provisions on certain subjects relating to the Law of Landlord and Tenant in respect of Homestead held by certain classes of persons in Rural Areas of the State of Bihar.

4. It appears from the aims and object of the Act of 1947 that the Act is intended by the State Legislature to improve the status of weaker section of the society, such as, labourers and artisans who have either no land or hold very little land of their own. Such persons live either in structures built by themselves on lands temporarily or in houses built by landlords on their own land. The provisions of this Act are intended to provide such persons with greater security and strengthen their right of occupation of their homestead either as the owner or tenant. Provisions have, therefore, been made in the Act for fixation of fair and equitable rent payable by such persons. It also provides statutory mechanisms for equitable rent payable to such persons and protection against illegal and unreasonable ejectment of "privileged persons" and "privileged tenants".

5. Clause (d) of Section 2 of the Act of 1947 provides statutory definition of the term "homestead". As per the definition, "homestead" means any land which is held on lease or used with the consent, express or implied, of the landlord for residential purposes and includes any building erected thereon, together with any Sahan and Ban appurtenant thereto.

6. "Permanent tenancy" has also been defined under clause 2(g) of the Act of 1947 which means a tenancy which is heritable in the same manner as any other immovable property and which is transferable subject to the provisions of this Act. The definition of "privileged person" has been provided in clause (i) of Section 2 of the Act of 1947, which reads here asunder:--

"Privileged person" means a person--

(1) who is not a proprietor, tenure-holder, under-tenure-holder, or a mahajan; and

(2) who, besides his homestead, holds no other land or holds any such land not exceeding one acre;

but does not include any person who has come into possession of the homestead land in contravention of the provisions of Section 20 of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 (Bihar Act XIV of 1949), of Section 46 of the Chotanagpur Tenancy Act, 1908 (Bengal Act VI of 1908) or Section 49-C of the Bihar Tenancy Act, 1885 (Act VIII of 1885);"

7. Clause (j) of Section 2 of the Act of 1947 provides the definition of "privileged tenant" which reads here asunder:--

"privileged tenant" means a privileged person who holds homestead under another person and is, or but for a special contract would be, liable to pay rent for such homestead to such person;"

8. In exercise of the powers conferred by Section 20 of the Act of 1947, rules are framed known as "The Bihar Privileged Persons Homestead Tenancy Rules, 1948" ("Rules of 1948"). Rules 3 to 5 of the Rules of 1948, undoubtedly, provide procedures regarding inquiry and notice to the concerned party. Rule 4 provides that on receipt of any of the applications mentioned in Rule 3, the Collector shall start proceedings under the relevant sections to which the applications relate and deal with them in the manner provided for land revenue cases.

9. The provisions of Rule 5 of the Rules of 1948 are very important for the purpose, therefore, it would be profitable and expedient to refer them in extenso:--

"5. (1) The Collector shall either himself make local inquiry or have such inquiry made by any responsible officer not below the rank of a Circle Inspector or Welfare Inspector and satisfy himself as to the correctness or otherwise of the contents of such applications.

(2) The enquiring officer shall issue a notice in Form F to all the interested parties intimating the date on which the inquiry shall be made and directing parties to produce all the evidence in their possession in support of or against the application.

(3) The enquiring officer shall make a record of the evidence produced before him and, if he is not the Collector, submit his report to the Collector.

(4) The Collector shall after hearing the parties on all points arising out of the application pass such order as to him seems to be just and proper.

(5) The Collector shall prepare a record of homestead held by privileged tenant in Form G. The main record shall be maintained in the office of the Collector and a copy of the record bearing the signature and seal of the Collector shall be made over to the landlord and the privileged tenant."

10. It has been contended on behalf of the petitioners that they are owner of the property having purchased the land by the Additional sale deed which is wrongly held and found to be fictitious and forged during course of the inquiry. In that, it has been further submitted that the inquiry itself is illegal as it was not carried out by the competent authority, as required by the provisions of law.

11. This submission appears to be quite weighty from the facts of the present case. There is no dispute about the fact that the inquiry was conducted and a report was made by the Karamchari, who is not competent to do so under the law. As it is seen from the provisions of Rule 5 of the Rules of 1948, the inquiry has to be conducted by the Collector or any authority not below the rank of Circle Inspector. Admittedly, as it has emerged from the record, no such authority had conducted the inquiry, as required under the law. Therefore, on that ground itself, the Impugned order requires to be quashed and the petition is required to be allowed with appropriate direction.

12. The inquiry must be made by the Collector or any responsible officer not below the rank of the Circle Officer or Welfare Inspector, as per(sic)e provisions of sub-rule (i) of Rule 5 of Rules 1948. If an inquiry is conducted by the Karamchan then it is not the compliance of the provisions of Rule 5(1) of the Rules of 1948. Not only that, even under Clauses (1) and (2) of sub-section (i) of Section 2 of the Act of 1947, there ought to be a finding that the person claiming to be privileged person is not a proprietor or tenure holder and besides, his homestead, he does not hold more than one acre of land. This aspect has also not been complied with from the record of the present case.

13. The Respondent-State has claimed that the disputed land is an abandoned land and it is vested in the State in terms of the provisions of Section 87 of the Bihar Tenancy Act, 1885. It will, therefore, be interesting and material to refer to the said provisions as hereunder:--

"87. Abandonment.--(1) If a raiyat voluntarily abandons his residence without notice to his landlord and without arranging for payment of his rent as it falls due and ceases to cultivate his holding either by himself or by some other person, the landlord may, at any time after the expiration of the agricultural year, in which the raiyat so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take it into cultivation himself.

(2) Before a landlord enters under this section, he shall file a notice in the prescribed form in the Collector's office, stating that he has treated the holding as abandoned and is about to enter on it accordingly; and the Collector shall cause a notice to be published in such manner as the State Government, by rule, directs.

(3) When a landlord enters under this section, the raiyat shall be entitled to institute a suit for recovery of possession of the land at any time not later than the expiration of two years, or, in the case of a non-occupancyraiyat six months, from the date of the publication of the notice; and thereupon the Court may on being satisfied that the raiyat did not voluntarily abandon his holding, order recovery of possession on such terms, if any, with respect to compensation to persons injured and payment of arrears of rent as to the Court may seem just.

(4) Where the whole or part of a holding has been sublet by a registered instrument the Fandlord shall, before entering under this section, on the holding, offer the whole holding to the sub-lease for the remainder of the term of the sub-lease at the rent paid by the raiyat, who has ceased to cultivate the holding, and on condition of the sub-lessee paying up all arrears due from that raiyat. If the sub-lessee refuses or neglects within a reasonable time to accept the offer, the landlord may avoid the sub-lease and may enter on the holding and let it to another tenant or cultivate it himself as provided in subsections (1) and (2).

(5) If an under-raiyat has a right of occupancy in a holding or a portion thereof the landlord shall before entering on the holding under this section, offer the whole holding to the under-raiyat at the rent paid by raiyat and on condition of

the under-raiyat paying up all arrears due from the raiyat. If the under-raiyat refuses or neglects within a reasonable time to accept the offer, the landlord may enter on the holding and let it to another tenant or cultivate it himself, as provided in sub-sections (1) and (2)."

14. No doubt, on abandonment of the holding, the landlord is entitled to resume "Khas possession" and proceedings u/s 87 of the B.T. Act are not sine qua non to the taking of possession. Ordinarily, the landlord should proceed under that Section before taking possession but absence of such proceedings is not an evidence against abandonment. It would be interesting to refer to the essential ingredients and material characteristics of the statutory expression "abandonment". They are hereasunder:--

- (i) voluntary abandonment by a raiyat of his residence without notice to his landlords,
- (ii) failure on his part to arrange for the payment of the rent as it falls due, and
- (iii) ceasing to cultivate the holding.

15. To establish a case of abandonment a landlord has to prove affirmatively these three facts. It may also be mentioned that the provisions of Section 87 are not exhaustive. They are enumerative. Therefore, the provisions of Section 87 are required to be examined and evaluated in the light of the factual profile and the object and spirit of the law.

16. The view which this Court is inclined to take is also very much reinforced by a Division Bench decision of this Court in the case of Hira Lal Vishwakarma vs. Vishwanath Sah & Ors. 1978 BBCJ 623 [: 1978 PLJR 398].

17. In the result, this writ petition is allowed and the impugned order, dated 20.6.1988, passed by respondent No. 2, Anchaladhikari, Anchal Barahara, Bhojpur, is quashed and set aside with a direction to the competent authority to reconsider and decide the matter afresh in accordance with law as early as possible, preferably, within a period of six months from the date of receipt of the writ of this Court. The writ petition, accordingly, shall stand allowed. Rule is made absolute. No costs.