

(1954) 11 PAT CK 0004

In the Patna High Court

Case No : Misc. Judicial Case No. 185 of 1952

Bajnath Prasad and Others

APPELLANT

Vs

Jang Bahadur Singh and Another

RESPONDENT

Date of Decision : 26-11-1954

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 — Section 11, 2
Constitution of India, 1950 — Article 226
Transfer of Property Act, 1882 — Section 58

Citation : AIR 1955 Patna 357 : (1955) 3 BLJR 56

Hon'ble Judges : Sahai, J; Ramaswami, J

Bench : Division Bench

Advocate : Rajendra Narayan Singh and Shreedeva Narayan, for the Appellant;
Uday Sinha, for the Respondent

Final Decision : Allowed

Judgement

Sahai, J.—This is an application under Article 226 of the Constitution of India for issue of an appropriate writ, quashing the order of the Commissioner of the Patna Division in a case under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. No relief has been claimed against the State of Bihar which appears to have been unnecessarily impleaded as opposite party No. 2.

2. It appears that the petitioners took a loan of Rs. 20,000/- from opposite party No. 1 and executed a "rehan" deed on 5-7-1945, giving in mortgage their houses, godown and orchard etc. On 7-7-1945, the petitioners took back the "rehan" pro-"perties on lease on the basis of "karayanama" wherein it was stipulated that the petitioners would, pay Rs. 100/- per month as rent to opposite party No. 1. The rate of interest for the loan advanced on the basis of the "rehan" was -/8/- per hundred per month and the total interest on Rs. 20,000/- came to Rs. 100/- per month. Under another "rehan" deed executed on 14-9-1945, the petitioners took a further loan of Rs. 14,500/- from opposite party no. 1 and gave the same properties, in "rehan". The total interest on this

amount came to Rs. 72/8/-per month. Thereafter, the petitioners executed a fresh "Kerayanama" in respect of the lease of these properties, stipulating to pay Rs. 172/8/- instead of Rs. 100/- per month to opposite party no. 1 with effect from 1-10-1945. All these facts are mentioned in the "kerayanama" itself.

3. Opposite party no. 1 filed an application u/s 11, Bihar Buildings Control Act, 1947, before the House Controller for an order of eviction of the petitioners on the ground that the petitioners had not paid rent for the period from 15-9-1945 to 15-10-1947 and that they had sublet portions of the house without his permission. By his order dated 27-12-1950, the House Controller ordered the petitioners to vacate the house. The petitioners filed an appeal before the Collector, who, by his order dated 25-G-1951, set aside the House Controller's order on the ground that the petitioners were not tenants under opposite party No. 1, because the amount which they had agreed to pay as rent was in the nature of interest on the money advanced to them by opposite party No. 1. Opposite Party no. 1 filed an application for revision before the Commissioner, Patna Division. By his order dated 19-4-1952, the Commissioner set aside the Collector's order on the ground that he had acted beyond his jurisdiction in dealing meanings into the "kerayanama" which were different from the clearly stipulated terms. He also directed the petitioners to vacate the house. The petitioners have prayed for quashing of this order.

4. The point which has been taken before us on behalf of the petitioners is that no application u/s 11, Bihar- Buildings Control Act, 1947 could be entertained at all, because the petitioners are not tenants within the meaning of that Act. The word "tenant" has been defined in Section 2(h) of the Act as follows :

"(h) "tenant" means any person by whom, or on whose account, rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour." The contention on behalf of the petitioners is that the amount which was payable by the petitioners to opposite party No. 1 was really the "interest" which they had to pay on the mortgage money advanced to them and not "rent" for the houses, godown, orchard, etc., which were taken in lease by them. The word "rent" has not been defined in the Act, but it certainly connotes a thing or an amount of money payable for use and occupation of lands or buildings."

The second "kerayanama" executed by the petitioners itself shows that the amount which they agreed to pay as rent was Rs. 100/-, because the total interest payable at the stipulated rate of -/8/-per hundred per month on the sum of Rs. 20,000/- borrowed by them came to Rs. 100/- per month. "It further shows that they agreed to pay Rs. 172/8/-per month because the total interest payable by them on Rs. 20,000/- which was originally advanced and on Rs. 14,500/- which was subsequently advanced came to that amount at the stipulated rate of -/8/- per hundred per month. It is, therefore, clear from the "kerayanama" relied upon by opposite party no. 1 himself that the so-called rent payable by the petitioners to him represented, in fact, the amount of interest

payable by them on the total mortgage money. It is manifest that the arrangement was thus a device for regular payment of interest and not a lease of the properties in question on payment of rent for their use and occupation.

5. For holding that the amount payable by the petitioners to opposite party no. 1 was "rent" and not "interest", the Commissioner has relied upon the fact that opposite party no. 1 obtained from the Civil Court a decree for arrears of rent against the petitioners in respect of the properties in question before he filed his application u/s 11, Bihar Buildings Control Act, 1947. I do not think that the Civil Court was concerned with the question whether the amount payable by the petitioners was "rent" or "interest", because the opposite party was certainly entitled to get a decree for the arrears. That decree has, therefore, no bearing on the point, in question in this case.

6. The learned advocate for the petitioners has relied upon some decisions of the Privy Council and this Court and I now propose to refer to them. In -- AIR 1927 32 (Privy Council) , the mortgagor gave, certain properties in "mortgage with possession" and then took back some of those properties on lease. The rent payable under the lease was equivalent to the amount of interest payable on the amount advanced on the security of the properties leased back. Their Lordships of the Judicial Committee accepted the contention that the mortgage and the lease formed parts of one transaction, and that the lease was "in the nature of a machinery for the purpose of realising the, interest due on the mortgage".

7. "In -- Rajniti Prasad Singh and Another Vs. Commissioner of Income Tax, , a Special Bench of this Court had to decide whether the usufructuary mortgage deed in respect of their proprietary interest in some villages executed by the mortgagors and a lease back of the same villages in favour of the mortgagors formed parts of one and the same transaction and whether the "rent" payable by the mortgagors was assessable to Income Tax. Their Lordships held that the documents formed parts of the same transaction and that) the amount payable by the mortgagors to the mortgagee was "interest" on the mortgage money, though it was described as "rent".

8. In the case of -- Umeshwar Prasad Sinha Vs. Dwarika Prasad, , question arose relating to the applicability of Order 34, Rule 14, Civil P. C., in proceedings for execution of... a decree for "rent obtained in circumstances similar to those of the present case by a sale of the equity of redemption in some of the mortgaged properties. Sinha J. who delivered the judgment, Fazl Ali C. J. agreeing, observed as follows :

"In other words, where the Court finds that though the documents have taken the shape firstly, of a mere usufructuary mortgage bond, the mortgagee purporting to take possession of the mortgaged properties, but in reality the second document whereby possession is purported to be given back to the mortgagor is merely a device to ensure regular payment of the interest, which also is secured on the same mortgaged properties, it may generally be said that

they are parts of the same transaction. Such a transaction may be evidenced by more than one document which may have been executed on different dates with varying periods of their operation, and possibly, even in the name of different parties, benami for the real mortgagor and mortgagee. The Court has to look upon the transaction as a whole after tearing of the veil attempted to be thrown round the real intent of the parties."

It is perfectly clear on the authority of the cases which I have referred to above that the real intent of the parties and the true nature of the transaction have to be ascertained. In the present case, a mere perusal of the "kerayanama" shows that there was one transaction and that the intention of the parties was that the mortgagee, opposite party No. 1, would not get possession of the mortgaged properties but would only get "interest" on the amounts advanced by him at the stipulated rate of 8 annas per hundred per month in the shape of "rent", so long as the lease continued. Mr. Uday Sinha has, however, urged on behalf of opposite party No. 1 that he is entitled to take possession of the mortgaged properties in view of the fact that the petitioners have not adhered to the terms of the lease as evidenced by the "kerayanama". In support of this argument, he has relied upon the case of -- (1933) 1 ITR 219 (Privy Council) . In that case also, there were two documents. The first was a usufructuary mortgage deed and the other was a lease back of the mortgaged properties to be mortgagor. The mortgagee instituted a suit for recovery of possession of the mortgaged properties. Their Lordships held that, the lease having expired, he was entitled to recover possession.

I do not think that that case helps opposite party No. 1. As their Lordships have mentioned, the claim for possession in the suit was based upon the plaintiff's right as mortgagee. The question whether the amount payable by the mortgagor as rent was or was not interest on the amount advanced by the mortgagee did not arise for consideration in that case. In the present case, opposite party no. 1 claimed an order of eviction on the ground that he was the landlord and the petitioners were his tenants. On the authority of the Privy Council decision, it is possible that opposite party No. 1 may, by virtue of his rights as a mortgagee, recover possession of the mortgaged properties after the expiry of the lease or on breach of any condition entitling him to recover possession when he brings an appropriate action, but that has no relevancy on the question whether the petitioners are his tenants within the meaning of the Bihar Buildings Control Act, 1947.

9. As I am clearly of the opinion that the amount payable by the petitioners to opposite party no. 1 was "interest" on the mortgage money and not "rent" for use and occupation of the mortgaged properties, it is manifest that the petitioners cannot be described as tenants within the meaning of the Bihar Buildings Control Act, 1917. This conclusion receives considerable support from a reference to Sections 5, 6 and 7 of the Act. These sections lay down the circumstances in which the House Controller can determine or re-determine the

fair rent of any building. Section 5 provides for an application for determination of fair rent being filed by the landlord or the tenant. The so-called rent which was originally fixed by the parties in this case was Rs. 100/- per month. Thereafter, the rent was suddenly raised to Rs. 172/8/- per month. If the petitioners had filed an application u/s 5, I do not think that the Controller could proceed to determine the fair rent, because it would have been argued that the amount which they were paying as "rent" was not liable to reduction as it was fixed on calculation of the "interest" payable by them.

10. For the reasons given above, I hold that the petitioners are not tenants within the meaning of the Act and that the application u/s 11 of the Act filed by opposite party No. 1 was not at all maintainable. That being so, the Commissioner had no jurisdiction to direct the petitioners to vacate the house in question.

11. In the case of -- Baijnath Sao Vs. Ram Prasad, , it has been held that the House Controller has jurisdiction to decide whether there is a relationship of landlord and tenant between the parties because it is necessary, for him to decide this question in order to enable him to exercise his jurisdiction to order or not to order the eviction of the tenant on the landlord's application.

It has further been held that the Civil Court has no jurisdiction to interfere with the House Controller's finding in respect of the relationship. I do not think that that decision has any application to this case because that was given in connection with a suit instituted for setting aside the Controller's order. In the present case, the question is whether a writ of certiorari should or should not issue, The High Court's power under Article 226 of the Constitution to grant a writ of certiorari is much wider in scope than that of a suit for setting aside the House Controller's order. The reason is that the High Court can, by issuing such a writ, interfere not only where there is a defect in the exercise of jurisdiction by the Controller but where there is an error of law apparent on the face of the order which is being impugned,

12. In the circumstances of this case, therefore, a writ in the nature of certiorari will issue, quashing the order of the Commissioner dated 19-4-1952. Opposite Party No. 1 will pay the costs of the petitioners: hearing fee Rs. 50/-.

Ramaswami, J.

13. In this case an argument was put forward on behalf of the respondent no. 1, Jangbahadur Singh, that the Tribunal constituted under, the Bihar Buildings Control Act, 1947, had final authority to determine the, preliminary facts upon which its jurisdiction is based and the decision of the Tribunal on the preliminary facts cannot be challenged in any collateral proceeding! Counsel on behalf of respondent No. 1 made the submission that even if the Commissioner wrongly held that there was relationship of landlord and tenant between the parties, that finding cannot be challenged by the petitioner in a collateral proceeding. In support of this submission counsel relied upon Baijnath Sao Vs. Ram Prasad, . It

was held in that case by a Division Bench that even if the House Controller had wrongly decided that the parties stood in the relationship of landlord and tenant the Civil Court had no jurisdiction to go behind that finding in a collateral proceeding or to say that the House Controller had no authority under the statute to pass an order of eviction.

It is not necessary in this case to consider whether this decision is correct or otherwise. I shall assume that this decision is correct; but even so the authority of this decision does not assist the case of respondent No. 1. The reason is that a writ of certiorari under Article 226 of the Constitution is much wider in scope than a suit instituted by the petitioner in a Civil Court for setting aside the order of the Controller. The decision of the Bench in *Bajinath Sao Vs. Ram Prasad*, was a decision given with reference to such a suit instituted by a tenant for a declaration that the order of eviction passed by the House Controller under the ACT was "ultra vires" and without jurisdiction. In the present case the question at issue is different. The question is whether the petitioner is entitled to be granted a writ in the nature of Certiorari under Article 226 of the Constitution.

The principle is well established that a writ of certiorari lies not merely for a defect of jurisdiction on the part of an inferior tribunal but also for an error of law apparent on the face of the record. This principle was laid down by the English Court of Appeal in -- "*Rex v. Northumberland Compensation Appeal Tribunal* (1952) 1 KB 338 (F), and it was held in that case that an order for certiorari could be granted for quashing a decision of an inferior Court, not merely for a defect of jurisdiction but also on the ground of an error apparent on the face of the record. At p. 357 Morris L. J. states:

"The survey of the law by Lord Sumner in the year 1922 in the case of "*Rex v. Nat Bell Liquors Ltd.* (1922) 2 AC 128 (G), lends no countenance to the view urged on behalf of the appellant, but on the contrary negatives it. In my judgment the law as laid down in the House of Lords in -- "*Walsall Overseers v. L. & N. W. Ry. Co.* (1879) 4 AC 30 (H), must take precedence over any observations made in the case of -- "*Racecourse Betting Control Board v. Secretary of State for Air* (1944) Ch 114 (I), which may be in conflict.

It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an order or decision, and then by quashing it"

This statement of the law was expressly approved by the Supreme Court in -- *T.C. Basappa Vs. T. Nagappa and Another*, . In the present case, the Commissioner has committed a patent error of law in misconstruing the "Kerayanama" executed by Bajinath Prasad and others in favour of respondent No. 1 dated 15-9-1945. As a result of this manifest error, the Commissioner

reached the finding that there was relationship of landlord and tenant between the parties and that he had jurisdiction to pass an order of eviction against the petitioner. In my opinion the decision reported in Baijnath Sao Vs. Ram Prasad, , has no application to this case. I agree with my learned brother that a writ in the nature of certiorari should be issued quashing the order of the Commissioner dated 19-4-1952.