
(2004) 02 PAT CK 0042
In the Patna High Court
Case No : CWJC No. 4553 of 2001

Bikrama Thakur and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 13-02-2004

Acts Referred:

Citation : (2004) 02 PAT CK 0042

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—Heard Mr. Shashi Shekhar Dwivedi for the petitioners, Mr. Abbas Haider, JC to GP No. II for respondent Nos. 1 to 5, and Dr. Alok Kumar Sinha for respondent Nos. 6 to 9. This writ petition is directed against the order dated 26.2.2001 (Annexure-1), passed by the learned Collector of the district of Saran at Chapra in Misc. Petition No. 24/95 Tapeswar Thakur and Ors. v. Sitaram Thakur and Ors. in purported exercise of powers u/s 21 of the Bihar Privileged Persons Homestead Tenancy Act 1947 (hereinafter referred to as the Act), whereby the revision petition at the instance of respondent Nos. 6 to 9 herein has been allowed, and the settlement of the lands in question in favour of the petitioners has been cancelled. According to the writ petition, it relates to plot No. 684, appertaining to khata No. 146, covering an area of 71/2 decimals= 2 kathas, situate at village Shekhpura, district Saran. It is further stated in the writ petition that the total area of this plot is 5 kathas and 2 dhurs, and the said 71/2 decimals of which was settled in favour of the petitioners by order dated 8.9.1982, as is evidenced by parcha marked Annexure-2 to the writ petition followed by the rent receipts marked Annexure-3 series. Respondent No. 6 to 9 had filed an application before the learned DCLR stating therein that the lands in question are gair- mazarua aam lands, being a garha used by members of the general public for purposes of bathing, drinking water, chhath and such other matters, and is being settled year after year for purposes of fishery settlement. The same was disposed of by order dated 27.9.2003, wherein he found that it was a garha being a pond used for the said purposes. He, however, desisted from cancelling the settlement for the reason that he was not authorised to do so.

Respondent Nos. 6 to 9 thereafter preferred revision application in terms of Section 21 of the Act which has been allowed by the impugned order and the settlement has been cancelled. Hence this writ petition at the instance of the settlee.

2. While assailing the validity of the impugned order, learned counsel for the petitioners submits that the aforesaid order dated 8.9.1982, ordering settlement in favour of the petitioners, had become final. He next submits that the revision application was not maintainable because the provision for revision in terms of Section 21 was inserted by Act XI of 1989 with effect from 25.9.1989, much less at the instance of mere busy-body like respondent Nos. 6 to 9 who claim no personal interest in the matter and have no locus standi to maintain the same. He relies on the following reported Judgments in support of his submission that a provision of law inserted at a later date cannot be allowed to be re-opened thereunder unless the same was retrospective in character either by clear provision of law or necessary intendment :

(i) Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, .

(ii) K. Kuppusamy and Another Vs. State of T.N. and Others, .

(iii) Chhangur Lal Gupta Vs. The State of Bihar and Others, , and

(iv) Shyam Sunder and Another Vs. Ram Kumar and Another, .

2.1. He next submits that there is no material on record to show that land in question is gair-mazurua aam lands and a garha and was being used for the alleged purposes as is being claimed by the respondents. He lastly submits that the cause of the respondents is hit by estoppel and acquiescence for the reason that the petitioners have made construction of a double-storeyed house on the land in question, taking the order of settlement to be final.

3. Learned government counsel has supported the impugned order. Learned counsel for respondent Nos. 6 to 9 has adopted his submissions.

4. I have perused the materials on record and considered the submissions of learned counsel for the parties. Learned government counsel has taken me through various materials on record to show that the lands in question were recorded in the survey records as gair-mazurua aam, and are being used for the aforesaid purposes, and being settled for fishery purposes year after year. First of all is the report of the Additional Collector, Saran, Chapra (Annexure-6) which says that the land in question is registered as gair-mazurua Malik garha and a portion of the land settled in favour of the petitioners is a garha which is settled every year for purposes of fishery. It was so settled at the time of inspection also. He has therefore, stated that this being a government land, could not have been settled, it is so recorded at page-62 of the Shairat Register, it has further been noticed in the impugned order that prior to vesting of zamindari, it was recorded as gair-mazurua Malik in R.S. Khatian, and on vesting had come in possession of the State of Bihar which is admitted by all sides before me. The

impugned order has also noticed the aforesaid order dated 27.9.1993, passed by the learned LRDC, wherein he states that the parcha has been illegally granted to the petitioners herein and ought to be cancelled. It is further stated in the order dated 23.6.1997, (Annexure-4), passed by the learned Collector of the district of Chapra in the present Misc. case No. 24/95 that the petitioners herein are not landless persons. It appears to me on a consideration of the materials on record that the lands in question are government lands which has a pond therein, which is being settled for the purpose of fishery, and was in fact at the time of impugned order settled in favour of some body. In fact, such are the findings recorded in the impugned order.

5. I must also deal with the objection raised by learned counsel for the petitioners that the forum of revision engrafted in Section 21 of the Act was inserted by Act XI of 1989 with effect from 25.9.1989, and, therefore, the aforesaid order of settlement dt. 8.9.1982, could not have been set aside. He relies on the aforesaid Judgments of the Supreme Court. A similar issue was raised before this Court in CWJC No. 15326 of 2001 Mostt. Shila Devi v. State of Bihar, wherein an order of settlement of the year 1969 was set aside by the Collector in purported exercise of powers u/s 21 of the Act. The settlee had challenged the same by preferring CWJC No. 15326 of 2001, in this Court which was dismissed. She preferred appeal before this Court which was registered as LPA No. 77 of 2002 Mostt. Shila Devi v. State of Bihar which was dismissed by order dt. 17.1.2002, with the following observations :

"The learned writ Court after looking into the records and the subsequent inspection report rightly held that the Collector of the district had rightly cancelled the parcha standing in the name of Bechan Paswan after hearing his heirs who had appeared before him as a right which has been obtained fraudulently cannot be sustained.

The contention of the appellant the Collector had no power to re-open the matter is also of no substance as the Act itself provides that the Collector can on his own motion or on a petition call for the records and after being satisfied, may pass an appropriate order in accordance with law."

6. The observation made herein above supports the case of the respondent that in a case of such an illegal settlement or which is tainted either by fraud or mala fides or was wholly unauthorised or was with respect to such public lands being used by the people at large could not have been settled, then such a revision application in terms of Section 21 of the Act would be maintainable. I must at this stage also negative the contention advanced on behalf of the petitioners that the revision application at the instance of respondent Nos. 6 to 9 was not maintainable for two reasons. Respondent Nos. 6 to 9 are not mere busy body in view of the findings recorded hereinabove that the lands are being used by the public at large for diverse purposes and is being settled year after year for fishery purposes, and have had the locus standi to maintain the revision application. Secondly, Section 21 of the Act is very widely stated and states that

the Collector can examine the records "on the application of any party" which includes a person like respondent Nos. 6 to 9. I am of the view that the Legislature has advisedly introduced this provision in Section 21 and has widely worded the section because the Act governs rural lands where a large number of plots are used for public purposes.

7. Learned counsel for the petitioners that he is protected by doctrine of promissory estoppel and acquiescence on the part of respondent No. 1 to 5. He relies on the Judgment of the Supreme Court reported in Krothapalli Satyanarayana Vs. Koganti Ramaiah and Others, wherein it has been laid down that relief was declined to the plaintiff on the ground that he had acquiesced to the injury. I am unable to accede to the submission for the reason that in view of the observations made hereinabove that the lands in question is being used by the people at large and settled year after year by the State Government, settlement of the same in favour of the petitioners was obviously collusive which renders the order of settlement void ab initio which can always be so declared by the Court. Furthermore, the Judgment of the Supreme Court in the case of Krothapalli Satyanarayana (supra) does not apply to the facts and circumstances of the present case for the reason that it was a case under the provisions of Section 34 and 39 of the Specific Relief Act where there was no allegation of the nature found in the present case, and, secondly, the issues are being examined in the present case in writ jurisdiction which the same is never exercised in favour of dishonest persons who are to grab the properties which do belong to them, and is exercised in the interest of justice. The contention is, therefore, rejected.

8. Learned government counsel is right in his submission that the lands in question could not have been settled in favour of the petitioners in view of the clear provision of Section 3 of the Act which, inter alia, lays down to the effect that this Act shall not apply to any land or plot, residential or otherwise, vested in the Government or a local authority. The irresistible conclusion, therefore, is that settlement of the lands in question was void, non-est in law and without jurisdiction.

9. Learned government counsel is further right in his submission that this Court in exercise of its extra-ordinary prerogative writ jurisdiction should not set aside an order which would result in reviving an illegal order. He is further right in his submission that in such a situation, assuming that exercise of revisional jurisdiction was bad in law, it is open to this Court to examine the impugned order on merits and come to its own conclusion. He has rightly relied on the Judgment of the Supreme Court reported in Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, . That was a case where the proceedings were taken under the Rent Control and Eviction (U.P. Urban Building Regulation of Letting, Rent and Eviction) Act 1972. The aggrieved party moved the District Judge in appeal who disposed of the matter. The aggrieved party on this occasion moved the High Court in writ jurisdiction and objection was taken

that there is no provision of appeal at all in the Act, much less before the District Judge and, therefore, the order was wholly without jurisdiction and a nullity. The contention was negatived by the High Court. Repelling the same contention, the Supreme Court observed that setting aside the order of the District Judge would result in revival of the illegal order of the original authority, which may not be done in exercise of writ jurisdiction. The Supreme Court observed that the High Court had adopted the orders of the District Judge as its own order. I had the occasion to follow the same in my Judgment since reported in 2002 (1) BLJR 600 Shri Prakash Singh v. State of Bihar, Paragraphs-12 to 15 of which are relevant in the present context and are set out hereinbelow for the facility of quick reference :

"12. The question is whether or not this Court, in exercise of its discretionary, prerogative writ jurisdiction, set aside the impugned order which would result in reviving patently illegal orders passed by the Certificate Officer. I have on a thoughtful consideration of the entire matter reached the conclusion that this Court should refrain from adopting such a course. In the case of Mohd. Swalleh (supra), the Supreme Court was faced with a situation where the District Judge had set aside the order of the first authority under the U.P. Urban Buildings (Regulations of Letting , Rent and Eviction) Act, 1972. In exercise of the writ jurisdiction under Article 226 of the Constitution, the Allahabad High Court upheld the order of the District Judge even though it came to the conclusion that no appeal lay before the District Judge, because setting aside the order of the District Judge would have resulted in reviving and perpetuating a patently illegal order of the first authority under the Act. In other words, the District Judge had exercised a jurisdiction under the Act where none was vested in him, notwithstanding which the Allahabad High Court has upheld his order. In one sense, the order of the District Judge will be deemed in law to have been substituted by the order of the High Court on the writ petition on a thorough consideration of the entire matter. On the other hand, in the present case, the learned Collector has exercised powers vested in him by law although in excess of the same. I am in no doubt that the present case is squarely covered by the Judgment of the Supreme Court in the case of Md. Swalleh.

"13. Learned counsel for respondent No. 3 has rightly relied on the Division Bench Judgment of this Court in Hari Prasad Jalan (supra), paragraph 6 of which is set out hereinbelow for the facility of quick reference :

"6He further contended that the Act does not vest any power of review in the District Magistrate so that by order dated 12.4.1982, the earlier order dated 21.4.1980, could have been recalled. According to the learned Additional Advocate General, as the earlier order was not in conformity with the direction of the Supreme Court and the order dated 12.4.1982, which is being questioned in the Court application is in accordance with the direction of the Supreme Court, the Court should not interfere with the order dated 12.4.1982, although passed without jurisdiction, because the effect thereof, will be that an illegal order dated

21.4.1980, shall be revived. In support of this contention, reliance has been placed to the well known Judgments of the Supreme Court and of this Court in the cases of Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, , Abdul Majid and Others Vs. The State Transport Appellate Authority and Others, , Devendra Prasad and Others Vs. State of Bihar and Another, and Hari Prasad Mandal v. Addl. College, Monghyr, (1978 BBCJ (HC) 575). It is almost settled that writ jurisdiction of this Court is discretionary and it should not be exercised for quashing an order which may have been passed without jurisdiction if that order has property to set aside another illegal order. If it is held that the order dated 21.4.1980, is either illegal or without jurisdiction, then there should not be any jurisdiction, then there should not be any difficulty in accepting the contention raised on behalf of the respondents."

(emphasis mine)

"14. Learned counsel for respondent No. 3 is equally right in placing reliance on the Division Bench Judgment of this Court in Naya Dwakhana v. State of Bihar, (supra). Paragraphs 53 and 54 of the Judgment are relevant in the present context and are set out hereinbelow for the facility of quick reference :

"53. At this juncture, the main submission made by Mr. Basudeo Prasad may be noticed. The learned counsel submitted that even assuming that the order dated 15.10.1985, passed by the Minister-in-Charge and as contained in Annexure-10 to the writ petition is wholly jurisdiction, this Court should not interfere with the said order as the order dated 22.12.1984, passed by the Drug Controller is also illegal and without jurisdiction. The learned counsel as contained hereinbefore, has placed heavy reliance upon the Judgment of this Court in A. Mazid v. State Transport Authority, AIR 1960 SC 828, Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, .

"54. The ratio of the aforementioned decisions is neither in doubt nor in dispute. In the aforementioned decisions, it has been held by this Court as well as by the Supreme Court that the issuance of writ or certiorari is a discretionary remedy. Such a writ may not be issued if substantial justice has been done to the parties or if in the event upon quashing of one illegal order it is found that the same would give rise to another illegality, the High Court in its discretion may quash both the orders."

(emphasis mine).

"15. Law is thus well settled that this Court should not exercise its discretionary, prerogative writ jurisdiction which will result in revival of an illegal order. While passing the impugned order the learned Collector may have exceeded in exercise of his review jurisdiction u/s 63 of the Act duly vested in him by law, and the same is hereby substituted by the present order of this Court. The order of the Certificate Officer is patently illegal and could not have been dropped on the ground assigned by him. Furthermore, the learned Collector has gone into the entire matter in depth and has also considered the circumstances leading to the

delay in preferring the appeal. He has stated in the impugned order that the concerned Branch Manager was not aware of the order of the Certificate Officer, and he had also suffered a heart attack during the period. In my view, these are valid circumstances to condone the delay."

10. I had the occasion to apply the Judgment of the Supreme Court in *Md. Swalleh v. 3rd Add. District Judge, Meerut*, once again in my Judgment since reported in *Md. Sabir Hussain and Others Vs. The State of Bihar and Others*. It may incidentally be mentioned that this case was also under the Bihar Privileged Persons Homestead Tenancy Act.

11. The position which clearly emerges is that the land in question is of public nature, is being used by the people at large, and is being settled by the State of Bihar for fishery purposes year after year. The settlement in favour of the petitioners was collusive, void, and non-est in law. The same is also hit by the provisions of Section 3(a)(ii) of the Act. I am also of the view that on account of the nature of the lands in question, respondent Nos. 6 to 9 have had the locus standi to maintain the revision application which was maintainable in view of the observations of the division bench in the case of *Mostt. Shila Devi v. State of Bihar*, (supra). Lastly, even if supposing for the sake of argument that the revision Application in terms of Section 21 of the Act were not maintainable, I find it to be a valid and legal order on merits, and setting aside the same may result in reviving an illegal order. I, therefore, in exercise of my discretionary, prerogative writ jurisdiction adopt. 12. In the result, this writ petition is dismissed.