

(1996) 07 PAT CK 0026
In the Patna High Court
Case No : C.W.J.C. No. 7595 of 1995

Brij Bihari Pandey and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 10-07-1996

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1997 Patna 74

Hon'ble Judges : Naresh Kumar Sinha, J

Bench : Single Bench

Advocate : Shivaji Singh, for the Appellant; Jagannath Jha, Govt. Pleader, Navneet Kumar and Jitendra Prasad Singh, for the Respondent

Final Decision : Dismissed

Judgement

Naresh Kumar Sinha, J.—The petitioners in their application under Articles 226 and 227 of the Constitution of India seeks quashing of the order dated 4-3-1992 (Annexure-3) passed by the Joint Director, Consolidation, (respondent No. 3) in revision case No. 20/92 giving direction to the Circle Officer, Nawanagar, (respondent No. 5) for incorporating six decimals of land bearing plot No. 267 in the name of Devidayal Pandey (respondent No. 6) on the ground the order was perverse, illegal and without jurisdiction.

2. The petitioners' case is that plot No. 267 having an area of six decimal of Khata No. 93 in village Nokhpur in Buxar district stood accorded in the revisional survey Khatian as "Rasta-Gali" the name of "Anabad Bihar Sarkar". Plot Nos. 265 and 266 being to the petitioners and are adjacent to plot No. 267. The petitioners claim to be using the aforesaid six decimals of land as their Rasta since long. The said Rasta, it is alleged, was illegally and mischievously closed by respondent No. 6 causing hardship to the petitioners and inconvenience to the general public. The petitioners filed an application before respondent No. 5 whereupon an encroachment proceeding case No. 1 of 199-3-94 was started and reports were called for from the Karmachari and the Circle Inspector of the area

concerned. The Karmachari and the Circle Inspector filed their reports dated 13-3-1994 and 17-3-1994 respectively supporting the assertion made by the petitioners. In spite of all this respondent No. 5 passed the order dated 10-6-1994 copy of which is Annexure-5 dismissing the encroachment case with the observation that the petitioners may move a court of competent jurisdiction for ventilating their rights. The said order Annexure-5 was passed on account of the fact that the predecessor in office had passed an order dated 28-8-1992 (Annexure 4) in connection with a mutation case No. 160/92-93 in view of the order dated 4-3-1992 (Annexure 3) passed by the respondent No. 3 in revision case No. 20 of 1992. The petitioners thereafter "obtained certified copy of the order dated 4-3-1992 (Annexure 3) and filed revision case No. 505/94 u/s 35 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act (hereinafter referred to as the "Act"). The revision was dismissed by the Director of Consolidation, Bihar, (respondent No. 2) by his order dated 9-9-1994 (Annexure 6) as not maintainable with the observation that the petitioners may seek other legal remedy. Such an order was passed on the ground that the Director of Consolidation had no power to review the order passed by the Joint Director, Consolidation, u/s 35 of the Act.

3. The petitioners have described the impugned order Annexure 3 as wholly mala fide as the plot No. 267 commonly in use as Gali and provided in the survey Khatian under the name of "Bihar Sarkar Anabad" could not have been the subject matter of compromise between the parties and none of the parties including respondent No. 6 could have got the said plot incorporated in their own schedule. The compromise could not have been recorded also on account of non-fulfilment of the ingredients contained in the provisions of the Order 23, Rule 3 of the Code of Civil Procedure. The petitioners then moved the Hon"ble Court for setting aside the impugned order by filing C.W.J.C. No. 8847/ 94. The writ application was dismissed for non-prosecution by order dated 16-2-1995 passed by a Bench of this Court. An application for restoration of the writ filed vide MJC No. 324/95 was also dismissed in limine on 29-3-1995 on account of delay in the appearance of the petitioners' counsel. The petitioners then filed second restoration application bearing MJC No. 496/95 which too was dismissed by order dated 27-6-1995, a photo copy of which is Annexure 7 with the observation that "the petitioner if so advised may file a fresh writ application, if permissible in law."

4. The application has been contested by respondent No. 6. In his counter-affidavit the respondent has taken an objection to the maintainability of the application both on the ground of inordinate delay in moving this court to challenge the impugned order passed as far back as on 4-3-1992 as also on the ground that an earlier writ application filed for the same cause of action had been dismissed by this Court. The case of the respondent is that cadastral survey plot No. 407 measuring 0.16 decimals and cadastral survey plot No. 409 measuring 12 decimals were recorded as Gairmazarua Malik in the cadastral survey and was a Gatha. During the revisional survey both the plots were carved

into five plots i.e. plot No. 264 measuring 5 decimals 10 decimals and plot No. 265 measuring 4 decimals in the name of the Deo Kumar Pandey, Ramjanam Pandey and Rampyar Pandey -- the ancestors of the petitioners. Plot No. 266 measuring 3 decimals was recorded in the name of Ramswarup Pandey and Plot No. 267 measuring 6 decimals had been wrongly recorded in the name of Bihar Sarkar when as a matter of fact that said area formed part of the respondent's residential house and was in his possession for the last 50 years. Even during the consolidation proceeding the revisional survey plots were recarved as plot Chak No. 120 (R.S. plot No. 264), Chak No. 121 (R.S. plot No. 264/782), Chak No. 122 (R.S. plot No. 267), Chak No. 127 (R.S. plot No. 165), Chak No. 126 (R.S. plot No. 266) with the same area and in favour of the same Raiyat and the land was declared to be Firaini i.e. homestead land and were kept out of the purview of the Consolidation. The respondent on account of his old age could not file objections during the revisional survey and when he came to know about the error he took the necessary steps and the mistake was rectified by the consolidation authorities in 1992. The respondent claimed that there was no lane in between the various plots carved during the revisional survey out of C.S. plot Nos. 407 and 409 and that the petitioners have got a separate passage for their use. The petitioners in their reply to the counter-affidavit have denied most of the averments made in the counter-affidavit. The enquiry report Annexure 2 has been referred to counter the claim of the respondent that there was no lane on the land. The petitioners claim that they were not made parties to the consolidation proceedings in which the impugned order Annexure 3 was obtained by respondent No. 6 in March 1992. The allegation that the petitiones have moved the court after inordinate delay against the impugned order is countered by the statement that the petitioners had moved in the matter as soon as the respondent took certain steps prejudicing the rights and interest of the petitioners in Feb. 1994.

5. Learned counsel appearing for the petitioners argued that the earlier order dated 16-2-1995 passed by a learned single Judge of this Court dismissing the petitioners' earlier writ application (C.W.J.C. 8847/94) for the same relief i.e. for setting aside the impugned order will not bar the filing of another writ application for the same relief as the order was passed for non-prosecution and would not constitute bar of res judicata. His argument in short is that since the earlier writ application was not dismissed on merit the bar of res judicata or constructive res judicata as incorporated in Section 11, C.P.C. has no application to the facts of this case. In support of his contention learned counsel referred to a number of authorities including certain decisions of the Apex Court. In Daryao and Others Vs. The State of U.P. and Others, the Apex Court was dealing with the question whether a prior decision on a writ petition under Art. 226 would not operate as a bar to a petition under Art. 32 of the Constitution. A seven Judge Bench of the Court while dealing with the matter held that -- "If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the dismissal of the

writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32." Their Lordships further observed that" If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated." In *Ram Gobinda Dawan and Others Vs. Smt. Bhaktabala*, the Apex Court observed that" once the decision on question of title becomes final it operates as *res judicata* even if the value of the subject-matter on which the former decision was pronounced was comparatively very trifling. When the decision was given by trial court after contest it operates as *res judicata* even if appeal therefrom might have been dismissed on some preliminary grounds like limitation."

6. The above two decisions including a decision of our own High Court in *Bajrang Rai v. Ismail Mian* AIR 1978 Pat 3389 (FB) and of the Apex Court in *B. Prabhakar Rao and Others Vs. State of Andhra Pradesh and Others*, relied upon by the petitioners have no relevance to the facts of the present case. It is no body's case that the court's earlier order dated 16-2-1995 dismissing the earlier writ application filed by the petitioners for the same relief would constitute the bar of *res judicata* so as to render the present writ application not maintainable on that ground. Admittedly the earlier writ was dismissed not on merits but on the ground of laches inasmuch as the learned counsel for the petitioners did not appear when the writ was called out. Learned counsel for respondent No. 6 who alone has contested this writ application did not advance any argument that the present writ application was barred by *res judicata*. The argument advanced on behalf of the second writ application is on the ground that it is a well established salutary rule of judicial practice and procedure that an order of a learned single Judge Bench or of a larger Bench of the same High Court dismissing the writ petition either on the ground of laches or non-exhaustion of the alternative remedy shall not be by passed by a single Judge Bench or Judges of a larger Bench except in exercise of review or appeal powers possessed by it. Learned counsel for respondent argued that the aforesaid rule of judicial practice and procedure had been affirmed by the Apex Court in a recent decision in *State of U.P. and another Vs. Labh Chand*, . Their Lordships referred to the statutory rule which has come to be accepted and followed in the exercise of writ jurisdiction of the courts in course of para 20 of the judgment in these words, to quote:--

"When a Judge of single Judge Bench of a High Court is required to entertain a second writ petition of a person on a matter, he cannot, as a matter of course, entertain such petition, if an earlier writ petition of the same person on the same matter had been dismissed already by another single Judge Bench or a Division Bench of the same High Court, even if such dismissal was on the ground of laches or on the ground of non-availing of alternate remedy. Second writ petition

cannot be so entertained not because the learned single Judge has no jurisdiction to entertain the same, but because entertaining of such a second writ petition would render the order of the same court dismissing the earlier writ petition redundant and nugatory although not reviewed by it in exercise of the recognised power. Besides, if a learned single Judge could entertain a second writ petition of a person respecting a matter on which his first writ petition was dismissed in limine by another learned single Judge or a Division Bench of the same court, it would encourage an unsuccessful writ petitioner to go on filing writ petition after writ petition in the same matter in the same High Court, and have it brought up for consideration before one Judge after another. Such a thing, if is allowed to happen, it could result in giving full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court exercising its writ jurisdiction under Article 226 of the Constitution in that any order of any Bench of such court refusing to entertain a writ petition could be ignored by him with impunity and relief sought in the same matter by filing a fresh writ petition. This would only lead to introduction of disorder, confusion and chaos relating to exercise of writ jurisdiction by Judges of the High Court for there could be no finality for an order of the court refusing to entertain a writ petition. It is why, the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject-matter respecting which the first writ petition of the same person was dismissed by the same Court even if the order of such dismissal was in limine, be it on the ground of laches or on the ground of non-exhaustion of alternate remedy, has come to be accepted and followed as salutary rule in exercise of writ jurisdiction of courts."

7. Learned counsel for the petitioners sought to distinguish the facts of the case on the ground that the Apex Court was dealing with the matter of entertaining of a second writ application by the High Court when the earlier writ application had been dismissed, not on the ground of laches but on the ground that the petitioner had not exhausted the alternative remedy by moving the Tribunal for the relief for which the writ application had been filed. Such an argument was countered by the counsel appearing for the respondent on the ground that the Apex Court in *State of U.P. and another Vs. Labh Chand*, while explaining the statutory rule in the exercise of writ jurisdiction of the courts had clearly mentioned in unambiguous terms that the principle applied even if the dismissal of the earlier writ application was on the ground of laches. As is evident from the averments made in para 10 of the writ application the earlier writ application was dismissed for non-prosecution in absence of the counsel at the time when the said case was called cut in the court. The learned single Judge who passed the order dated 16-2-1995 dismissing the earlier writ application dismissed the first application for restoration filed by the petitioners vide MJC No. 324/94 for default on 29-3-1995. The order dated 27-6-1995 (Annexure 7) dismissing the second application for restoration itself mentions it. It was argued on behalf of the petitioners that the learned single Judge by his order Annexure-7 had given the petitioners the opportunity to file a fresh writ application and as such it was

not open to the respondent to challenge its maintainability on the ground that the earlier writ applications were dismissed and two applications for their restoration had also not been allowed. It appears from the order Annexure-7 that the learned single Judge after dismissing the second application for restoration after noticing the facts that the earlier application for restoration was also dismissed for default made the reservation that -- "However, if the petitioner so advised may file a fresh writ application if permissible in law". There is no scope for argument that the learned single Judge while dismissing the second application for restoration of the writ application had given opportunity to the petitioner to file a fresh writ application. Had it been so the words "if permissible in law" would not have been used by the Bench. Thus the question whether in the facts of the case a second writ application by the petitioners for the same relief after the earlier writ application had been dismissed for non-prosecution was maintainable in law has got to be considered even in the light of the observations made by the learned single Judge in his order dated 27-5-1995 (Annexure-7).

8. The Apex Court in *State of U.P. and another Vs. Labh Chand*, had observed in no unambiguous terms that the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject-matter respecting which the first writ petition of the same person was dismissed by the same court even if the order of such dismissal was in limine, be it on the ground of laches or on the ground of non-exhaustion of alternative remedy has come to be accepted and followed as salutary rule in exercise of writ jurisdiction of courts. No decision other than the above decision of the Apex Court had been cited either by the petitioner or the respondent. No decision of this Court on the subject-matter was cited by the petitioners or the respondent. In the present case the admitted position is that the earlier writ application for the same relief by the same petitioners had been dismissed by a Bench of this Court and the first application for restoration of the writ application was also dismissed by the same Bench for non-prosecution. The dictionary meaning of "laches" is negligence or undue delay specially such as to disentitle remedy. Since the earlier writ application and the first application for restoration were dismissed as no one appeared in support of the application it was a clear case of negligence on the part of the petitioners and thus the earlier writ petition had been dismissed for laches. The extra ordinary discretionary jurisdiction of this court under Arts. 226 and 227 of the Constitution should not ordinarily be exercised at the instance of a party whose earlier writ application for a similar relief had been dismissed by the Court for laches. If the law permitted the entertaining of a second writ petition by the court in such circumstances by giving unfettered right to the petitioner to file a second writ application even if the earlier writ petition was dismissed for laches, it would give full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court exercising its writ jurisdiction. It was for these reasons that the Apex Court used some very strong language in the matter by observing that this would only lead to introduction of disorder confusion and chaos relating to exercise of writ jurisdiction by Judges

of the High Court for there could be no finality for an order of the court refusing to entertain a writ petition. I am, therefore, of the considered view that the present writ application is not maintainable as the earlier writ application for the same relief by the petitioners had been dismissed for laches and as many as two applications for restoration of the writ were also rejected. This writ application is thus liable to be dismissed on the ground of non-maintainability alone.

9. Since the parties had also been heard on merits it is necessary to observe that the petitioners do not claim title to or possession of over six decimals of land of plot No. 267. The controversy is that the said plot constituted a lane and the petitioners who were owners of the adjoining plots Nos. 264 and 265 used the lane as passage to their house since time immemorial. The case of respondent No. 6 is that the plot was wrongly recorded in the name of "Bihar Sarkar Anabad" and by order dated 4-3-1992 passed by the Joint Director in the consolidation proceeding the entry of Gali in respect of the land was ordered to be deleted and the name of respondent No. 6 house was ordered to be substituted. The above order (Annexure 3) passed in revision case No. 20/ 92 was sought to be quashed in this writ application on the ground that the Joint Director had no jurisdiction to pass such a perverse order and that the petitioners were not made parties to the consolidation proceeding. The case of respondent No. 6 is that the lane belong to his ancestors and had been wrongly recorded in the name of "Bihar Sarkar" and all that the consolidation authorities had done was to rectify a mistake. The fact the necessary correction in the Khatian in respect of the land has been made by the consolidation authorities was noticed by the Circle Officer (respondent No. 5) in his order dated 10-6-94 (Annexure 5) by which he found that for that reason no application for removal of encroachment could be entertained on behalf of the villagers. The Circle Officer had also referred to the claim of the petitioners over the right of passage over the land and while dropping the land encroachment case had made the observation that the petitioners could move a court of competent jurisdiction for ventilation of their right. Likewise the Director of Consolidation (respondent No. 2) while dismissing the revision filed by the petitioners u/s 35 of the Act on the ground that he had no jurisdiction to review an earlier order passed under the said provision of the Act had advised the petitioners to seek other legal remedy. The petitioners are claiming for all practical purposes a right of easement i.e. a right of passage over the disputed land saying that they had their only passage to their house in the adjoining plots through the said land. This has been denied by respondent No. 6 who claimed that the petitioners had other passage available to their houses. Such disputed questions of fact cannot be decided in course of exercise of writ jurisdiction of this Court and only a civil, court of competent jurisdiction could do so after adducing evidence. This writ application was thus liable to be dismissed on this score alone even if it has been found maintainable.

10. In the result this writ application is dismissed both as not maintainable and also on the ground that disputed questions of fact cannot be gone into in the exercise of writ jurisdiction but with the observation that the petitioners, if so,

advised may seek their remedy before a court of competent jurisdiction.