
(1978) 04 PAT CK 0001
In the Patna High Court
Case No : C.W.J.C. No. 246 of 1977

Damodar Prasad	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 19-04-1978

Acts Referred:

Bihar Public Land Encroachment Act, 1956 — Section 11, 3

Citation : (1978) 26 BLJR 677

Hon'ble Judges : K.B.N. Singh, C.J.; Prem Shanker Sahay, J

Bench : Division Bench

Final Decision : Allowed

Judgement

K.B.N. Singh, C.J. and Prem Shanker Sahay, J.—In this writ application the petitioners has prayed for quashing an order dated the 10th March, 1975 (Annexure "2") of the Deputy Collector, Land Reforms, Hilsa, as also an order dated the 31st July, 1976 (Annexure "4"), of the District Magistrate and Collector of Nalanda (Respondent No. 4), directing him to remove encroachment from Gairmazarua Am land.

2. Short facts necessary for the disposal of this writ application need be stated. A proceeding u/s 3 of the Bihar Public Land Encroachment Act, 1956, (hereinafter referred to as the Act) was started against the petitioner by the Deputy Collector, Land Reforms. Hilsa (Respondent No. 2), in August, 1974, on the allegation that the petitioner had encroached upon 1.15 acres of land of Plot No. 1329, Khata No. 269, Touzi No. 6344, situated in Village Mankrauta, Police-Station Hilsa, in the District of Nalanda, which is recorded as Gairmazarua Am Pokhar in the survey record of rights. On the 10th March, 1975, Respondent No. 2, after rejecting the petitioner's prayer for time, in an ex parte order decided the proceeding against the petitioner. A copy of the said order of Respondent No. 2 has been filed as Annexure "2 Against that order, the petitioner filed an appeal u/s 11 of the Act before the District Judge of Patna, the appellate authority under that Section, which was registered as Miscellaneous Appeal No. 64 of 1975, and

was admitted on the 20th May, 1975. During the pendency of the appeal before the District Judge, the Government of Bihar promulgated an Ordinance. The Bihar Public Land Encroachment (Amendment) Ordinance, 1975 (Bihar Ordinance No. 210 of 1975). Section 6 of the Ordinance repealed Section 11 of the Act and substituted a new section for it. The new Section 11 provided for filing of appeal before the Collector of the District or before the Divisional Commissioner, and not before the District Judge or the High Court, as provided in the repealed Section 11. Thereafter, treating that the new provision of Section 11 divested the District Judge of the power to hear the appeal, the District Judge of Patna as it appears from order dated the 22nd May, 1976, (Annexure 3J transferred the appeal pending before him to the Collector of Patna, for disposal, and, the Collector, after hearing the parties, dismissed the appeal on the 31st July, by order Annexure "4", which is under challenge in this writ application.

3. A counter-affidavit has been filed on behalf of the State denying some of the assertions of facts made in the writ application, which it is not necessary for us to mention, in view of the order that we propose to pass in this writ application.

4. Mr. Shanker Prasad, Learned Counsel appearing on behalf of the petitioner, has urged that the petitioner having filed an appeal before the District Judge, as provided under the old Section 11 of the Act, the appeal had to be decided by the District Judge. The Ordinance not having retrospectively amended section 11 of the Act, the District Judge had no jurisdiction to transfer the appeal to the Collector, and that has affected the petitioner's vested right to have the appeal decided by the District Judge, where he could have appreciated of law and facts.

5. In view of the submissions made the question that falls for consideration in this writ application is as to whether, in view of the new provisions of Section 11, the District Judge was divested of his jurisdiction to hear the appeal pending before him. We want to make it clear that the question of vires of the new Section 11 of the Act has not been raised before us and our decision should not be construed in any way or the other in this regard.

6. On a reference to the provisions of Ordinance No. 21 of 1975, and the later Ordinance, which replaced it, namely, Ordinance No. 33 of the 1976, it is apparent that the provisions of the Ordinance substituting Section 11 of the Act are prospective and not retrospective. It is thus manifest that the amended provision could be at best enforceable from the date of the Ordinance, that is to say, the 4th December, 1975. The appeal of the petitioner before the District Judge, which was filed and admitted prior to the Ordinance, could not be affected by the new provisions. Learned Standing Counsel has, however, submitted that although the Ordinance does not in terms make it retrospective, but the right of appeal of being a matter of procedure Section 11 will be deemed to be retrospective. There is no substance in the submission of the learned Standing Counsel. The right of appeal is not a mere matter of procedure, but is a matter of substantive right for the parties. Section 6 of the Ordinance in so far as it affects the right of a party to appeal to the District Judge or the High Court,

depending upon the valuation of the subject matter does take away the vested right of the party concerned, and, therefore, could not be said to be a matter of procedure. There cannot be any dispute that a right of a party of his appeal being heard by the District Judge or by the High Court as provided in the Act, is more advantageous than the one provided under the Ordinance for having the appeal heard by the Collector of the Commissioner, as the case may be. The District Judge, or, for the matter of that, the High Court, is undoubtedly a superior tribunal vis-a-vis the Collector, the Commissioner. A judicial officer of the rank of District Judge by virtue of the nature of the legal training from the very beginning, not only develops a high sense of responsibility of the judicial office he holds, but is also expected to take a more detached view of things. He is thus attuned to appreciate facts and law in a more judicious manner than a Collector. The right of the petitioner created under the statute for his appeal being heard by the District Judge being a substantive right must subsist unless it is explicitly or by necessary implication taken away by the Ordinance. The forum of appeal that the statute provided at the time of the initiation of the proceeding would endure to his benefit notwithstanding any change, unless the change is made retrospective from the date of the initiation of the proceeding. As held earlier, the new Section 11 has been made to operate retrospectively. Therefore, the petitioner's right of his appeal before the District Judge subsists. The District Judge was therefore clearly in error in view of the Section 11, the appeal to the Collector. The view we have taken is supported by a decision of the Supreme Court in the case of *Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others*, wherein the law on the subject has been firmly laid down, after consideration of various authorities on the point, in the following passage:

"The above decisions quite firmly establish and out decisions in *Janardan Reddy and Others Vs. The State*, and in *Ganpat Rai Hiralal and Another Vs. Aggarwal Chamber of Commerce Ltd.*, uphold the principle that a right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by the inferior Court. In the language of Jenkins, C.J. in *Nona v. Sheku* (supra) to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away, except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication." The Supreme Court also quoted with approval the following observations of Lord Macnaghten, in the case of *the Colonial Sugar Refining Company Limited v. Irving* 1905 A.C. 369 :

To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as or right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle

that statutes are not to be held to act retrospectively, unless a clear intention to that effect is manifested.

7. Learned Standing Counsel, appearing on behalf of the Respondents, however, has urged that the petitioner, having taken a chance of a favourable order from the Collector and having submitted to his jurisdiction, was estopped from challenging the jurisdiction, if the result of the order happened to be against him. He has relied upon a Bench decision of this Court in the case of Mukund Ram Tanti Vs. S.I. Raza, Registrar, Trade Unions and Others, . There is no substance in this contention of the Learned Standing Counsel, The District Judge transferred the appeal to the Collector suo motu and in the order sheet of the appeal, which has been filed as Annexure "3", there is no specific order of the District Judge transferring the appeal, and the fact that it has been so transferred appears from the order dated the 22nd May, 1976 of the Collector. The appeal has neither been filed by the appellant before the Collector nor it has been transferred to the Collector at the instance or even after hearing the petitioner. The appeal lay before the District Judge and he had no jurisdiction at that point of time to transfer the appeal to the Collector nor the Collector had any jurisdiction to hear appeals already pending before the District Judge.

In such a situation, there was no question of submitting to the jurisdiction of the Collector and taking chance of a favourable order. The decision relied upon by the Learned Standing Counsel was not a case or absolute lack of jurisdiction on the part of the Registrar, Trade Unions, to enquire about the legality of the new election of the office bearers of the Union for the limited purpose of maintaining appropriate register Showing the names of the office bearers, who may be, as the relevant time, required to comply with the provisions of the Act or to be dealt with in accordance therewith. The decision relied upon by the learned Standing Counsel was rendered in an entirely different circumstance and is distinguishable, apart from the fact that it was in a matter administrative in nature, as will appear from the following observations made in the said decision itself:

Counsel for the respondents has conceded that the principle of law involved in the above submission that the Registrar, Trade Unions, had no power to declare an election unconstitutional, is correct; but, he has submitted that the principle is not applicable to the facts of the present case. His first submission is that the petitioner himself called for an enquiry with regard to the matter in question and submitted to the jurisdiction of Respondent No. 1, and, as such, he cannot be allowed to urge that the Registrar, Trade Unions, had no jurisdiction to make an enquiry. It is submitted that the petitioner took a chance of getting a favourable order from the Registrar, and, he therefore, was estopped from challenging the jurisdiction, if the result of the enquiry happened to be against him. The above contention pressed on behalf of the respondents appears to be well founded and must be accepted as correct.

It is true that the petitioner did not raise any objection at the time of the hearing

of the appeal by the Collector, The initial error having been committed by the District Judge by transferring the appeal, which could not have been transferred, and also by the Collector in issuing notice to the petitioner and in entertaining that appeal, the petitioner cannot be penalised for having fallen in the same error as the above two authorities, nor any question of estoppel arises in the case. The order of the Collector dated the 31st July, 1976 (Annexure "4"), has, therefore, to be quashed, as also the order of the District Judge, transferring the appeal of the petitioner to the Collector. The result will be that the appeal records, with the Collector, will be sent back to the District Judge for disposal in accordance with law. 8, The application is accordingly allowed, but, in the circumstances of the case; there will be no order as to costs.