

(2004) 03 PAT CK 0046
In the Patna High Court
Case No : CWJC No. 5012 of 2001

Jagdutt Thakur and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 24-03-2004

Acts Referred:

Citation : (2004) 03 PAT CK 0046

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—This writ petition has been preferred with the prayer to quash the order dated 5.3.2001 (Annexure-15), passed by the learned Settlement Officer, Bhojpur at Ara, in Kaushal Kumar Thakur v. The State of Bihar, M.P. Case No. 228 of 1999 whereby he has rejected the application filed by the petitioners for survey of villages Shivpur and Nawaranga Chak under the provisions of the Bihar Tenancy Act, 1885 (hereinafter referred to as the "1885 Act").

2. It appears from the statements of objects and reasons of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 (hereinafter referred to as the "Central Act"), that the deep stream of river Ganga forms the inter-State boundary between Shahabad District of Bihar and Ballia District of Uttar Pradesh. The river has been changing its course almost every year, as a result of which the inter-State boundary continues to fluctuate, giving rise to difficult administrative problems affecting the areas particularly in the field of revenue administration and law and order. The Chief Ministers of the two States had agreed in 1961, to refer the dispute to an Arbitrator appointed by the Prime Minister, and to abide by the decision given by the Prime Minister on a consideration of the recommendations of the Arbitrator. Shri C.M. Trivedi was appointed as Arbitrator and he submitted his report to the Prime Minister on 28.8.1964, recommending a fixed boundary in river Ganga the decision of the Prime Minister based on the recommendations led to the Central Act providing a permanent solution to the perennial problem.

3. Thereafter interested persons including the petitioners have been agitating for

survey of the undivided Shahabad District which, according to them, included villages Shivpur and Nawaranga Chak. The writ petition states that the State Government issued notification dated 24.8.1960 (Annexure-8), directing survey of the villages in question under the 1885 Act which has not been implemented so far. The area was instead surveyed under the provisions of the Bengal Survey Act, 1875 (hereinafter referred to as the "1875 Act"), as would appear from the notification dated 9.2.1966 (Annexure-11). The petitioners thereafter filed an application before the learned Settlement Officer, Bhojpur, with the prayer to ensure survey of the area in question which was registered as Kaushal Kumar Thakur v. The State of Bihar, M.P. Case No. 228 of 1999 which has not been allowed by the impugned order, inter alia on the ground that the survey under the 1875 Act has already been done. Hence this writ petition.

4. While assailing the validity of the impugned action, learned counsel for the petitioners submits that existence of the two villages has been recognised in the Trivedi Committee's report and the schedule to the Central Act on the Bihar side and, therefore, the State Government is obliged to conduct survey under the provisions of 1885 Act. He further submits that in view of the aforesaid notification dated 24.8.1960 (Annexure-8), the State Government is estopped from resiling from its commitment to survey the area under the 1885 Act. He relies on the judgment of the Supreme Court reported in B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others, . Relying on the provisions of Sub-sections (1) and (4) of Section 101 of the 1885 Act, he submits that it is the statutory duty of the State Government to conduct the survey and prepare the record of rights. He relies on certain portions of Craies on Statute Law. He next submits that the survey under the 1875 Act is grossly inadequate compared to that of 1885 Act. He next submits that the notification dated 24.8.1960 (Annexure-8) was issued in the name of the Governor of Bihar, which has been modified by the aforesaid notification dated 9.2.1966 (Annexure-11) by the Revenue Department which is, impermissible in law.

5. Learned counsel for respondent Nos. 6 to 25 has supported the petitioners. He submits that any person claiming interest in land can insist for survey under the 1885 Act and the writ petition is, therefore, maintainable. He further submits that a direction to conduct survey does not by itself lead to petitioners' claim regarding survey entry being allowed.

6. Learned counsel for respondent Nos. 26 to 94 has opposed the writ petition. He has submitted that the provisions of Section 101(1) 1885 Act is directory in nature and, therefore, an action for writ of mandamus is not maintainable. He next submits that conducting survey operation is an expensive affair, being essentially administrative in nature and should be left to the decision of the executive, particularly in a situation where full survey has already been done under the 1875 Act. He next submits that villages Shivpur and Nawaranga Chak existed more than a century ago which have either submerged in Ganga or have re-appeared in the State of Uttar Pradesh. The petitioners are interlopers, which

position is manifest from the continuous litigation put up by the petitioners or their proteges for a very long time and are trying to recover their losses by claiming lands in Bihar. He next submits that the question of estoppel does not arise in the present case. He next submits that the subject-matter of the present writ petition has been raised by respondent No. 25 in CWJC No. 7865 of 1990, which has been dismissed by judgment dated 10.3.1999 (Annexure-A to the counter-affidavit of respondent Nos. 26 to 94). The same issue cannot be allowed to be re-agitated by the same group, because respondent Nos. 6 to 25 are supporting the petitioners. He next submits that the State of Uttar Pradesh has not been impleaded as party respondent.

7. Learned counsel for respondent Nos. 1, 4 and 5 (State of Bihar has adopted the arguments advanced by respondent Nos. 26 to 94. He submits that survey of an area is a massive affair and needs great planning and resources. It also raises problems of logistics. He has emphasised that after all survey has been done under 1875 Act. He has also taken me through his counter-affidavit that the villages of Shivpur and Nawaranga Chak are non-existent villages because of change of course of river which have gone into the river-bed and are now on the U.P. side.

8. I have perused the materials on record and considered the submissions of learned counsel for the parties. Chapter-X of the 1885 Act is headed "Record of Rights and Settlement of Rents". Section 101 is headed "Power to order survey and preparation of record-of-rights", the relevant portions of which are set out hereinbelow for the facility of quick reference :--

"101. Power to order survey and preparation of record- of-rights.--(1) The State Government may, in any case if it thinks fit, make an order directing that a survey be made and a record-of-rights be prepared by a Revenue Officer, in respect of the lands in any local area, estate or tenure or part thereof.

(2) In particular and without prejudice to the generality of the foregoing power the State Government may make such an order in the following cases, namely :--

(a) Where,--

(i) the landlord or tenants; or

(ii) a proportion of not less than one-half of the total number of landlords; or

(iii) a landlord, or a proportion of the landlords, whose interest, or the aggregate of whose interest, respectively, in the lands of the local area, estate or tenure or part thereof is not less than one-half of the total shares of all the landlords therein, or

(iv) proportion of not less than one-fourth of the total number of tenants, applies, or apply, for such an order, depositing or giving security for, such amount for the payment of expenses as the State Government directs;

(b) Where the preparation of such a record is calculated to settle or avert a

serious dispute existing or likely to arise between the tenants and their landlord generally;

(c) Where the local area, estate or tenure or the part thereof belongs to, or is managed by, or on behalf, of the Government or managed by the Court of Wards or a manager appointed by the District Judge u/s 95;

(d) Where a settlement of land-revenue is being or is about to be made in respect of the local area, estate or tenure or of the part thereof.

Explanation 1.--The terms "settlement of land- revenue" as used in Clause (d) includes a settlement of rents in an estate or tenure which belongs to the Government;

Explanation 2.--A superior landlord may apply for an order under this section, notwithstanding that his estate or part thereof is temporarily leased to a tenure holder.

(3) A notification in the official Gazette of an order under this section shall be conclusive evidence that the order has been duly made.

(4) The survey shall be made and the record-of-rights prepared in accordance with rules made in this behalf by the State Government."

Sub-section (1) of Section 101 of the 1885 Act provides that the State Government may, if it thinks fit, order for survey. It appears to me to be an enabling provision, and not a mandatory provision, to order for survey and preparation of record of rights. It is, therefore, primarily in the zone of executive discretion to order for survey. Sub-section (2) of Section 101 may also be noticed which lays down to the effect that, without prejudice to the generality of the powers conferred by Section 101 (1), the State Government may order for survey under the circumstances mentioned therein. The conditions for ordering survey mentioned under subsection (2) of Section 101 are quite stringent and speak for themselves which bring out in shining contrast the generality of the powers conferred u/s 101 (1). In the present case, the petitioners have not set up their case u/s 101(2). Section 101 (4) lays down to the effect that once the Government has passed orders for survey, then survey shall be made and the record of rights prepared in accordance with the Rules made in this behalf by the State Government. Section 101 (4) is mandatory and consequential to Sub-sections (1) and (2) of Section 101. In other words, the nature and content of the provisions of Section 101(1) and 101(2) have been explained above which, once exercised, the prescribed procedure will have to be followed meticulously. This has to be read with the relevant provisions of the Bihar and Orissa Survey Settlement Manual which provides for the detailed preparation required to be made prior to the commencement and during the course of the survey operations. This by itself raises problems of administrative nature relating to organizational set-up and logistics. It is obvious that conducting a survey over an expensive area like a district will require deployment of massive work force and

would be an expensive affair. It appears to me that it is primarily for the State Government, in exercise of its administrative discretion in relation to its other priorities, to conduct survey in a particular area and/or to do it according to a system formulated by it. Such a decision of a purely administrative in nature will obviously entail planning and executive discretion as to which area in the State has to be surveyed first and this Court would be reluctant to fix the priorities of the State Government.

9. I am in this connection reminded of the observations of the Court of Appeal in England in the judgment reported in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* 1947 (2) ALLER 680 Speaking for the Court, Lord Greene observed as follows :--

"The contention of the authority, in my opinion, is based on a misconception of the effect of the Act in granting this discretionary power to local authorities. The Courts must always remember, first, that the Act deals, not with a judicial Act, but with an executive act; secondly, that the conditions which, under the exercise of that executive act, may be imposed are in terms put within the discretion of the local authority without limitation; and thirdly, that the statute provides no appeal from the decision of the local authority. What, then, is the power of the Courts? The Courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition....and the Court, whenever it is alleged that the local authority have contravened the law must not substitute itself for the local authority; When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the Courts in a very limited class of cases. It must always be remembered that the Court is not a Court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any Court of law."

The distinguished master of the Rolls then proceeded to enumerate the circumstances in which the exercise of executive discretion can be interfered with by Courts in exercise of the powers of judicial review and has illustrated by stating that it would be a ground for interference if a red-haired teacher were dismissed because she had red hair. In other words, the exercise of discretion has to be as unreasonable as that. The judgment of the Court of Appeal has become classical in legal literature for the subject-matter it deals with, and has been quoted with approval by Indian Courts times without number, one such being that of the Supreme Court reported in *Tata Cellular Vs. Union of India*,

9.1. What then is the scope of interference with the exercise of discretion in the present case. How close is it to the example given by Lord Greene. Is it within the powers of this Court to direct the respondents to post one hundred persons in the district and to sanction fifty crores for the purpose vis-a-vis its other priorities like medical care, primary education, potable water, roads, electricity,

etc. Will it not amount to re- determining the administrative and financial priorities of the Government and interference with its powers to prepare the budget, a power exclusively vested in the Government in office under the Constitution of India.

10. It has been laid down as follows in the Halsbury's Laws of England, Fourth Edition, Vol. I, paragraph 120, page 131 :--

"120. Legal right or substantial interest.--The applicant for an order of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought, or alternatively that he has a substantial personal interest in its performance. In order that a mandamus may issue to compel something to be done under a statute, it must be shown that the statute imposes a legal duty; the duty may be to exercise a genuine discretion, or to exercise a discretionary power according to law. It has been said that the Court will not enforce an equitable, as distinct from a legal, right by this remedy; but it would seem that an applicant may have a right enforceable by mandamus to secure compliance with a public duty to give effect to his equitable interests."

11. The following passage from Craies on Statute Law, Seventh Edition, Chapter-II, may be usefully quoted :--

"When a statute creates a duty, one of the first questions for a judicial consideration is what is the sanction for its breach, or the mode for compelling the performance of the duty? This question usually resolves itself into the inquiry whether the Act is mandatory or directory, i.e., absolute or discretionary. If it is directory, the Courts cannot interfere or compel performance or punish breach of the duty, and disobedience to the Act does not entail any invalidity. If the Act is mandatory, disobedience entails legal consequences, which may take the shape of a public or private remedy obtainable in a Court of justice, or the avoidance of some contract, instrument, or document without intervention of any Court."

"Shall" and "may"

This distinction is reflected in the use of the words "shall" or "may" in a statute. The meaning of these words in statutes conferring a power is the subject of constant and conflicting interpretation. "May" does not mean "must"; "may" always means "may". "May" is a permissive or enabling expression but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power, it becomes his duty to exercise it."

It is thus manifest that the provisions to order for survey and preparation of record of rights is an entirely enabling provision, is a matter of executive discretion with the State Government, and is directory in nature. There is no mandatory duty on the part of the State Government, nor any right in the petitioners, to seek a writ of mandamus. Such a writ petition is not maintainable. I am, therefore, of the view that there is no legal right available to the

petitioners for the enforcement of which a writ of mandamus can be issued.

12. Similar issues under the Central Act fell for the consideration of the Supreme Court in its judgment reported in *Ram Badan Rai and Others Vs. Union of India and Others*, wherein it has been held that the questions raised under the Act could be decided by Courts of competent jurisdiction and not in writ jurisdiction, as lot of oral and documentary evidence has to be adduced and considered. The questions whether certain villages of State are non-existent or ghost villages have been created, need substantive evidence.

13. Learned counsel for respondent Nos. 1, 4 and 5 (State of Bihar) has taken me through his counter-affidavit, paragraphs 20 and 21 of which are relevant in the present context and are set out hereinbelow for the facility of quick reference :--

"20. That the statement made in para 26 and 28 it is submitted that it is replied that State of Bihar never accepted the identity of village Sheopur and Nauranga Chak. The Revenue Record of Bihar shows that the land in question is part of village Isharpura Naubarar and Sonebarsa Diar Naubarar and because the land is situated at the UP. Bihar boundary as such to protect the interest of the raiyat, Regulation survey was made for the land and it was finally published in 1968-69."

"21. That the statement made in paragraphs 29, 30 and 31 by the petitioners assuming that the land in question have been transferred to Bihar after Trivedi Award. But it is not a fact. The land in question existing in Bihar since 1989, and to protect the interest of the raiyats of these land regulation survey was made."

In other words, the issue arising out of the statement made above has been fully answered by the Supreme Court in the case of *Ram Badan Rai v. Union of India*, (supra), and discussed in paragraph 11 hereinabove. The petitioners assert that the two villages are in Bihar whereas State Government assert that the same have lost identity and are no longer in Bihar.

14. The evidentiary value and legal validity of the survey entries under the 1885 Act was the subject-matter of a Full Bench judgment of this Court reported in *Nand Kumar Rai and Ors. v. State of Bihar and Ors.* 1974 BLJR 50 wherein it has been held that a survey entry is not evidence of title, and neither creates nor obliterates rights. Furthermore, a suit is not barred. Therefore, in case the petitioners' right, title and interest with respect to any plot of land is threatened, it will be open to them to institute a civil suit in a Court of competent jurisdiction for adjudication of their rights. Read it in contradistinction to the provisions of Section 15 of the Bihar Consolidation Act which lays down that the notification thereunder is conclusive evidence of title and suit is barred. In other words, the petitioners do not suffer any prejudice, nor their rights are adversely affected, on account of failure or refusal on the part of the State Government to conduct survey and prepare record of rights. Furthermore, survey under the 1875 Act has already been done. It appears to me that the basic difference between the evidentiary value of survey under the two Acts is that the survey under the 1885

Act raises a rebuttable presumption as to the correctness of the entries, whereas no such presumption attaches to the survey under the 1875 Act, a distinction wholly inconsequential for a land-holder because the remedy of suit is always available to him whether survey has been done, or has not been done, under one or the other Act. Paragraph 23 of the counter-affidavit of the State of Bihar is relevant in the present context and is set out hereinbelow for the facility of quick reference":--

"23. That the statement made in paragraphs 36, 40 and 41 of the writ petition, it is submitted that the petitioner had full knowledge regarding survey under regulation 7 and final publication of the same. It is also submitted that in Regulation 7 survey, there is provision for appeal after final publication but even after knowledge the petitioner did not prefer any appeal against the finally published khatian. the questioned land has been surveyed and name of the village has been entered as per Revenue Record."

15. I must at this stage notice the contention advanced on behalf of the petitioners that the State Government had taken the decision to survey the district in question by its notification dated 24.8.1950 (Annexure-8). It is , therefore, submitted that the State of Bihar cannot be permitted to resile from its decision and is estopped for doing it. I am afraid the principle is not applicable to the facts and circumstances of the present case for the reason that the plea of estoppel arises in a situation where the aggrieved party has acted on the representation of the other side and the position of the parties has been rendered irreversible. In the present case, the respondents have not acted on the representation of the petitioners, let alone to their prejudice. The law in this behalf has been laid down in Halsbury's Law of England, Vol. 16, Fourth Edition, Paragraph 1514, page 1017, which is set out hereinbelow for the facility of quick reference :--

"1514. Promissory estoppel. When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced. This doctrine, which is derived from a principle of equity enunciated in 1877, has been the subject of considerable recent development and is still expanding. It differs from estoppel in pairs in that the representation relied upon need not be once of present fact.

The doctrine cannot create any new cause of action where non existed before, and it is subject to the qualification (1) that the other party has altered his position; (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promise a reasonable opportunity of resuming his position; (3) the promise only becomes final and

irrevocable if the promisee cannot resume his position. The doctrine is known variously as "equitable" or "promissory" or "quasi" estoppel."

15.1. Section 115 of the Indian Evidence Act also lays down that representation is not enough. The aggrieved party must have acted on the representation of the other side.

16. The said notification dated 24.8.1960 (Annexure-8) was issued nearly 45 years ago, not having been acted upon so far, a writ of mandamus would not lie at this belated stage. Furthermore, the same had been modified by notification dated 9.2.1966 (Annexure-11) which is to the effect that the survey shall instead be done under the 1875 Act which has in fact been done. The said order dated 24.8.1960 (Annexure-8), has been modified by a valid order dated 9.2.1966 (Annexure-11).

16.1. I must at this stage consider another objection advanced on behalf of the petitioners, namely, the order dated 24.8.1960 has been issued in the name of the Governor of Bihar and, therefore, the Gazette notification issued in the name of the Governor could have been modified in a similar manner. He relies on the judgments reported in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, , the Division Bench judgment of this Court reported in Patna High Court Ministerial Officers Association and many Ors. v. The State of Bihar and Ors. 1990 (1) PUR 446 and Section 24 of the Bihar and Orissa General Clauses Act. I am afraid the same are inapplicable to the facts and circumstances of the present case for the reason that the notification dated 9.2.1966 (Annexure-11) has been issued to modify the notification dated 24.8.1960 (Anpexure-8) in the same mode and manner as Annexure-8. Both the orders have been issued in the name of the Governor of Bihar. Therefore, the two judgments are inapplicable to the facts and circumstances of the case. Furthermore, the Parliament brought on the statute book the 1968 Act which may have brought about a change of approach in the mind of the State Government in so far as notification dated 24.8.1960 (Annexure-8) is concerned.

17. In the result, this writ petition is dismissed. Petition dismissed.