

(2000) 02 PAT CK 0040
In the Patna High Court
Case No : C.W.J.C. No. 7439 of 1989

Kumar Krishna Rastogi and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 01-02-2000

Acts Referred:

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act,
1961 — Section 10(2), 5, 5(2)(ii)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2000) 1 PLJR 1068

Hon'ble Judges : S.N. Jha, J;G.S. Sharma, J

Bench : Division Bench

Advocate : Tulsi Pd. Rastogi, for the Appellant; Hemendra Prasad Sinha, for the Respondent

Judgement

Gurusharan Sharma, JJ.—The petitioners, claiming to be land holders, within the meaning of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as "the Act") have filed this writ application challenging the orders dated 26.4.1989 passed by Additional Member, Board of Revenue, Bihar in Board Revision No. 275 of 1988 (Annexure 22), dated 30.5.1988, passed by Collector, Rohtas at Sasaram, in Ceiling Appeal No. 15 of 1988 (Annexure 21) and dated 14.1.1988, passed by Additional Collector, Rohtas, in Ceiling Case No. 64 of 1982/61 of 1985 (Annexure 15). Sarju Madhav Rastogi of village Sakari, P.S. Kudra, District Rohtas left behind his widow, Malti Rastogi, petitioner no. 5, four sons, Kamal Krishna Rastogi, Hare Krishna Rastogi, Ajay Krishna Rastogi and Vijay Krishna Rastogi, petitioners 1 to 4 and two daughters, Manju Bala Rastogi and Madhu Bala Rastogi, petitioners 6 and 7. Kamal Krishna Rastogi got two sons, Hari Om Rastogi and Hari Prakash Rastogi, who are said to have been born respectively on 3.1.1956 and 9.2.1958.

2. Land Ceiling Case No. 968 of 1973-74, under the Act was initiated against Sarju Madhav Rastogi. He was reported to have possessed total 205.83 acres lands of different classes and was entitled to two ceiling units.

3. The land holder, Sarju Madhav Rastogi, contested the proceeding. He challenged classification of lands and claimed exclusion of lands already (i) gifted to his two daughters, (ii) acquired by Government for construction of canal and additional Ceiling units for his other three sons, who were major on the appointed date under the Act and additional Ceiling unit for his two minor grand sons. Against the decision of Collector under the Act, the landholder preferred Ceiling Appeal No. 54 of 1975-76, u/s 30 of the Act before the Collector, Rohtas and thereafter Board Revision No. 897 of 1996 was filed by him, u/s 32 of the Act, before the Member, Board of Revenue, Bihar, Patna. The Revisional Court by order dated 9.6.1976, Annexure 1 held that land holder's family was entitled to five Ceiling units, one for himself and four units for his four sons, who were found major on 9.9.1970. His claim for two separate ceiling units for two married daughters was refused. Lands under the proceeding were held to be class II and Collector under the Act was directed to exclude the land, if any, acquired by government.

4. The land holder, Sarju Madhav Rastogi filed C.W.J.C. No. 1393 of 1977 and his two daughters aforesaid filed C.W.J.C. No. 1816 of 1977 in this Court. Both the writ applications were heard together and disposed of on 7.11.1977 (Annexure 2). It was observed by this Court that there were only two private tube-wells covering a particular area for irrigation and for the rest there was no source of irrigation. Authorities under the Act were directed to reconsider the matter on the point of classification of lands. The land holder was held entitled to exercise option under the Act. In respect of claim of both daughters, this Court directed the authorities to examine the gifts said to be made by the land holder in their favour and pass appropriate orders in respect of total 43.41 acres land, alleged to be gifted to them (21.43 acres to petitioner no. 6 and 21.98 acres to petitioner no. 7).

5. Thereafter by order dated 25.10.1978 (Annexure 3), Collector under the Act excluded the aforesaid 43.41 acres on the basis that the same was already gifted by the land holder to his two daughters, petitioners 6 and 7. It was held that from two private tube-wells constructed by the land holder only 2 acres land in village Sakari and 6 acres in village Gora were irrigated. There was absolutely no source of irrigation in 1970-71 for the other lands in village Sakti and Gora as well as for the lands in village Sahpur and Panchphokhari. Certificates dated 31.7.1977 and 3.8.1977 (Annexure 17), granted on land holder's petitions, by Section Officer of Sub-Divisional Officer (Canal), Bhabhua were taken into consideration, wherein it was reported that there was no irrigation facility by high level canal and left (sic?lift ?) irrigation for the lands of all the villages, Saskari, Pachpokhari, Gora and Sahpur of Rohtas District in the year 1970-71 and 1971-72. In 1974, 2.56 acres lands of land holder were acquired for the purpose of construction of canal and 9.69 acres land of village Gora were voluntarily surrendered by him. It was found that the land holder possessed 8 acres class II and 132.01 1/2 acres class IV lands, i.e. total 146.14 acres class IV land, whereas he was entitled to total 156 acres (36 acres class IV lands x 5 units).

Hence, no surplus land was found and the proceeding was dropped.

6. The Collector of Rohtas District, in exercise of powers u/s 45B of the Act, by order dated 8.9.1982 reopened the Land Ceiling proceeding, which was dropped earlier on 20.10.1978 (Annexure 3). It was renumbered as Land Ceiling Case No. 64 of 1982. Fresh notice dated 26.5.1984, u/s 10(2) of the Act was served on the land holder, wherein he was shown to have possessed 200.51 acres class I and 0.11 acres class IV lands and was entitled to retain lands for four Ceiling units and two additional for minors and rest of the lands were surplus under the Act.

7. Record shows that the land holder appeared in the proceeding before the Additional Collector on 30.4.1984 and filed a petition for time to file objection. Thereafter neither any objection was filed nor any other step on behalf of land holder was taken. Sarju Madhav Rastogi is said to have died on 27.1.1985. On 6.2.1986 a registered notice was issued fixing date of hearing of the case on 25.2.1986. Further on receipt of Anchal Adhikari's report on 25.8.1987, another registered notice for hearing of the case was issued on 2.11.1987 and ultimately by order dated 14.1.1998 (Annexure 15) the Additional Collector, Sasaram, to whom the proceeding was transferred by Collector of Rohtas District decided the proceeding holding the land holder's family entitled to 78 acres Class I land and declared rest 130.56 acres Class I land as surplus. It was found that no registered deed of gift within the prescribed period under the Act was executed by the land holder in favour of his two daughters and so exclusion of aforesaid 43.41 acres land from the proceeding was not justified.

8. Against the said order petitioner no. 1, who is one of the sons of original land holder Sarju Madhav Rastogi, who was dead, and others preferred Ceiling Appeal No. 15 of 1988 before the Collector, Rohtas, which was disposed of by order dated 30.5.1988 (Annexure 21). It was submitted in the said appeal that there was no canal in the area as on 9.9.1970 and as such Collector under the Act should have considered irrigational facility available on the said date. The Collector considered subsequent development, i.e., construction of canal in the area in 1976-77. Accordingly lands were treated as Class I. Regarding gift to the two daughters made in the year 1963, which related to approximately 43 acres land, deeds of gift were not produced. Further details of land held by their respective husband were also not furnished and age of both of them was also not disclosed. The aforesaid lands said to have been gifted were not exonerated.

9. After death of Sarju Madhav Rasgoti his sons appeared in the proceeding and took necessary step and contested it. Details of transfer of 7.88 acres land before 9.9.1970 was not given. In absence of details and documents merely on the basis of statement, the Collector did not accept those transfers. 9.69 acres land was voluntarily surrendered and the Sub-Divisional Officer was said to have already distributed those lands on 25.10.1978, hence it was excluded, subject to confirmation by the Sub-Divisional Officer that actually those lands were distributed. 2.56 acres land acquired for canal was also excluded. The Collector

came to conclusion that order dated 14.1.1988 (Annexure 15) was not an ex-parte order. The original land holder appeared and sought time to file show cause and thereafter inspite of repeated notices, failed to appear at the hearing.

10. Against the appellate order dated 30.5.1988 (Annexure 21) petitioners preferred Revision, u/s 32 of the Act, before the Member, Board of Revenue, Bihar, Patna, vide Revision Case No. 275 of 1988, which was rejected by order dated 26.4.1989 (Annexure 22) at the admission stage.

11. It is relevant to quote proviso to Section 5(2)(ii) of the Act, which runs as under:?

Provided that the ceiling area shall be redetermined, where subsequent classification of land improves as a result of irrigation work constructed, maintained, improved or controlled by the Central or the State Government or by a body corporate constituted under any law for the time being in force whether or not the land holder actually draws water from the source.

In the present case admitted position is that lands were acquired for construction of a canal, which was completed in the year 1976-77. The land holder failed to satisfy the authorities that there was any such area which was either non-irrigated or not capable of being irrigated by the said canal. It was therefore, found that canal existed and as such under the aforesaid provision of proviso to Section 5(2)(ii) of the Act, the petitioners' ceiling area was redetermined for improvement in classification of the lands as a result of construction of canal and accordingly those lands were classified and rightly treated as Class I.

12. Mr. Rastogi, counsel for the petitioners submitted that no notice was given to the petitioners in connection with re-opening of the land ceiling proceeding u/s 45B of the Act and as such the same was illegal and without jurisdiction. Consequently all the orders passed thereafter are also illegal and not binding on the petitioners. I do not find any merit in this submission. After proceeding was reopened, the petitioners instead of challenging the same appeared and submitted to the jurisdiction of the court and participated in the proceedings and as such they are estopped from challenging the same at a later stage.

13. At the time of admission of this writ application on 10.5.1990, it was directed to be heard by a Division Bench as one of the questions to be considered was whether on the basis of mere acquisition of land for the purpose of construction of canal, it could be assumed that class of the land has changed on account of improvement so as to attract proviso of Clause (ii) of Sub-section (2) of Section 5 of the Act or not. Admittedly canal was already constructed in the year 1976-77 and as such classification of land improved as a result thereof. Hence, petitioners' ceiling area was redetermined not merely on the basis of mere acquisition of land for the purpose of construction of a canal, but on account of actual construction of irrigation work by the State Government in respect of lands in question.

14. In the aforesaid circumstance, I do not find any reason to interfere with the impugned orders contained in Annexures 15, 21 and 22 of the Writ application. This writ application is dismissed.

S.N. Jha, J.

15. I have gone through the text of the judgment prepared by Brother Gurusharan Sharma, J. and I agree that the writ petition is fit to be dismissed. One of the contentions of Shri Tulsi Pd. Rastogi was that since the Collector reopened the proceeding u/s 45B of the Act without issuing notice to the land holder, not only the order dated 8.9.82 but the entire subsequent proceedings before the Additional Collector, Rohtas, the appeal and revision before the Collector, and the Board of Revenue, and the orders passed therein, impugned in the writ petition, are illegal and without jurisdiction. Reliance was placed on Dhruv Narayan Singh and Another Vs. The State of Bihar and Others, . Brother Sharma has rejected the contention in his proposed judgment with which I agree. However, considering the significance of the question and the fact that the contention finds support from the decision in Dhruv Narayan Singh's case, I would like to say a few words. The necessary facts have already been stated in the impugned judgment and it is not necessary to mention them again.

16. The precise question is whether the order of reopening of the proceeding dated 8.9.82 being illegal, about which there can be little doubt as this was done without issuing notice to the landholder, the subsequent orders passed by the Additional Collector are also illegal and without jurisdiction. Brother Sharma has observed, and rightly, if I may say so with respect, that as the petitioners participated in the proceeding before the Additional Collector after it was reopened by the Collector, they are estopped from challenging the validity of the proceedings and/or the orders at the subsequent stage. But this involves a side question as to whether the order of reopening dated 8.9.82 was a nullity so as to make the resultant proceeding and the orders "without jurisdiction" as held by the learned Judge in Dhruv Narayan Singh's case (supra). In a case where the authority has no jurisdiction to entertain a proceeding, the orders passed by it have to be treated as nullity, that is, not existing in the eye of law. But even then question may arise whether the order should be set aside. In a recent case, Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, , the Supreme Court declined to interfere observing that where setting aside an order on the ground of lack of jurisdiction would result in the revival of an illegal order, the order should not be set aside even though passed without jurisdiction. In that case after the compensation assessment roll in respect of proprietary interest upon the vesting of the estate under the Bihar Land Reforms Act had been prepared, the Board of Revenue acting suo motu reopened the case, which was challenged by the petitioner. The Supreme Court relied on an earlier decisions in Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, and Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, . In the present case, it is not necessary to go to that

extent. I propose merely to point out the distinction between an "illegal" order and order "without jurisdiction".

17. The term "jurisdiction" has got different shades of meaning. In *Shri M.L. Sethi Vs. Shri R.P. Kapur*, , the Supreme Court observed that it is "a verbal cast of many colours". The term, if I may say, is often used loosely to describe an order passed in wrong or erroneous exercise of jurisdiction as distinct from inherent lack of jurisdiction. Section 115 of the CPC itself contains indication to this effect. It contemplates (a) exercise of jurisdiction not vested by law, (b) failure to exercise jurisdiction so vested, and (c) acting illegally or with material irregularity in exercise of the jurisdiction. Cases falling in any of the three categories are called "jurisdictional error". But certainly if the court has acted illegally and committed any material irregularity in exercise of jurisdiction, the order cannot be said to be a nullity in the sense that the Court had no jurisdiction to pass an order. They are simply illegal orders. If the court has inherent competence to try a case the order passed by it either in excess of the jurisdiction or tainted with illegality or material irregularity cannot be described as orders without jurisdiction in the sense of being a nullity.

18. In *Seth Hiralal Patni Vs. Sri Kali Nath*, , the Apex Court observed,

The competence of a court to try a case goes to the root of the jurisdiction and where it is lacking, it is a case of inherent lack of jurisdiction.

In *Ittavira Mathai Vs. Varkey Varkey and Another*, the Court observed,

It is well settled that a court having jurisdiction over the subject matter of the suit and the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities.

19. There may be several situations in which the order or decree of a court can be said to be nullity in the eye of law, the jurisdiction of the court might have been ousted by express words or necessary implication of the statutes. The court may be lacking in pecuniary or territorial jurisdiction. In *Kiran Singh and Others Vs. Chaman Paswan and Others*, the Apex Court had observed,

A defect of jurisdiction, whether it is pecuniary or territorial jurisdiction, or whether in respect of the subject-matter of the action, strikes at the very authority of the court to pass a decree, and such a defect cannot be cured even by the consent of parties.

20. In *M.L. Sethi vs. R.P. Kapur* (supra) the Supreme Court, however, observed that though the term jurisdiction originally seems to have had a limited meaning

"to enter upon the inquiry in question", and if there was any entitlement to enter upon an inquiry into the question then any subsequent error could only be regarded as an error within the jurisdiction, the difference between the jurisdictional error and error of law within jurisdiction has been reduced almost to vanishing point. The Supreme Court quoted the observations of Lord Reid and Lord Pearce in *Anisminde Ltd.*, (1969) 2 AC 147, as under:?

But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.

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Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity.

After quoting the above passages, the Supreme Court observed as under:?

The dicta of the majority of the House of Lords, in the above case would show the extent to which "lack" and "excess" of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error.

Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allow. In the end it can only be a value judgment (See H.W.R. Wade, "Constitutional and Administrative Aspects of the Anisminde case", Law Quarterly Review, Vol. 85, 1969, P. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court.

21. Coming back to the present case, it is not in dispute that the Additional Collector had jurisdiction to entertain the proceeding after reopening and to pass final orders therein. The only thing said is that the Collector's order being illegal and without jurisdiction, the final order passed by the Additional Collector or, for that matter, the appellate order of the Collector and the revisional order of the Board of Revenue are also illegal. This is not acceptable. Section 45B empowers the State Government or the Collector of the district authorised in that behalf at any time to call for and examine any record of any proceeding disposed of by Collector under the Act and, if it thinks fit, to direct that the case be reopened and disposed of afresh in accordance with the provisions of the Act. As held by this Court, it is mandatory to issue notice and give an opportunity of hearing to the landholder before any order for reopening a concluded proceeding is passed. Thus, where notice is not given the order has to be treated as illegal and, within the extended meaning of the term, as per the aforequoted observations of the Supreme Court, also without jurisdiction. But that does not mean that on that ground alone the subsequent orders would also become illegal, particularly when the petitioner participated in the proceeding, thus, acquiescing in the jurisdiction of the Additional Collector which he undisputedly possessed. It must be clarified that the position might have been different, had it been a case of inherent lack of jurisdiction on the part of the Additional Collector, for it is well settled that even consent of the parties cannot confer jurisdiction upon any authority which it does not possess.

22. Now coming to the decision in Dhrub Narayan Singh's case the point does not seem to have been decided. From paragraph 4 of the judgment it appears that an argument was made on behalf of the State that since the petitioners had participated in the proceeding before the Additional Collector instead of challenging the order of the Deputy Commissioner or the Collector of the district reopening the disposed of case, they were estopped from challenging the order of the Deputy Commission at later stage. Without dealing with the argument, which I think was well founded, the learned Judge made a general observation in paragraph 9 of the judgment that since the order of the reopening was erroneous

in law, "Consequently the order passed by the Additional Collector after the case was forwarded to him for disposal is illegal and wholly without jurisdiction. The subsequent order passed in appeal and revision are also bad in law" These observations cannot be regarded as laying down the law correctly.

23. In the above premises, the impugned orders of the Additional Collector cannot be said to be illegal only on the ground that the order of reopening was bad in law. The contentions put forward in this regard are devoid of any merit. So far as the other points are concerned, I do not think, I can make any useful addition to what has been stated by Brother Sharma.