
(1999) 11 PAT CK 0026

In the Patna High Court

Case No : Civil Revision No. 1505 of 1989

Lakhan Paswan and Others

APPELLANT

Vs

Shiwnandan Pd. and Others

RESPONDENT

Date of Decision : 19-11-1999

Acts Referred:

Bihar Tenancy Act, 1885 — Section 17, 45F, 45F(5), 48E, 48E(13)

Citation : (2001) 1 PLJR 174

Hon'ble Judges : S.K. Katriar, J; Nagendra Rai, J

Bench : Division Bench

Advocate : Nawal Kishore Singh and R.B. Singh, for the Appellant; Braj Nandan Singh, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—The Defendants-Petitioners have filed the present application challenging the order dated 16.5.89 passed by the Munsif, Hilsa in Title Suit No. 24/1983 rejecting their objection to the maintainability of the suit.

2. The Plaintiffs-opposite parties filed the aforesaid suit for declaration of their title, confirmation of possession to the suit land and for declaration that the claim of the Defendants as Bataidar is false and untenable and in the alternative in case Plaintiffs are not found in possession over the suit land then the delivery of possession may be given to them.

3. The facts necessary for disposal of the present case lie in a narrow compass. The dispute relates to a portion of plot No. 205 measuring 2 acres 42 Dhurs under Khata No. 2 of village Kosiaban, P.S. Ekangarsarai, District Nalanda. The Plaintiffs' case is that C.S. Plot No. 230 measuring 6 Acres and 42 Decimals belonged to Raghubansh Mani Singh and Yaduban Mani Pd. Singh both sons of Loknath Singh of village Kosiaban, who sold the same to Abu Singh in 1947 by a registered sale deed and said Abu Singh in 1947 by three registered sale deeds of the year 1961 sold the same to Plaintiff opposite party Shivnandan Pd. and

one Anup Das. Plaintiff-opposite party Shivnandan Pd. purchased 2 acres. 42 decimals of land, which is in dispute in this case, and the same during the consolidation proceeding has been recorded as Chak No. 205 under Khata No. 2. The Plaintiffs claim that no Mahanth of Nan-diha Math including Garibanand Das has any concern with the said land. The Defendants Petitioners Lakhan Paswan, Ram Bachchan Rai, and Jang Bahadur Pd. falsely claimed that aforesaid Garibanand Das was the owner of the said land and filed a Bataidari cases before the D.C.L.R. Hilsa u/s 48E of the Bihar Tenancy Act (hereinafter referred to as the Act) claiming Bataidari right against Mahanth Garibanand Das of Nandiha Math. The Plaintiffs and other purchasers were not made parties and when they came to know about the proceeding they filed an application for being added as party but the same was not allowed and the D.C.L.R. decided the proceeding u/s 48E of the Act in favour of the Defendants Bataidars and on the basis of which the Defendants threatened to remove them from the land in question and the same necessated filing of the suit.

4. The Defendants filed a written statement and challenged the maintainability of the suit on the ground that the order passed by the D.C.L.R. u/s 48E or on appeal under 48F of the Act is final and the same shall not be called in question in Civil Court. They also challenged the title and possession of the Plaintiffs over the land in question, which is not to be detailed for the reason that the same is not necessary for disposal of the present controversy.

5. The Defendants filed an application challenging the maintainability of the suit which was rejected by the court below and thereafter they came to this Court in C.R. No. 1287/85 and this Court by order dated 27.11.87 directed the court below to decide the maintainability of the suit as a preliminary issue and thereafter the court below has decided the said issue as a preliminary issue and has rejected by the impugned order.

6. The case was admitted and placed for hearing before the learned single judge who has referred the matter to a Division Bench for an authoritative decision on the question as to whether the suit in which the order u/s 48E of the Act has been challenged is maintainable or not in view of the provisions contained under Sections 48E and 48F of the Act.

7. Learned Counsel for the Petitioners submitted that the suit in substance is a suit challenging the order passed by the D.C.L.R. Hilsa u/s 48E of the Act which is not maintainable in view of the specific bar contained u/s 48-F(4) of the Act which provides that an order duly made u/s 48E of the Act or on appeal u/s 48F shall be final and shall not be called in question in any Civil Court.

8. Learned Counsel for the Plaintiffs-opposite parties on the other hand submitted that the suit is for declaration of title and confirmation of possession and in the alternative for the recovery of the possession. The order passed by the authority u/s 48E has not been challenged and as such the aforesaid bar is not applicable. Alternatively it was submitted that even if the suit is treated to

have been filed challenging the order passed u/s 48E of the Act the same is maintainable as the Plaintiffs have challenged the proceeding passed u/s 48E of the Act, on the ground that the authority while disposing of the matter has not complied with the provisions of the Act and it has not acted in conformity with the fundamental principle of the judicial procedure inasmuch as having found that the question of title was involved and the Plaintiffs were necessary party he disposed of the proceeding without adding them as party.

9. So far the question of declaration of title is concerned the suit is maintainable for the simple reason that in a proceeding u/s 48E the Court is not concerned with the title over the land. It has to decide the relationship of landlord and tenant (under Raiyat) and thereafter has to decide whether the tenant is threatened of ejectment or not by the landlord. However, the only controversy is as to whether the suit with regard to the challenge made to the order u/s 48E of the Act is maintainable or not.

10. To decide the said controversy it is useful to refer the relevant provisions of Sections 48E and 48F of the Act which run as follows:

48-E. Prevention of threatened ejectment of under raiyat and restoration to possession of under raiyat unlawfully ejected.--(1) If an under raiyat is threatened with unlawful ejectment from his tenancy or any portion thereof by his landlord or if there is a dispute between them over the possession of land, crop or produce thereof either on the ground of non-existence of relationship of landlord and tenant between them or otherwise or if an under raiyat is or has been ejected from his tenancy or any portion thereof within twelve years before the commencement of proceedings under this section in contravention of the provisions of Section 89 the Collector may, of his own motion or an application made in this behalf by the under raiyat, initiate a proceeding for preventing the landlord from ejecting the under raiyat or for settlement of the said dispute or for restoration to possession under raiyat unlawfully ejected from his tenancy or portion thereof.

Explanation : If in the midst of the proceeding it is found that the landlord has during or before the initiation of the proceeding transferred the land to any other person who is not a party to the proceeding initiated under Sub-section (1), the Collector shall make such transferee a party to the proceeding.

(2) The Collector may, after hearing the parties, about which due notice shall have been given to them ex-parte, in cases of emergency by an order in writing, prevent the landlord from ejecting the under raiyat until any disposal of the proceeding or until further orders and if he is of opinion that any crop or produce of the land which is subject matter of dispute in the proceeding under this section, is liable to speedy and natural decay, he may, if the situation so warrants and in similar manner as aforesaid direct the proper custody or harvesting or sale, as the case may be, of such crop or produce or the sale proceeds thereof.

(3) When a proceeding is initiated under Sub-section (1) the Collector may refer

the matter (hereinafter referred to as dispute) to a Board to be appointed by him for promoting the settlement of the dispute between the under raiyat and the landlord.

(4) A Board to be appointed by the Collector in the prescribed manner under Sub-section (3) shall consist of a Chairman; who shall be unconnected with the dispute referred to such Board or with any party directly affected by such dispute and two members to represent the parties to the dispute and the persons appointed as a member to represent any party shall be appointed on the recommendation of that party : Provided that if any party does not nominate any person to represent him in the Board or nominates a person who is not available within such time as the Collector considers reasonable, the Collector may appoint such person as he thinks fit; to represent that party.

(5) If any time before the Board has completed its work, the service of the Chairman or any members of the Board ceases to be available, or any member of the Board fails to attend the meeting of the Board on two successive dates without showing cause to the satisfaction of the Chairman, the Collector may appoint any suitable persons in the prescribed manner to take his place and the proceeding shall be continued before such Board as so constituted.

(6) The Chairman of the Board to which a dispute is referred shall give written notice to the under raiyat and his landlord in the prescribed manner and the Board shall make endeavours to bring about an amicable settlement of the dispute and when an amicable settlement of the dispute is brought about, the Board shall forthwith submit a report containing the terms on which settlement had been brought about, to the Collector, who may dispose of the proceeding in accordance with the terms of the report:

Provided that failure on the part of any member of the Board to sign the report shall not affect the validity of the same.

(7) Where a Board does not succeed in bringing about an amicable settlement of the dispute, it shall make enquiry into the same, receive such evidence as it considers necessary, record its findings on the dispute and transmit the entire record of the proceeding forthwith to the Collector who may dispose of the proceeding in accordance with the terms of the findings:

Provided that failure on the part of any members of the Board to sign the finding shall not effect the Validity of that finding

(8) In case of disagreement with the report of the findings of the Board, the Collector shall, after recording his reasons for such disagreement and after giving the parties concerned a reasonable opportunity of being heard, make such enquiry, if any, as he thinks necessary and on being satisfied that:

(i) the person threatened with ejectment is an under raiyat the Collector shall declare the threatened ejectment illegal and direct that the landlord shall not interfere with the possession of the under raiyat in his tenancy or any portion

thereof;

(ii) the land under dispute is in the tenancy of the under raiyat the Collector shall declare possession of the under raiyat and order the crop or produce or the sale proceeds thereof, as the case may be, to be divided between the under raiyat and his landlord in accordance with the provisions of Sections 69 to 71 of the Act;

(iii) the person alleged to have been ejected was an under raiyat of the disputed land on the date of ejectment and was ejected within twelve years before the commencement of proceeding under this section in contravention of Section 89, the Collector shall order that the landlord, or where any other person, is in possession of the land comprised in the under raiyat tenancy or portion thereof under any claim derived from the landlord, such persons shall restore the under raiyat to possession of the tenancy or portion from which he was so ejected.

(9) The order of the Collector under Sub-sections (6), (7) or (8) shall be in writing and shall state the grounds on which it is made and specify the period which shall not exceed six months from the date of the order within which his order shall be carried out.

(10) If the Board fails to record its findings or transmit the records as required under Sub-section (7) within a period of six months (which shall be reckoned from the date of its appointment under Sub-section (3) the Collector may withdraw the proceeding from the Board and decide the dispute himself according to the provisions of this section.

(11) If the person against whom an order has been made under Sub-sections (6), (7) or (8) fails to carry out the orders of the Collector within such reasonable time as may be specified in the order or the order passed to appeal u/s 48F the Collector shall take or cause to be taken such steps or use or cause to be used such force as in his opinion may be necessary for securing compliances with the order or for preventing such threatened ejectment of under raiyat or for restoring possession to under raiyat unlawfully ejected.

(12) The Board shall have the same power regarding the summoning and attendance of witnesses and compelling the production of documents as a Civil Court has under the Code of Civil Procedure, 1908 (V of 1908) and the Collector shall have general control and superintendence over the Board.

(13) Save as expressly provided in this Act, no Civil or Criminal Court shall have any jurisdiction over the subject matter of a dispute after proceeding is initiated under Sub-section (1) by the Collector:

Provided that nothing in this sub-section shall be deemed to affect the power of a criminal court to, take such action as may be necessary for preventing breach of the peace pending the final disposal of the proceeding.

48-F. Appeal.--(1) An appeal shall lie from an order referred to in Sub-section (7) and Sub-section (8) of Section 48E:

(i) if such order is passed "by an officer other than the Collector of a district, to the Collector of the district or to any officer specially empowered by the State Government by notification to hear such appeal; and

(ii) if such order is passed by the Collector of a district, to the prescribed authority.

(2) The Collector of the district may, at any time, transfer any appeal filed before him to any officer specially empowered under Clause (i) of Sub-section (1) to hear such appeals or withdraw any appeal pending before any officer so empowered, and either hear such appeal himself or transfer it for disposal to any other officer so empowered.

(3) Appeals under this section shall be heard and disposed of in accordance with the prescribed procedure.

(4) An order duly made u/s 48E or on appeal under this section be final and shall not be called in question in any Civil Court.

(5) If a suit is instituted challenging an order made u/s 48E or on appeal under this section, the Civil Court shall have no power, during the pendency of the suit, to stay the enforcement of such order.

11. Section 48E contains, a provision with regard to prevention of threatened ejectment of under raiyat and restoration of possession of an under raiyat who has been unlawfully ejected.

12. Under the said provision the Collector has been empowered to initiate a proceeding and refer the matter to the Board constituted thereunder. The Board has to first make efforts for amicable settlement and in case of settlement, the Collector will dispose of the proceeding in terms of the settlement and in case of disagreement the Board will make an enquiry and submit a report, on the basis of which the Collector will decide the proceeding. The Collector in case of agreement may dispose of the proceeding in terms of the finding and in case of disagreement he will pass an order in the manner as mentioned therein. The Collector has also power to recall the proceeding from the Board in the eventualities mentioned in the said section.

13. Sub-section (13) of Section 48E provides that so long as the proceeding u/s 48E is pending no Civil or Criminal Court shall have any jurisdiction over the matter.

14. Section 45F contains a provision with regard to appeal and Sub-section (4) of the said section provides that an order duly made u/s 48E or on appeal under this section shall be final and shall not be called in question in any Civil Court. Sub-section (5) provides that if suit is instituted challenging an order made u/s 48E or on appeal under this section, the Civil Court shall have no power, during the pendency of the suit to stay the enforcement of such order.

15. Thus, the conjoint reading of the aforesaid two sections show that once an

order has been duly made u/s 48E or on appeal u/s 48F, the same shall not be called in question in Civil Court. During the pendency of the proceeding the Civil Court or the Criminal Court shall not have jurisdiction over the subject matter of the suit. In case suit has been filed to challenge u/s 48E or on appeal u/s 48F the Civil Court has no power to issue injunction restraining the enforcement of the order.

16. When there is a right there is a remedy for enforcement or protection of the said right (Ubi Jus Ibi Remedium). The affected person can approach the Civil Court for enforcement or for protection of his right on the aforesaid principle. The exclusion of the jurisdiction of the Civil Court is not to be interfered (sic inferred) readily unless the statutory provision specially or impliedly excludes the jurisdiction of the Court. Even in case where the jurisdiction is excluded and the power to decide the matter has been conferred on the Tribunal or the authority even in that cases also the Civil Court can interfere in the matter where the provision of the Act has not been complied with or the tribunal or the authority has not acted in conformity with the fundamental principle of the judicial procedure or the order amounts to nullity or there is a jurisdictional error resulting into the order being a nullity or void.

17. The Privy Council in the case of Secretary of the State v. Mask & Co. 1940 Privy Council 105 has held as follows:

It is settled law that the exclusion of the jurisdiction of the Civil Court is not to be readily interfered (sic inferred), but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if the jurisdiction is so excluded, the Civil Court have jurisdiction to examine into the cases where the provisions of the Act have not been complied with or statutory Tribunal has not acted in conformity with the fundamental principle of judicial procedure.

18. A Constitution Bench of the Supreme Court considered the question regarding the exclusion of the jurisdiction of the Civil Court in the case of Dhulabhai etc. v. State of M.P. 1969 S.C.C. 78. From the facts of the said case it appears that a suit was filed by the Assessee for refund of the tax on the ground that it was calculated against the constitutional prohibition. Section 17 of the relevant Act provided that the order passed under the Act or the rules by a statutory authority shall not be called in question in any case and remedy of appeal, revision, reference etc. was provided under the said Act. The Apex Court held that as the tax was levied without complying with the provision of the charging section the order was without jurisdiction and so the suit was maintainable. The Apex Court in the said case Laid down the principle regarding exclusion of the jurisdiction of the Civil Court in paragraph 32 which runs as follows:

(1) Where the statute gives a finality to the orders of the special Tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however,

does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said liability shall be determined by the Tribunals so constituted, and whether, (emedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

19. The view taken by the Supreme Court in Dhulabhai case (supra) has been fallowed by the Apex Court in catena of cases. Reference in this connection may be made to the case of Sri Raja Kandregula Srinivasa Jagannatha Rao Pantulu Bahadur Garu v. State of A.P. 1971 S.C.C. 71 and M.P. Electricity Board, Jabalpur Vs. M/s. Vijaya Timber Co., .

20. Thus, the law is well settled that when the Act creates a right and liability and also creates forum including right of appeal etc. and bars the jurisdiction of the civil court either expressly or impliedly in that case the jurisdiction of the civil court is excluded and no suit is maintainable to challenge the order on merits.

However, even in such cases suit would be maintainable on the ground that the provision of the Act has not been complied with or the Tribunal has not acted in conformity with the fundamental principle of judicial procedure or the order is without jurisdiction which amounts to nullity or void in the eye of law.

21. The conjoint reading of Section 45F (4) & (5) show that the suit is barred only with regard to an order duly made u/s 48E or on appeal u/s 48F. If the order is not duly made under the Act a suit is maintainable and the only bar created is that in that case no interim order shall be granted staying the operation of the order passed under the Act.

22. According to Stroud's Judicial Dictionary 4th Edition word "duly" means done in due course or according to law. Thus, if an order is not passed after following the procedure prescribed under the Act or it has been passed without following the fundamental principle of judicial procedure or is without jurisdiction then the order is not duly made and the suit is maintainable. The bar created u/s 48F(4) is not attracted in such situation. However, no suit will be maintainable to challenge the order passed u/s 48E or on appeal under 48F on merits.

23. To decide the question as to whether the suit is maintainable or not when the order under 48E or passed in appeal is challenged the Court has to consider the averments made in the plaint as that primarily govern the question of jurisdiction (See 1995 Supp. (1) SCC 144, State of Haryana v. Randhir Singh and Ors.)

24. In this case it has been specifically averred in the plaint that the proceeding u/s 48E is against a person who was not the landlord and the Plaintiffs appeared for the addition as party even that was not allowed and the proceeding was decided against them. It has also been stated that the authority has decided the question of title which is beyond its jurisdiction. The impugned order of the D.C.L.R. dated 21.2.83 also shows that he has observed in his order that the title is involved in this case even then he has decided the question of title and held that the land belongs to Mahanth Garibanand and not to the Plaintiffs.

25. The averments made in the plaint clearly show that the Plaintiffs apart from declaration of title has challenged the proceeding and order passed u/s 48E on the ground that the same has been disposed of without complying with the provisions of the Act. They have also challenged the same on the ground that the Tribunal has passed an order in complete breach of principle of natural justice thus without following the fundamental principle of judicial procedure.

26. Thus, in my considered view the suit is maintainable before the Civil Court and the Court below has rightly rejected the prayer of the Defendants.

27. In the result, there is no merit in this application and the same is dismissed in the facts and circumstances of the case. There shall be no order as to cost.

S.K. Katriar, J.

28. I agree.