

(1978) 05 PAT CK 0020

In the Patna High Court

Case No : Civil Writ Jur. Case No. 1851 of 1977

Lakshmi Prasad Bhagat and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 09-05-1978

Acts Referred:

Bihar Tenancy Act, 1885 — Section 48(12), 48(3), 48(8), 48E
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1979 Patna 169 : (1979) PLJR 82

Hon'ble Judges : K.B.N. Singh, C.J;P.S. Sahay, J

Bench : Division Bench

Advocate : Gorakh Nath Singh and Sheojee Prasad, for the Appellant; K.D. Chatterji, General, S.N. Jha, Standing Counsel No. 2, C.M. Jha, Junior Counsel and Parmanand Sharan Singh, for the Respondent

Final Decision : Allowed

Judgement

1. In this application under Articles 226 and 227 of the Constitution the petitioners have prayed for quashing the order of the Land Reforms Deputy Collector Saharsa, dated the 4th of Feb. 1977, declaring respondent No. 4 to be a bataidar in respect of the land in dispute, a copy of which has been filed as Annex. 1.

2. Petitioner No. 1 is the recorded raiyat of land bearing plot No. 6756, khata No. 392 having an area of 1 bigha, 5 kathas and 17 dhurs situate in village Chandaaur Tola Hanuman Nagar, in the district of Saharsa, petitioner No. 2 being his brother's son. The case of the petitioners is that petitioner No. 1 gave 2 kathas of land to Mohan Hazra (respondent No. 4) for constructing his house and residing in the same and the rest of the land remained in the cultivating possession of the petitioners. Taking advantage of his house being on a portion of the plot, respondent No. 4 on 15-6-1956 filed an application u/s 48-E of the Bihar Tenancy Act (hereinafter referred to as "the Act") in respect of the entire plot a copy of which has been filed as Annexure 2. The said application was

forwarded to the Circle Officer, Sour Bazar, and the Circle Officer after notice to the parties constituted a Board and the Board found that respondent No. 4 was not the bataidar of the land. Disagreeing with the finding of the Board, the Circle Officer came to the conclusion that respondent No. 4 was the bataidar. On appeal by the petitioners, the order of the Circle Officer was set aside by the Sub-Divisional Officer, Saharsa, by his order dated 17-12-1957 (Annex. 3). The petitioners' grievance is that, notwithstanding the aforesaid order, respondent No. 4 filed a second petition on 6-12-1976 before respondent No. 3 (Annexure 4) on which respondent No. 3 initiated a proceeding u/s 48-E of the Act and without constituting any Board as required under Sub-section (6) of Section 48-E of the Act he held an enquiry himself and came to the conclusion that respondent No. 4 was a bataidar of the land in question and declared him as such by his order dated 4-2-1977 (impugned Annexure 1).

3. The challenge of the petitioners against the impugned order is twofold. Firstly, in view of the order in the earlier proceeding (Annexure 3), no second proceeding u/s 48-E of the Act could be initiated by respondent No. 3 as the order in the previous proceeding will operate as *res judicata*. The second ground of attack is that respondent No. 3 the Collector under the Act, has no jurisdiction to initiate a proceeding and dispose it of without reference to the Board.

4. There is no substance in the first contention of learned counsel inasmuch as from the order in the earlier proceeding dated 17-12-1957, which is Annexure 3 to the writ petition, it appears that the application u/s 48-E of the Act was held to be not maintainable. The provisions of Section 48-E (1) of the Act, as existed in 1957, required that an application under that section could be maintainable only when "an under-raiyat is or has been ejected by his landlord from his tenancy or any portion thereof at any time after the 1st February, 1953, in contravention of Section 89" and not in the case of even threatened dispossession as is provided under the present Section 48-E which has been brought in by Section 3 of Bihar Act VIII of 1970. The application, therefore, not being maintainable in absence of the necessary averment regarding dispossession, the order in the earlier proceeding (Annexure 3) cannot be held to be *res judicata* as nothing was decided in that proceeding except that the application was not maintainable.

5. There is, however, substance in the second contention of Mr. Singh that when an application u/s 48-E has been entertained and a proceeding has been initiated under Sub-section (1) of Section 48-E, the Collector under the Act is bound to refer the matter to the Board and not to decide the dispute himself. Sub-section (3) of Section 48-E, which is relevant, may be usefully reproduced:

"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."

Sub-sections (4) and (5) deal with the constitution of the Board and filling of vacancies for the office of Chairman or Panchas in the Board. Sub-section (6) lays down the procedure to be followed by the Chairman and reads as follows:--

"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 endeavour 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."

Sub-section (7), which is also relevant, may usefully be reproduced:

"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 disputes 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 member of the Board to sign the finding shall not affect the validity of that finding:

Provided further that if any member does not want to sign the findings of the Board he will submit his disagreement on the findings in writing failing which the Chairman will submit his notes on the subject."

If the Collector disagrees with the findings of the Board then he has to proceed under Sub-section (8) of Section 48-E and after notice to the parties he can make such enquiry as he thinks necessary and pass any order as mentioned in the three sub-clauses of Sub-section (8). Under Sub-sec. (9) the Collector shall state the grounds on which the order is made and specify the period not exceeding six months within which the order has to be carried out. Sub-section (10), which is relevant, may usefully be reproduced:

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

It is thus manifest that the Collector gets power to enquire into the matter firstly in case of disagreement under Sub-section (8) and secondly where the Board fails to record its findings or transmit the records within six months from the date of its appointment and not otherwise.

6. Mr. Parmanand Saran Sinha learned counsel appearing on behalf of respondent No. 4, however, has urged that as under Sub-section (3) quoted

above, the Collector may refer the matter to a Board, under Sub-section (8) he has power to differ with the findings of the Board and enquire into the matter and under Sub-section (10) he has also power to decide the dispute himself in case the Board does not submit its findings within six months from the date of its appointment, it must be inferred that the Collector has power in appropriate cases after initiation of a proceeding u/s 48-E (1) of the Act to decide the dispute himself and the expression "may" does not mean "must". Aid is also sought from Sub-sec, (12) of Section 48-E, which lays down that:

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

This submission of learned counsel is without any substance. Whether the expression "May" used in Sub-section (3) is obligatory or mandatory has been fully examined in the case of Ram Narain Singh and Others Vs. State of Bihar and Others, and it has been held that the expression "may" means "must". It was observed in that decision as follows (at p. 280):

"Thus, the rule laid down by the Lord Chancellor (Earl Cairns) in Frederic Guilder Julius's case (1880) 5 AC 214 is applicable to the case before us. The power conferred by this section is coupled with the duty of the Collector, the person to whom it is given to exercise it. It has, therefore, to be construed as imperative. Whenever the Collector comes to know of the existence of any of the three conditions, either suo motu or on an application of an under-raiyat, he is duty bound to initiate a proceeding."

7. It is thus manifest that the ex-pression "may refer the matter (herein-after referred to as "dispute") to a Board" occurring in Sub-section (3) of Section 48-E of the Bihar Tenancy Act means that if the Collector, under the Act on being satisfied about the existence of any of the three conditions, initiates a proceeding, he must refer the dispute to a Board for promoting the settlement of the dispute between the under-raiyat and the landlord. There is, therefore, no escape from the conclusion that once the proceeding is initiated, the Collector under the Act, has no jurisdiction to decide the matter himself, without constituting a Board in the first instance, and he is" bound to constitute a Board for promoting settlement of the dispute. Learned Advocate General, appearing on behalf of the State, has also conceded that this is the correct legal position. The fact that the Collector under the Act can, in certain circumstances, interfere into the matter, as urged by learned counsel appearing on behalf of the contesting respondent, cannot override the mandatory requirement of Sub-sec. (3), aforesaid. In other words, the! fact that the Collector, in appropriate cases, may not accept the findings of the Board, and may make such enquiries, as he may think fit, and pass any of the three orders, as contemplated under Sub-section (8), or the fact that, if the Board fails to transmit the findings within six months from the date of the appointment of the Board, he can decide the proceeding

himself, cannot override the initial mandatory requirement of Sub-section (3). Such power cannot also be inferred from the mere fact that the Collector, under Sub-section (12) has power of general control and superintendence over the Board. The power of general control and superintendence in the Collector has to be there, because it is the Collector, who can, under Sub-section (5), in case the services of the Chairman or any Member of the Board ceased to be available, appoint any suitable person, in the prescribed manner, in the absentee's place, and has the final say in the matter even after the Board's finding. The scheme of the Act being that in the first instance a Board has to be suitably constituted for promoting settlement of the dispute between the parties, its very purpose will be defeated, if the Collector is left with the power to constitute the Board in some cases and not in others. Such a construction would make the provision discriminatory and vulnerable under Article 14 of the Constitution. That being the dominant purpose of the legislation, the submission of learned counsel for the contesting respondent that the Collector under the Act can, in appropriate cases, decide the dispute himself, is without any substance. We, therefore, hold that after initiating, a proceeding the Collector under the Act has no jurisdiction to decide the dispute himself.

8. We accordingly quash the order of the Land Reforms Deputy Collector, Saharsa, dated the 4th Feb., 1977, as contained in Annexure "1", and remand the case to him with a direction to proceed with it in accordance with law and in the light of the observations made above. In the circumstances, we make no order as to costs.