
(2019) 07 JH CK 0179

In the Jharkhand High Court

Case No : Writ Petition (c) No. 2110 Of 2019

Md. Javed Jamal

APPELLANT

Vs

Jharkhand State Housing Board And Ors

RESPONDENT

Date of Decision : 10-07-2019

Acts Referred:

Bihar State Housing Board Act, 1982 — Section 59, 62
Transfer Of Property Act, 1882 — Section 108(o)
Code Of Criminal Procedure, 1973 — Section 345, 346
Indian Penal Code, 1860 — Section 193, 228
Constitution Of India, 1950 — Article 226

Citation : (2019) 07 JH CK 0179

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : A. Allam, Richa Sanchita

Final Decision : Dismissed

Judgement

1. This writ petition is under Article 226 of the Constitution of India whereby and whereunder the order dated 29.01.2019 passed by Managing Director, Jharkhand State Housing Board, Ranchi is under challenge by which the authority has passed an order deciding the representation in terms of the order passed by this Court in W.P.(C) No.5051 of 2017 disposed of on 26.04.2018 by which the question of eviction of respondent Nos.4 & 5 has been rejected on the ground that question of allotment which has been objected by the petitioner of this writ petition of not transferring the said property is to be decided by the competent court of law and so far as the eviction of the petitioner from the said house/ premises is concerned, the same is only by filing eviction case before the competent court of law.

2. Mr. A. Allam, learned senior counsel appearing for the petitioner has questioned the aforesaid order so far as the order pertaining to eviction from the premises is concerned on the ground that the competent court of civil jurisdiction is having no jurisdiction to entertain a petition filed for eviction of property which

belongs to Housing Board rather the specific provision has been stipulated under Sections 59 and 62 of the Bihar State Housing Board Act, 1982.

3. This Court in order to examine the issue which has been raised by the petitioner, deem it fit and proper to first narrate the brief facts of the case as per the pleadings made by the petitioner.

4. The admitted fact is that the father of the petitioner namely, Md. Jamaluddin has been allotted dwelling house at Argora Housing Colony being House No.50, Argora Housing Colony, Ranchi on 28.05.1992 by virtue of following the due process of allotment.

Since the father of the petitioner was in the Central Government duty, therefore, he all time remained outside Ranchi and hence, he has made an application for transfer of the said allotment in favour of his son and to that effect, an agreement was entered into in between the petitioner and his father which having been agreed by the Housing Board, the house in question has been allotted in favour of the petitioner as would be evident from Letter dated 28.06.2017 (Annexure-8).

5. It is evident from the order that prior to the said allotment made in favour of the petitioner by Md. Jamaluddin, he has executed an agreement to sell the said house in favour of one Smt. Shashi Prabha Das vide agreement dated 05.04.1999 and in consequence to the terms and conditions of the said agreement, the consideration amount was paid.

6. The son of Smt. Shashi Prabha Das namely, Shri Amitabh Chandan has submitted an affidavit for transfer of the said house in the office of the Jharkhand State Housing Board in terms of Clause 13 of the lease deed which was accepted and calculated the labansh money of Rs.14,36,653/- which was to be paid on or before 30.11.2012. The said amount was to be paid by the allottee but with the consent of the allottee the purchaser Amitabh Chandan willing to pay the said amount for which he has requested to the Board to grant NOC for sanctioning the loan from the financial institution but in the meanwhile, due to dispute having being arisen in between the parties, the terms and conditions of the agreement could not have been materialized and in the meanwhile, Md. Jamaluddin had died on 30.01.2017 and thereafter the allotment has been made in favour of the petitioner on 28.06.2017.

7. The petitioner's case is that since he, in good faith, has entered into an agreement to sell the property in favour of Amitabh Chandan, son of Smt. Shashi Prabha Das, and therefore, he has also entered into the premises which the petitioner has been allotted, keeping the fact into consideration the said property is to be purchased by him but the property having not been purchased due to the dispute and the petitioner in such circumstances has made grievance before the Housing Board for their eviction from the house which has been entertained by the Housing Board by issuing an order by the Executive Engineer on 28.07.2017 (Annexure-10) whereby and whereunder the respondent No.5 has been directed

to evict the house, failing which, forceful action in accordance with law shall be taken.

8. The respondent Nos.4 & 5 have approached to this Court by filing a writ petition being W.P.(C) No.5051 of 2017 which was disposed of by co-ordinate Bench of this Court vide order dated 26.04.2018 directing the Managing Director, Jharkhand State Housing Board, Ranchi to take decision with respect to the claim of the parties by providing opportunity of hearing to the petitioner as well as the original allottee/his successor in interest in accordance with law, in terms thereof, the order has been passed on 29.01.2019 which is impugned in this writ petition.

9. It is evident from the aforesaid factual aspect that the father of the petitioner was the actual allottee but subsequently, it has been allotted in favour of the petitioner who happens to be the son. It is also admitted fact that the father of the petitioner has entered into an agreement on 05.04.1999 with the respondent No.4 & 5 for transfer of the said property and they have been allotted the same and remained in possession of the said house.

10. The contention of the petitioner in assailing the said order is two folds:

(i) since the Annexure-10 has already been passed by the Executive Engineer for eviction, therefore, the said order is binding and in consequence thereof, the decision is required to be taken by the authority for evicting by taking all measures as provided under the statute.

(ii) Section 59 is applicable and when Section 59 confers power upon the concerned authority to deal with such situation, the order passed by the Managing Director to approach before the competent court of jurisdiction for eviction is contrary to the mandate as provided under the Bihar State Housing Board Act, 1982 and further under Section 62 of the Act, 1982 the jurisdiction of civil court is barred.

11. In this context reference of Section 59 as also of Section 62 needs to be made herein, which reads hereunder as:

"59. Summary procedure for eviction and recovery of rents.--(1) Notwithstanding anything contained in the Transfer of Property Act, 1882 (Act 1 of 1882), the Code of Civil Procedure, 1908 (Act 5 of 1908) or any other law for the time being in force, if the competent authority is of opinion -

(a) that the person authorised to occupy and Board premises has -

(i) not paid rent lawfully due from him in respect of such premises for a period of not less than three months; or

(ii) sub-let, without the permission in writing of the Board, the whole or any part of such premises, or

(iii) committed, or is committing any act contrary to the provisions of clause (o)

of section 108 of the Transfer of Property Act, 1882 (Act 4 of 1882); or

(iv) made or is making material alteration to, alteration in, such premises without the previous written permission of the Board, or

(v) otherwise acted in contravention of any of the terms, expressed or implied, under which he is authorised to occupy such premises, or

(b) that any person is in unauthorised occupation of any Board premises.

The competent authority may issue in the manner hereafter provided a notice in writing calling upon the person, if any, authorised to occupy as well as any other person who may be in occupation of the whole or any part of the premises to show cause why order of eviction and recovery of arrears of rent and damages, if any should not be made.

(2) The notice under sub-section (1) shall specify--

(a) the grounds on which the order of eviction or of recovery of arrears of rent or damages is proposed to be made; and

(b) the date by which cause against the proposed order may be shown, such date being not earlier than fifteen days from the date of issue of the notice provided that the competent authority may on application allow further time on such terms as to payment of the amount claimed in the notice otherwise, as it deems fit.

(3) The competent authority shall cause the notice under sub-section (1) to be served by having it affixed on outer door or from the salary or wages payable to him, such amount as may be some other conspicuous part of the Board premises and in such other manner as may be prescribed, whereupon the notice shall be deemed to have been duly given to all persons concerned.

(4) Where the competent authority knows or has reason to believe that any person is in occupation of the Board premises, then, without prejudice to the provisions of sub-section (3) it shall cause copy of the notice to be served on him by registered post or delivery or tender to him or in such other manner as may be prescribed.

(5) If, after considering the cause, if any, shown by any person in pursuance of the notice under sub-section (1) and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the competent authority is satisfied that any of the circumstances mentioned in sub-section (1) exists, or existed on the date of the issue of the notice, it may on a date to be fixed for the purpose make an order stating reasons therein directing that the Board premises shall be vacated by all persons who may be in occupation thereof or any part thereof and may further order that any person shall pay such amount of arrears of rent or damages as may be specified in the order.

(6) If a person who has been asked to show cause under sub-clause (i) or sub-clause (iii) of clause (a) of sub-section (1) pays to the Board within the time allowed, the rent in arrears together with interest thereon as fixed by the Board and such costs as may be prescribed, or, as the case may be remedies to the satisfaction of the competent authority the breach of the term violated by him, the competent authority shall, in lieu of evicting such person under the sub-section (5) discharge the notice, and whereupon such person shall continue to hold the premises on the same term on which he held them immediately before such notice was served on him.

(7) The competent authority shall for the purpose of holding any inquiry under this chapter, have, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (Act 5 of 1908), when trying a suit, in respect of the following matter, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents; and

(c) any other matter which may be prescribed, be deemed to be a Civil Court within the meaning of sections 345 and 346 of the Code of Criminal Procedure, 1973 (Act 2 of 1974), and any proceeding in such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (Act 45 of 1860).

(8) If any person refuses or fails to comply with an order of eviction under sub-section (5) within thirty days from the date of the order or such longer time as the competent authority may allow, the competent authority or any other officer duly authorised by it in this behalf, may evict him from, and take possession of, the Board premises, and may for that purpose use such force as may be necessary.

(9) Any arrears of rent or damages ordered to be paid under sub-section (5) may be recovered as arrears of land revenue.

62. Bar of jurisdiction of Courts.-- No order made by the government or the competent authority in the exercise of any power conferred by or under this Chapter shall be called in question in any Court and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Chapter."

It is evident from the provision as contained under Section 59 as quoted above which confers for initiating summary procedure for eviction and recovery of rents by making a non-substantive clause by starting with the word "Notwithstanding" anything contained in the Transfer of Property Act, 1882, the Code of Civil Procedure, 1908 or any other law for the time being in force, if the competent authority is of opinion -

- (a) that the person authorised to occupy and Board premises has -
- (i) not paid rent lawfully due from him in respect of such premises for a period of not less than three months; or
 - (ii) sub-let, without the permission in writing of the Board, the whole or any part of such premises, or
 - (iii) committed, or is committing any act contrary to the provisions of clause (o) of section 108 of the Transfer of Property Act, 1882; or
 - (iv) made or is making material alteration to, alteration in, such premises without the previous written permission of the Board, or
 - (v) otherwise acted in contravention of any of the terms, expressed or implied, under which he is authorised to occupy such premises, or
- (b) that any person is in unauthorised occupation of any Board premises.

While Section 62 stipulates that there would be bar of jurisdiction of Courts which stipulates the provision that no order made by the government or the competent authority in the exercise of any power conferred by or under this Chapter shall be called in question in any Court and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Chapter.

12. The provision of Section 59 starts with the word obstante clause and when the clause begins with the word "Notwithstanding" the object is to give it overriding effect over other provisions of the Section/Acts which is equivalent to showing in respect of those provisions the particular clause would have full operation, meaning thereby, a substantive clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such substantive clause.

It is evident that the applicability of provision of Section 59 is having full operation but it does not mean that the provision of Transfer of Property Act, 1982 or the Code of Civil Procedure, 1908 will have no applicability depending upon the cases.

Further Section 59 has been enacted for eviction by way of summary procedure and recovery of rent by way of summary procedure.

13. The main object for insertion of the provision of Section 59 is that if any premises is being occupied illegally or any rent is not being paid to the Housing Board and if the eviction suit would be filed before the competent court of civil jurisdiction it will consume much time which will ultimately be detrimental to the purpose for which the Housing Board has been created and therefore, by way of summary disposal of the proceeding the Section 59 has been enacted.

Further it is evident that the provision of the said Act would be applicable depending upon the certain conditions as enumerated therein i.e., in case of non-

payment of rent or in case of sub-letting without the permission in writing of the Board or commission of act contrary to the provision of Clause (o) of Section 108 of Transfer of Property Act, 1982 or if there is material alteration without the previous written permission of the Board or otherwise, acted in contravention of any of the terms, expressed or implied under which he is authorised to occupy such premises.

14. Section 62 stipulates the bar of jurisdiction and it is evident therefrom that no order made by the government of the competent authority in the exercise of any power conferred by or under this Chapter shall be called in question in any Court and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Chapter.

15. This provision suggest that Section 59 is under the same Chapter which provides for summary procedure and therefore, the jurisdiction of the Court has been barred so that the very purpose for which the provision of the Section 59 has been enacted under the Act for summary procedure for disposal of the matters if subjected to proceeding before the competent court then the purpose would not be achieved, therefore, in that context the bar of jurisdiction of court has been stipulated under Section 62 of the Act, 1982 by making provision in accepting or entertaining any order passed under the said Chapter.

16. In the background of this legal position, the factual aspect needs to be examined.

17. Admitted case herein is that the plot in question has been allotted in favour of the father of the petitioner namely, Md. Jamaluddin on 28.05.1992. He has entered into an agreement with the respondent Nos.4 & 5 on 05.04.1999 for Transfer of Property with the permission of the Jharkhand State Housing Board in terms of Clause 13 of the lease deed and to that effect an affidavit was filed but on one pretext or the other, the agreement arrived in between the father of the petitioner and the respondent Nos.4 & 5 could not have reached to its logical end. Thereafter, the father of the petitioner has died, upon that, petitioner has made an application for transfer of the allotment in his favour which has been acted by taking a decision in his favour vide order dated 28.06.2017.

18. The respondent Nos.4 & 5 have entered into the premises by virtue of an agreement dated 05.04.1999, the day when the father of the petitioner was alive who has died on 30.01.2017 and thereafter the said premises has been allotted in favour of the petitioner on 26.06.2017.

19. It is the admitted case of the petitioner that the respondent Nos.4 & 5 are in possession since the date of the agreement.

20. The original lease deed contains a condition as condition No.13 which reads hereunder as :

"13. That the lessee shall not sublet or part with the possession or transfer his

right, title and interest in the said house in whole or part by way of sale, exchange, gift or mortgage or otherwise without the prior permission of the Board in writing which it shall be entitled to refuse in its sole discretion or in the event of consent being given the Board may impose such terms and conditions as it thinks fit and proper and the Board shall be entitled to claim and recover a portion of the unearned increase in the value (i.e., the difference between the cost paid and the market value of the land and the house) at the time of sale, mortgage, transfer by way of gift, assignment or parting with the possession the amount to be recovered being 50% of the unearned increase. The decision of the Board regarding the market value of the land/premises shall be final. The Board shall also have the preemptive right to take back (purchase) the house/premises from the lease after paying an amount equal to the premium/cost paid by the lessee, less/depreciation and 50% of the unearned increase in the value of the land determined in the manner indicated above.

The condition stipulated at condition No.13 speaks that the lessee shall not sublet or part with the possession or transfer his right, title and interest in the said house in whole or part by way of sale, exchange, gift or mortgage or otherwise without the prior permission of the Board in writing which it shall be entitled to refuse in its sole discretion or in the event of consent being given.

Thus, the condition stipulated under condition No.13 speaks for not to sublet or part with the possession or transfer his right with the previous sanction of the Board.

21. Admittedly, it is not a case of subletting because the agreement dated 05.04.1999 has not been acted upon on account of the dispute in between the parties and there is no order passed by the competent authority of the Board for subletting the same in favour of the respondent Nos.4 & 5.

22. Learned senior counsel appearing for the petitioner has emphasized upon the word "sublet" and when there is subletting, Section 59 will attract, meaning thereby, in case of subletting, the Housing Board is to act upon in pursuance to the provision of Section 59 of the Act, 1982.

23. It cannot be disputed that if the case would be of subletting the summary procedure for eviction as required under Section 59 is to be invoked but it is not a case of subletting since there is no prior permission of the Board or there is no order annexed with the writ petition of subletting by the petitioner rather it is admitted case that the respondent Nos.4 & 5 are in possession and therefore, he will be said to be parting with the possession of premises.

24. In view of this factual aspect when there is no subletting rather it is parting with the possession, whether the action for eviction is required to be taken as per the provisions of Section 59 of the Act, 1982, the answer of this Court would be in negative for the reason that the case herein is of not subletting rather parting with the possession and hence, the condition as stipulated under Section 59, the ingredients contained therein is not warranting the remedy to be resorted

to under the aforesaid provision.

25. The second question has been agitated that there is already an order of eviction on 28.07.2017, therefore, the subsequent order should not have been passed by the Managing Director but the question herein is that the order dated 28.07.2017 has been assailed by the respondent Nos.4 & 5 by filing writ petition before this Court being W.P.(C) No.5051 of 2017 disposed of on 26.04.2018 by directing the Managing Director, Jharkhand Housing Board, Ranchi to decide the claim after providing opportunity of hearing to the petitioner as well as the original allottee/his successor in interest in accordance with law.

26. The Managing Director has acted in pursuance to the said order and has passed an order on 29.01.2019 which is impugned in this writ petition.

27. The petitioner's contention is that he was not party to the said writ petition, therefore, there is miscarriage of justice but this argument is not having force for the reason that even though the petitioner was not party but when he has been summoned by the Managing Director, at that stage, he ought to have preferred appropriate application for modification of the order passed by this Court in W.P. (C) No.5051 of 2017 but he has not chosen to do so rather he has participated in the hearing before the Managing Director and he has been heard at detail and thereafter the fresh order was passed on 29.01.2019 by the Managing Director, therefore, Annexure-10 which has been passed by the Executive Engineer stand superseded by the fresh order passed by the Managing Director in pursuance to the order passed by this Court.

28. If this Court would not have passed order and Managing Director if would have passed an order independently without taking into consideration the order dated 28.07.2017 then only it should have been said that there is error on the part of the Managing Director but the moment this Court has passed an order directing the Managing Director to decide the claim by providing opportunity of hearing to the petitioner vis-a-viz the respondent Nos.4 & 5 and if the said order has been acted upon even by its acceptance by the petitioner and in terms thereof, when the aforesaid order has been passed, the petitioner will be seized to raise the issue of applicability of order dated 28.07.2017 for the simple reason that the order dated 28.07.2017 passed by the Executive Engineer will stand superseded by an order passed by the Managing Director in terms of the direction passed by this Court in W.P.(C) No.5051 of 2017 sitting under Article 226 of the Constitution of India, therefore, the contention as has been raised by the petitioner that the order of eviction dated 28.07.2017 is still in force, is having no force.

29. The question herein which the petitioner is harping upon is that the respondent Nos.4 & 5 are in illegal possession being a trespasser, therefore, Section 59 is the remedy available but as has been observed hereinabove that Section 59 will not come into play and furthermore, it is also for the reason that the Housing Board has allotted the house in favour of the petitioner and if he has

handed over the possession in breach of condition as contemplated under condition No.13 to the lease deed since admittedly there is no permission of the Housing Board for parting with the possession of the premises, the Housing Board will have no duty casted upon it to get the premises evicted from the respondent Nos.4 & 5 and hand it over to the petitioner in view of the fact that it is the dispute in between the petitioner and the respondent Nos.4 & 5 wherein the Housing Board is having no concern, save and except, the cancellation of the lease deed if found to be in breach of the terms and conditions as stipulated under condition No.13, by following due procedure.

30. In view thereof and in the entirety of facts and circumstances as enumerated hereinabove, the impugned order suffers from no infirmity, accordingly, this Court declines to interfere with the same.

31. In the result, the writ petition fails and is dismissed.