
(2002) 07 PAT CK 0064
In the Patna High Court
Case No : C.W.J.C. No. 7779 of 2002

Md. Sabir Hussain and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 31-07-2002

Acts Referred:

Citation : (2002) 07 PAT CK 0064

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—Heard learned Counsel for the petitioners, and learned Government Pleader No. VII for respondent Nos. 1 to 4.

2. This writ petition is directed against the order dated 28.5.2001 (Annexure-4), passed by the learned Collector, Muzaffarpur in Case No. 26 (Misc.) 1998-99 Ganesh Choudhary v. Md. Sabir Hussain and Ors. whereby he has directed the Anchai Adhikari of Katra and Anchai Adhikari, Aurai, to remove the encroachments at the instance of the present petitioners on the land in question.

3. This relates to proceeding under the Bihar Privileged Persons Homestead Tenancy Act (hereinafter referred to as "the Act") and is with respect to Khesra No. 2102, Khata No. 511, covering an area of 2 decimals situate at village Barhar, with respect to which Basgit Parcha was issued in favour of respondent No. 5 (Ganesh Choudhary). According to the writ petition, respondent No. 5 had filed an application in terms of the Act for issuance of Basgit Parcha with respect to the land in question covering an area of 3 decimals. The same was registered as Basgit Case No. 5 of 1990-91, which was rejected by order dated 20.7.1990 (Annexure-1), passed by learned Anchai Adhikari, Katra. It further appears from the writ petition that respondent No. 5 later on filed another application for issuance of Basgit Parcha for the same plot of land, but on this occasion with respect to 2 decimals only. The same was registered as Case No. 151/1991-92 before the learned Anchai Adhikari, Katra. It appears from the order dated 27.9.1991 (Annexure-2) that notice was issued to the land-owner inviting objections. It further appears from the same order that Halka Karmachari had

submitted his report to the effect that the applicant (respondent No. 5) has his house on the said plot, that he has no other land, and accordingly recommended for issuance of Basgit Parcha in favour of the applicant (respondent No. 5 herein). The same was approved by the Circle Inspector. It appears from the order dated 30.9.1991 (Annexure-2) that the learned Anchai Adhikari, Katra, had made a local inspection of the plot in question and found that the applicant (respondent No. 5) has a house on the plot in question in which he himself is living and, therefore, ordered for issuance of Basgit Parcha in his favour. It thus appears that respondent No. 5 has continuously remained in peaceful possession of the land in question from before the dated of issuance of Basgit Parcha.

4. It further appears from the statements made in the writ petition that the petitioners had purchased the land covering an area of 3 decimals including the land in question by a registered deed of absolute sale dated 26.3.1999 from Murari Choudhary, son of the landlord. It further appears from the writ petition that the petitioners made some construction on the land in question after the registered deed of sale in their favour. Thereafter, differences arose between respondent No. 5 and the petitioners which led to an application for removal of the construction before the learned Collector of Muzaffarpur, which was registered as No. 26 (Misc.) 1998-99 Ganesh Choudhary v. Md. Sabir Hussain and Ors. The order-sheet of that Misc Case is marked Annexure-4 to the writ petition. By order dated 30.7.1998, the learned Collector called for a report from the Circle Officer. It appears from the order dated 4.3.1999 that on a perusal of the report of Circle Officer, the application of respondent No. 5 was admitted and notice was issued to the opposite parties (the petitioners herein). Thereafter, the matter was taken up on 12.4.1999, 20.5.1999 and 14.6.1999. The petitioner did not appear and, therefore, the learned Collector by his order dated 15.7.1999 directed for issuance of notice to the opposite parties (the petitioners herein) per registered post. It appears from the order dated 16.8.1999 that the opposite parties (the petitioners herein) entered appearance through Counsel and filed duly executed Vakalatnama. It further appears from the order-sheet that the opposite parties (the petitioners herein) sought adjournment on various occasions, and were present on other occasions. Ultimately, the impugned order dated 22.5.2001 (Annexure-4) was passed, whereby the learned Collector allowed the petitioners' application holding that Basgit Parcha had been issued in favour of respondent No. 5 herein long time ago, and the petitioners herein are causing obstruction to the peaceful possession of respondent No. 5 herein. He has, therefore, passed the impugned order directing the Anchai Adhikari, Katra, and the Circle Officer, Aurai, to take steps to get the land in question rid of the encroachment from the petitioners herein.

5. While assailing the validity of the impugned action, learned Counsel for the petitioners has submitted that the order dated 30.9.1991 (Annexure-2) was an illegal order and amounted to review of his earlier order dated 20.7.1991 (Annexure-1). In view of the legal position that the Act has not conferred power of review on the Anchai Adhikari, he could not have reviewed his own order. It is,

therefore, submitted that the said order dated 30.9.1991 (Annexure-2) is a nullity. In case the order dated 30.9.1991 is held to be a nullity, the impugned order dated 28.5.2001 (Annexure-4) also falls to the ground. When the substratum is gone, learned Counsel submits, where is the question of the super-structure.

6. Learned Government Counsel has opposed this writ petition on diverse grounds. He submits that the writ petition suffers from unexplained delay. He next submits that the petitioners' action of purchasing the land in question by sale-deed dated 26.3.1999 is a mala fide act. The vendor of the petitioners has passed on his liability to them. The petitioners have stepped into the shoes of the vendor with all rights, liabilities and encumbrances. He next submits that the order dated 30.9.1991 (Annexure-2) was passed after issuance of notice to the land owner, i.e. the vendor of the petitioners, and has become final. He lastly submits that the petitioners will be deemed to have ventilated his grievances before the Collector who is the appellate authority under the Act. The petitioners have had the occasion to point out the defects before him. He lastly submits that in any event the entire conspectus of the matter is now before this Court and the validity of the action can on merits be examined . before this Court.

7. I have persuaded the writ petition and carefully considered the submissions of the learned Counsel for the parties. I am of the view that this writ petition suffers from unexplained delay. The impugned order was passed on 28.5.2001 (Annexure-4) and the present writ petition has been filed on 11.7.2002. Learned Government Counsel is further right in his submission that the order dated 30.9.1991 (Annexure-2) was passed after due notice to the vendor of the petitioners. Not having been challenged the same has become final. The petitioners have stepped into the shoes of their vendor and have purchased the property with all rights, liabilities and encumbrances. Law is well settled that the vendor cannot pass on a higher title than what he himself had. In that view of the matter, it is obvious that the petitioners have acquired title to the property along with encumbrances created by the effect and force of the order dated 30.9.1991 (Annexure-2). It appears to me that the alienation in favour of the petitioners is a mala fide act to nullify the effect of the order dated 30.9.1991 (Annexure-2). Furthermore, there are as many as four petitioners who, I presume, jointly claim interest in the property. In totality it appears to me to be an act of oppression against a weak and indigent person like respondent No. 5. He, therefore, deserves the fullest protection of law.

8. I must at this stage deal with the contention advanced on behalf of the petitioners that the order dated 30.9.1991 (Annexure-2) is a nullity. I am unable to accede to the submission for various reasons. The order dated 30.9.1991 was not in letter or spirit in exercise of powers of review. A fresh application was filed by respondent No. 5 on which fresh notice was issued to the land-owner (vendor of the petitioners), and after affording him reasonable opportunity to explain his position and re-examination of the whole matter the order dated 30.9.1991

(Annexure-2) was passed. It is manifest from the order dated 27.9.1991 that the report of the Halka Karmachari was obtained who stated in his report that respondent No. 5 has his house on 2 decimals of plot No. 2102 and he is living therein and, therefore, recommended for issuance of Basgit Parcha. The same was approved by the Anchal Inspector. The vendor of the petitioners had, therefore, full occasion to raise all objections available to him in law before the Anchal Adhikari before the order dated 30.9.1991 was passed. Secondly, the same not having been challenged, has become final. Thirdly, the earlier claim of respondent No. 5 was with respect to 3 decimals, whereas the claim on the later occasion is with respect to 2 decimals only. Frothily, as stated hereinabove, the present petitioners have stepped into the shoes of their vendor and cannot claim right, title, and interest higher than that of their vendor. The petitioners are bound by the order dated 30.9.1991 (Annexure-2). Lastly, even if conceding for the sake of argument that the order dated 30.9.1991 (Annexure-2) was unwittingly in exercise of power of review, this Court in exercise of its prerogative writ jurisdiction has examined the entire conspectus of the matter and is of the view that the order dated 28.5.2001 (Annexure-2) was valid order. Setting aside the same would result in reviving an illegal order dated 20.7.1990 (Annexure-1). The extraordinary prerogative writ jurisdiction is never exercised to set aside a seemingly irregular order, which in substance is a lawful order, and will result in revival of an illegal order. I am, in this connection supported by the judgment of the Supreme Court reported in Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, the Supreme Court was faced with a situation where the District Judge had set aside the order of the first authority under the UP. Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972. In exercise of the writ jurisdiction under Article 226 of the Constitution, the Allahabad High Court upheld the order of the District Judge even though it came to the conclusion that no appeal lay before the District Judge, because setting aside the order of the District Judge would have resulted in reviving and perpetuating a patently illegal order of the first authority under the Act. In other words, the District Judge had exercised a jurisdiction under the Act where none was vested in him notwithstanding which the Allahabad High Court upheld his order. In one sense, the order of the District Judge will be deemed in law to have been substituted by the order of the High Court on the writ petition on a thorough consideration of the entire matter. I am in no doubt that the present case is squarely covered by the judgment of the Supreme Court in the case of Md. Swalleh (supra). I had the occasion to deal with a similar matter in the case of Sri Prakash Singh and Another Vs. State of Bihar and Others although the facts of that case were on a slightly different footing. The question in the present case is whether or not this Court, in exercise of its discretionary, prerogative writ jurisdiction, set aside the impugned order which would result in reviving an illegal order passed by the Anchal Adhikari on 20.7.1990 (Annexure-1). I have on thoughtful consideration of the entire matter reached the conclusion that this Court should restrain itself from adopting such a course.

9. In the result, this writ petition is dismissed.