
(2003) 07 PAT CK 0068
In the Patna High Court
Case No : C.W.J.C. No. 2137 of 1992

Om Prakash Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 02-07-2003

Acts Referred:

Bihar Privileged Persons Homestead Tenancy Act, 1947 — Section 18, 21
Bihar Privileged Persons Homestead Tenancy Rules, 1948 — Rule 4, 5, 5(2)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11

Citation : AIR 2004 Patna 95 : (2003) 2 BLJR 1523 : (2004) 2 PLJR 621

Hon'ble Judges : S.N. Jha, J;A.K. Verma, J

Bench : Division Bench

Advocate : Shashi Shekhar Dwivedi, for the Appellant; Yogesth Chandra Verma, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha and A.K. Verma, JJ.—This writ petition arises from a proceeding Under the Bihar Privileged Persons Homestead Tenancy Act, 1947 (hereinafter referred to as "the Act"). The petitioner is landlord of the lands in question with respect to which purcha has been granted in favour of respondent No. 3 Indrasan Bhar (in short, the respondent"). The petitioner seeks quashing of the order by which purcha was granted to the respondent.

2. The dispute relates to 0.07 Acre out of 5 Katha 19 Dhurs land of Plot No. 200, Khata No. 104 situate a Village Nawada Mathia within Jalalpur PS of Saran district. The case of the petitioner is that the land in question originally belonged to one Guljari Singh and Shiv Shanker Bharti. On 9-4-1971 they sold the land to Manki Devi. The husband of Manki Devi was running wholesale shop business in which respondent No. 3 was an employee. He was permitted to construct a room and live therein. On 27-8-1978 Manki Devi sold the land to Laxmina Devi and her sons. Manwhile Shiv Shankar Bharti had died, and in the circumstances the respondent was retained as houseguard One room was added to the earlier

construction for keeping fodder etc. On 26-8-1983 Laxmina and her sons sold the land to the petitioner under different sale-deeds. The petitioner called upon the respondent to vacate the room to which he did not pay any heed. The petitioner filed Title Suit No. 102/85 for ejectment of the respondent and delivery of possession of the land/room. The respondent filed written statement claiming to have obtained purcha under the Act. The plaint was accordingly suitably amended. On 25-3-1989 the suit was decreed and the impugned purcha was held to be invalid. However, on appeal by the respondent the decree was set aside by the lower appellate Court on 22-12-1990. The petitioner preferred Second Appeal which was dismissed by this Court summarily at the stage of hearing under Order XLI, Rule 11 CPC on 9-1-1992. According to the petitioner a liberty was given to challenge the purcha by a writ petition. From the order dated 9-1-1992, however, it appears that the Court did not express any opinion on the prayer. The plea was disposed of with the observation that he may pursue such remedy as may be permissible to him in law". After the Second Appeal was dismissed the petitioner filed the present writ petition on 6-3-1992.

3. The writ petition was admitted for hearing by a Division Bench on the point of maintainability of the petition in view of adverse decisions in the suit. Shri Shashi Shekhar Dwivedi, learned Counsel for the petitioner, submitted that rightly or wrongly, the suit having been held to be not maintainable in view of the provisions of Section 18 of the Act which makes the order passed under the Act final and excludes the jurisdiction of the Civil Court for varying or setting aside any order except on the ground of fraud or want of jurisdiction, it is too late for the petitioner to aruge that the suit was maintainable but even if the same was not maintainable, the remedy under Articles 226 and 227 of the Constitution of India cannot be denied, for that would amount to denying him the remedy to challenge the impugned order altogether rendring him remedy less. According to the Counsel no person can be said to be without a remedy and therefore, the remedy of suit not being available to the petitioner, the writ petition must be held to be maintainable.

4. Shri Yogesh Chandra Verma, learned Counsel for the respondent, did not seriously challenge the above preposition. He however, took the position that Section 21 of the Act confers plenary jurisdiction on the Collector of the district to call for and examine the record of any case decided by the Collector under the Act for satisfying himself as to the regularity of the proceeding or to the correctness, legality or propriety of an order passed by the Collector, under the Act in the case or proceeding, and to direct that the case or the proceeding be re-opened and disposed of afresh in accordance with the provisions of the Act. Counsel submitted that if this Court comes to the conclusion that the proceeding suffered from any error of procedure and the grant of purcha was illegal, the matter may be remitted to the Collector of the district to exercise jurisdiction u/s 21 of the Act.

5. The submission of the Counsel for the respondents cannot be accepted for two

fold reason. Firstly, Section 21 of the Act was introduced by amendment in 1989, by Act 11 of 1989 with effect from 25-9-1989, much after passing of the impugned order. The validity of the proceeding and rights of the parties in context have to be determined with reference to the date of the proceeding, and proceeding having been concluded in 1984, any amendment conferring power upon the Collector to examine correctness and legality etc. of the order/proceeding cannot be applied with retrospective effect. Secondly, it is well-settled that once a writ petition is admitted for hearing, existence of alternative remedy cannot be a ground to non-suit the petitioner on that ground. Rejecting the writ petitioner without adjudicating upon the issue after keeping the case pending for years together, giving a hope to the aggrieved petitioner that the lis would be decided by the Court, may not be a proper exercise of discretion under Articles 226 and 227 of the Constitution of India. For these reasons we are not persuaded to relegate the petitioner to the remedy under Article 21 of the Constitution. The submission of the Counsel for the respondent in this regard accordingly is rejected.

6. Adverting to the merit of the case it was submitted on behalf of the petitioner that the Act has been enacted to protect the rights of the privileged tenant as defined u/s 2(j) of the Act but there is no finding in the impugned order about respondent being privileged tenant, and therefore, grant of purcha must be held to be illegal. Secondly, Counsel submitted, the Act read with Rules framed thereunder lays down a definite procedure for disposal of the application for grant of purcha. In the instant case there was utter failure on the part of the authority to follow the procedure and in that view of the matter too, the impugned order cannot be sustained.

7. Section 2(j) of the Act defines "privileged tenant" to mean :

"a privileged person who holds homestead under another person and is, or but for a special contract would be, liable to pay rent for such homestead to such person."

The term "privileged person" is defined in Section 2(i) to mean : "a person :

(1) who is not a proprietor, tenure-holder, under-tenure-holder, or a mahajan; and

(2) who, besides his homestead, holds no other land or holds any such land not exceeding one acre;

but does not include any person who has come into possession of the homestead land in contravention of the provisions of Section 20 of the Santhal Parganas Tenancy (Supplementary Provisions) Act 1949 (Bihar Act XIV of 1949), of Section 46 of the Chotanagpur Tenancy Act, 1908 (Bengal Act VI of 1908) or Section 49-C of the Bihar Tenancy Act, 1885 (Act VIII of 1885)."

From combined reading of the two definitions it is evident that in order to claim protection under the Act a person must be a privileged person first. If he is

proprietor or tenure-holder or under-tenure-holder or a mahajan, he cannot be privileged person. Besides, it is also essential that he holds no other land or land exceeding one Acre.

8. In the instant case, in his application the respondent no doubt described himself as landless person living on portion of Plot No. 200 by constructing a house thereon for several years. The date of application is not known but from the order-sheet of the case (Case No. 2/84-85) it appears that the Anchal Adhikari, Jalalpur (vested with the power of Collector under the Act) took cognizance of the application on 9-5-1984. On the same day he called for a report from the Halka Karamchari. From the next order dated 14-5-1984 it appears that the Halka Karamchari submitted report through the Circle Inspector recommending the case of the respondent for grant of purcha with respect to 7 dec. of land of Plot No. 200 of Khata No. 104. On receipt of the said report, the Anchal Adhikari directed that a general notice be published and the records be put up on 21-5-1984. On 21-5-1984 he proceeded to pass final order observing that no objection had been filed from any quarter.

9. Copy of the enquiry report has not been brought on record and therefore, the findings of the Karmachari are not known. However, one thing is clear that neither in the preliminary order dated 14-5-1984 by which notice was ordered to be issued, nor in the final order dated 21-5-1984 there is any finding about the respondent being a privileged person or privileged tenant. On similar facts a Division Bench of this Court in *Hiralal Vishwakarma v. Vishwanath Sah and Ors.*, 1978 PLJR 398, held that the applicant did not come within the ambit of privileged person/tenant in view of the provisions u/s 2(i)(1) and 2(i)(2) of the Act. It would be useful to quote the relevant passage as under:

"It is no doubt true that in the application filed by respondent No. 1 he has stated that he holds no other land than the land on which he claims to have built a house for the last seven years, But neither in the reports of the calorimeter nor in the report of the Circle Inspector there is any mention that the facts stated in the petition of respondent No. 1 are correct nor do they say that respondent No. 1 holds no other land besides the land on which he has constructed the house or holds any such land nor exceeding one acre. Apart from this infirmity, there is another infirmity that respondent No. 1 in his application does not say that he is not a proprietor, tenure-holder, under tenure-holder or a mahajan and the reports also do not throw any light on this topic. It is manifest that the twin conditions necessary for being a privileged tenant within the ambit of privileged person either u/s 2(i)(1) or 2(i)(2) have not been satisfied in this case before the impugned order has been passed."

10. Another aspect of the case is that though report of the Halka Karamchari is said to have been forwarded by the Circle Inspector there is nothing on the record to suggest that any enquiry was held by the Circle Inspector himself as contemplated in Rule 5(1) of the Rules. In the case of *Hiralal Vishwakarma* (supra) the enquiry was made by the Halka Karamchari with which the Circle

Inspector agreed in the following words, "The report of the Karamchari is correct. The Parcha may kindly be issued under P.P. Act". The Court held that this did not amount to compliance of requirement under Rule 5(1) which enjoins upon the Circle Inspector to make enquiry himself. As there was no material or pleading of the parties to show that any enquiry was made by the Circle Inspector, the Court held that the report was not in accordance with the Rules. In the instant case, the report of the Karamchari appears to have been merely forwarded by the Circle Inspector and it is not clear from the order-sheet as to whether he concurred in the findings of the Karamchari. Even if it is accepted that forwarding report of Karamchari, amounted to accepting the correctness thereof, the fact remains that no enquiry was made by the Circle Inspector himself and for this reason too the impugned order passed on such report cannot be said to be correct and final.

11. Even if another view on this point were to be taken we are satisfied that the petition has to succeed on the second point urged by the Council, namely, non-observance of the laid down procedure. Rule 4 of the Bihar Privileged Persons Homestead Tenancy Rules, 1948 framed u/s 20 of the Act provides that on receipt of an application mentioned in Rule 3, the Collector shall start proceedings under the relevant section to which the application relates and deal with them in the manner provided for land revenue cases. Rule 5 provides that the Collector shall either himself make local inquiry or have such inquiry made by any responsible officer nor below the rank of a Circle Inspector or Welfare Inspector and satisfy himself as to the correctness or otherwise of the contents of such application. Under sub-rule (2) of Rule 5 the enquiring officer is required to issue a notice in Form F to all the interested parties intimating the date on which the inquiry shall be made and directing parties to produce all the evidence in their possession in support of or against the application. Sub-rule (3) of Rule 5 enjoins upon the enquiring officer to make a record of the evidence produced before him and, if he is not the Collector, submit his report to the Collector. Thereafter the Collector (under the Act) may pass such order as seems to be just and proper on the application after hearing the parties.

12. It is the definite case of the petitioner that no notice muchless notice in Form F was issued to the petitioner who had by then already come on the scene by reason of purchase under the registered sale-deeds in 1983. Even if it is assumed that the petitioner did not get his name mutated in the relevant record, the name(s) of his predecessor in interest must have been in the record. It was submitted that there is nothing in the order-sheet to indicate that any attempt was made to serve notice on any individual. It was contended that being custodian of the revenue records the Anchal Adhikari was supposed to be in know of the name or names of the persons in whose favour the land stood recorded in the revenue records, if not the petitioner. But without making any effort to find out the owner i.e. the landlord within the meaning of the Act, by issuing a so-called general notice, the proceeding was disposed of, whereas in terms of sub-rule (2) of Rule 5 he was required to issue notice to "all the

interested parties" intimating the date of enquiry and informing them to produce their evidence in support of their case. The petitioner being purchaser under registered deeds, publication of a general notice would not amount to serving notice on "all the interested parties" within the meaning of Sub-rule 2 of Rule 5 of the Rules. We find substance in these contentions. The notice was issued on 14-5-1984 and within seven days thereof the final order was passed. All told, it took only 12 days to dispose of the proceeding. We are satisfied that the petitioner was denied opportunity to contest the respondent's claim.

13. We are conscious of the fact that the Act has been enacted to protect the interest of the weaker Section and the proceeding is to be disposed of in a summary manner but it does not mean that it should be done in derogation of the laid down procedure. Grant of parcha results in adversely affecting the rights of the person to whom the land belongs and it cannot be done without following the procedure prescribed in law.

14. In the facts and circumstances, we are constrained to hold that the proceeding was not conducted in accordance with the rules and consequently, grant of Parcha in favour of the respondent cannot be said to be in accordance with law. The result is that the impugned order dated 21-5-1984 in case No. 2/84-85 and the Parcha issued pursuant thereto are quashed. The matter is remitted to the authority namely, Anchal Adhikari, Jalalpur for passing a fresh order in accordance with law. In order to expedite disposal of the proceeding we fix 4th August, 2003 when the parties will appear before the Anchal Adhikari. The Anchal Adhikari will thereafter, make enquiry either by himself or by an officer not below the rank of Circle Inspector/Welfare Inspector as laid down under Rule 5(1) and proceed to decide the proceeding in accordance with law.

15. In the result, the petition is allowed in the above terms. There will be no order as to costs.