(2005) 03 PAT CK 0111

In the Patna High Court

Case No : CWJC No. 14838 of 2004

Rishikesh Kashyap and Another — APPELLANT

Vs

State of Bihar and Others — RESPONDENT

Date of Decision : 03-03-2005

Acts Referred:
Bihar Self Supporting Co-operative Societies Act, 1996 — Section 5, 5(v)

Citation : (2005) 2 PLJR 438

Hon'ble Judges : Mridula Mishra, J

Bench : Single Bench

Advocate : Pashupati Pd. Sinha and Deepak Kumar, for the Appellant; A. Amanullah, for the Respondent

Final Decision : Allowed

Judgement

Mridula Mishra, J.—Petitioners are the Fisherman Cooperative Society registered u/s 5 of the Bihar Self Supporting Co-operative Society Act, 1996. Area of operation of both the society is to the extent of Darbhanga Anchal and the dispute relates to five jalkars which are Fish-cum-Makhana jalkars situated within the area of operation of Darbhanga Anchal. These jalkars belong to Revenue Department and used to be settled by the officials of the Revenue Department. The Revenue Department vide Memo No. 672 dated 4.9.2004 transferred all Fish-cum-Makhana jalkars to the Fisheries Department with a direction that from the date of issuance of this letter the settlement of Makhana jalkars will be made by the Fisheries Department. The jalkars which has already been settled on expiry of the period will be settled in future by the Fisheries Department. Prayer made by the petitioners in the present application is for quashing the order dated 30.9.2004 (Annexure-1) by which the Anchal Adhikari, Darbhanga has settled five Fish-cum-Makhana jalkars situated in Darbhanga Anchal in favour of respondent No. 8 society in complete violation of the letter issued by the Revenue Department vide Memo No. 672 dated 4.9.2004. It is stated that the Anchal Adhikari was informed about the letter of the Revenue Department on

28.9.2004 as it was served to him by the petitioner alongwith his petition dated 28.9.2004. Even then on 30.9.2004 violating the circular and the direction of the State Government the Circle Officer has made settlement of five jalkars in favour of respondent No. 8 society. Further settlement has been challenged on the ground that without publishing the notice in two newspapers regarding the settlement of jalkars of which reserved zama is more than Rs. 50,000/- (Fifty thousand). The circular No. 668 dated 1.8.2002 of the Revenue Department indicates that the jalkars of which reserved zama is more than fifty percent, the settlement should be made after publication in two newspapers. Reserved zama of Harahi Pokhar is Rs. 97,750/- and Dighi Pokhar is 1,15,000/- but the settlement has been made without publication in two newspapers as required under the Circular of the Revenue Department. Another reason for challenging the settlement is that the respondent No. 8 society was a defaulter on the date of settlement and no settlement should have been made in favour of a defaulter society. In spite of that the settlement has been made by the Circle Officer for some extraneous reason and that must be quashed.

2. Respondent No. 8 has stated in his counter affidavit that five jalkars have been settled in his favour in consonance with the circular No. 276 dated 9.5.2001 as well as letter No. 137 dated 10.9.2004 issued by the Collector, Darbhanga. The respondent No. 8 society was earlier registered under the provisions of the Bihar Co-operative Society Act, 1935. Subsequently it was converted into Swawlambi Sahkari Samiti under the provisions of Section 5(v) of the Bihar Self Supporting Co-operative Society Act, 1996. According to Circular No. 276 dated 9.5.2001 the Society registered under 1935 Act and society converted from 1935 Act to Swawlambi Sahakari Samiti Act, 1996 has priority in settlement of jalkars over the societies registered under Swawlambi Sahkari Samiti Act, 1996. Further it has been submitted that the process for settlement of Sairat was initiated much before as the last settlement was going to expire on 30.9.2004. Respondent No. 8 filed a petition before the Secretary, Revenue Department, Bihar Patna for settlement of Dighi and Harahi Tank alongwith three other jalkars situated in Darbhanga Anchal. The Commissioner, Darbhanga Division by his letter No. 847 dated 31.8.2004 requested the District Magistrate, Darbhanga to settle the Sairat. According to circular No. 276 dated 5.4.2001 the District Magistrate Darbhanga directed the Circle Officer to settle the sairat with the petitioners.

3. It has been submitted by the counsel for the respondents that Memo No. 672 dated 4.9.2004 unless published in the extra ordinary gazette was only a decision of the cabinet and the question arises whether it will come into effect from the date of the order or from the date of its publication in the extra ordinary gazette. This letter was not communicated to the concerned authorities, therefore, it cannot be said that the Circle Officer without its communication could have started acting in terms of Memo No. 672 dated 2.9.2004. Further it has been stated that so far as Dighi and Harahi Tank are concerned, they are tanks concerned with the community benefit and even according to letter No.

672 dated 4.9.2004 such sairats were not to be transferred to the department of Fisheries and it remained under control of Land and Revenue Department. In support of his submission Annexure-9 series have been annexed. It has also been stated that in paragraph 6 of the letter No. 672 dated 4.9.2004 it is mentioned that within six months, the list of those jalkars which are going to be transferred to Fishery Department will be made available to the concerned authorities unless this list is published and communicated, it is not probable that the settlement will be made by the department of Fishery. Six months time is indicative of this fact that the direction issued in this letter will be effective from the date of its publication in extra ordinary gazette. Regarding the non-publication of the notice in the newspapers for settlement of those jalkars which is more than rupees fifty thousand, it has been submitted that since the settlement was to be done on fixed reserved zama in that case only when no society would have been ready to take settlement on fixed reserved jama, there would have been any requirement for publication in the newspaper. The respondent society was to take settlement on reserved fixed zama as such there was no need for publication. In reply to the allegations against respondent No. 5 of being defaulter, it is stated in paragraph 28 of the counter affidavit that no dues certificate has been issued in his favour by all concerned authorities much prior to the date of settlement. Further it has been stated that the petitioners society is incompetent to take settlement as society has been declared farzi and fictitious at the district level.

4. Initially a joint counter affidavit was filed by respondent Nos. 3 to 7. In this counter affidavit they supported the case of the respondent No. 8 in verbatim. The petitioner in paragraph 4 of his reply to the counter affidavit filed by respondent Nos. 3 to 7 stated that the counter affidavit has been filed by respondent Nos. 3 to 7 against the direction of Secretary, Revenue Department, Bihar, Patna (respondent No. 2) as the respondent No. 2 has clearly stated in his letter No. 2 dated 13.1.2005 to Collector, Darbhanga that a misleading counter affidavit has been filed in the High Court after giving wrong interpretation of letter No. 672 dated 4.9.2004. This letter has been annexed as Annexure-14. Thereafter the respondent No. 2 was asked to file a separate counter affidavit. In the counter affidavit filed by respondent No. 2 in paragraph 3 it has been stated that previously the administration of jalkars including Makhana was under the Revenue and Land Reforms Department. In view of the valuable suggestion made by this Hon''ble Court in C.W.J.C. No. 7250 of 2001, the Revenue and Land Reforms Department, after taking approval of the State cabinet has transferred all jalkars including Harahi and Dighi jalkars to the Animal Husbandary and Fishery Department through its circular No. 672 dated 4.9.2004. It is clearly mentioned in column Nos. 5 and 7 of the circular No. 672 dated 4.9.2004 that all jalkars including Harahi and Dighi jalkars stands transferred to the Animal Husbandary and Fishery Department from the date of issuance of the circular. It is also mentioned that the settlement done prior to the date of issuance of Circular No. 672 dated 4.9.2004 would remain valid till the period of such

settlement expires. After completion of the settlement period all such jalkars which were settled before 4.9.2004 will also stand transferred to the Animal Husbandary and Fishery Department. It has further been stated that the Circle Officer, Darbhanga have settled five jalkars in spite of the clear instruction given in circular No. 672 dated 4.9.2004. With respect to the Harahi and Dighi tank which according to respondent No. 8 have been declared as tanks for public utility. In the counter affidavit filed by respondent No. 2 it has, been stated that as per the new policy a distinction of public importance has been made only with respect to sairat which are Pashu Melas as well as religious melas and with respect to jalkars which are involved with irrigation or public transport by boats. Any previous distinction made with respect to fishery jalkars on grounds of public importance stands demised. However the possibility of making such a distinction in future in consultation with the Fisheries Department on receiving such proposals from the field administration has been kept open in the circular. There have been no proposals with adequate justification from the field officers, nor has the department declared any fishery jalkars as of public importance after the issuance of circular No. 672(9) on 4.9.2004. The circular dated 4.9.2004 supersedes all previous instructions.

5. Considering the counter affidavit filed by respondent No. 2 it is clear that the direction issued by Circular No. 672(9) dated 4.9.2004 came in effect from the date of issuance i.e. 4.9.2004, as such the submissions made by respondent No. 8 that unless it is published in the extra ordinary gazette it has not become effective and there is no illegality in the settlement made by the Circle Officer Darbhanga on 3.9.2004 has no leg to stand. The stand taken by respondent No. 8 that the Circle Officer came to know about the circular subsequent to the settlement is also dismissed. Considering the representation filed by the petitioners before the Circle Officer on 28.9.2004 which has been received in the office of the Circle Officer on the same day (Annexure-5). By this letter information about the Circular No. 672(9) dated 4.9.2004 was given to the Circle Officer. It is expected that after getting this information the Circle Officer should have restrained himself from proceeding with the settlement in violation of the directions contained in Circular No. 672(9) dated 4.9.2004. He made settlement with respondent No. 5 on 13.9.2004. in the facts and circumstances it cannot be said that the settlement was made as the Circle Officer was ignorant of any such circular issued by the Land and Revenue Department. The question which has been raised by respondent No. 8 that that on harmonious reading of circular, irrespective of other conditions fulfilled will ipso-facto-all jalkars be transferred to the department of Fishery, the reply is that in paragraph 4 of the circular it has been stressed that the circular will come into effect from the date of issuance no where it has been stated that after its publication in the gazette or after the list of jalkars are furnished to the authorities concerned, it will come into effect. Going by the words in the circular it can be said that the all Fishery-Makhana jalkars which were settled by the department of Land and Revenue were settled immediately to the Animal Husbandary and Fishery Department on the basis of

the circular in question.

6. Regarding the Public utility of Harahi, Dighi and Ganga Sagar Jalkars, the counsel for the Respondent has filed a supplementary affidavit, when the hearing of the case had already concluded. In the supplementary affidavit it has been stated that in compliance of letter No. 1632/R dated 26.10.2004 (Annexure-E to the counter affidavit filed by respondents 3 to 7) issued by Collector, Darbhanga. The Circle Officer informed all Halka Karamcharies of Darbhanga regarding transfer of sairats from Revenue Department to Animal Husbandary and Fisheries Department and directed to submit their reports within one week regarding jalkars, which are to be transferred to Fisheries Department as well as jalkars which comes within purview of public utility and irrigation purpose. In response the Halka Karamchari of Halka Nos. 10 and 11 submitted report on 29.1.2005 stating that Harahi Pokhar, Ganga Sagar Pokhar and Dighi Pokhar comes within the category of "Public Utility" jalkars and they are not to be transferred to Animal Husbandary and Fisheries Department. This affidavit has been filed to justify settlement of these jalkars, even after issuance of the Letter No. 672 dated 4.9.2004. This affidavit is in clear contradiction of the statement made in counter affidavit of Respondent No. 2.

7. Respondent No. 2 in his counter affidavit has stated that any previous distinction made with respect to the Fishery jalkars on grounds of public importance has stand dismissed and it will be decided only in consultation with the Fishery Department on receiving such proposal from the field of administration. It has been reiterated subsequent to the Circular No. 672(9) dated 4.9.2004 all previous instructions have come to an end. In that view of the matter the respondent No. 8 cannot take advantage of Annexure-9 series by which the Dighi and Harahi tanks were declared jalkars of public utility for a limited period. In the supplementary affidavit it has not been stated that department of Fisheries has declared these three jalkars as Jalkars of Public utility. Subsequent to the issuance of Letter No. 672 dated 4.9.2004. In this circumstances the settlement of these three jalkars by Circle Officer cannot be held to be correct.

8. Mr. A. Amanuilah counsel appearing for respondent No. 8 advanced alternative argument and submitted that since the respondent No. 8 after settlement has invested huge sum for development of the tanks settled with him and has also made investment for rearing fishes. He has also deposited annual rent for the settled jalkars. Considering the equity aspect of the matter the respondent No. 8 should be allowed to continue with its settlement for a year and thereafter it may be settled by the department of Fishery according to the guidelines in Circular No. 672(9) dated 4.9.2004. Though the settlement made in favour of respondent No. 8 in any view cannot be held to a valid settlement but on compassionate ground considering this fact that the respondent No. 8 has already parted with huge amount over the settled jalkars, the respondent No. 8 is directed to present his case before the Secretary, Animal Husbandary and Fishery, Bihar, Patna who

on considering this fact that the respondent No. 8 has spent a huge amount over the settled jalkars may allow the respondent No. 8 to continue with the settlement till 30.9.2005. Thereafter the settlement should be made by the Department of Animal Husbandary and Fishery in terms of the Circular No. 672(9) dated 4.9.2004. This application is accordingly allowed.

