
(2008) 09 PAT CK 0106

In the Patna High Court

Smt. Sugapati Devi and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 11-09-2008

Acts Referred:

Citation : (2008) 09 PAT CK 0106

Final Decision : Allowed

Judgement

Ramesh Kumar Datta, J.—Heard learned Counsel for the parties.

2. In all the five writ petitions the common question which arises is whether the Member, Board of Revenue can hear an appeal filed u/s 18(6) of the Bihar Panchayat Raj Act, 2006 in four cases and Section 70(5) of the said Act in CWJC No. 5814/2008 after coming into force of the Bihar Panchayat Raj (Amendment) Act, 2007 with effect from 4.2.2008, by which the powers of the Commissioner to direct such removal have become vested in the State Government and the provisions regarding the appeal from the order of the Commissioner have been deleted.

3. In four of the writ petitions the grievance of the petitioners is that after their removal from the post of Mukhiya by various orders and in the fifth case after removal as Adhakshya of Zila Parishad by the order of the Commissioner, they had preferred appeals before the Member, Board of Revenue but in the said appeals either orders have been passed that the Member, Board of Revenue has no power to hear an appeal after the amendments brought about by the Amending Act of 2007 or the matters have been kept pending after sending the concerned files to the State Government in the Panchayat Raj Department for further action.

4. The representative facts may be taken from CWJC No. 9918/2008. The petitioner in the said case was elected as Mukhiya on 26.6.2006. Subsequently a report was submitted before the Divisional Commissioner, Magadh Division, Gaya by the District Magistrate, Aurangabad containing certain allegations against the

petitioner. On the basis of the said report, the Commissioner passed the impugned order dated 4.11.2007 u/s 18(5) (Annexure-9) dismissing the petitioner from the office of Mukhiya. Since the original provision of Section 18(6) contained in the Bihar Panchayat Raj Act provided for filing an appeal against such an order before the Member, Board of Revenue, the petitioner preferred an appeal bearing case No. 55/2007 challenging the validity of the order dated 14.11.2007 on 13.12.2007. By order dated 28.12.2007 of the Member, Board of Revenue, the appeal was admitted and the order of the Divisional Commissioner, Magadh Division, Gaya was stayed.

5. In the meantime, the Bihar Panchayat Raj (Amendment) Act, 2007 was passed and came into force upon its publication in the Official Gazette on 4.2.2008. Thereafter on no further progress being made in his case the petitioner made enquiries and learnt that after coming into force of the said Amendment, the Board of Revenue has forwarded the records of about 12 such appeals, including that of the petitioner, to the Panchayati Raj Department for taking appropriate steps. It is stated that the Panchayati Raj Department by its letter dated 29.5.2008 informed the Board of Revenue that no appeal appears to have been provided to the Principal Secretary of the Department by the Amendment Act, 2007 to the 2006 Act and in such circumstances, it was not proper for the Department to pass any order on the appeal files sent to it and since the appellants had not filed any application in the Department, therefore, the files were being consigned. Faced with the said situation, the petitioner has approached this Court by filing the present writ petition.

6. Learned Counsel for the petitioners submits that the Bihar Panchayat Raj (Amendment) Act, 2007 does not state that it applies with retrospective effect and thus the petitioners' right for appeal will become vested on the passing of the impugned order by the Commissioner of the Division and it could not be defeated on the said amendment brought about by the Amending Act of 2007. So far as the appeals filed before the Member, Board of Revenue are concerned, the same would have to be dealt with under the preexisting provisions as in existence on the date when the order of the Commissioner was passed which gave rise to the filing of appeal by the petitioners of the present cases. It is further submitted that in the absence of any provision making the Act retrospective or even inserting any savings clause in the said Act, the provision of Section 8 of the Bihar and Orissa General Clauses Act, 1917 would apply to the said enactment and the repeal of the said provisions regarding the appeal shall not affect the right, privilege or obligations acquired or accrued to the petitioners under the previously existing provision and the Member, Board of Revenue ought to have proceeded in the matter and decided the appeals in accordance with law. In support of the said proposition, learned Counsel for the petitioners relies upon several decisions of the Supreme Court, the principal decision being that of the Constitution Bench in the case of Garikapatti Veeraya Vs. N. Subbiah Choudhury, in paragraph Nos. 23 and 25 of which it has been laid down as follows:

23. From the decisions cited above the following principles clearly emerge;

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

25. In construing the articles of the Constitution we must bear in mind certain cardinal rules of construction. It has been said in *Hough v. Windus* 1884-12 QBD 224 at P. 237(V) that "statutes should be interpreted, if possible, so as to respect vested right". The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation; it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed. *Leeds and County Bank Ltd. v. Walker* (1883) 11 QBD 84 at P. 91 (W); *Moon v. Durden* (1848) 2 Ex 22 : 76 RR 479 at p. 495 (X). The following observation of Rankin C.J. in *Sadar Ali v. Dalimuddin, (K)* (supra) at p. 520 : of ILR Cal : at p. 643 of AIR is also apposite and helpful: "Unless the contrary can be shown the provision which takes away the jurisdiction is itself subject to the implied saving of the litigant's right." In *Janardan Reddy and Others Vs. The State*, Kania C.J. in delivering the judgment of the Court observed that our Constitution is generally speaking prospective in its operation and is not to have retroactive operation in the absence of any express provision to that effect. The same principle was reiterated in *Keshavan Madhava Menon Vs. The State of Bombay*, and finally in *Dajisaheb Mane and Others Vs. Shankar Rao Vithal Rao Mane and Another*, to which reference will be made in greater detail hereafter.

7. Learned Counsel also relies upon a decision of the Supreme Court in *Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others*, in paragraph Nos. 8 and 9 of which similar propositions have been laid down in the following terms:

8. The above decisions quite firmly establish and our decisions in Janardan Reddy and Others Vs. The State, and in Ganpat Rai Hiralal and Another Vs. Aggarwal Chamber of Commerce Ltd., uphold the principle that a right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the interior Court. In the language of Jenkins C.J., in Nana v. Sheku (B) (supra) to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication.

9. Sri Ganapathy Aiyar urges that the language of Section 22 (1) as amended clearly makes the section retrospective. The new proviso, it is pointed out, peremptorily requires the authority not to admit the appeal unless it is accompanied by a satisfactory proof of the payment of the tax in respect of which the appeal is preferred and this duty the authority must discharge at the time the appeal is actually preferred before him. The argument is that after the amendment the authority has no option in the matter and he has no jurisdiction to admit any appeal unless the assessed tax be deposited. It follows, therefore, by necessary implication, according to the learned Advocate, that the amended provision applies to an appeal from an assessment order made before the date of amendment as well as to an appeal from an order made after that date. A similar argument was urged before the Calcutta special Bench in Sardar Ali v. Dolimuddin (E)(supra) namely, that after the amendment the Court had no authority to entertain an appeal without a certificate from the single Judge Renkin C.J. repelled this argument with the remark at p. 643: "unless the contrary can be shown the provision which takes away jurisdiction is itself subject to the implied saving of the litigants" right.

8. Learned Counsels also relies upon other decisions of the Apex Court in the following cases:- State of Punjab v. Mohar Singh Pratap Singh AIR 1955 SC 84, State of Bombay Vs. Supreme General Films Exchange Ltd., and Mukund Deo (Dead) represented by his legal representatives Kasibai and Ors. v. Mahadu and Ors. AIR 1965 SC 730.

9. Learned Counsels for the State do not oppose the aforesaid stand of the petitioners rather it is stated in the counter affidavit filed today in CWJC No. 6201/2008 on behalf of the Secretary, Panchayati Raj, Government of Bihar that the matter was considered and opinion was sought from the Law Department and from the Advocate General and it has been opined that all pending appeals will have to be heard by the Board of Revenue as if the Amendment order has not been passed. Accordingly, it is stated that all the 12 matters of appeal have been referred back to the Member, Board of Revenue for taking necessary action, according to the said opinion of the Law Department/Advocate General.

10. In view of the matter having been concluded by the Constitution Bench in 1957 in the case of Garikapati Veeraya (supra), it is evident that the right of appeal is a substantive right and not a mere matter of procedure. Once the said right of appeal accrues to a party the same does not stand defeated on the said right having been repealed by any subsequent amendment or repealing Act unless the said amendment Act clearly provides so with retrospective effect. It may also stand defeated in the eventuality of the Amendment Act abolishing the forum by which the appeal was to be heard. The saving of such right of appeal is also provided in Section 8 of the Bihar and Orissa General Clauses Act 1917 particularly in Clauses (c) and (e) thereof, which are quoted herein below:

Where any Bihar and Orissa Act or Bihar Act repeals any enactment hitherto made, or hereafter to be made, then, unless a different intention appears, the repeal shall not,

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

11. It is thus evident that such right of appeal to the Board of Revenue accrued to the petitioners in all the five cases on the date when the Commissioner exercised his powers u/s 18(5) or Section 70(5) of the Act. Such right to institute or continue the legal proceeding by way of appeal cannot be defeated and has not, as a matter of fact, been defeated by the amending provisions brought about by the Amending Act of 2007. The Board of Revenue was therefore, wrong in coming to the conclusion that on account of the amendment it had no powers to hear the appeals pending before it since the provisions had been repealed by the Amendment Act 2007. As a matter of fact, so far as the appeals before the Board of Revenue were concerned, the same had to be heard by it and for the purpose of the said appeals, the earlier unrepealed provisions of the Bihar Panchayat Raj Act, 2006 would be deemed to have continued to operate by virtue of the provisions of Section 8 of the Bihar and Orissa General Clauses Act, 1917 which apply to all Acts enacted by the State Legislature of Bihar.

CWJC No. 9918 of 2008

12. In this case the appeal bearing case No. 55/2007 had been admitted by order dated 28.12.2007 and the order of the Divisional Commissioner, Magadh Division, Gaya was stayed. Thereafter, to the knowledge of the petitioner, no further orders have been passed. The matter is remitted to the Member, Board of Revenue to decide the appeal in accordance with law as early as possible preferably within a period of three months from today. It is clarified that the

earlier order of stay shall continue until any further order is passed by the Member, Board of Revenue.

CWJC No. 10016 of 2008

13. In the present matter the appeal being Case No. 57/2007 was admitted for consideration by the Member, Board of Revenue on 25.1.2008 and the order passed by the Commissioner, Magadh Division was stayed. The matter is remitted to the Member, Board of Revenue for deciding the appeal in accordance with law as early as possible preferably within a period of three months from today. Until further orders by him, the stay granted on 25.1.2008 shall continue.

CWJC No. 5814/2008

14. In this case the petitioner had filed an appeal before the Member, Board of Revenue upon dismissal of an earlier writ petition being CWJC No. 2317/2008 by order dated 13.2.2008 on the ground that specific forum of appeal has been provided by the statute and this Court was not inclined to interfere with the impugned order of the Commissioner at that stage and the petitioner was given liberty to move the appellate forum. By order dated 7.3.2008 the Member, Board of Revenue held that provision of Section 18(6) of the Act for appeal against the order of the Commissioner before him having been deleted by the Amendment Act he did not have the authority to hear and pass order and the file was accordingly sent to the Department of Panchayat Raj for further action. The order dated 7.3.2008 is set aside and the matter is remitted to the Member, Board of Revenue to hear the appeal case No. 10/2008 and dispose of the same within a period of six weeks from the date of receipt/production of a copy of this order.

15. In the present matter the post of Adhakshya, Zila Parishad held by the petitioner, has been filled up by fresh election by Smt. Kamla Devi, respondent No. 9 before this Court who was noticed and is present before this Court through her counsel. It is directed that no further notices will be required to be sent to the said respondent No. 9 by the Member, Board of Revenue and both the petitioner and respondent No. 9 are directed to present themselves before the Member, Board of Revenue on 25th September 2008 on which dated the Member, Board of Revenue shall either proceed to hear the matter or fix such date as he pleases for hearing and decide the appeal within the period as indicated above.

CWJC No. 13163/2008

16. In this case it is stated that the petitioner filed appeal No. 1/2008 before the Member, Board of Revenue on 7.1.2008 which is pending. The matter is remitted to the Member, Board of Revenue to hear and finally dispose of the appeal in accordance with law as early as possible preferably within a period of three months from today.

CWJC No. 6201 of 2008

17. In the present writ petition the petitioner filed the appeal being case No.

05/2008 in which by order dated 4.3.2008 it was held by the Member, Board of Revenue that since the provisions u/s 18(6) has been deleted, therefore, that Court had no authority to take up the case and accordingly sent the case records to the Secretary, Panchayati Raj, Government of Bihar for necessary action. The order dated 4.3.2008 is set aside and the matter is remitted to the Member, Board of Revenue to hear and dispose of the appeal in accordance with law as early as possible preferably within a period of three months from today.

18. In the present case by order dated 19.6.2008 this Court had passed an interim order by which the proposed election for the post of Mukhiya of Raj Ganj Gram Panchayat in the District of Purnea was stayed and so far as the functioning of Mukhiya was concerned, the status quo as of that day was to continue till further orders. The said interim order shall continue until any other order is passed by the Member, Board of Revenue.

19. All the writ applications are accordingly allowed in the terms as indicated above.