

**Narayan Sah Vs. the State of Bihar and ors.**

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**Court :** Patna

**Decided On :** May-13-2004

**Judge :** S.K. Katriar, J.

**Acts :** Bihar Privileged Persons Homestead Tenancy Act, 1947 - Sections 21

**Appeal No. :** C.W.J.C. No. 10323 of 2001

**Appellant :** Narayan Sah

**Respondent :** The State of Bihar and ors.

**Disposition :** Petition dismissed

**Prior history :** S.K. Katriar, J. 1. Heard Mr. V. Nath for the petitioner, Mr. Abbas Raider, JC to GP II for respondent Nos. 1 and 2, and Mr. O.P. Agrawal for respondent No. 3 (Shailendra Singh). This writ petition is directed against the order dated 16.3.2001 (Annexure 2), passed by the learned Collector of the District of Begusarai in Revenue Case No. 68/97 Ram Lagan Singh v. Narayan Sah, in purported exercise of powers under Section 21 of the Bihar Privileged Persons Homestead Tenancy Act, 1947 (hereinafte

**Judgement :**

**S.K. Katriar, J.**

1. Heard Mr. V. Nath for the petitioner, Mr. Abbas Raider, JC to GP II for respondent Nos. 1 and 2, and Mr. O.P. Agrawal for respondent No. 3 (Shailendra Singh). This writ petition is directed against the order dated 16.3.2001 (Annexure 2), passed by the learned Collector of the District of Begusarai in Revenue Case No. 68/97 Ram Lagan Singh v. Narayan Sah, in purported exercise of powers under Section 21 of the Bihar Privileged Persons Homestead Tenancy Act, 1947 (hereinafter referred to as 'the Act').

2. According to the writ petition, the petitioner is a 'privileged tenant' in terms of Section 2(J) of the Act and has his homestead on the land in question. He was threatened with ejectment and, therefore, filed an application under Section 5 of the Act which was on contest allowed by order dated 15.9.1997 (Annexure 1), passed by the learned Anchal Adhikari, Begusarai, in Basgit Parcha Case No. 6026/3 of 96-97/97-98, whereby the requisite declaration under the Act, was granted in favour of the petitioner, and Basgit Parcha was directed to be issued to him. Respondent No. 3 preferred an application under Section 21 of the Act which has been allowed by the impugned order, whereby the said order dated 15.9.1997 (Annexure 1) has been set aside, and the Basgit Parcha directed to be issued in favour of the petitioner has been cancelled primarily on the ground that the petitioner is not a 'privileged tenant' within the meaning Section 2(j) of the Act who is owner land in his own right.

3. While assailing the validity of the impugned order, learned counsel for the petitioner submits that in view of the scope and content of Section 21 of the Act, it was not open to the learned Collector of the district to decide the matter on merits and grant full relief to one or the other party, In his submission, if the learned Collector of the district was convinced of the incorrectness of the impugned order, the only course open to him was to remit the matter back to the learned first authority for a fresh decision in accordance with law. He relies on the parallel provisions of Section 45B of the Bihar Land Ceiling Act, and discussed in a Division Bench judgment of this Court reported in 1993 (2) BLJ 562 Rupchand Baid v. State of Bihar. He also draws support reference from the provisions of Section 35 the Consolidation Act which, in his submission, is differently worded as a result of which the scope, content and revisional power under Section 35 of the

Act are quite different. He lastly submits that respondent No. 3 has resorted to parallel proceedings by preferring the present writ petition as well as the civil suit.

4. Learned counsel for respondent No. 3 has supported the impugned order, and submits that the narrow interpretation sought to be given by the petitioner does not seem to flow from the plain reading of Section 21 of the Act. He relies on the Division Bench judgment of this Court reported in 2002(1) PLJR 638 Mostt. Sheela Devi v. State of Bihar. He also submits that he shall withdraw the civil suit forthwith in so far as it relates to the lands which are subject matter of the present writ petition.

5. Learned Government Counsel appearing for respondent Nos. 1 and 2 has also assisted this Court,

6. I have perused the materials on record and considered the submissions of learned counsel for the parties. Section 21 of the Act is set out hereinbelow for the Facility of quick reference:--

'21. Power of the Collector of the District to call for and examine record.-- Notwithstanding anything to the contrary contained in any judgment, decree or order of any Court or authority, the Collector of the district may on his own motion or on the application of any party, or on reference being made by any subordinate authority, call for and examine record of any case decided or proceeding taken 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 may after, allowing the parties concerned opportunity of being heard, direct that the case or the proceeding be re-opened and disposed of afresh in accordance with the provisions of this Act."

Section 45B of the Bihar Land Ceiling Act is also set out hereinbelow for the facility of quick reference:--

'456. State Government to call for and examine records.--The State Government may, at any time, call for and examine any record of any proceeding disposed of

by a Collector under the Act and may, if it thinks fit, direct that the case be reopened and disposed of afresh in accordance with the provisions of the Act.'

6.1 it appears to me that the closing words of the two Sections are similarly worded. Both the Sections empower the authority exercising the power thereunder, that if it thinks fit, direct the case to be reopened and disposed of afresh in accordance with the provisions of the Act.

7. Before I proceed further, I must point out the distinction which comes to my mind in so far as the two Sections are concerned. In so far as the Land Ceiling Act is concerned, Section 45B can be availed of after the entire proceeding under the Act have come to an end. The scope and content of Section 45-B has been the subject matter of a large number of judgments of this Court all of which have assigned a restricted sweep and content to the section. On the other hand the stage under Section 21 of the Act reaches just after the first authority has passed the order a semi finality attaches to the same, there being no provision for appeal or the like. However, two things are common to both, namely, both the Acts are hostile to the land-owner and tend to promote the cause of the landless. In both the cases, the right, title and interest of the genuine land-holder is sought to be truncated or adversely affected by the terms of the respective statutes. These two Acts are, therefore confiscatory in nature and have to be seen in contradistinction to the provisions of the Bihar Land Reforms Act where the intermediary interest of the person have been taken away who had no title to the property. Therefore, in case of doubt or difficulty, under the present Act or the Land Ceiling Act, the Court would prefer to lean in favour of land-holder who has had valid title to the property.

8. Learned counsel for the petitioner appears to be right in his submission that the provisions of Section 21, like Section 45B of the Ceiling Act, assign limited powers to the Collector of the district. If the Collector of the district is convinced of the illegality of the order impugned before him, then the only course open to him is to set aside the impugned order and remit the matter back to the first authority to dispose of the same afresh in accordance with the provisions of the Act. It is not open to him to pass a fresh order on the merits of the case. Learned counsel for the petitioner has rightly relied on the Division Bench of this Court in Rupchand

Baid v. State of Bihar (supra). It appears from a bare perusal of paragraphs 16 to 18 of that judgment that restricted powers have been assigned to the Collector of the district in exercise of powers under Section 21 of the Act. The Division Bench judgment of this Court in Mosst. Sheela Devi (supra) relied on by respondent No. 3 does not deal with the question raised before me, wherein the scope, content and the sweep of Section 21 of the Act was neither raised nor answered. The same is, therefore, inapplicable to the facts and circumstances of the present case.

9. Learned counsel for respondent No. 3 has undertaken to withdraw the suit in so far as the same relates to the lands covered by the present writ petition is concerned, and elected to pursue the present remedy of writ jurisdiction.

10. This does not conclude matters. In exercise of its discretionary, prerogative writ jurisdiction, will it be right for this Court to set aside the impugned order on the technical ground that he exceeded the jurisdiction conferred by Section 21 of the Act, even in a situation where this Court is convinced that he is right on facts, and setting out his order would result in revival of an illegal order. It is manifest from the materials on record that the petitioner is not a 'privileged tenant' within the meaning of Section 2(j) read with the definition of 'privileged person' within the meaning of Section 2(i) of the Act. It has further been found that the petitioner is not using the land in question as his homestead but is using it for a commercial purpose and has set up a betel shop. This finding completely deprives the petitioner of the benefit under this Act.

11. I am supported by the judgment of the Supreme Court reported in (1988) 1 SCC 40, Mohd. Swalleh v. Third Addl. District Judge. That was a case under the U.P. Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972. The first authority had disposed of the matter on merits and the aggrieved person had moved the District Judge in appeal who, in his turn, had disposed of the same on merits. The aggrieved party had challenged the order of the District Judge before the High Court in writ jurisdiction raising the grievance that no appeal is provided under the Act, and the order of the first authority was final subject of course to the writ jurisdiction of the High Court. In order words, it was submitted that the District Judge was no authority at all under the Act and, therefore, the impugned order

was bad in law. Repelling the contention, Allahabad High Court observed that the appeal before the District Judge was in the scheme in the Act wholly incompetent but the same was correct on merits, and setting aside the same would result in revival of an illegal order. Therefore, Allahabad High Court adopted the Order of the District Judge as its own. The matter travelled to the Supreme Court which approved of the provisions of law and upheld the judgment of the Allahabad High Court.

12. I had the occasion to deal with a similar issue in my judgment in case of *Shri Prakash Singh v. State of Bihar*, reported in (2002) 1 BLJR 606, which was on facts closer to the present one. That was a case where the Collector of the district had reviewed his order under Section 63 of the Bihar Public Demand Recovery Act. The question canvassed before this Court was that the Collector of the district had far exceeded his powers of review conferred on him by Section 63 of the Act. Repelling this contention, this Court observed that setting aside the impugned order would result in revival of an illegal order which should not be resorted to in exercise of writ jurisdiction. Therefore, the common feature between the case of *Shri Prakash Singh* (supra) and the present case, unlike the case of *Mohd. Swalleh* (supra), is that both the authorities have been vested with the powers of review and revision, and two seem to have acted in excess of their jurisdiction. In other words, exercise of powers is not wholly without jurisdiction and does not go to the root of the matter. On the other hand, in the case of *Mohd. Swalleh*, the order of the District Judge was a nullity and had gone to the root of the matter. Yet the common features in three cases are that the impugned orders in all were correct on merits, and setting aside the impugned orders would result in revival of illegal orders which should not be done in exercise of discretionary prerogative writ jurisdiction. This Court, in the present case, adopts the impugned order as its own.

13. Paragraphs 12 to 15 of the judgment of *Shri Prakash Singh* are set out hereinbelow for the facility of quick reference:--

'12. The question is whether or not this Court, in exercise of its discretionary, prerogative writ jurisdiction, set aside the impugned order which would result in reviving patently illegal orders passed by the Certificate Officer. I have on a

thoughtful consideration of the entire matter reached the conclusion that this Court should refrain from adopting such a course. In the case of Mohd. Swalleh (supra), 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 has 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. On the other hand, in the present case, the learned Collector has exercised powers vested in him by law although in excess of the same. 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.

'13. Learned counsel for respondent No. 3 has rightly relied on the Division Bench judgment of this Court in Hah Prasad Jalan (supra), paragraph 6 of which is set out hereinbelow for the facility of quick reference :--

'6. He further conceded that the Act does not vest any power of review in the District Magistrate so that by order dated 12.4.1982 the earlier order dated 21.4.1980 could have been recalled. According to the learned Additional Advocate General, as the earlier order was not in conformity with the direction of the Supreme Court and the order dated 12.4.1982 which is being questioned in this Court application is in accordance with the direction of the Supreme Court, this Court should not interfere with the order dated 12.4.1982 although passed without jurisdiction, because the effect thereof, will be that an illegal order dated 21.4.1980 shall be revived. In support of this contention, reliance has been placed to the well known judgments of the Supreme Court and of this Court in the cases of G. Venkateshwara Rao v. Government of Andhra Pradesh, AIR 1966 SC 828, Abdul Majid v. State Transport Appellate Authority, Bihar, AIR 1960 Pat 333, Devendra

Prasad v. State of Bihar, 1977 BBCJ 543 : AIR 1977 Pat 166 and Hari Prasad Mandal v. Addl. College, Monghyr, 1978 BBCJ (HC) 575. It is almost settled that writ jurisdiction of this Court is discretionary and it should not be exercised for quashing an order which may have been passed without jurisdiction if that order has property to set aside another illegal order. If it is held that the order dated 21.4.1980 is either illegal or without jurisdiction, then there should not be any difficulty in accepting the contention raised on behalf of the respondents.'

[Emphasis mine]

'14. Learned counsel for respondent No. 3 is equally right in placing reliance on the Division Bench judgment of this Court in Naya Dawakhana v. State of Bihar (supra), Paragraphs 53 and 54 of the judgment are relevant in the present context and are set out hereinbelow for the facility of quick reference :

'53. At this juncture, the main submission made by Mr. Basudeo Prasad may be noticed. The learned counsel submitted that even assuming that the order dated 15.10.1985 passed by the Minister-in-Charge and as contained in Annexure-10 to the writ petition is wholly without jurisdiction, this Court should not interfere with the said order as the order dated 22.12.1984 passed by the Drug Controller is also illegal and without jurisdiction. The learned counsel as contained hereinbefore, has placed heavy reliance upon the judgment of this Court in A. Mazid v. State Transport Authority, AIR 1960 SC 828, Jagan Singh v. 3rd Addl. District Judge Meerut, 1988 (1) SCC 40.

'54. The ratio of the aforementioned decisions is neither in doubt nor in dispute. In the aforementioned decisions, it has been held by this Court as well as by the Supreme Court that the issuance of writ of certiorari is a discretionary remedy. Such a writ may not be issued if substantial justice has been done to the parties or if in the event upon quashing of one illegal order it is found that the same would give rise to another illegality, the High Court in its discretion may quash both the orders.'

'15. Law is thus well settled that this Court should not exercise its discretionary, prerogative writ jurisdiction which will result in revival of an illegal order. While passing the impugned order, the learned Collector may have exceeded in exercise of his review jurisdiction under Section 63 of the Act duly vested in him by law, and the same is hereby substituted by the present order of this Court. The order of the Certificate Officer is patently illegal and could not have been dropped on the ground assigned by him. Furthermore, the learned Collector has gone into the entire matter in depth and has also considered the circumstances leading to the delay in preferring the appeal. He has stated in the impugned order that the concerned Branch Manager was not aware of the order of the Certificate Officer, and he had also suffered a heart attack during the period. In my view, these are valid circumstances to condone, the delay.'

14. In the result, this writ petition is dismissed. There shall, however, be no order as to costs in the facts and circumstances of the present case.

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