

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.906 of 2014

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1. Amar Nath Pandey Son of Late Raghunath Pandey Resident of Pandey Plaza, Police Station Gandhi Maidan, District Patna
 2. Indradeo Rai Son of Late Dwarika Rai resident of Village Saidpur Kothiya, Police Station Digha, District Patna
 3. Bihari Rai Son of Late Dwarika Rai Resident of Village Saidpur Kothiya, Police Station Digha, District Patna
 4. Keshri Nandan Son of Late Dwarika Rai Resident of Village Saidpur Kothiya, Police Station Digha, District Patna
 5. Bindeshwari Prasad Son of Late Dwarika Rai Resident of Village Saidpur Kothiya, Police Station Digha, District Patna

.... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Bihar, Patna
2. The District Magistrate, Patna
3. The Senior Superintendent of Police, Patna
4. The Sub Divisional Officer, Patna Sadar, Patna
5. The Circle Officer, Patna Sadar, Patna
6. The Officer-In-Charge, Digha Police Station, Patna

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sanjay Singh, Adv.
Mr. Uma Kant Prasad, Adv.
Mr. Sanjeev Kumar Singh, Adv.
For the Respondent-State: Mr. Ashok Kumar Choudhary, AAG 13
Mr. Anil Kumar Tiwari, A.C. to AAG 13

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
C.A.V. JUDGMENT
Date: 14-12-2015

Re: C.W.J.C.No.906 of 2014

With

I.A. No. 412 of 2014

With

I.A. No.2014 of 2015

The writ petition initially questioned the notice dated 23.10.2013 issued by the respondent-Circle Officer, Patna Sadar in Land Encroachment Case No. 13 of 2012-13, a copy of which is placed at Annexure-7 to the writ petition whereby the petitioners were



directed to remove encroachment from unsurveyed land lying adjacent to the river Ganges within 24 hours failing which the same would be removed. The petitioners also filed I.A.No.412 of 2014 praying for interim relief during the pendency of the writ petition even when the boundary wall of the petitioners had already been demolished by the respondent authorities on 21.12.2013 as stated by the petitioners in paragraph 15 of the writ petition. Under the orders of this Court a counter affidavit was filed by the District Magistrate, Patna Sadar placing on record the various orders passed by the Circle Officer in Encroachment proceedings whereunder the objections raised by the petitioners had been disposed of. The petitioner claiming that these orders were ante dated has sought permission to question the same by way of I.A.No.2014 of 2015.

Taking note of the circumstances that the orders placed on record by the District Magistrate vide Annexure-A to the supplementary counter affidavit and also impugned with I.A.No2014 of 2015 are foundation for the notice impugned in the writ petition, the prayer is allowed and the petitioner is permitted to question the same in the present proceedings.

Mr. Sanjay Singh has appeared for the petitioners and the State is represented by Mr. Ashok Kumar Choudhary learned AAG 13.

The matter in contest relates to a piece of land being Tauzi



No.5070, Khesra No.3488 situated in Mauza Hamidpur Digha Diara, Thana No. 140 admeasuring 4 bighas and 4 kathas lying adjacent to Mohalla- Kurji, in the district of Patna. According to the petitioners, the said plot of land was in possession of the grand father of the petitioner Nos. 2 to 5 Sita Ram Raut since more than 50 years and after his demise was mutated in the name of the father of the petitioner No.2 to 5 namely, late Dwarika Rai. The petitioner Nos. 2 to 5 came in peaceful possession over the land after the death of the father Dwarika Rai. It is the case of the petitioners that the name of Dwarika Rai was mutated in the revenue records vide order passed on 25.7.1995 in Dakhil Kharij (Mutation) Case No. 283/1 of 1995-96 and a Jamabandi No.5070/3 was created.

According to Mr. Singh since the land in question was a part of Digha Diara area hence it was submerged in river Ganges in the year 1957 and has resurfaced in 1993 and thus was subjected to Alluvion and Diluvion characteristics. Learned counsel has referred to the order passed by the Circle Officer in the mutation case, a copy of which is placed at Annexure-1 to the writ petition. He submits that since after the order of mutation, rent receipts were issued, copies of which are placed at Annexure-1 series.

Learned counsel next referred to a judgment passed in Title Suit No.41 of 1996/6 of 2001 to support his contentions that the land is



alluvion/ diluvion in nature as well as to canvass that the right, title and interest of the petitioners over the land in question was tested in the suit filed by the father of the petitioner Nos. 2 to 5 who prayed for a declaration of his title and possession over the plot in question and when it was noticed by the trial court that a 'Thak Bast Survey' had taken place in relation to the Diara area as back as in 1842 and map and registers had been prepared containing the name of the persons in occupation of such land. He with reference to the facts discussed by the trial court at paragraphs 2 of the judgment and the findings recorded at paragraphs 7 to 10 of the judgment submits that the trial court on appreciation of the facts and evidence on record has confirmed the title of the father of the petitioners Nos. 2 to 5 over the land. He submits that the judgment and decree in the suit was passed on 20.2.2001 and the matter stood rested at that stage.

It is argued that the petitioner No.1 purchased a portion of the land in question from the petitioner Nos. 2 to 5 admeasuring 6 kathas, 4 dhurs and 9 dhurkies i.e. about 8475 sq. ft. and a registered deed was executed on 27.4.2012. With reference to a land possession certificate present at Annexure-3 he submits that the title of the father of the petitioner Nos. 2 to 5 stands confirmed from the said documents. It is stated that in view of such uncontested circumstances existing there was no dispute as regarding the title of the petitioner



Nos. 2 to 5 over the land in question. He submits that the petitioner No.1 after purchase of the plot in question started to construct his boundary wall and when a complaint was made before the respondents and a report was submitted by the Circle Inspector who reported accumulation of water due to construction of the boundary wall by the petitioners. The Circle Inspector further reported that it is only upon measurement that it can be ascertained whether the land is raiyati or Government land. The Circle Officer on the report of the Circle Inspector directed the Circle Amin to carry out measurement and a report was submitted by the Circle Amin in which it is mentioned that on the North of Plot No.568 lies unsurveyed land and on which a Nala exists. The Circle Amin has further mentioned that on the west side of the road constructed on the Nala, lies a boundary wall. Mr. Singh next referred to a map which forms a part of report of the Circle Amin and with reference to the remarks he submits that although the measurement if any was made in respect of a shaded area marked over the Nala but the land in question of the petitioners lies North of the Nala and the boundary wall constructed thereon had no connection with the obstruction of the Nala. He submits that any construction on the Nala which is found shaded in the map, in no manner would concern the petitioners but for the reasons best known, the Circle Officer, Patna Sadar initiated proceedings under the Bihar



Public Land Encroachment Act, 1956 giving rise to Encroachment Case No. 13 of 2012-13. A notice was issued which is undated and requires the petitioner to remove the boundary wall by 16.11.2012. He submits that the notice merely charges the petitioner of constructing a boundary wall on unsurveyed plot and thus causing encroachment on the Nala as well as the passage for going to the Ghat. It is stated that although the notice was issued some time in October- November, 2012 but for almost a year nothing happened and it is only on 23.10.2013 that a second notice was issued requiring the petitioner to remove the alleged encroachment within 24 hours. The petitioners responding to the notice filed a detailed reply before the Circle Officer placed at Annexure-8 but without passing any order disposing of the objection that the respondents came on the plot and demolished the boundary wall on 21.12.2013. He submits that a counter affidavit was filed initially by the Circle Officer and not being found satisfactory that it has been supplemented by the affidavit of the District Magistrate, Patna. Learned counsel submitted that the action complained of is being defended by the respondents on the following grounds:

- (a) The State not being party to the title suit, the judgment passed thereon is not binding on the State.
- (b) Since the land lying North of Plot Nos.567 and 568 are

unsurveyed land hence it belongs to the State and the petitioner has no claim thereon.

(c) The identity of the plot itself has been questioned on grounds that whereas the petitioner claims his plot of land lying within Digha-Diara police station, the demolition has been carried out by the respondent over a plot which is lying within the Mainpura police station.

It is stated that in so far as the identity of the land is concerned, the judgment itself takes notice of its situs at Thana No.(1),(2),(140) and (141). He further with reference to the map enclosed with the supplementary counter affidavit of the District Magistrate present at page 137 submits that the descriptive details refers the name of Mauza as Mainpur No.2, Thana No.2 in Revenue Thana Phulwarisharif, P.S. Phulwarisharif known by the revenue survey name as Mainpur, Digha etc. but the entire dispute is resolved by the presence of Plot No.567 and 568 on the Northern end of the map which also refers to Digha Diara Thana No.141 in which the plot in question is situated as well as Mainpur -Diara 140 which police station(s) have also been noticed in the judgment of the trial court. He submits that although the area does not show any land lying north of Plot Nos.567 and 568 but the reason is the alluvion and diluvion nature of the lands. He thus submits that the land in question is lying

north of the said plots and thus it is merely to wriggle out of the situation that the State has introduced a bogey that the demolition had taken place on a different plot.

Mr. Singh concluding his argument submitted that there is absolutely no confusion as to the identity of Plot No.3488 nor there is any confusion that the said plot was owned by the family of the petitioner Nos. 2 to 5 and who have got their names mutated in the survey records and are paying rent in respect thereof and thus had title to make sale thereof in favour of the petitioner no.1. It is submitted that the order impugned having been passed without any determination that the nature of the land is public land as defined under 'the Act', the entire proceedings is without sanction of law. Learned counsel for the petitioner has relied upon a judgment of this Court reported in **1992(2) PLJR 854 (Smt. Rekha Singh and others Vs. State of Bihar and others)** more particularly paragraphs 7 to 10 to submit that summary remedy for eviction under 'the Act' is not a proper remedy especially where there is a bona fide dispute regarding title. Learned counsel has next referred to a judgment of the Privy Council reported in **AIR 1937 Privy Council 245 (Secretary of State v. Midnapore Zamindary Co., Ltd. and others)** which is rendered in consideration of the Bengal Alluvion and Diluvion Act, 1847, to submit that issues of title cannot be raised by the State in case of

alluvion lands.

Responding to the preliminary objection raised by Mr. Choudhary regarding the alternative remedy of appeal so available to the petitioner under Section 11 of 'the Act', learned counsel referred to the case reported in **(1998)8 SCC 1 (Whirlpool Corporation versus Registrar of Trade Marks, Mumbai)** and with reference to paragraphs 14,15 and 20 of the judgment submits that an alternative remedy is not a bar to maintaining a writ petition under Article 226 of the Constitution of India more particularly where the appellate authority has disclosed his opinion.

The argument of Mr. Singh has been contested by Mr. Choudhary on merits as well as on maintainability. With reference to the provisions underlying Section 11 of 'the Act' it is argued that the appellate remedy so available to the petitioner under 'the Act', the issues so raised by him can well be raised before the appellate authority for consideration inasmuch as it also involves issues of fact and law. Basing his argument primarily on the affidavit of the District Magistrate filed under the orders of the Court it is submitted that the encroachment proceedings had been initiated in respect of land lying under Mauza Mainpura, Thana No.2 which is the unsurveyed land and not in respect of the plot claimed by the petitioner situated in Mauza Hamidpur Digha Diara which falls under Thana No. 141. It is also

argued that since the State was not party to the suit hence the judgment and decree passed would not bind the State.

The argument of Mr. Choudhary thus primarily is directed against the maintainability as well as the identity of the land. It is also sought to be canvassed that the writ petition involving disputed issues of fact, a writ remedy would not be the proper forum for the petitioner to establish his claim. It is submitted that the encroachment proceedings was initiated in respect of the unsurveyed land which had been encroached by the petitioner and thus it suffered no infirmity warranting any interference and the petitioner if so aggrieved can well raise his issues before the appellate forum available to him under 'the Act'.

I have heard learned counsel for the parties and I have perused the records.

In so far as the issue of availability of alternative remedy of appeal under Section 11 is concerned, it is seen that the proceedings has been conducted by the Circle Officer, Patna Sadar and thus the appellate forum against the order would be the Collector of the District which in the present case is the District Magistrate, Patna. Considering that under the orders of this Court, the District Magistrate, Patna has filed his affidavit expressing his opinion on the issue, in my opinion relegating the petitioner to exhaust the forum of

appeal in such circumstances would be a mere completion of formality. In the special circumstances of the present case, I am not persuaded by the argument of Mr. Choudhary to relegate the petitioner for exhausting the statutory remedy of appeal.

The petitioner having crossed the hurdle of maintainability it is to be seen whether he has made out a case for indulgence on merits. The proceedings in question arises under the provisions of the Bihar Public Land Encroachment Act, 1956. 'Public land' has been defined in Section 2(3) of 'the Act' to mean any land managed by or vested in the Union of India or the State of Bihar, or in any local authority or statutory body, public undertaking, educational institution recognized by the Government or by any University established under any law for the time being in force, Railway Company or Gram Panchayat and includes any land over which the public or community has got a right of user, such as right of way, burial, cremation, pasturage or irrigation. Thus it is only where the 'Collector' under 'the Act' is satisfied, that the land encroached is a 'public land' within the meaning of 'the Act', that any encroachment proceedings can be initiated failing which any steps taken by the statutory authorities under 'the Act' for removal of encroachment, would be without jurisdiction. The stand taken by the Circle Officer as the 'Collector' under 'the Act' in paragraph 8 of the counter affidavit filed in the



proceedings by itself is sufficient to render the proceedings illegal. It is admitted by the Circle Officer, Patna Sadar that the land in question is 'Khas Mahal' land. The very admission of the Circle Officer as the Collector under 'the Act' that the nature of land in question is 'Khas Mahal', renders the proceeding illegal. It is well settled that a complete procedure for eviction being provided under the Khas Mahal Manual, no proceeding can be initiated under the Bihar Public Land Encroachment Act for eviction of any person from a 'Khas Mahal' land. Reference in this regard is made to a Bench decision of this Court reported in **2000(2)PLJR221 (Ashwani Kumar Gupta Vs. The State of Bihar & Ors.)**.

Now whereas the Circle Officer, Patna Sadar makes a statement and takes a stand that the nature of land is 'Khas Mahal', the District Magistrate, Patna in paragraphs 5 and 7 of the supplementary counter affidavit takes a different stand to admit that the nature of land is unsurveyed land. The Circle Officer, Patna Sadar as well as the Collector, Patna however are united on the issue that the proceedings is in respect of the land lying under Mauza Mainpura and not under Mauza Hamidpur Digha Diara as claimed by the petitioner. In my opinion whether the plot of land lies in Mauza Hamidpur or Mauza Mainpura, until such time that the statutory authorities under 'the Act' are satisfied that the nature of land is a 'public land' as defined under

‘the Act’, they cannot initiate any proceedings under ‘the Act’ for removal of encroachment whatsoever.

In so far as the case in hand is concerned, in view of the admission of the respondent themselves, it stands confirmed that the land in question is not a ‘public land’ within the meaning of ‘the Act’ and in view of the legal position settled by this Court in the case of **Ashwani Kumar Gupta** (supra) neither a ‘Khas Mahal’ land can be subject matter of proceedings under ‘the Act’ nor in my opinion any proceedings in respect of unsurveyed land, the nature of which is yet to be established by the authorities, could have been initiated under ‘the Act’.

Whereas the petitioner Nos. 2 to 5 claim title and possession over the plot of land since more than three generations, the petitioner No.1 is a purchaser of a portion thereof. That the land has Alluvion and Diluvion character, is not in contest. The judgment rendered in Title Suit No. 41 of 1996 discusses the nature of land and holds that it was submerged in the Ganges since 1957 only to reappear in 1993 and it is whereafter that a dispute on title and possession arose, to be resolved through the Title Suit. The petitioner Nos. 2 to 5 have made a sale of 6 Kathas and 9 dhurs which is equal to 8475 sq. ft. to the petitioner No.1 on 27.4.2012. The name of the father of the petitioner nos. 2 to 5 Dwarika Rai was mutated as back as on 25.7.1995 in

Mutation Case No. 283/ 1 of 1995-96 and whereafter receipts have been issued. The Sub- Judge II, Patna by a judgment and decree passed on 20.2.2001 upheld the title of the father of the petitioner Nos. 2 to 5 who had deceased in the meanwhile and was substituted by legal heirs.

Now whereas the petitioner Nos. 2 to 5 claim possession over the piece of land in question since three generations, there is nothing on record of the proceedings to confirm that plot in question is a 'public land' or that at any stage before the initiation of the proceedings in question, did the State Government or the statutory authorities under 'the Act' raise any issue of title, possession or encroachment as against the petitioner Nos. 2 to 5. It is an admitted position that the land in question is of alluvion and Diluvion nature and according to the petitioners it re-emerged only in 1993. In terms of the provisions underlying the Bengal Alluvion and Diluvion Act, 1847 as finds interpreted in the judgment of the Privy Council relied upon by Mr. Singh, it is not on plain emergence and upon accretion of a submerged land that such land automatically becomes a Government land in absence of any document supporting such position, rather a declaration to such effect has to be there. But until such time that it is established by the respondents that the land in question is a Government land and/or falls within the definition of a 'public land'

under 'the Act', no proceedings can be initiated under 'the Act' by terming the possession of the petitioners thereon, as 'encroachment'.

It is rather strange that even when the legal position stands settled in a catena of judgments that where a dispute goes to the root of the matter and involves complicated issues of title and possession then a summary proceedings under 'the Act' would not be a correct recourse, yet the statutory authorities have kept themselves oblivious to the legal position and unaware of their obligations.

For the reasons aforementioned, I deem it fit and proper to hold that the entire proceedings initiated under 'the Act' arising out of the Encroachment Case No. 13 of 2012-13 by the Circle Officer, Patna Sadar is wholly without jurisdiction and all orders passed thereunder are per se illegal and unsustainable in law. However, in the nature of contest involved and the dispute so raised by the respondents to contest the claim of the petitioners and considering the statutory provisions underlying Section 18 of 'the Act', I do not feel persuaded enough by the argument of Mr. Singh for grant of compensation to the petitioners for the acts undertaken by the statutory authorities.

In result, the entire proceedings arising out of Encroachment Case No. 13 of 2012-13 including the notices issued and the orders passed thereunder are set aside. The writ petition is allowed. The interlocutory applications stands disposed of.

(Jyoti Saran, J.)

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