

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.60 of 1990

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1. Prahalad Ray Puranmalka
 2. Tejnarayan Puranmalka
 3. Shyamsundar Puranmalka

All sons of Late Babulal Puranmalka, residents of Barabazar,
Katihar, P.S.-Katihar, District-Katihar.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Katihar Municipality, Katihar.
3. The Executive Officer, Katihar Municipality.
4. Prahlad Prasad Sah, son of Late Ramnath Sah, resident of Mohalla
Driver Tola, Katihar, P.S.-Katihar, District-Katihar.
5. Om Prakash Sah, son of Raghubir Prasad Sah, resident of Mohalla
Anatyalay Road, Katihar, P.S.-Katihar, District-Katihar.
6. Kishori Lal Sah, son of Tufani Sah, resident of Mohalla-Vinodpur,
Katihar, P.S. Katihar, District-Katihar.
7. Sudam Lal Sah, son of Late Babu Lal Sah, resident of Mohalla-Saifganj,
Katihar, P.S.-Katihar, District-Katihar
8. Lakshmi Tailor, son of Late Mahabir Tailor, resident of Barabazar,
Katihar, P.S.-Katihar, District-Katihar.

.... Respondent/s

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Appearance :

For the Petitioner/s : None

For the Respondent/s : Mr. Ajit Kumar, A.C. to G.A. 7

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
And
HONOURABLE JUSTICE SMT. ANJANA MISHRA
And
HONOURABLE MR. JUSTICE SUDHIR SINGH
ORAL JUDGMENT
(Per: HONOURABLE THE ACTING CHIEF JUSTICE)



Date: 17-01-2017

None is present on behalf of the petitioners.

2. The petitioners have sought a writ of mandamus directing the respondents to remove the encroachments on a portion of municipal road by respondent nos. 4 to 8 as such encroachment causes discomfort and annoyance to the petitioners and that the petitioners have been sustaining pecuniary loss due to unauthorized occupation of the respondent nos. 4 to 8.

3. The matter has been referred to the Full Bench on the question as to whether a writ of mandamus can be issued to direct the respondent no.2 to remove the alleged encroachment without following the procedure prescribed under law.

4. A full Bench of this Court in the case reported as Rita Mishra and others Vs. Director, Primary Education, Bihar and others, 1987 PLJR 1090 has discussed as to when writ of mandamus would lie. The Full Bench relied upon the Supreme Court judgment reported as Lekhraj Sathramdas Lalvani v. Deputy Custodian-cum-Managing Officer, Bombay, A.I.R. 1966 SC 334 to return the following finding:-

“25A. The primary scope and function of writ of *mandamus* has been pithily expressed in the phrase that this writ is issued to command and execute; and not to inquire and adjudicate. It is not to establish a legal right but to enforce one. It is only where the legal public duty is clear, unqualified and specific that a writ of *mandamus* can be truly claimed. It is not to be granted where the claim of the petitioner has, in fact, to be first established and adjudicated upon before it can be enforced.



As in the present case, a frontal challenge is laid to the petitioner's claim on every aspect and the averments on their behalf are sought to be controverted at every step. It is manifest that first the petitioners' claim has to be gone into, adjudicated and then established. That obviously is not the scope of a writ of *mandamus*. Ferris in the Law of Extraordinary Legal Remedies has said:-

“The office of mandamus is to execute, not adjudicate. It does not ascertain or adjust mutual claims or rights between the parties. If the right be doubtful, it must be first established in some other form of action; mandamus will not lie to establish as well as enforce a claim of uncertain merit. It follows, therefore, that mandamus will not be granted where the right is doubtful”.

Equally instructive it is to notice the scope and nature of a writ of *mandamus* authoritatively described as follows in **Halsbury's Laws of England**:-

“The order of mandamus is an order of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.”

The statement of the law on the scope of mandamus in **Corpus Juris Secundum** is-

“..... as a writ commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. It is a proceeding to compel someone to perform some duty which the law imposes on him, and the writ may prohibit the doing of a thing, as well as command it to be done.

26. It is evident from the authoritative exposition of the law that the *sine qua non* for the issuance of a writ of mandamus is the existence of a statutory or a public duty devolving upon the person or the body against whom or which the said writ is directed. Equally settled it is



that along with this must co exist a corresponding right in the petitioners who were entitled to claim the enforcement of the said statutory public duty. Unless these two preconditions are satisfied, the requisite foundation for the issuance of a writ of mandamus can hardly be said to exist. Applying the twin test in the present context, I am of the view that neither one stands satisfied. The learned counsel for the petitioners were wholly unable to pinpoint even a single statutory provision which imposed upon the respondents any statutory public duty to pay the salary, where the very appointment of the petitioners may well be forged, fraudulent or illegal. Equally no provision can possibly be pointed out which would inhere in the petitioners an established enforceable right to the relief which they seek to claim.”

5. In view of the test laid down in Rita Mishra's case, the writ of mandamus is issued to command and execute and not to enquire and adjudicate. The question as to whether the Respondent Nos. 4 to 8 are unauthorized occupant on a public land requires inquiry and adjudication. The legal right has to be established first and then, the question of enforcement arises.

6. There is adequate efficacious summary procedure established under Bihar Public Land Encroachment Act, 1956 for eviction of unauthorized occupants. The competent authority under the said Act has a power to enquire and adjudicate and then to order eviction. Therefore, writ of mandamus would not be maintainable where a fact of unauthorized possession is required to be inquired into and to be adjudicated upon. It is only in the case of enforcement of legal right and not to establish a legal right, the writ of mandamus would be



maintainable.

7. Having said so, it may be noticed that it is open to this Court in appropriate cases to examine the nature and extent of encroachment and the nature of the land said to be encroached to invoke the jurisdiction of this Court so as to compel the authorities to perform the statutory duty conferred under the Act. The question of law is answered in the above manner.

8. However, since none is present on behalf of the petitioners, the writ petition stands dismissed for non-prosecution.

(Hemant Gupta, ACJ)

(Anjana Mishra, J)

(Sudhir Singh, J)

P.K.P.

AFR/NAFR	N.A.F.R
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