

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17836 of 2019

Ashok Kumar Sah Son of Late Ram Chandra Prasad Sah Resident of Thana
Road ward no. 18, Khagaria, P.O.- Mukhya Dak Ghar, District- Khagaria.

... .. Petitioner

Versus

1. The State of Bihar through Collector, District- Khagaria.
2. District Magistrate Khagaria.
3. Anchal Adhikari Sadar Khagaria.
4. Executive Officer Nagar Parishad Khagaria.
5. Sub- Divisional Officer Khagaria.
6. Circle Officer Khagaria.

... .. Respondents

Appearance :

For the Petitioner : Mr. Ashok Kumar Keshri, Advocate
Ms. Shilpi Keshri, Advocate
For the Respondent State: Mr. Birendra Prasad Singh, AC to SC-19
For the Khagaria Nagar Parishad: Mr. Krishna Chandra, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

CAV JUDGMENT

Date : 08-06-2020

The Circle Officer, Khagaria, exercising his jurisdiction as Collector, within the meaning of the provisions of the Bihar Public Land Encroachment Act, 1956 (hereinafter referred to as 'the Act'), had initiated a proceeding for removal of encroachment from public land with issuance of a notice dated 17.05.2019 in Encroachment Case No. 1/2019-20, treating the land to be a public land within the meaning of the Act, against the petitioner and several other persons. The petitioner appeared before the Circle Officer in response to the said notice but did not file his response despite opportunity having been given to him. The Circle Officer



passed his final order in the encroachment case on 23.06.2019, asking the petitioner to vacate the land.

2. The petitioner, it may be noted, had preferred a writ application before this Court against the order of the Circle Officer dated 23.06.2019, giving rise to C.W.J.C. No. 12791 of 2019, which was subsequently withdrawn with a liberty to the petitioner to prefer statutory appeal.

3. The appeal of the petitioner, registered as Encroachment Appeal No. 2 of 2019, has been dismissed by the Additional Collector, Khagaria, the appellate authority, by an order dated 10.08.2019, which is under challenge in the present writ application filed under Article 226 of the Constitution of India.

4. I have heard Mr. Ashok Kumar Keshari, learned counsel, assisted by Ms. Shilpi Keshari, on behalf of the petitioner, Mr. Krishna Chandra, learned counsel representing the Khagaria Nagar Parishad and Mr. Birendra Prasad Singh, learned A.C. to S.C.-19.

5. I must record, at the outset, that whereas the petitioner has claimed his title over the land in question as private property mainly on the ground of a *Hukumnama* issued by the erstwhile *Jamindar* in favour of his ancestors, the respondents have denied such claim of the petitioner and have reiterated their plea that the



land in question had always been a public land and the nature of which is recorded in *Khatiyan*, a *Gaddha* (ditch). A question has arisen, in that background, as to whether this Court, exercising power of judicial review under Article 226 of the Constitution of India, should enter into and determine the disputed question of title in respect of the land in question.

6. Before I take note of the facts asserted in the writ application and the pleadings made in the counter affidavits filed on behalf of the Nagar Parishad and the State of Bihar, I must record, at this stage, that the petitioner had relied on existence of mutation in his favour in respect of the land in question before the Additional Collector, i.e. the appellate authority. By the impugned order of the appellate authority dated 10.08.2019, exercising the power under Section 9 of the Bihar Land Mutation Act, 2011, the *jamabandi* created in favour of the petitioner has been ordered to be cancelled and the Circle Officer has been directed to make necessary correction in *jamabandi* accordingly.

7. The land in question appertains to Khesra No.174, Mauza Hajipur in the district of Khagaria.

8. It has been vehemently argued on behalf of the petitioner, while assailing the impugned order, that exercising power of the appellate authority under the provisions of the Act,



the Additional Collector could not have exercised power under Section 9 of the Bihar Land Mutation Act, 2011, cancelling the *jamabandi* existing in the name of the petitioner/his ancestors. It has been argued that to the aforesaid extent, the impugned order is completely beyond jurisdiction.

9. Mr. Keshri, learned counsel for the petitioner, has argued that the dispute in question involves complicated questions of title over the land in question and, therefore, the Circle Officer ought not to have decided the same in a summary proceeding under the Act. In support of his submission, he has relied on a decision of this Court in case of ***Dharam Prakash Vs. The State of Bihar and Others***, reported in **2015(1) PLJR 804**, with special reference to paragraph 10 thereof. Reliance has also been placed on Supreme Court's decision in case of ***Government of Andhra Pradesh vs. T. Krishna Rao and Another*** (AIR 1982 SC 1081), which has subsequently been relied upon by this Court in decision rendered in case of ***Smt. Usha Devi Sinha vs. The State of Bihar and Others***, reported in **2001(2) PLJR 587**.

10. Let me first examine the materials on record, which have been relied on by the petitioner to claim his title over the land in question. It is the petitioner's case that the erstwhile *Jamindar* Raja Devaki Nandan Singh had settled the land in question by a



hukumnama dated 24.08.1937. A copy of the *hukumnama* has been brought on record by way of Annexure-3 to the writ application. A *Jamindari* register has also been brought on record by way of Annexure-4 to the writ application to claim that said Devaki Nandan Singh had filed his *jamindari* return to the State Government at Sl. No. 151, on which name of great grandfather of the petitioner Harilal Sah finds place.

11. I have perused the said two documents and I must record that nothing can be discerned from the said two documents, which are totally illegible. I have failed to understand how typed copy of Annexure-4 could be prepared as, in the Court's opinion, nothing can be discerned either from photostat copies at Annexure-3 or at Annexure-4. I am not commenting upon the genuineness or otherwise of the documents, but, at the same time, I am recording my opinion that this Court cannot record any finding on the basis of such documents, contents of which cannot be read and deciphered by this Court.

12. It is further case of the petitioner that the petitioner's forefather Harilal Sah had started paying *malguzari* to ex-*Jamindar* and after vesting of *Jamindari*, the petitioner's forefather started paying rent to the State Government and getting rent receipt in token thereof. Few copies of the rent receipts of the



years 1975-76, 1978 to 1981, 2013-14 and 2015-16 have been annexed with the writ application. It is further asserted in the writ application that the petitioner had received one notice issued by the learned Additional Collector, Khagaria, in Case No. 20 of 1970-71. The petitioner himself admits that he does not have any further related documents available with him as there were nearly 200 family members in the family of his great grandfather Harilal Sah. It is his further case that there was a partition between Shauki Lal Sah and Harilal Sah, in which the land in question and some other lands were partitioned between the sons of late Shauki Lal Sah and Harilal Sah, consequent upon which the land admeasuring 1 bigha 10 katha 19 dhur and 19 dhurki fell in the share of the petitioner's father in the year 1970, whereafter petitioner's father constructed a *kutcha* house over the said land. It is accordingly the petitioner's case that for nearly 50 years, the petitioner is residing in the said house without any disturbance. It has further been stated that great grandfather of the petitioner had constructed a *kutcha* house in plot in question, but when the house became dilapidated, the petitioner's father made new construction and continued his possession and thus the petitioner and his predecessors are in possession over the land in question since 1944 without any obstruction.



13. There is averment made in paragraph 14 that the structure in question has been mutated in the name of the petitioner with Khagaria Nagar Parishad in 2017. The petitioner had relied on following documents before the Additional Collector, Khagaria, in Appeal No. 2 of 2019-20 to claim his title over the land in question : -

- (i) Copy of *Malguzari* receipt of Raj Banaili;
- (ii) Copy of certified register of Raj Banaili;
- (iii) Copies of rent receipts for the years 1975-76, 1980-1981, 2013-14 to 2015-16 in respect of *jamabandi* No.256/239 with respect of Mauza Hajipur;
- (iv) Copy of notice issued by Deputy Collector Land Reforms in Case No. 20 of 1970-71; and
- (v) Copy of *Hukumnama* issued by Raj Banaili.

14. From the impugned order of the appellate authority, I notice that he has referred to these documents in his order and has recorded that photostat copies of these documents are some other documents of Raj Banaili were produced, which were not readable. The appellate authority doubted the genuineness of creation of *jamabandi* for the first time in 1974, if the ancestors of the appellant were at all the settlees. According to the appellant authority, had the ancestors of the petitioner been the settlees,



jamabandi ought to have been created in 1955 itself. He recorded in his order the stand of the Circle Officer that private lands of the encroachers were adjacent to the public land in question and by progressively moving beyond their private plots, in course of time, they illegally encroached upon the public land and had prepared a fabricated *hukumnama*.

15. In the counter affidavit filed on behalf of the Nagar Parishad, Khagaria, it has been asserted that the land in question is a public land and has been recorded in *khatiyān* as *gaddha* (ditch). In the counter affidavit, issuance of *hukumnama* by the ex-landlord and settlement of land in favour of the petitioner's ancestors has been denied. It has further been stated that lands, which were used by the ex-landlord, or those, which were being used for public purpose, would be deemed to have been vested in the State of Bihar under the Bihar Land Reforms Act, 1950. It has further been asserted that Nagar Parishad, Khagaria, required the land in question for the purpose of solid waste management, in the light of the order passed by the National Green Tribunal and when Nagar Parishad filed an application/requisition for allotment of the land for the said purpose, the Collector, Khagaria, vide his letter No. 413 dated 13.05.2019 had allotted the land of Khata No. 157, Khesra No. 174, admeasuring 1 bigha, 10 katha out of 2 bigha 11



katha. After allotment, it could be noticed that several persons had encroached upon the land, whereafter Amin was directed to measure the land and submit a report. Measurement was done in presence of all the parties and they were asked to furnish their respective documents in respect of the encroached area. None of the encroachers, however, could produce any document in support of their claim of any nature.

16. Dealing with a notice issued by the Deputy Collector Land Reforms, Khagaria, in Case No. 20 of 1970-71, initiated under Section 4H of the Bihar Land Reforms Act, 1950, on the basis of which *jamabandi* is said to have been opened, it has been pleaded that the said notice is not a certified copy nor there is any copy of any favourable order passed to strengthen the petitioner's case and had that been so, he could have produced such order. It has been specifically stated in paragraph 14 of the counter affidavit of Nagar Parishad that the revenue authorities did not find any kind of notice nor any order passed in Case No. 20 of 1970-71, which went to show that the petitioner was producing fabricated documents to build a case in his favour. In respect of the encroachment proceeding initiated against the petitioner, it has been asserted that the petitioner did not file any objection, despite



valid service of notice and chose to approach this Court by filing writ application, giving rise to C.W.J.C. No. 12791 of 2019.

17. In the counter affidavit filed on behalf of the Circle Officer, Khagaria, it has been stated that several notices were issued to the petitioner for removal of encroachment. The petitioner was asked to file any chit of paper, if he had, in respect of his claim, but he failed to do so. In such circumstance, the Circle Officer, Khagaria, passed the order asking the petitioner to remove encroachment from the land in question, as mandated under the law. It has been asserted that if the petitioner's claim is based upon his right, title and possession, the only remedy available to him is by way of appropriate suit before competent Civil Court.

18. Rival pleadings of the parties have been noticed above for reaching a conclusion as to whether it would be proper for this Court to entertain the present writ application, which apparently involve disputed questions of title over the land in question. If the Court arrives at a conclusion that this writ application involves disputed question of title and, therefore, it should not proceed to determine such dispute exercising power of judicial review under Article 226 of the Constitution of India, whether the petitioner can be relegated to Civil Court for



adjudication of his claim of title by filing a suit, in view of bar under Section 16 of the Act, is also a question, which needs to be addressed.

19. Section 16 of the Act reads thus : -

“16. Bar of jurisdiction of Civil Courts.- No Suit or other legal proceeding shall lie in any Court in respect of any order passed under this Act.”

20. I have no hesitation in recording my opinion that disputed questions of facts, touching title over an immovable property, should not be gone into in a proceeding under Article 226 of the Constitution of India. This view has been consistently taken by the Supreme Court in a series of decisions, illustratively : -

- (1) **AIR 1961 SC 1526 (*Union of India (UOI) vs. Ghaus Mohammad*)** (paragraph 7)
- (2) **AIR 1976 SC 386 (*D.L.F. Housing Construction (P) Ltd. vs. Delhi Municipal Corpn. and Ors.*)** (Paragraph 18).
- (3) **(1999) 7 SCC 298 (*Chairman, Grid Corporation of Orissa Ltd. (Gridco) and Ors. vs. Sukamani Das and Ors.*)** (Paragraph 6).
- (4) **(2008) 14 SCC 32 (*Food Corporation of India and Ors. vs. Pala Ram and Ors.*)** (Paragraph 46 and 47).



5. **AIR 2009 SC 1989 (*The State of West Bengal and Ors. vs. Somdeb Bandyopadhyay and Ors.*).**
6. **(2011) 7 SCC 605 (*Hindustan Coca-Cola Beverage Pvt. Ltd. vs. Sangli Miraj and Kupwad Municipal Corporation and Ors.*)** (Paragraph 21).
7. **(2012) 9 SCC 729 (*Subhashree Das vs. State of Orissa and Ors.*)** (Paragraph 7).

21. It is true that a proceeding under the Public Land Encroachment Act can be initiated only if the land in question is a public land. Once, Collector, under the Act, is satisfied, on the basis of materials on record, that the land in question is a public land and proceeds for removal of encroachment invoking the provisions of the Act, it is for the person, against whom the proceeding has been initiated, to establish conclusively, his title over such land as his private property.

22. A similar question had arisen before a Division Bench of this Court in case of ***Jagdeo Gope Vs. State of Bihar and Others***, reported in **1965 B.L.J.R. 744**. This Court, in case of ***Jagdeo Gope*** (supra), had occasion to deal with Section 16 of the Act. In case of ***Jagdeo Gope*** (supra), an order passed by the Commissioner of Patna Division, affirming the orders of the lower



revenue authorities directing removal of encroachment said to have been committed by the petitioner on a piece of land, was under challenge. The petitioner Jagdeo Gope had claimed the land to be his private property on two grounds: - (i) that he had acquired raiyati interest over the same by virtue of valid settlement from the landlord and payments of rent thereafter; and (ii) in any case he had perfected his title by adverse possession. His plea was rejected by the revenue authorities relying mainly on the settlement entry, which showed the plot as *gairmazarua aam*. Section 9 of the Act, shifts burden on the person raising his defence against allegation of illegal encroachment. In case of **Jagdeo Gope** (supra), the revenue authorities were not satisfied that the petitioner had discharged his burden and they had also concluded that settlement from the landlord was a bogus settlement.

23. Taking into account rival cases in case of **Jagdeo Gope** (supra), a Division Bench of this Court held in paragraph 2 as under : -

“2. It is well settled by repeated decisions of their Lordships of the Supreme Court that writ jurisdiction cannot be invoked where a disputed question of fact on the basis of which title to property has to be decided arises for consideration. This should be dealt with by regular civil action in law courts.”



24. Dealing with Section 16 of the Act, which bars jurisdiction of civil Court in respect of any order passed under the Act, the Division Bench held in paragraph 3 as under : -

“3. It was, however, contended that Section 16 of that Act bars the jurisdiction of a civil court in respect of any order passed under that Act. The words “in respect of any order passed under this Act” occurring in Section 16 obviously refer to valid orders passed under that Act. The jurisdiction of revenue authorities to proceed under the Act arises only if the land in question is public land as defined in Section 2(3) of the Act. If, however, the petitioner can satisfy the civil court that it is not public land but is private property, the jurisdiction of the revenue authorities to continue the proceedings under the Public Land Encroachment Act disappears and any order passed will be null and void. The order will no longer be “an order passed under this Act” within the meaning of Section 16 and the bar to the jurisdiction of the civil court will not apply. This principle has been repeatedly laid down in several decisions, the leading one being *Secretary of State v. Mask and Co.*, which has been followed in subsequent decisions.”

25. The Division Bench, relying on the observations of Lord Esher, in *The Queen Vs. The Commissioners for Special Purposes of the Income Tax*, reported in 1881 (sic. 1888) 21 Q.B.D. 313, held that if the land in question is a public land, the Collector, under the Act, has jurisdiction to proceed under the Act for removal of encroachment. If any order is passed in such a



proceeding in respect of a public land, no suit or other legal proceeding can lie in any Court in respect of such order in view of the bar under Section 16 of the Act. If a person, taking defence against removal of encroachment, raises the plea of his title over the land in question, the burden of proving that the land is not a public land is on the person raising such defence.

26. In the present case, as a matter of fact, the petitioner did not raise any defence before the Circle Officer at all in the encroachment proceeding, who is the Collector within the meaning of the Act. Whatever plea, did he raise in respect of his title over the land in question, was at the appellate stage. In the absence of any such plea taken before the Circle Officer, the order of the Circle Officer, directing removal of encroachment, cannot be said to be suffering from any jurisdictional error.

27. I am tempted to refer to the classical observations made by the Court of Appeal in case of *The Queen Vs. The Commissioners for Special Purposes of the Income Tax* (supra), on the question of existence of a fact for exercising a jurisdiction by a Court or Tribunal, as without existence of such fact, proceeding before such Tribunal shall be rendered without jurisdiction. The Lord Esher has propounded the legal principle in following clear terms : -



“.... There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on find that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction.”

28. The said observations have been referred to and relied on by the Division Bench in case of *Jagdeo Gope* (supra). Applying the legal reasoning present in case of *The Queen Vs. The Commissioners for Special Purposes of the Income Tax* (supra), the existence of a fact, that land in question is a public land, is imperative for exercise of jurisdiction by the Collector



within the meaning of Section 2(1) of the Act. An issue may arise that when there exists a dispute whether the land in question is a public land or privately owned property, whether Section 16 of the Act would come in way, which puts bar on filing of a suit or taking any legal proceeding in any Court.

29. In view of the law clearly laid down in case of *Jagdeo Gope* (supra), my answer to the said issue would be in negative. It will be open for a person, claiming his title over land in question, which has been treated to be a public land, to approach civil Court of competent jurisdiction by filing a suit for getting a declaration to this effect. If he gets a declaration finally that the land in question is not a public land, there would not be any question of putting an order, passed by the authority under the Act, to challenge, as such proceeding would be nonest in the eye of law in view of conclusive finding by a competent court of civil jurisdiction. Conclusively thus, the bar under Section 16 of the Act shall not operate if the person against whom removal of encroachment proceeding is initiated under the Act and he, in his defence, disputes the nature of the land to be a public land and puts forth his claim of his title over it as his private property.

30. In all fairness to the submissions advanced on behalf of the petitioner, I must refer to a coordinate bench decision of this



Court in case of *Dharam Praskash Vs. State of Bihar* (supra); observation made in paragraph 10 of which has been heavily relied on by Mr. Keshari, learned counsel for the petitioner, which reads as under : -

“10. Therefore, it would appear from the aforesaid facts that a complicated question of title was involved before the Circle Officer in Encroachment Case No.3/2006-07 and it is well settled principle of law that the complicated question of title cannot be decided in summary proceeding.”

31. The said observation has been made in the background of the certain admitted facts noted therein, particularly in paragraph 10 thereof. This Court noticed in the said case that the order of the consolidation authorities had already become final, which could not be tested or judged in a summary proceeding under the Bihar Land Encroachment Act, 1956. It is in the backdrop of the said finding that this Court in case of *Dharam Prakash* (supra) made the observation that a complicated question of title cannot be decided in summary proceeding. Secondly, in my opinion, the petitioner's case is squarely covered by Division Bench decision of this Court in case of *Jagdeo Gope* (supra).

32. The decision, in case of *Uma Devi Sinha* (supra), by a coordinate Bench of this Court, has been rendered relying on



Supreme Court's decision in case of ***Government of Andhra Pradesh vs. T. Krishna Rao*** (supra).

33. In case of ***T. Krishan Rao*** (supra), the Supreme Court held in paragraph 7 that if there was a bonafide dispute regarding the title of the Government to any property, the Government cannot take unilateral decision in its own favour that the property belonged to it and on the basis of such decision could take recourse to a summary remedy provided under Section 6 of the Act for vacating the person who is in possession of the property under 'a bonafide claim or title'. The Apex Court further observed that summary remedy, prescribed under the provisions of the Andhra Pradesh Land Encroachment Act, was not the kind of legal process, which is suited to adjudication of complicated question of title.

34. I must note here that the Supreme Court made the aforesaid observations in case of ***T. Krishan Rao*** (supra) in the facts of said case noted in the decision, where the property admittedly belonged originally to the family of one Nawab Habibuddin, from whom the respondents claimed to have purchased it.

35. In the present case, the facts, claimed by the petitioner in support of the plea of his title over the disputed



property, has been seriously disputed. It has been argued on behalf of the State of Bihar that the *hukumnama*, on which the petitioner was placing reliance, did not bear the requisite seal. He has further argued that the petitioner has not been able to make out bonafide case of his title, as according to his own case, though the land was settled by the *Jamindar* in 1937, for the circumstances best known to the petitioner, *jamabandi*, according to his own case, was created nearly 37 years thereafter without any valid reason. The decision, in case of *Uma Devi Sinha* (supra), rendered by a coordinate Bench of this Court, is also of no help to the petitioner for the reason that in that case the parties had appeared before the Circle Officer to claim their title and had questioned the maintainability of the proceeding. In any view of the matter, the said decision does not take note of clear laid down law, laid by the Division Bench of this Court in case of *Jagdeo Gope* (supra), which still holds the field.

36. In such view of the matter, the plea of the petitioner, that the Circle Officer ought not to have proceeded for removal of encroachment under the Act, is not tenable and is accordingly rejected. The impugned order does not require interference by this Court.



37. However, in the light of the discussions as above, it is made clear that the petitioner shall be at liberty to file a suit before the competent court of civil jurisdiction for adjudication on the point as to whether the land in question is a public land or not.

38. So far as second part of the impugned order passed by the appellate authority in exercise of power under Section 9 of the Bihar Land Mutation Act, 2011, is concerned, I find force in the submission made on behalf of the petitioner. Exercising powers under the provisions of the Act, the Additional Collector could not have passed order under Section 9 of the Bihar Land Mutation Act, 2011, without complying with the requirements and without following the procedure as stipulated under Section 9 of the Bihar Land Mutation Act, 2011.

39. Learned counsel representing the respondents could not justify the impugned order to this extent passed by the learned Additional Collector, Khagaria.

40. The impugned order, dated 10.08.2018, is set aside to the limited extent, i.e., to the extent it relates to cancellation of *jamabandi*, in exercise of powers under Section 9 of the Bihar Land Mutation Act, 2011.

41. The Additional Collector shall, however, be at liberty to pass appropriate order under Section 9 of the Bihar Land



Mutation Act, 2011, after following the procedure in accordance with law.

42. This application is allowed to the limited extent as noted above.

43. There shall be no order as to costs.

(Chakradhari Sharan Singh, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	29.01.2020
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