

(2006) 08 AHC CK 0269

Allahabad High Court

Case No: None

Justice Birendra Dikshit (Retired)  
and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

**Date of Decision:** Aug. 18, 2006

**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 133
- Evidence Act, 1872 - Section 114
- Penal Code, 1860 (IPC) - Section 441

**Citation:** (2006) 4 AWC 3618

**Hon'ble Judges:** Pankaj Mithal, J; B.S. Chauhan, J

**Bench:** Division Bench

**Final Decision:** Dismissed

**Judgement**

B.S. Chauhan, J.

Mandhyan, learned senior counsel appearing for the petitioners submits that he wants to delete the names of respondent Nos. 6 to 12 from the array of parties and restrict his case only against respondent Nos. 1 to 5. He is permitted to do so and the names of respondent Nos. 6 to 12 be deleted from the array of the parties. Any pleadings against the said respondent Nos. 6 to 12 stands automatically deleted and no argument shall be advanced against them.

2. The petitioners by means of the present writ petition have challenged the order dated 6.2.2006 (Annexure-17) passed by the Collector, Allahabad, whereby he has directed for removal of encroachment from the 15 feet wide common passage, which forms part of nazul plot No. "A-A", Civil Station, Allahabad.

3. The dispute in the writ petition relates to a portion of nazul plot "A-A". Civil Station,, Allahabad. Admittedly the said nazul plot having an area of 1 acre 1807 sq. yard had been leased out to the predecessor-in- interest of respondent Nos. 4 and 5. The lease of the aforesaid nazul land has been renewed for a period of 30 years on 21.2.1991 in favour of Shri Jagdish Narain Kapoor, Shri Satish Narain Kapoor, both sons of late Deep Narain Kapoor, Smt. Rekha Kapoor w/o late Shri Chandresh Narain Kapoor, Adarsh Kapoor s/o late Shri Chandresh Narain Kapoor and Ms. Ekta Kapoor d/o late Shrt Chandresh Kapoor.

4. The petitioners claimed that their father late Shri Banwari Lal Dikshit was the tenant of one of the dwellings situated over the said nazul plot along with Garage, servant quarters and the land attached thereto since 1942. He was paying rent to late Shri Deep Narain Kapoor and late Shri Shlv Narain Kapoor, predecessor-in- Interest of the respondent Nos. 4 and 5. On the death of Shri Banwari Lal Dikshit, the tenancy had devolved upon the petitioners and their mother. The petitioner No. 1 had entered into an agreement to sell dated 28.7.1981 with Shri Jagdish Narain Kapoor for the purchase of part of the aforesaid nazul plot and the dwelling unit situate over it. On the basis of the said agreement, petitioner No. 1 with the consent of the lessees applied for freehold rights in respect of house No. 9, Stanley Road with an area of 911 sq. mtrs. forming part of the aforesaid nazul plot in accordance with the terms and conditions of the freehold policy issued vide G.O. dated 1.12.1998.

5. The Collector, Allahabad granted permission of freehold rights as claimed by the petitioner No. 1 and a sale deed dated 19.10.2000 was executed in respect of only 852.20 sq. mtrs. of land. The said sale deed which has duly been executed by the Collector, Allahabad, on behalf of his Excellency, the Governor of Uttar Pradesh clearly provides the area in respect whereof freehold rights have been granted in favour of the petitioner No. 1 and the boundaries thereof providing for 15 feet wide common passage on three sides of the house, i.e.. West, North and South on Stanley Road (Kastoorba Gandhi Marg on the East).

6. The respondent No. 4, Smt. Rekha Kapoor and others on 3.1.2005 made a complaint to the Collector, Allahabad that the petitioner Nos. 2 and 3 have encroached upon one of the 15 feet wide common passage and has blocked the same without any justification and lawful authority. On the said complaint, after necessary enquiries and after notice to the petitioners, the impugned order dated 6.2.2006 was passed by the Collector. The petitioner No. 1 admitted before the Collector the existence of 15 ft. wide common passage, which is in dispute.

7. Shri B.D. Mandhyan, learned Counsel appearing for the petitioners has tried to assail the impugned order dated 6.2.2006 on the ground that the same is patently without jurisdiction as the Collector has no right to interfere in the private civil dispute of the parties. There is no common passage and unauthorized encroachment by the petitioners over any part of the aforesaid nazul plot. The

petitioners are in possession of the same as the lawful tenants and their tenancy rights have not come to an end even though the petitioner No. 1 has acquired ownership right in respect of the portion of the land under the freehold policy of the State Government.

8. On the other hand, Shri C.B. Yadav, learned chief standing counsel appearing for respondent Nos. 1 to 3 and Shri Shyamal Narain, learned Counsel appearing for respondent Nos. 4 and 5 have contested the case "submitting that the tenancy rights stood evaporated on execution of sale deed dated 19.10.2000 in respect of 852.20 sq. meters and a plan was attached with the said sale deed (Annexure-C.A. 7), which clearly provides that on three sides, 15 ft. common passage was there and once the rights of the parties stood crystallized by the said sale deed dated 19.10.2000, it was not open for the petitioners to encroach upon one of the said roads, which are meant for common use. It has further been submitted that the land, other than 852.20 sq. meters of the said plot, is still a nazul land and has not been converted into freehold, therefore, the Collector being the in charge of the nazul properties under the law, had every right to interfere in the matter and remove the obstructions. Even otherwise in exercise of powers u/s 133 of the Code of Criminal Procedure, such an order could be passed. Therefore, the order passed by the Collector, which has been duly executed on 11.2.2006 as is evident from the impugned order itself, does not require any interference and the petition is liable to be dismissed. More so, in case petitioners claim any exclusive title or right over the said passage, the only remedy available to them is to file a civil suit for declaratlop of their rights. In view of the above, the petition is liable to be dismissed.

9. We have considered the submissions made by the learned Counsel for the parties and perused the record.

10. Father of petitioners had been the tenant over the part of the premises in dispute and a part thereof had been converted into freehold in favour of petitioner No. 1, but that is limited to the area measuring 852.20 sq, meters. The sale deed so executed in this respect on 19.10.2000 clearly provides a passage of 15 ft. on three sides and one of the said passages had been encroached upon which has been the issue involved before the Collector. The impugned order itself reveals that the parties were heard before passing the order. It was admitted by the parties that there were 15 ft. wide road meant for common use on three sides of the plot in respect of which freehold rights stood created in favour of the petitioner No. 1. The passage which is in dispute had been the common passage, which had been carved out at the time of creation of freehold rights in favour of petitioner No. 1. The passage did not fall within the said freehold land. It remained a part of nazul land over which the Collector has full control. Had the Collector no authority in respect of nazul land, he would not have executed the sale deed in favour of petitioner No. 1 and that too creating freehold rights therein. No reliance can be placed on the old plans of the land/buildings as the same stood superseded by the new plan attached

to the sale deed in favour of the petitioner No. 1 dated 19.10.2000. The matter is being argued in a casual and cavalier manner without making any reference to any rule.

11. The Nazul Rules deal with the issue involved herein Rule 5 provides for change of entries in Nazul Register by the Collector on being satisfied that it was so necessary because of the successive transfer or assignment. Rule 5A deals with the procedure prescribed for mutation in the name of transferees in the records accordingly. The mutation is also to be made by the Collector. Sub-rule (4) of Rule 5A would not debar any person from establishing his right to the property in any civil or revenue Court having Jurisdiction Rules 7 to 12 deal with the management of the nazul land Rule 8 provides that the department managing nazul property is bound to forward to the Collector a certificate every year showing the area of nazul properties, the purpose for which it is used and reporting whether any encroachment had been made on any part of such properties. In case of encroachment upon the nazul land used for road purposes, the certificate is required to be forwarded in a prescribed Form wherein encroachments have to be noted specifically. Rule 9 thereof provides for preparing the list of encroachments by the department in respect of each nazul property and to issue certificates in this respect to the Collector. Rule 13 of the said Rules provides that in case of sale or lease of nazul land, it shall be carried out under the Collector's order and in case such land is in occupation of any department other than the revenue department, the nazul shall be transferred to the Collector for the purpose of lease or sale. Rule 74 provides that any administrative-body or local body shall ensure the compliance of the order passed by the Collector requiring the removal of encroachment upon or of unauthorized occupants of nazul. Vide the Criminal Laws (U. P. Amendment) Act, 1961, the provisions of Section 441 of the Indian Penal Code stood amended authorizing the local bodies to register a criminal case for removal of encroachments on nazul land after giving notice to the encroachers or trespassers.

12. Thus, it is evident that every nazul property is under the direct control of the Collector and by no stretch of Imagination, it can be held that the Collector had no jurisdiction to deal such properties or pass an order for removal of encroachment.

13. Thus, we do not see any ground to hold that the Collector had no jurisdiction to entertain the complaint or pass the impugned order.

14. Learned Counsel for the petitioners failed to produce any document to substantiate the pleadings that petitioners are still holding the tenancy rights over the land other than 852.20 sq. meters, in respect of which, freehold rights stood created. In spite of repeated queries put to Shri Mandhyan, our attention could not be drawn on any such document on record. Though certain averments have been made in the petition in this regard, but petitioners miserably failed to substantiate the same.

15. It is settled proposition of law that a party has to plead his case and produce/adduce sufficient evidence to substantiate his submissions made in the petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. In [Bharat Singh and Others Vs. State of Haryana and Others](#), the Hon"ble Supreme Court has observed as under:

In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the CPC and a writ petition or a counter-affidavit. While in a pleading, i.e., a plaint or written statement, the facts and not the evidence are required to be pleaded. In a writ petition or in the counter-affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.

16. Similar view has been reiterated in [M/s. Larsen and Toubro Ltd. Vs. State of Gujarat and Others](#), : [National Buildings Construction Corporation Vs. S. Raghunathan and Others](#), [Ram Narain Arora Vs. Asha Rani and Others](#), : [Smt. Chitra Kumari etc. Vs. Union of India and Others](#), and [State of U.P. and Others Vs. Chandra Prakash Pandey and Others Etc.](#), .

17. In [M/s. Atul Castings Ltd. Vs. Bawa Gurvachan Singh](#), , the Hon"ble Apex Court observed as under:

The findings in the absence of necessary pleadings and supporting evidence cannot be sustained in law.

18. Similar view has been reiterated in [Vithal N. Shetti and Anr. v. Prakash N. Rudrakar and Ors \(2003\) 1 SCC 18](#) : [Devasahayam \(D\) by LRs. Vs. P. Savithramma and Others](#), and [Sait Nagjee Purushotham and Co. Ltd. Vs. Vimalabai Prabhulal and Others](#),

19. In [Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others](#), , the Hon"ble Apex Court has categorically held that it is the solemn duty of a party to litigation to adduce the best evidence in support of his case and in case it is withheld, the Court has a right to draw adverse inference against him, as provided u/s 114, Illustration (g) of the Indian Evidence Act.

20. In the instant case, no attempt had been made by the petitioners to adduce any evidence regarding subsistence of their tenancy in respect of any part of the remaining nazul land. Thus, the argument advanced in this respect cannot be entertained.

21. Even if we assume, for the sake of argument, that the Collector did not have the jurisdiction to pass the order impugned, the law does not require to quash the same for the reason that the writ is a discretionary relief and petitioners cannot agitate that any injustice has been done to them.

22. Writ jurisdiction is discretionary. It is not issued merely because if it is lawful to do so. Once a factual stand is taken, it cannot be changed on any legal proposition, whatsoever, nor it is permissible for the Court to examine the correctness of the findings of fact unless it is found to be perverse being based on no evidence or contrary to evidence, as the writ court exercises its supervisory jurisdiction and not of appellate forum. The purpose of the writ court is not only to protect a person from being subjected for violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the Court. However, being the power discretionary, the Court has to balance competing interest, keeping in mind that interest of justice and public interest can coalesce in certain circumstances. (Vide [Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others](#), [Ramniklal N. Bhutta and another Vs. State of Maharashtra and others](#), : [Chimajirao Kanhojirao Shirke and Another Vs. Oriental Fire and General Insurance Co. Ltd.](#), : [Shama Prashant Raje Vs. Ganpatrao and Others](#), : [Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another](#), : [Roshan Deen Vs. Preeti Lal](#), : [S.D.S. Shipping Put. Ltd. v. Jay Container Services Co. Pvt. Ltd. and Ors.](#) 2003 (4) Supreme 44 and [Chandra Singh Vs. State of Rajasthan and Another](#),

23. In [A.M. Allison Vs. B.L. Sen](#), the Apex Court held that writ court can refuse to exercise its jurisdiction as the writ proceedings cannot "of course", if it is satisfied that there has been no failure of justice.

24. In [Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others](#), , the Hon''ble Apex Court held as under:

When substantial justice and technical considerations are pitted against each other, the cause of substantial Justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done.

25. Therefore, Court has to examine the case with this angle also bearing in mind that cause of substantial justice cannot be defeated on mere technicalities.

26. It is also settled legal proposition that writ court should not quash the order if it revives a wrong and illegal order. (Vide [Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others](#), : [Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others](#), : [Mallikarjuna Mudhagal Nagappa and Others Vs. State of Karnataka and Others](#), and Chandra Singh (supra)).

27. In Dal Singh v. King Emperor of India 1917 PC 25 the Privy Council held that in case the authority/Court has done substantial justice, the appellate court may .not

interfere even if the order was passed without jurisdiction or suffers from some kind of illegality. Same view has been reiterated in [Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another,](#) and [Sree Jain Swetambar Terapanthi Vid.\(S\) Vs. Phundan Singh and Others,](#)

28. In Mohammad Swalleh (supra), the Hon"ble Apex Court considered a situation wherein an appeal had been entertained and allowed by the District Judge, Meerut, against the order passed by the Prescribed Authority under the U. P. (Temporary) Control of Rent and Eviction Act, 1947, though the appeal was not maintainable. This Court dismissed the writ petition and refused to interfere with the order purported to have been passed without jurisdiction. The Hon"ble Apex Court, while deciding the appeal, observed as under:

It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Article 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Article 226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken.

29. Thus in view of the above, it is not necessary for the writ court to interfere in a case where a Just order has been passed by an authority having no competence to do so.

30. In view of the above, as the encroachment by the petitioners had been on the land which was outside the land in respect of which the freehold rights had been created in favour of petitioner No. 1 and formed part of the nazul land, the encroachment removed by the Collector, even if without jurisdiction, does not require any interference, whatsoever.

31. On the basis of the aforesaid discussion, we reach the inescapable conclusion that petitioner No. 1 got freehold rights in respect of the land measuring 852.20 sq. meters only and the rest of the land remained nazul land, whosoever may be in possession thereof and whatever may be nature of their possession. The said freehold property was surrounded on three sides by 15 ft. wide road for common use, which formed part of the nazul land, therefore, the Collector had every right to entertain an application in respect of the encroachment on any part of the said road and as one of the said roads had been encroached upon by the petitioners, we do

not see any cogent reason to Interfere with the well reasoned order of the Collector removing the said encroachment as the Collector is the in charge of the nazul property in the entire district and the submission to the effect that Collector had no jurisdiction to remove the encroachment, is preposterous and not worth acceptance.

32. In view of the above, we do not find any farce in the petition, it is accordingly dismissed.