

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.46872 of 2012

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1. Ramashray Dubey S/O Late Ramadhar Dubey R/O Vill-Milki, P.S.-Chausa, Distt-Buxar

2. Lalan Dubey S/O Late Ramadhar Dubey R/O Vill-Milki, P.S.-Chausa, Distt-Buxar

3. Mishra @ Mittra Dubey S/O Ramadhar Dubey R/O Vill-Milki, P.S.-Chausa, Distt-Buxar

.... Petitioner/s

Versus

1. The State Of Bihar

2. Most. Saroj Devi W/O Late Vibhu Dubey R/O Vill-Milki, P.S.-Chausa, Distt-Buxar, At Present Residing At Mohalla-P.C.College Colony, P.S.-Buxar(M), Distt-Buxar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Parijat Saurav, Adv.

For the Opposite Party/s : Mr. P.Mehta (App)

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL ORDER

5 14-05-2015 Heard learned counsel for the petitioners and the State.

Even after valid service of notice, the O.P.No.2 did not choose to appear.

As has been submitted by the counsel for the petitioners, Ramashray Dubey (petitioner no.1) and Mishra @ Mittra Dubey (petitioner no.3) have died and only surviving petitioner is petitioner no.2 i.e. Lalan Dubey.

Petitioners filed the instant case for quashing the order dated 16th March 2012 passed in Trial No. 1816 of 2011 (arising out of Complaint Case No. 1195© of 2011) whereby and

whereunder the Judicial Magistrate, 1st Class, Buxar has taken cognizance u/s 147, 323 and 379 IPC.

Saroj Devi wife of Late Vibhu Dubey, O. P. No. 2 is one of the plaintiffs in Partition Suit No. 79 of 2009 which is pending in the court below. There the plaintiffs have claimed the share in the property mentioned in Schedule-II.

From the Genealogical table it appears that Saroj Devi is daughter in-law is the legal heir and successor of Ramashray Dubey through her husband. Father in -law and his brother have been made accused are Ramashra Dubey and Lalan Dubey. In the Title suit share has been claimed over the property which is pending for disposal claiming that the land in schedule-II are joint family property.

In the mean time the present complainant has filed the complaint case claiming that she had cultivated crop and the accused persons have forcibly harvested the standing crop and on that basis the Magistrate has taken cognizance.

Counsel for the petitioners submits that when the land claimed by the complainant is joint family property in such view of the matter, the allegation made against the accused persons (petitioners) about forcible harvesting of crop does not arise, as in the joint family property every co-parcener has right

over every inch of the land, unless the property is divided by metes and bounds.

From the complaint petition it does not show that the partition was ever effected and she was handed over the property. Submission has been made that the possession of one co-parcener is possession of other co-parcener and the case of theft and forceful harvesting of standing crop does not arise. As it appears from the complaint petition as well as the plaint of the title suit that the property is in joint possession.

When already a title suit is pending for partition of the joint family property by metes and bounds, during the pendency of the title suit the filing of the complaint and taking cognizance therein is illegal. As he has further submitted that there is no wrongful gain and there is no wrongful loss as the petitioners themselves were title holder of the property.

In support of his contention, he has relied on the judgment reported in 22013(1) PLJR 180 (Nurul Hoda v. State of Bihar) where the Court in a similar situation interfered with the continuation of the proceeding and quashed the same.

Counsel for the State submits that there is no illegality in the order impugned. The court below has rightly taken cognizance.

Having considered the contention of the parties, from the complaint petition and the statements made in the S.A. only undisputed fact that comes out is that the property is in joint family property in possession of the family and from the complaint it appears that the complainant and her son have claimed share in the joint family property which is pending for adjudication in partition suit.

The question of theft and forceful harvesting does not arise in a situation when the partition suit is pending and as such claim of complainant who is the plaintiff to be the joint family property of forceful harvesting does not arise, the purpose of filing the complaint case is to exert pressure on other co-parceners to get them easily ready for partition. In such situation the attending facts and circumstances the continuation of the complaint case is an abuse of the process of court.

In such view of the matter the impugned order dated 16th March 2012, taking cognizance is hereby quashed and, accordingly, this petition is allowed.

(Shivaji Pandey, J)

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