

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11842 of 2012

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Most.Guljari Kuer & Ors.

.... Petitioner/s

Versus

Ramadhar Seth & Ors.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. S.S.Dvivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey, Advocate
For the Respondent/s : Mr. J.S. Arora, Advocate
Mr. Waliur Rahman, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. ORDER

11 24-11-2015 Heard the learned senior counsel, Mr. S.S. Dvivedi for the petitioners and the learned counsel, Mr. J.S. Arora for the respondents.

This application under Article 227 of the Constitution of India has been filed by the decree holders-petitioners against the order dated 15.05.2012 passed by Sub Judge I, Kaimur in Miscellaneous Case No.83 of 1997 whereby the learned Court below allowed the Miscellaneous Case filed by the opposite parties under Section 47 read with 151 C.P.C. and Section 4 of the Partition Act, 1893.

For the purpose of disposal of this writ application, the facts may be stated briefly that Bagedi Seth, Ramadhar Seth and Bikarma Seth, the three brothers had purchased disputed land by registered sale deed dated 14.09.1968. Thereafter, there was



partition between them by a registered partition deed dated 16.06.1976. After partition, they came in possession of their respective shares. It appears that subsequently Bagedi Seth firstly entered into agreement to sale to the ancestors of the petitioners on 10.12.1977 and then by registered sale deed dated 06.06.1978 sold the present disputed land to the ancestors of the petitioners. After purchase, according to the petitioners, the purchasers came in possession. Subsequently, the petitioners were dispossessed by Ramadhar Seth. The said Ramadhar Seth filed Title Suit No.264 of 1978 for specific performance of contract against Bagedi Seth and ancestors of the present petitioners alleging that Bagedi Seth had entered into agreement on 29.09.1976 to sell his share in Rs.8,000 out of which, Ramadhar had already paid Rs.5,000.

The petitioners filed Title Suit No.21 of 1979 for declaration of title and recovery of possession on the facts aforesaid. Both the suits i.e. suit filed by Ramadhar for specific performance and Title Suit No.21 of 1979 were heard together and the suit for specific performance was dismissed whereas Title Suit No.21 of 1979 was decreed in favour of the petitioners. Two title appeals were filed being Title Appeal No.1/15 of 1980 and 2/16 of 1980 and both the title appeals were dismissed by the appellate Court then Ramadhar filed two Second Appeals before the High



Court and the High Court after setting aside the judgments remanded to the trial Court for fresh decision. The trial Court again by terms of judgment and decree dated 04.07.1986 dismissed Title Suit No.264 of 1978 i.e. suit for specific performance and decreed the title suit of the petitioners i.e. Title Suit No.21 of 1979. Against the said judgment and decree, Ramadhar has filed two title appeals being Title Appeal No.25 of 1986 and Title Appeal No.26 of 1986 which are still pending for hearing.

It further appears that in the meantime, for execution of the decree passed by the trial Court, Execution Case No.5 of 1997 was filed by the present petitioners for recovery of possession. In this execution case, the judgment debtor filed application under Section 47 and 151 of C.P.C. read with Section 4 of the Partition Act which was registered as Miscellaneous Case No.83 of 1997. By the impugned order, the court below has allowed this Miscellaneous Case and directed the petitioners to execute the sale deed in favour of Ramadhar Seth after payment of Rs.2,50,000/-.

Notices were issued to the respondents. At the time of hearing of this writ application in admission matter, the learned counsel, Mr. J.S.Arora raised preliminary objection to the maintainability of this writ application under Article 227 of the



Constitution of India. According to the learned counsel, the order has been passed under Section 4 of the Partition Act, 1893 which is a deemed decree according to the provision as contained in Section 8, therefore, the petitioners should have filed regular appeal before the appellate Court.

On the other hand, the learned senior counsel, Mr. S.S.Dvivedi submitted that Section 4 of Partition Act is not applicable in the present case, as such, the Executing Court who was to execute a decree arising out of declaration of title and recovery of possession had inherent lack of jurisdiction to entertain an application under Section 4 of Partition Act. Merely because the application has been leveled under Section 4 and the court below although had no jurisdiction to decide the same, which is void ab initio order, the petitioners are not required to file appeal. Since the order is void ab initio, without jurisdiction and that the Court below acted in the manner not permitted by law, this Court can exercise supervisory jurisdiction under Article 227 of the Constitution of India and, therefore, this application is maintainable.

So far merit is concerned, the learned senior counsel, Mr. S.S.Dvivedi submitted that Section 4 of the Partition Act can be applied only if three conditions are fulfilled i.e. firstly, the



property must be dwelling house secondly, it must be of the undivided family and then the purchasers must file the partition suit. In the present case, the suit property purchased by the petitioners is not the undivided family property and the purchasers never filed any partition suit, therefore, there is no question of application of Section 4 of Partition Act arises. According to the learned counsel, in the plaint filed by Ramadhar Seth for specific performance of contract, he has specifically pleaded at paragraph 6 that there had been a partition between three brothers and Bagedi Seth entered into agreement to sell his partitioned property for Rs.8,000. In the plaint filed by the present petitioners for declaration of title and recovery of possession at paragraph 4 specifically stated that there was partition by registered partition deed dated 16.06.1976 and the three brothers came in separate possession of their shares. In the said suit for declaration of title and recovery of possession, Ramadhar filed written statement and at paragraph 8 admitted the statements made in paragraph 4 of the plaint. The plaint and written statement have been annexed with the supplementary affidavit. On these grounds, the learned senior counsel submitted that the provision as contained in Section 4 is not applicable and that the Executing Court exceeded his jurisdiction in deciding the said application thereby causing grave



injustice to the petitioners. Further, since there had already been partition between the three brothers, there was no question of filing partition suit by the purchasers i.e. these petitioners arises, as such, no partition suit was filed. Therefore also, provision as contained in Section 4 of the Partition Act is not applicable. On these grounds, the learned senior counsel submitted that the writ application be allowed and the impugned order be set aside and the trial Court be directed to execute the decree.

On the other hand, the learned counsel, Mr. J.S.Arora submitted that whatever ground is being raised in this writ application can be raised by the petitioners in the appeal as the impugned order is appealable order. The court below after appreciation of the evidences and the statements made by the opposite parties in the application under Section 47, 151 read with Section 4 of the Partition Act and reply to the said application came to the conclusion that the partition deed was never acted upon and, therefore, has rightly allowed the Miscellaneous Case. While exercising jurisdiction under Article 227 of the Constitution, this Court cannot reappreciate the evidence and substitute its own finding. The Court below also found that both portions of the house cannot be partitioned. The pleader commissioner was also appointed. All these matters can only be



gone into in appellate jurisdiction and not in supervisory jurisdiction. The plaint or the written statement filed in this writ application in support of the case that the stand of Ramadhar Seth was that there had been partition by registered deed were never filed before the Executing Court, therefore, those pleadings cannot be gone into or looked into while exercising supervisory jurisdiction. According to the learned counsel, at the execution stage also, an application under Section 4 of the Partition Act is maintainable. In support of his contention, the learned counsel relied upon a decision of the Supreme Court (2010) 10 Supreme Court Cases 560. On these grounds, the learned counsel submitted that the writ application be dismissed.

Now let us consider the preliminary objection raised by the respondents. Section 8 of the Partition Act provides that “any order for sale made by the Court under sections 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure, 1882.” Therefore, in view of this provision, the order is appealable if the orders are passed under Section 2, 3 or 4. According to the learned counsel for the respondents, the present order has been passed under Section 4 of the Partition Act. The learned counsel placed reliance on the decision (2000) 10 Supreme Court Cases 560(Sharada Verma(Smt.) v. Dilip Gupta and



Others). From perusal of this decision, it appears that it has been held in the said decision that application under Section 4 of the Partition Act is maintainable even at execution stage. However, it appears that the execution case in that case was arising out of a partition suit. In such circumstances, the question is merely because the application has been leveled under Section 4 in any execution case whether the Executing Court will get jurisdiction to decide the application under Section 4 without considering the facts or provision as contained in Section 4. I, therefore, find that maintainability of this application is dependent on the merit of this case. If it is held that in the present execution case, Section 4 application was maintainable and the Court below has rightly therefore decided the same, certainly the petitioners will have to avail the right conferred on them under Section 8 of the Partition Act.

Now let us see whether the application under Section 4 of the Partition Act was maintainable in this execution case.

Section 4 of the Partition Act, 1893 reads as follows:

“4. Partition suit by transferee of share in dwelling-house.-(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such

transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.”

It may be mentioned here that the objects and reasons

for enacting the Act itself shows that there was no power on the Court earlier to direct a sale and division of the proceeds in any case whatever as the Courts did and had only power to divide the property and in some exceptional cases where an equal division is not practicable to award a money compensation for the purpose of equalizing the value of the share. Therefore, this Act was enacted to remove the defect in the law by giving the Court a discretionary authority to direct a sale where a partition cannot reasonably be made and a sale would, in the opinion of the Court, be more beneficial for the parties. Because of this objectionary reason, the title of the Act is also Partition Act and from perusal of the provisions from Section 2 onwards, it will appear that this Act apply only in partition suit. Section 4 empowers the Court to direct the sale of such share to share holder if the condition mentioned in this provision is fulfilled. Firstly, there must be transfer of a

dwelling house belonging to an undivided family and the transfer must be made to a third person not a member of the family. Secondly, such transferee must file a partition suit then only this provision will apply.

The Hon'ble Supreme Court in **A.I.R. 2001 Supreme Court 61(Gautam Paul v. Debi Rani Paul and others)** at paragraph 23 has held as follows:

“23. We are in agreement with this opinion.

There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of preemption, under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above one of the conditions is that the outsider must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsideer does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-



empt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal interpretation may be given, the interpretation cannot be one which gives a right which the Legislature clearly did not intend to confer. The Legislature was aware that in a Suit for Partition the stranger/outsider, who has purchased a share, would have to be made a party. The Legislature was aware that in a Suit for Partition the parties are interchangeable. The Legislature was aware that a Partition Suit would result in a decree for Partition and in most cases a division by metes and bounds. The Legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. Yet the Legislature did not provide that the right for pre-emption could be exercised "in any Suit for Partition". The Legislature only provided for such right when the "transferee sues for partition". The intention of the Legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger/purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition. The interpretation given by the Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provisions of Section 4, which only gives a right when the transferee sues for partition. If that interpretation were to be accepted then in all

cases, where there has been a sale of a share to an outsider, a co-sharer could simply file a suit for partition and then claim a right to purchase over that share. Thus even though the outsider may have, at no stage, asked for partition and for the delivery of the share to him, he would be forced to sell his share. It would give to a co-sharer a right to pre-empt and purchase whenever he/she so desired by the simple expedient of filing a suit for partition. This was not the intent or purpose of Section 4. Thus the view taken by Calcutta, Patna, Nagpur and Orissa High Courts, in the aforementioned cases, cannot be said to be good law.

This decision of the Hon'ble Supreme Court fully covers

this case. The suit property in this case is not belonging to undivided family because there is no dispute between the parties that there was partition by registered deed between the three brothers. Admittedly, no partition suit was filed. Admittedly, the suit for specific performance of contract was filed by the respondent No.1 thereby he admitted the title of Bagedi Seth on the suit property. This clearly proves partition between them. The suit for specific performance was dismissed. Still the purchaser has not filed any partition suit and the execution case which has been filed by the petitioners is not arising out of partition suit rather the execution case has been filed for executing the decree obtained by the petitioners in a suit for declaration of title and recovery of possession. Further, the registered deed of partition is

admittedly of the year 1976 i.e. dated 16.06.1976 and the transfer in favour of the petitioners is dated 06.06.1978.

From perusal of the impugned order, it appears that the Executing Court did not consider these aspects of the matter. The learned counsel, Mr. Arora submitted that in the reply to the Miscellaneous Case, the petitioners never objected the maintainability of prayer under Section 4 of the Partition Act and thereby they subjected themselves to the jurisdiction of the Court and participated in the said proceeding. In such circumstances, now they cannot be permitted to say that the Court had no jurisdiction to pass the order in the execution case arising out of a decree for declaration of title and recovery of possession. So far this submission is concerned, it may be mentioned here that if Section 4 of the Partition Act was not applicable then merely because the petitioners did not object, whether the Executing Court will get jurisdiction to decide the same. The answer will be no.

It is settled principles of law that judgment/decreed/order passed by Court which lacked inherent jurisdiction is non est and void ab initio as the defect of jurisdiction strikes at very root and authority of Court to pass order. Such defect cannot be cured even by consent or waiver of parties. Therefore, if an order is found to

be a nullity, it can also be challenged in collateral proceedings or even at execution stage. In this matter, reference may also be made to the decision of the Hon'ble Supreme Court in the case of **Sarup Singh and Another v. Union of India and Another, (2011) 11 Supreme Court Cases 198.**

Now, it becomes clear that in the facts and circumstances narrated above, Section 4 of the Partition Act was not maintainable and, therefore, the Executing Court had no jurisdiction while executing the decree aforesaid to direct the petitioners to transfer the land after receiving payment of Rs.2,50,000/-.

So far the submission of the learned counsel, Mr. Arora that the pleadings which are filed before this Court were not filed before the Executing Court, therefore, this Court cannot look into the pleading, I do not agree with the submission of the learned counsel. It is not denied by the respondent that he had not admitted regarding partition in his plaint or in his written statement. It is not his case that it was not a suit for declaration of title and recovery of possession. It is admitted fact that decree was filed before the Executing Court. Can it be said that the Executing Court had no knowledge about the nature of decree which he is to execute. In my opinion, therefore, this objection raised by the respondents is

nothing but a technical objection for the sake of objection which speaks a lot against the conduct of the respondents.

It will not be out of place that so far the statements of fact mentioned above are not disputed rather those are admitted facts. In the plaint filed by respondents for specific performance and in the written statement filed in the suit for declaration of title, there is clear admission of partition by registered deed of partition. Now, suppressing all these facts, the respondents filed the aforesaid application under Section 47, 151 C.P.C. read with Section 4 of the Partition Act. In this application, he made a different case and pleaded that the partition was not acted upon and respondents were to purchase the share of Bagedi Seth. This was not his case in the earlier proceedings.

The Hon'ble Supreme Court in the case of **R. N. Gosain v. Yashpal Dhir, A.I.R. 1993 Supreme Court 352** has held that "law does not permit a person to both approbate and reprobate. No party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage." In this present case, the respondent, Ramadhar Seth earlier admitted the



transaction to be valid and now he is pleading that the said transaction was not acted upon. This conduct is nothing but aprobate and reprobate which he cannot be allowed to say. Further, it appears that the respondent No.1 suppressed all these admitted facts and filed the application before the Executing Court and thereby he approached with unclean hand only with a view to linger the execution of the decree.

The Hon'ble Supreme Court in the case of **S.P.Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs. and others, (1994) 1 Supreme Court Cases 1** has held that "the courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation." In the present case, admittedly as stated above, the respondent, Ramadhar Seth suppressed/withheld all these facts and thereby played a fraud on the Executing Court. He did not approach Court



with clean hand. Now, the argument is advanced that these pleadings were not filed by the present petitioner. This is not the matter whether these pleadings/admissions made by the respondent No.1 were filed by the petitioners or not. The matter is whether the facts are correct or not. The respondent No.1 did not disclose the true fact. The Executing Court also did not look into these admitted facts and misapplied Section 4 of the Partition Act.

The learned counsel, Mr. Arora relied upon the decision of the Hon'ble Supreme Court (2015) 5 Supreme Court Cases 423. The Hon'ble Supreme Court in this decision elaborately dealt with the jurisdiction of the High Court under Article 226 and under Article 227 of the Constitution of India. So far the principles laid down by the Hon'ble Supreme Court is concerned, there is no dispute at all. In the said decision also, the Hon'ble Supreme Court has held that even if the scope of Section 115 C.P.C. has been curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

It is settled principles of law that supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the Subordinate Courts within the bounds of their jurisdiction. When a



Subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may exercise supervisory jurisdiction. In this matter, reference may be made to the decision of the Hon'ble Supreme Court in the case of **Shalini Shyam Shetty and another v. Rajendra Shankar Patil, (2010) 8 Supreme Court Cases 329** and **Kokkanda B. Poondacha & Ors. v. K.D. Ganapathi & Anr., (2011) 3 PLJR 46(SC)**.

In the present case, I have already recorded a finding that Section 4 of the Partition Act was not applicable. Therefore, the Executing Court had no jurisdiction to pass the impugned order directing the petitioners to transfer the property on payment of Rs.2,50,000/-. By this impugned order which was obtained by suppression of fact grave injustice has been done to the petitioners and in fact, by the impugned order, the judgment and decree passed by the court below in the suit for declaration of title and recovery of possession has been nullified and in other words, the judgment and decree whereby the suit for specific performance of contract which was dismissed has been allowed. The respondent No.1 was praying the same very relief in the suit for specific



performance of contract which was refused but now he got the same relief from the Executing Court by this impugned order. In my opinion, the order passed by the court below is unique and peculiar order which is never seen earlier. Therefore, the order passed by the court below is void ab initio and non est in the eye of law. In such circumstances, the High Court cannot shut its eyes on mere technicalities that the pleadings were not produced by the petitioners or that the Court below found that the registered partition deed was not acted upon. It will not be out of place to say that the validity or otherwise or acting or non-acting on registered partition deed was never questioned in earlier suits.

In view of the above discussion, since the order itself was void ab initio, without jurisdiction and that the Court acted in a manner not permitted by law causing grave injustice to the petitioners, the petitioners were not obliged to file appeal as provided under Section 4 of the Partition Act. The forum of appeal cannot be determined only because the application has been leveled under Section 4 and the Executing Court had decided allowing the same although, in the present case, Section 4 application was not applicable and Executing Court had no jurisdiction to decide the same. The respondent, Ramadhar Seth never filed any counter-claim claiming relief under Section 4 of

the Partition Act in the earlier suits nor he ever challenged the registered partition deed but by the impugned order, the Executing Court has held that the registered partition deed was not acted upon.

In the result, this application under Article 227 of the Constitution is allowed with costs. The impugned order is set aside and the respondent No.1 is directed to pay cost of Rs.10,000/- to the petitioners within one month and if it is not paid within the aforesaid period, the petitioners are at liberty to realize the same in the execution case. The Court below is directed to execute the decree expeditiously considering the fact that the execution case is of the year 1997.

(Mungeshwar Sahoo, J)

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