

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.1182 of 2013

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Deep Shankar Prasad

.... Petitioner/s

Versus

Dina Nath Sah & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Madan Mohan

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

6 04-11-2015

Heard the learned senior counsel, Mr. Ganpati Trivedi
for the petitioner and the learned counsel, Mr. Bashisth Narayan
Mishra for the respondent Nos.1 to 3.

This application under Article 227 of the Constitution of
India has been filed by the defendant-petitioner against the order
dated 19.12.2012 passed by the learned Munsif, Bagaha, West
Champaran in Title Suit No.23 of 2011 whereby the court below
had allowed



Subsequently, an application under Section 75 read with Order 26 Rule 9 and Order 39 Rule 7 was filed by the plaintiff-respondent for measurement of the suit property. The suit property is only 1 katha 1 dhur. Rejoinder was filed to the said application. The court below after considering the pleadings of the parties and hearing the learned counsels appearing on behalf of both the parties allowed the application and directed to measure the land and also to give report regarding the possession of the other purchasers on the rest portion of the suit plot i.e. Plot No.72 of Khata No.160.

The learned senior counsel, Mr. Trivedi appearing on behalf of the petitioner submitted that the relief claimed in this I.A. by the plaintiffs-respondents should not have been entertained by the court below because in the main suit that was not the relief claimed. The learned counsel further submitted that by the impugned order, the court below directed even to find out the possession of the purchasers regarding the purchase of other part of the suit plot although, those purchasers are not parties to the suit and those part of the suit plot is not the subject matter of the suit. Further, according to the learned senior counsel, the court below has in fact, collected the evidence for the plaintiffs-respondents in the suit which the court below could not have done. On these

grounds, the learned counsel submitted that the impugned order be set aside.

On the other hand, the learned counsel for the plaintiffs-respondents submitted that in fact, the plaintiffs have prayed for measurement of the suit plot which is donated to him by the gift deed and there is mistake in the gift deed. Therefore, he has prayed for correction of the boundary of the gift deed. Since the purchasers of the rest of the suit plot are denying the existence of the suit property measuring 1 katha 1 dhur at the spot, the plaintiffs were compelled to file the application regarding as to whether the suit property exist there or not. Pursuant to the order, the pleader commissioner was appointed and he has also submitted the report. According to the learned counsel, the report of the pleader commissioner specified the purchased portion of the suit plot and also the suit plot. The petitioner has also not filed any objection to the pleader commissioner's report.

The learned senior counsel for the petitioner in reply submitted that the copy of the pleader commissioner's report was not given to the petitioner in spite of requisition but the certified copy of the pleader commissioner's report was supplied to the plaintiffs-respondents. In such circumstances, the petitioner could not file the objection to the pleader commissioner's report.



Perused the impugned order. It appears that the court below after considering the pros and cons and hearing the parties and also considering the pleadings of the parties recorded a clear finding that in the facts and circumstances of the case, it is necessary to exercise the jurisdiction under Order 26 Rule 9 C.P.C. Order 26 Rule 9 C.P.C. provides that “in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

So far the submission of the learned senior counsel that the court below has no jurisdiction to collect evidence for the respondents is concerned, it may be stated here that it is not the case of the plaintiffs that the defendant has encroached the land of the plaintiffs or that it is also not the case of the defendant that the plaintiffs have encroached the land of the defendant. It is specifically stated by the learned counsel for the parties at the time of hearing of this application that the gifted property is distinct than the property purchased by the defendant. In such circumstances, there is no question of collection of evidence

arises.

The learned senior counsel relied upon a decision of this Court reported in **2000(1) PLJR 231(Jayanti Kuer and Ors. v. Laxmichand Upadhyay & Ors.)** is concerned, it may be stated here that in that case, there was rival contention between both the parties regarding possession of the suit property. In the present case, as stated above, the only suit property is 1 katha 1 dhur. Admitted position is that the gifted property is separate and distinct than the property claimed by the purchasers i.e. the petitioner and others. The only defence is that land is not in existence at the spot. In view of this position, the decision relied upon by the learned counsel for the petitioner is not applicable in the present case.

The Hon'ble Supreme Court in the case of **Kokkanda B. Poondacha & Ors v. K.D. Ganapathi & Anr., 2011(3) PLJR 46 (SC)** has held that supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the Subordinate Courts within the bounds of their jurisdiction. When the 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 step in to exercise its supervisory jurisdiction.” Admittedly, the report has already been submitted and therefore, if so advised, the petitioner may file objection to the report of the pleader commissioner.

It is settled principles of law that pleader commissioner’s report is only an evidence in the case. After filing objection, if that is pressed at the time of final hearing of the case, the court below shall decide the objection vis-à-vis the report of the pleader commissioner. It is also settled law that the power of recording a finding with respect to possession is on the Court and the pleader commissioner has no jurisdiction to decide who is in possession of the property.

So far the non-supplying of copy of the pleader commissioner’s report is concerned, if any fresh requisition is filed by the petitioner, the court below is directed to supply the same.

In the result, this writ application is dismissed.

(Mungeshwar Sahoo, J)

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