

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1853 of 2004

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1. Butai Bhagat
2. Mohan Bhagat Both are Sons of Late Ram Nandan Bhagat, Resident of Village Purani Sahar P.S. Daudnagar District Aurangabad

.... Petitioner/s

Versus

1. The State of Bihar
2. Sub Divisional Magistrate, Daudnagar, District Aurangabad
3. (i) Krishna Malakar,
(ii) Tripurary Malakar,
(iii) Murary Malakar All sons of Late Hari Prasad Malakar All resident of Village- Purani Sahar, P.S.- Daudnagar, District- Aurangabad (Bihar) presently residing at Village- Amatoli, Sitapur, P.S.- Sitapur, District- Surguja (Chhatisgarh)
4. Malti Devi wife of Shashi Kumar Sinha, Resident of Ward No. 8, Daudnagar, P.S. Daudnagar, District- Aurangabad (Bihar)

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Dhrub Narayan, Sr. Advocate
Mr. Jitendra Pd. Singh, Advocate.
For the State : Mr. Ravish Chandra, AC to SC-16
For Respondent no.4: Mr. Mrigendra Kumar, Advocate.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 06-04-2015

Heard learned counsel for the petitioners and learned counsel for the State.

2. In the present writ petition, petitioners are challenging the order dated 24.11.2003 passed by the Sub Divisional Officer, Daudnagar in Misc. Case No.408 of 2003 whereby he has rejected the claim of possession of the petitioners with respect to land and structure in dispute. The matter relates to the property i.e. land and house over Plot No.998, Khata No.361,



are 2.1/2 Katha. Present property and other property were part of joint family property. Partition took place in the joint family in the year 1975, all the co-sharers came in possession of respective property. The disputed property had fallen in the share of the father of petitioners with the land and building to the knowledge of all, later on father of the petitioners executed a sale deed in the year 1970.

3. After long lapse of time, father of the petitioner filed title suit vide Title Suit No.187 of 1991 for declaration of title and confirmation of his possession on the ground that the sale deed executed by him in favour of respondent no.3 was farzi and sham deed and also claimed possession over the said plot. The trial court has framed four issues and one of the issue was as follows:

“Is the sale deed dated 28.12.1970 alleged to have been executed by the plaintiff in favour of defendant is bogus, in-operative, void and not binding upon the plaintiff and has not effected the title and possession of the plaintiffs over the suit land given in schedule I of the plaint?”

4. The trial court after discussion of the evidence produced by the parties arrived to a conclusion “ So the possession of defendant over the disputed land also followed the title. On the

basis of the aforesaid discussion issued no.4 is decided against the petitioners.”

5. Against the judgment and decree petitioners moved before the first appellate authority vide Title Appeal No.26 of 1999/37 of 2000. The appellate court did not find favour in the claim of the petitioners that the sale deed executed by the father of the petitioners was sham and fraudulent recorded a finding in paragraph 12 which is as follows:

“The evidence of P.W.10 in para 10 has completely demolished the assertions which was given with respect to fraud. In view of this fact there is no scope to hold that the sale deed was executed or defendant got sale deed executed from the plaintiff appellant by playing fraud on him. It can safely be held that after execution and registration of the sale deed title passed to the defendant respondent and possession of the defendant over the disputed land also passed.”

6. Against that judgment and decree passed by the first appellate court the petitioners have moved before this Court in S.A. No.166 of 2002, during pendency the respondent no.4 approached to the Sub Divisional Officer and requested for a police protection. On the basis of the request the Sub Divisional officer passed the order in favour of the respondent no.4 which



was challenged before this Court vide C.W.J.C. No.11057 of 2002 and this Court has recorded that the counsel for respondent no.4 could not show the possession of respondent no.4 with respect to the property in dispute and on recoding that finding this Court has quashed the order which was passed in favour of respondent no.4 and directed the parties to approach the Sub Divisional Officer who will examine the question of possession of the property.

7. In the meantime the second appeal vide S.A. No.166 of 2002 was taken up and vide order dated 3.7.2003 this Court has rejected the second appeal and specifically gave a finding with regard to the title and possession that the plea of adverse possession was not the issue framed by the court below and the matter regarding possession had not been considered by the courts below whereupon the court has recorded a finding which is as follows:

“ Although there was a plea of adverse possession no issue was framed by either of the courts below and the matter regarding possession had not been considered by the courts below but on perusal of the judgments of both the courts below it is found that the possession in respect of the suit land has been considered by both the courts below and the plea of the plaintiff

regarding possession of the suit land has been disbelieved.”

8. Petitioners were not satisfied with the same and they filed review application vide Civil Review No.106 of 2003. This Court did not find any error apparent on the face of the record and vide order dated 2.7.2004 rejected the review petition.

9. The matter went to the Hon’ble Supreme Court and there he did not succeed.

10. Learned counsel for the petitioners submits that the Sub Divisional Officer after remand of the matter was to discuss the evidence which was brought before him as the fact is that even after the order passed in a civil suit the petitioners and family members were remained in possession of the property and they were never dispossessed by the process of law. He has further submitted that even if there is judgment and decree, *epso facto*, is not entitled to forcibly dispossess adversely, only course is left to file an execution and get the decree executed. He has further submitted that rule of law provides that any person dispossess forcibly, their possession should be restored and the parties may be asked to take recourse through process of law and get a favourable order in his favour. In support of his contention he has relied on (2012)5 SCC 370.

11. Learned counsel for the respondent submits that the



question of dispossession of the petitioners does not arise as after execution of the sale deed, simultaneous possession of property was given, accordingly, possession of respondent no.4 with the property in question has been found by the trial court, appellate court as well as this Court. It has further been submitted that the Sub Divisional Officer was not a regular court he was holding summary enquiry and in enquiry he has recorded an adverse finding against the petitioners, the impugned order cannot be held to be bad in law. So much so in a situation, in civil proceeding the possession of respondent no.4 and his family was found.

12. Having considered the rival contentions of the parties, this Court can not examine about the falsity and authenticity execution of sale deed as, that issue has reached to its finality. So much so the trial court has specifically framed issue no.4 dealing with the possession of the property and finding has been recorded against the petitioners and in favour of respondent no.4. The appellate court has also approved the finding and this Court has specifically dealt with the possession of respondent no. 4 and approved the finding of both the courts below and recorded that respondent no.4 was in possession of the land and this Court in present proceeding in exercise of power conferred under Article 226 of the

Constitution of India can not examine the finding recorded by the second appeal which operates res-judicata against the petitioners. Though this Court is not satisfied with manner the authority has passed the order without discussing the evidence of the parties but there already finding recorded a finding of possession it will not be proper and prudent to remand the matter and reopened the issue of possession of property again. As this Court has considered the issue with regard to possession in favour of respondent no.4 now the Sub Divisional Officer can not give a finding de horse to the finding recorded in civil proceeding, in such situation, even some illegality in the order of the Sub Divisional Officer, will not be prudent to interfere with the order.

13. In this view of the matter, this writ petition does not survive. It is accordingly dismissed.

(Shivaji Pandey, J)

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