

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.21005 of 2011

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1. Sheo Shankar Tiwary @ Shiva Shankar Tiwary S/O Late Umapati Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar).

.... Petitioner/s

Versus

1. Vinay Kuamr Tiwary S/O Late Radha Raman Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
2. Raghwendra Tiwary S/O Late Radha Raman Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
3. Madhwendra Tiwary S/O Late Radha Raman Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
4. Karuna Devi D/O Late Radha Raman Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
5. Shanti Devi W/O Late Radha Raman Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
6. Champa Devi D/O Late Ramsurat Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
7. Chandrakala Devi D/O Late Ramsurat Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
8. Kishori Devi D/O Late Ramsurat Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
9. Ramavati Devi D/O Late Ramsurat Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
10. Rajendra Tiwary S/O Late Laxmipati Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
11. Madanmohan Tiwary S/O Late Laxmipati Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
12. Subhadra Devi D/O Late Laxmipati Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar)
13. Vimla Devi S.O Late Laxmipati Tiwary Resident Of Village- Ranipur, P.S- Vijayipur, District- Gopalganj (Bihar).

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. M. N. Parbat, Sr. Adv.

Mr. Nityanand Mishra, Advocate

For the Respondent/s : Mr. Radha Mohan Pathak, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
C A V O R D E R

10 12-05-2016

Petitioner/plaintiff/decreed holder being aggrieved by

and dissatisfied with the order dated 23.06.2011 passed by Sub-

Judge-1st, Gopalganj in Final Decree Proceeding No. 40/1957 has

preferred the instant petition.

2. In order to properly appreciate the lis, salient feature of the present controversy is to be taken note of;

3. Title (Partition) Suit No. 40/1957 was filed by the petitioner/plaintiff/decreed holder which was decreed on 24.09.1959. Accordingly, preliminary decree was prepared. The aforesaid judgment and decree was challenged by the respondent/defendant/judgment debtor under First Appeal No. 28/1960. Petitioner/plaintiff/decreed holder also filed cross objection. The aforesaid First Appeal along with cross objection was decided vide judgment dated 07.04.1967 whereby and whereunder the judgment and decree of trial court was confirmed with certain modification in terms of cross objection. Accordingly, preparation for final decree commenced whereunder a Survey Knowing Pleader Commissioner was appointed. During midst thereof, a prayer was made on behalf of petitioner/plaintiff/decreed holder for grant of maintenance as the land was under the possession of respondent/defendant/judgment debtor whereupon defendant no.1 was appointed receiver who was simultaneously, directed to pay Rs. 100/- per month as maintenance amount. Subsequently thereof, on 21.03.1968 defendant no.1/receiver had prayed for his exoneration from receiver-ship as well as also



requested before the Court that petitioner/plaintiff/decreed holder be directed to take possession of the property having been demarcated in their share by the Survey Knowing Pleader Commissioner subject to condition that the same was to be influenced by an order being passed on an objection raised on behalf of respective parties and, with the aforesaid condition delivery of possession was effected.

4. The Survey Knowing Pleader Commissioner had submitted his report on 22.08.1969 disclosing the fact that both the parties have disposed of majority of lands either by sale-deed or by mortgage deed whereupon both the parties have filed objection on 20.04.1970, 28.08.1970, 09.01.1970 and 22.11.1972 respectively.

5. During midst thereof, petitioner/plaintiff/decreed holder filed two Execution Cases bearing numbers 15/1965 and 02/1968, respectively, for realization of arrear of maintenance amount. While the aforesaid matter was pending, Gopalganj has been notified as a district having separate identity from Saran at Chapra District and accordingly, vide order dated 26.02.1974. Record was directed to be transmitted to Gopalganj District.

6. During course of aforesaid eventuality, the record became untraceable for quite a long time and lastly in the year

1984, after lapse of approximately 10 years, it was traced out. However, the report submitted by the Survey Knowing Pleader Commissioner got rotten as was eaten up by the rats. Even thereafter, the record was out of main stream from 28.08.1991 to 09.01.1998.

7. As the concerned Survey Knowing Pleader Commissioner had died, report was completely damaged, on account thereof, on 18.04.2000, a prayer was made on behalf of petitioner for reappointment of the Survey Knowing Pleader Commissioner for identification of *Pattibandi* according to share for the purpose of preparing final decree which was also supported at the end of respondent/defendant/judgment debtor by filing a petition on 08.09.2000.

8. On 20.09.2000, petitioner/plaintiff/decreed holder filed petitions asking for mesne profit as well as arrear of maintenance which they subsequently found non appreciable and so, withdrew.

9. It is evident that petitioner/plaintiff/decreed holder insisted that his prayer was confined relating to prayer made on 20.09.2000 only, while learned lower court vide order dated 01.12.2000 observed that petitioner/plaintiff/decreed holder did not press petition dated 20.09.2000 as well as 18.04.2000 and

accordingly, dismissed both the petitions as not pressed. Subsequently thereof, on 11.12.2000, prayer was made on behalf of petitioner/plaintiff/decreed holder to recall the order wherein they could not succeed. The aforesaid order was brought under challenge under C.R. No. 51/2001 and the same was allowed vide order dated 09.05.2002 remitting the matter to the learned lower court to consider afresh in light of observation made therein directing that in case final decree is found duly prepared followed with delivery of possession, then the matter would come to an end otherwise the court will proceed with preparation of final decree. Then thereafter, as the learned lower court, failed to proceed with in terms of observation made by this Court under C.R.No. 51/2001, a petition was filed on 22.07.2003 for reappointment of Survey Knowing Pleader Commissioner to carve out respective *takhta* in terms of preliminary decree whereupon there was an objection at the end of the respondent/defendant/judgment debtor that matter had already been compromised and DP had already been effected in terms thereof, and so, there was no question of reappointment of Survey Knowing Pleader Commissioner. The Court after hearing both the parties came to the conclusion that neither there happens to be compromise petition on record nor final decree has been prepared, therefore, directed the parties to

proceed, vide order dated 16.09.2005 against which, respondent/defendant/judgment debtor filed Civil Revision No. 2354/2005, which was allowed setting aside the order dated 16.09.2005 passed by the learned lower court.

10. The aforesaid order was brought under challenge at the end of petitioner/plaintiff/decreed holder under SLA (Civil) No. 4520/2007 and the same was dismissed on 19.03.2007.

11. Subsequently thereof, petitioner/plaintiff/decreed holder filed petition on 26.06.2007 annexed with the order passed by the Hon'ble Apex Court as referred above and asked for expeditious disposal of the proceeding however, the court sat idle without any development whereupon CWJC No. 14227/2010 was filed on his behalf. The aforesaid CWJC was disposed of directing the learned lower court to expedite and conclude the same at an earliest. It is the order impugned by which prayer of the petitioner/plaintiff/decreed holder has been disposed of, on account thereof, the instant petition has been filed.

12. It has been submitted on behalf of the petitioner/plaintiff/decreed holder that apart from status of the record, they have also filed petition under RTI Act asking for a disclosure regarding date of preparation of final decree which has been answered in negative. That means to say, final decree has not



been prepared upto now and so, the learned lower court was not at all competent to refuse the prayer made on behalf of petitioner/plaintiff/decreed holder. Furthermore, it has been submitted that there happens to be wrong perception that DP has already been effected in pursuance of report submitted by Survey Knowing Pleader Commissioner. It has also been submitted that while granting maintenance to the petitioner/plaintiff/decreed holder, defendant no.1 was appointed receiver who subsequently filed a petition asking for exonerating him from receiver and who, himself had prayed for that petitioner be given possession over the land allotted to his share subject to outcome of an objection made on behalf of the respective parties. Therefore, neither Survey Knowing Pleader Commissioner's report was accepted nor rejected rather for survival of petitioner/plaintiff/decreed holder such relaxation was made at the end of receiver/defendant no.1 himself, although objections were filed on behalf of respective parties which till today is pending in the background of having the report in rotten condition. Therefore, rejecting the prayer of the petitioner for reappointment of Survey Knowing Pleader Commissioner by the learned lower court happens to be bad in law as well as on facts and is fit to be set aside.

13. On the other hand, learned counsel for

respondent/defendant/judgment debtor has submitted that now, after disposal of appeal by the Hon'ble Apex Court, dispute is finally found to be settled and on account thereof, the learned lower court had rightly passed the order impugned which needs no interference.

14. As indicated above, Civil Revision No. 2354/2005 (Annexure-11) was filed against order dated 16.09.2005 by the learned lower court whereby and whereunder reappointment of Survey Knowing Pleader Commissioner was ordered wherein the earlier order dated 09.05.2002 passed in C.R.No. 51/2001 (Annexure-8) was also taken note of and was allowed. The operative portion of the order is quoted below:-

“To my mind, this exercise is a total exercise in futility. The Court was to enquire into the question of delivery of possession. There is no law that prohibits delivery of possession as per report of Pleader Commissioner even prior to final decree if parties agree to it. It was therefore imperative on the part of the trial Court before whom final decree preparation was pending to enquire into aspect of delivery of possession and then take decision. All so was through important document of the plaintiff himself being his application dated 18.04.2000 (Annexure-1) wherein he himself had admitted the delivery of possession. It is well settled that a person cannot abrogate and reprobate as he likes. The plaintiff had clearly taken a stand and accepted the position of delivery of possession on basis whereof he obtained certain order. Now he cannot be permitted to take fresh and deny entire thing and merely state that other application will not be pressed and he did not state that he had made a

wrong submission in that application or a false statement in that application. The application speaks volume and i.e. that the trial Court was required to enquire into before passing any order on the application of the plaintiff.

In that view of the matter, this civil revision is allowed, the impugned order is set aside and petitioner is directed to make a prayer now with regard to delivery of possession before passing any further order appointing fresh Pleader Commissioner.”

15. The aforesaid order was subject to challenge under SLA (Civil) No. 4520/2007 and the same was dismissed. Therefore, the order remained intact.

16. From the order impugned, it is evident that the learned lower court had considered the factum of delivery of possession having been effected in the year 1968 to 1969 by mutual consent and so, observed that the observation having been made by the High Court under Annexure-11 is found duly complied with.

17. As stated above, Annexure-11 got finality in light of dismissal of SLA (Civil) by the Hon'ble Apex Court. After going through Annexure-11, order dated 12.10.2006 passed in Civil Revision No. 2354/2005, it is evident that petitioner/plaintiff/decreed holder's admission under petition dated 18.04.2000 over delivery of possession has been taken note of and



further, the learned lower court was also directed to see and inquire into the aspect of delivery of possession. Petition dated 18.04.2000 is Annexure-4 wherefrom it is evident, specially from para-3 thereof, that the lands were lying scattered in 19 villages out of which the parties disposed of according to their shares and now the land remains lying only at villages, Ranipur Mathh, Mahuawa, Mahuawa Khas, Bakarwa Khas and Hardiaya Dih. Furthermore, there happens to be no controversy over appointment of respondent/defendant/judgment debtor as receiver and further, on his prayer, certain lands so shown under *Takhtbandi* of petitioner/plaintiff/decreed holder was given under his possession in lieu of maintenance. This factual aspect has been overlooked at an earlier occasion. Even on perusal of the order impugned is found not properly been considered in its right perspective.

18. There happens to be specific disclosure in a petition dated 18.04.2000 that lands spread over at different villages comprising 19 in numbers have already been disposed of by the respective parties according to their shares and now, the lands situated at five villages so disclosed therein are left to be partitioned which never been controverted and in likewise manner delivery of possession on a prayer made by defendant no.1/receiver in lieu of maintenance, also not been considered,

then in that event, it was incumbent upon the learned lower court to inquire into the matter whether delivery of possession relating to the lands lying at five villages as disclosed under petition dated 18.04.2000 has been effected in accordance with share identified under preliminary decree. The order impugned is silent on that very score. The learned lower court was directed to inquire into the matter by Annexure-11 and the aforesaid exercise has not properly been conducted in its true tone and tenor.

19. That being so, the order impugned is set aside. Petition is allowed.

20. The matter is remitted back to the learned lower court to do proper exercise in accordance with direction given under order dated 12.10.2006 passed under Civil Revision No. 2354/2005.

(Aditya Kumar Trivedi, J)

Patna High Court
May 12th 2016
Perwez/AFR

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