

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9690 of 2010

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1. Rabindra Kumar (Paswan), son of Late Ram Nandan Prasad (Paswan), r/o Mohalla- Purenderpur, P.S. Pirbahore, Distt.- Patna
 2. Santosh Kumar Paswan, s/o Sri Rabindra Kumar Paswan, r/o Mohalla- Purenderpur, P.S. Pirbahore, Distt.- Patna
 3. Smt. Reena Devi, w/o Sri Santosh Paswan, r/o Mohalla- Purenderpur, P.S. Pirbahore, Distt.- Patna

.... Petitioners

Versus

1. Sunita Devi, d/o Sri Rabindra Kumar And w/o Sri Dilip Sarkar
2. Dilip Sarkar, s/o Sri Banslochan Paswan Originally r/o Vill.- Mohari, P.O. Mokari, P.S. Bhabhuya, Distt.- Kaimoor. At Present r/o With His Wife Sunita Devi, Mohalla- Puranderpur, P.S. Pirbahore, Distt.- Patna
3. Prem Shanker Paswan, s/o Sabitri Devi, r/o Bakerganj (Nalapar), P.S.- Pirbahore, Distt.- Patna
4. Munni Devi, widow of Late Shyam Babu Paswan, r/o Mohalla- Kaushal Nagar Chitkohra, P.S. Gardanibagh (Wrongly Mention As P.S. Kotwali), Distt.- Patna

.... Respondents

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Appearance :

For the Petitioners : Mr. Dhanendra Chaubey, Advocate

For the Respondents : Mr. Arabind Nath Pandey, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 19-07-2016

Heard the parties.

Petitioners are the defendant no. 1 to 3 before the learned lower court. They are aggrieved by an order dated 30.03.2010 passed by Sub-Judge-XII, Patna in Title (Partition) Suit no. 118 of 2013.

Although, there happens to appearance of all the respondents but during the course of hearing, only respondent

no. 3 is being represented.

Respondent no. 1 and 2 filed the aforesaid Title (Partition) Suit no. 118 of 2013 asking for following reliefs :-

1. *Upon adjudication of the facts and circumstances stated above, the share of the Plaintiff no. 1 in the house and landed property in suit fully described in Schedule no. 1 to the plaint be decided.*
 2. *After granting the relief no. 1 to the plaintiff no. 1 or deciding the share of the plaintiff no. 1 in the suit properties, Takhtabandi may be made in the suit properties according to the decree in favour of the plaintiff no. 1.*
 3. *The plaintiffs may be put in possession of the allotted share of land and house to the plaintiff no. 1 through the process of the Court.*
- 3A. *It may be declared that the alleged sale deed dated 19.01.2003 is a forged,*

fraudulent, false fabricated, fogus, illegal, void, inoperative, motivated, mischievous, without consideration money, sham and showy document and is not binding upon the plaintiffs as well as upon their share in the suit property. The purchaser had not paid the consideration money to the vendors.

And for that furnished a genealogical table wherefrom, it is evident that there was one Danwari Dusadh who has two sons namely Sarjoo Dusadh and Kalau Dusadh. Mundar Dusadhin happens to be wife of Sarjoo Dusadh while Chanvali Dusadhin happens to be wife Kalau Dusadh. Sarjoo Dusadh has daughters namely Sushila Devi, Sabitri Devi and a son namely Rabindra Kr. Paswan whose wife happens to be Sharda Devi, plaintiff Sunita Devi is their daughter while Santosh Kumar happens to be the defendant. It is also evident that another daughter Sabitri Devi has a son namely Prem Shanker.

It is apparent that at an initial stage only Rabindra Kr. Paswan, Santosh Kr. And Reena Devi were the



party as defendants. They appeared on notice and filed their written statement. Subsequently thereof, issues were settled and then the evidence of the respondent parties, as is evident from para 7 of the petition, commenced. The evidence of plaintiff was closed on 09.05.2006 while the evidence of defendant no. 1 to 3 was closed on 09.11.2006. As is evident from para 8 thereof, Prem Shankar Paswan as well as Munni Devi filed petition under Order 1 Rule 10 of the Code of Civil Procedure and same was allowed vide order dated 21.12.2006 and accordingly, they both filed their independent written statement on 08.01.2007 and 12.02.2007, respectively. Then thereafter, the evidences of newly added defendants were closed on 05.12.2007 as well on 10.12.2007. Furthermore, it has also been pleaded that argument begin.

Subsequently thereof, the case has a twist. As per para 11, it is apparent that defendant no. 4 Prem Shankar Paswan advanced his plea in terms of Order 8 Rule 6A C.P.C., by way of counter claim whereupon rejoinder was invited and then, thereafter, vide order dated 12.03.2008, the same was rejected. Thereafter, on 23.12.2009, a petition was filed on behalf of



aforesaid Prem Shanker Paswan to amend the issue whereupon defendant no. 1 to 3/ petitioners filed their objections and, after hearing both sides, by the order impugned, the learned lower court rejected the other proposed issues having furnished at the end of Prem Shanker Paswan/ defendant no. 4, however, picked up issue no. 1 and on the basis thereof, re-casted the issue which has caused annoyance to the petitioners and thereafter, challenged the order impugned by way of filing instant petition.

Manifold arguments have been advanced by the learned counsel for the petitioners in order to challenge the order impugned. The first and foremost happens to be that learned lower court would not have allowed by selecting proposed issue no. 1 and further, would not have recasted the issue in the background of the fact that counter claim having been made on behalf of the Prem Shanker, defendant no. 4 stood rejected at an earlier occasion. That being so, all the proposed issues having been tendered at the end of Prem Shanker, defendant no. 4 happens to be nothing but cyclostyle of the counter claim and, being rejected at an earlier occasion, the learned lower court should have disowned the same. Furthermore, it has also been



submitted that the alleged proposed issue should not be allowed in the background of the fact that it happens to be outside the pleading. Apart from the fact, that by such re-cast, the learned lower court have given an opportunity to open the Pandora box which, at an earlier occasion been discouraged. It has also been submitted that the aforesaid proposed issue does not happens to be the matter of controversy whereupon, the finding so recorded by the learned lower court would not survive. Consequent thereupon, the instant petition is fit to be allowed.

At the other end, the learned counsel representing respondent no. 3 (defendant no. 4) Prem Shanker Paswan has submitted that the order impugned is just, legal and proper in the background of the fact that issues are to be settled on the basis of the pleading of the respective parties by identifying the matter of controversy over factual as well as legal aspect. It has further been submitted that admittedly when the issue was settled, there was no presence of these defendants (defendant no. 4 and 5). They have filed written statement and in the aforesaid background, it was incumbent upon the learned lower court to consider the same and should have identified the matter of



controversy and it was proper for the learned lower court to re-cast the issues on the basis thereof. Furthermore, it has also been submitted that rejection of counter claim would not barricade the power of the Court in recasting the issues. It has also been submitted that power is exclusively vested to the Court for recasting of issue over the matter of controversy, and only to assist the Court, the points have been furnished and out of which, proposed issue no. 1 has been selected by the learned lower court to be relevant for the purpose of adjudication. Apart from this, it has also been submitted that status of petitioners happens to be at par with the status of defendant no. 4 and 5 and on account thereof, they are excluded from challenging the status of the defendant no. 4 and 5. That being so, it has been submitted that the instant petition is fit to be rejected.

First of all, the power of the Court has to be perceived in terms of Order 14. Order 14 Rule 1 authorizes the Court to frame issue over the material proposition of fact and law advanced by one party and denied by the other. The basis for framing of issue happens to be the respective pleadings. Admittedly, while the issue was settled, the presence of defendant

no. 4 ad 5 was not at all on the record. After closure of evidences of both the parties having been on record since then, presence of defendant no. 4 Prem Shanker and Defendant no. 5 Munni Devi took place, whereupon written statement which was admitted. Then, it was incumbent upon the learned lower court to have gone through the pleadings of defendant no. 4 and 5 and further, should have tested whether any new issue is warranted or not.

Whether the Court has got power on this score can be traced out under Order 14 Rule 5 of the Code of Civil Procedure wherein the Court has got power to amend or to strike out the issues. Therefore, the Court was well within its province while perceiving the controversial *lis* and further re-casting the same.

Apart from this, even if it is found that the aforesaid issue happens to be irrelevant for the purpose of adjudication of the *lis*, it will not cause prejudice to the petitioner/defendant, as the Court happens to be duly empowered to strike out the same even at the stage of judgment.

That being so, the instant petition is found devoid of merit and is accordingly rejected.

(Aditya Kumar Trivedi, J.)

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