

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6604 of 2011

Along with

Interlocutory Application No. 8494 of 2014

Along with

Interlocutory Application No. 9930 of 2016

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1. Sunil Kumar Bose, S/O Late Kunj Bihari Bose, R/O Mohalla Suratganj, Ward No. 11 Town P.S. +P.S. & Distt. Madhubani
 2. Sudip Kumar Bose, S/O Sunil Kumar Bose, R/O Mohalla Suratganj, Ward No. 11 Town P.S. +P.S. & Distt. Madhubani

.... Petitioner/s

Versus

1. Smt.Anju Roy W/O Santa Kumar Roy R/O Mohalla Suratganj, Ward No. 11 Town P.S. +P.S. & Distt. Madhubani At Present Residing At Qr. No. D/144, Mohalla Udyogpuri, Town P.O+ P.S. & Dist Kota (Rajasthan)
2. Smt. Ranju De@ Runa , Wife Of Faiaz Ahmad @ Chand R/O Mohalla Suratganj, Ward No. 11 Town P.S. +P.S. & Distt. Madhubani
3. Surendra Nath Das @ Surendra Nath Dey S/O Late Hari Bhusan De R/O Mohalla Suretganj Ward No. Ii Town , P.O & P.S. +Distt. Madhubani At Present Residing At 9/2 Bosepura By Lane Shankar Bazar Warisha, P.S. Thakurpur Town, Kolkatta (West Bangal)
4. Surya Kumar Dey S/O Manendra Nath Dey R/O Mohalla Suretganj Ward No. Ii Town , P.O & P.S. +Distt. Madhubani At Present Residing At 9/2 Bosepura By Lane Shankar Bazar Warisha, P.S. Thakurpur Town, Kolkatta (West Bangal)
5. Arya Kumar Dey S/O Manindra Nath Dey R/O Mohalla Suretganj Ward No. Ii Town , P.O & P.S. +Distt. Madhubani At Present Residing At 9/2 Bosepura By Lane Shankar Bazar Warisha, P.S. Thakurpur Town, Kolkatta (West Bangal)
6. Sumitra Kumar Dey S/O Surendra Nath De @ Surendra Nath Dey R/O Mohalla Suretganj Ward No. II Town , P.O & P.S. +Distt. Madhubani At Present Residing At 9/2 Bosepura By Lane Shankar Bazar Warisha, P.S. Thakurpur Town, Kolkatta (West Bangal)
7. Pulkit Ram S/O Khatru @ Bare Bhai R/O Ward No. 14, Mohalla Suratganj, P.O+ P.S. & Distt. Madhubani
8. Ghanshyam Sah S/O Bikau Sah R/O Ward No. 12, Mohalla Suratganj, P.O+P.S & Distt. Madhubani
9. Ashok Kumar Sah S/O Late Jai Naraiyan Sah R/O Mohalla Suratganj, Ward No. 12 Town P.S. +P.S. & Distt. Madhubani
10. Vishwanath Thakur S/O Late Naraiyan Thakur R/O Mohalla Suratganj, Ward No. 12 Town P.S. +P.S. & Distt. Madhubani
11. Sita Ram Safi S/O Late Thakkan Safi R/O Mohalla Suratganj Ward No. 14 Town P.S. & P.O And Distt. Madhubani
12. Ram Deo Ram S/O Ganour Ram R/O Mohalla Suratganj, Ward No. 12 Town P.S. +P.S. & Distt. Madhubani
13. Sita Ram Suman S/O Late Santjee R/O Mohalla Suratganj, Ward No. 12 Town P.S. +P.S. & Distt. Madhubani
14. Suraj Purbey S/O Ram Chandra Purbey R/O Mohalla Suratganj, Ward No. 10 Town P.S. +P.S. & Distt. Madhubani



15. Baij Nath Thakur S/O Late Sahdeo Thakur R/O Mohalla Suratganj, Ward No. 11 Town P.S. +P.S. & Distt. Madhubani
16. Kali Sharan Sah S/O Ram Prasad Sah R/O Mohalla Suratganj, Ward No. 12 Town P.S. +P.S. & Distt. Madhubani
17. Sujeet Kumar Bose S/O Sunil Kumar Bose R/O Mohalla Suratganj, Ward No. 11 Town P.S. +P.S. & Distt. Madhubani

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Prabhat Ranja, Advocate
Mr. Ashok Kumar Prasad, Advocate
For the Respondents no.1 and 2 : Mr. Shashi Nath Jha, Advocate

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH
ORAL JUDGMENT

Date: 19-01-2017

Heard learned counsel for the parties.

Re.: Interlocutory Application No. 8494 of 2014

The present Interlocutory Application has been filed on behalf of the petitioner to substitute petitioner no.1, who died on 7.10.2014, by his heirs mentioned in paragraph no.2 of the application.

After having heard learned counsel for the parties and considering the facts and circumstances of the case, the prayer is allowed.

Let the name of petitioner no.1 be substituted by his heirs detailed in paragraph no.2 of the writ application.

Interlocutory Application No. 8494 of 2014 stands disposed off.

Re.: Interlocutory Application No. 9930 of 2016

The present Interlocutory Application has been filed on



behalf of respondents no. 1 and 2 praying for recall of the order of stay granted on 14.10.2009.

Since, with the consent of the parties, the main writ application is being taken up for final disposal, no order is required to be passed on the Interlocutory Application No. 9930 of 2016, which, accordingly, stands disposed off.

Re.: Civil Writ Jurisdiction Case No. 6604 of 2011

The challenge in the present writ application is to the order dated 11.5.2009 passed by the Sub-Ordinate Judge III, Madhubani in Title Suit No. 83 of 2000 by which the petition dated 27.3.2009 filed by the petitioners for deciding the maintainability of the suit as a preliminary issue has been rejected.

Learned counsel for the petitioner submitted that Title Suit No. 83 of 2000 has been filed by respondents no.1 and 2 in which one of the reliefs sought is to hold and declare that the gift deed dated 2.4.1992, said to have been executed by Sri Birendra Nath De in favour of the petitioner, was illegal, fraudulent, void and inoperative and not binding upon the plaintiff and to hold that the title of the plaintiff over the said land and possession be declared confirmed.

Learned counsel submitted that the petitioner filed a petition on 27.3.2009 taking the plea that the said relief was also the relief sought for by respondent no.2 in Title Suit No. 45 of 1990



preferred by her in which defendants no.3 and 4 are petitioners in the present case. He submitted that in the said suit, the defendants had appeared and also filed their written statement and thereafter, due to repeated non-appearance of the plaintiff, that is, respondent no.2, the said suit was dismissed for default. Learned counsel submitted that in terms of the provisions of Order 9 Rule 8 of Code of Civil Procedure (hereinafter referred to as 'the Code') the said order was passed and thereafter Order 9 Rule 9 of the Code barred fresh suit where a suit is partly dismissed under Order 9 Rule 8 of the Code. Learned counsel submitted that Section 11 of the Code described *res judicata* and in the present case, on that principle, the present suit was not maintainable. Learned counsel submitted that once a petition was filed challenging the maintainability of the suit, the same has to be decided as a preliminary issue for the reason that when it can be shown to the Court that the issue cannot be gone into or contested in a full-fledged proceeding, the Court should decide the preliminary issue so as to ascertain whether the suit should be conducted in usual course or can be decided on the basis of such preliminary issue at the first instance so as to save the Court from unnecessarily going into all issues which may have been raised and formulated in the suit after adducing evidence on every point.

Learned counsel submitted that by the impugned order,



the Court has deferred such consideration and observed that at the time of final hearing it would be heard and dealt with in the judgment itself, which is not permissible in law. For such proposition, learned counsel relied upon a decision of this Court in the case of **Krishna Kumar Tibrewal vs. Sheo Narayan Prasad @ Sheo Shankar Prasad**, reported as **2005(4) PLJR 580**, the relevant being at paragraphs no. 5 and 6. He submitted that in view of the said judgment, the Court had discretion either to allow the application or reject it or in the alternative to keep the issue pending only if it came to the conclusion that the issue was a mixed question of law and fact. He submitted that in the present case, the issue is purely legal, based on the provisions of Order 9 Rules 8 and 9 read with Section 11 of the Code and thus the same not being mixed question of fact and law should have been decided one way or the other.

Learned counsel for the respondents no.1 and 2, who are the contesting respondents and who are the plaintiffs in Title Suit No. 83 of 2000, submitted that the plea of the petitioner is misconceived for the reason that initially Title Suit no. 45 of 1990 was based on the information available to the respondents no.1 and 2, that two of the petitioners were claiming the land in question to have been gifted by the father of the respondents no.1 and 2, but upon being informed that the same was on the basis of the oral gift deed, they were advised not



to pursue the Title Suit as the same was meaningless. He submitted that thereafter, when the respondents no.1 and 2 became aware of there being a written gift deed executed in favour of two of the petitioners then only Title Suit No. 83 of 2000 was filed and the same relief was sought, in addition to other reliefs. It was submitted that Title Suit No. 83 of 2000 is a partition suit and, thus, there cannot be any *res judicata* as it is a continuing cause of action. For such proposition he relies upon the decision of this Court in the case of **Ram Krishna Thakur vs. Om Prakash Thakur**, reported as **2010(1) PLJR 293**, the relevant being at paragraphs no. 10, 15 and 16.

Learned counsel further submitted that even if the court below has passed a wrong decision, it cannot be a ground to exercise jurisdiction in the present matter under Article 227 of the Constitution of India as it is a power of superintendence and unless the wrong is referable to dereliction of duty and abuse of power resulting in grave injustice, the said power should not be invoked.

Learned counsel further submitted that with regard to the decision in the case of **Krishna Kumar Tibrewal** (supra), relied upon by the learned counsel for the petitioner, the same has no bearing on the facts and circumstances of the present case for the reason that in the said case the Court was considering the issue arising out of a Miscellaneous Case in a matter in which there was alleged violation



of the order of injunction. He submitted that since the Court was not required to go into any factual aspect, in that context it was observed that the maintainability issue should have been decided first, whereas, in the present case, which is a partition suit, there are other parties who are co-sharers and though the land which was part of Title Suit No. 45 of 1990 has also been included, there are other properties also and thus, on this ground the whole suit itself cannot be said to be not maintainable.

At this stage, learned counsel for the parties agreed that the Suit itself be finally decided within six months by the Court below and the issue raised by the petitioners in their petition dated 27.3.2009, be also adjudicated upon as a separate issue on the point of maintainability.

In view of the aforesaid, the writ petition stands disposed off with a direction to the Court below, before which Title Suit No.83 of 2000 is pending at Madhubani, to conduct the case, preferably on a day to day basis and pass final judgment latest by 31st August, 2017.

It goes without saying that the interim order of stay dated 14.10.2009 stands vacated.

(Ahsanuddin Amanullah,J)

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