

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10657 of 2015

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1. Bangali Yadav, son of late Doma Yadav, Resident of Village-Dinapatti, Tole-Gularbaga, P.O.-Bharatpura, Police Station-Gautumbudh Nagar, District Siwan.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar.
2. The District Magistrate, siwan.
3. The District Programme Officer, Siwan.
4. The Superintendent of Police, Siwan.
5. The Sub-Divisional Officer, Siwan.
6. The Sub-Divisional Police Officer, Siwan.
7. The Circle Officer, Pachrukhi, District -Siwan.
8. The Block Development Officer, Pachrukhi, District Siwan.
9. The Station- Head-officer, Police Station- Gautum Budh Nagar District Siwan.
10. Rajdeo yadav
11. Ganesh yadav
12. Nand kishore Yadav. All respondent No. 10 to 12 sons of late Utim Yadav
13. Yogendra Yadav, Son of Rajdeo yadav
14. Nagendra Yadav, son of Rajdeo yadav
15. Sanjay Yadav, Son of Nand Kishore Yadav
16. Permod Yadav, son of Nand Kishore Yadav
17. Pankaj Yadav, son of Ganesh Yadav
18. Dhananjay Yadav, Son of Sudama Yadav. All (10 to 18) are resident of Village Dinapati Tole- Gularbaga, P.O. Bharat Pura, Police Station- Gautambudh Nagar, District Siwan.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Shambhu Prasad Yadav
For the Respondent/s : Mr. Prashant Pratap

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL ORDER

6 04-07-2017 Heard learned counsel for the petitioner and learned
G.P.-2 for respondent nos. 1 to 9.

The present writ application has been filed for a
direction to the respondent nos. 2 to 9 to get the illegal



encroachment removed from the public road appertaining to Khata No. 99, Plot No. 516 and Khata No. 138, Plot No. 1017, situated in Village Dinapatti in the District of Siwan.

It is claimed by the petitioner that the land in question was transferred by the petitioner and others in favour of Government of Bihar on which road was constructed but subsequently, it was encroached and obstructed by private respondents.

A counter affidavit has been filed on behalf of respondent nos. 2 to 5 and 7 to the effect that the Circle Officer, Pachrukhi, respondent no.7, took cognizance of the matter and got the issue enquired into by Halka Karamchari, who submitted his report on 10.06.2015 to the effect that the land in question having total area measuring about 2 bigha, 11 katha and 7 dhurs of land is recorded in R.S. Khatiyani in the name of Laxman Rawat and is not a Government land. Presently, there are five co-sharers of the land in question. The petitioner and his brothers have executed a gift deed in favour of Hon'ble Governor, Bihar with regard to 13 dhurs belonging to other co-sharers. Statement to that effect has been made in paragraph 4 of the counter affidavit, which reads as follows:-

“That as per the aforesaid report the land in



question having total area 2 bigha 11 katha 7 dhur is recorded in R.S. Khatiyani in the name of Laxman Rawat and is not a Government land. Presently there are 5 co-sharers including the petitioner in respect of the said land. The petitioner and his brothers have executed a Sale Deed (Annexure-2 to the writ petition) in favour of the State of Bihar in respect of 13 dhur of the portion belonging to other Co-sharers. It has been reported that the said sale deed has been executed without permission of the Government authorities and allegations of encroachment are mala fide and not maintainable.”

Further statement has been made in para 6 of the counter affidavit that Jamabandi No. 69/29 is standing in the name of Ram Sawroop Chaudhary in respect of the aforesaid land bearing Khata No.99, paragraph no.6 of the counter affidavit reads as follows:-

“That importantly, Jamabandi No. 69/29 is standing in the name of Ram Sawroop Chaudhary in respect of the aforesaid land bearing Khata No.99.”

Further statement has been made in para 9 of the counter affidavit that since the land in question is not a government land, hence encroachment proceeding cannot be



initiated.

Having heard learned counsel for the parties, this Court feels necessary to deliberate upon the issue, whether factual issues and disputed question of facts can be looked into, while exercising discretionary jurisdiction under Article 226 of the Constitution of India. There is no binding rule that the High Court cannot try the issue of facts in a writ application, but in such cases where relief has been prayed for on the basis of disputed question of facts, which cannot be determined without leading of evidence, the Court should ordinarily relegate the parties aggrieved to agitate the issue before Civil Court. This is, however, a rule of practice and not an incident of jurisdiction of the High Court.

Facts are of two types. (i) The facts which the court or an authority determines for the purpose of deciding the question before it; and (ii) the facts which must exist before the Court or a Tribunal for exercise of its jurisdiction which is called jurisdictional or preliminary facts. When the writ discretion cannot be exercised for deciding the question before the court in view of disputed question of fact, it falls in the first category but where alternative remedy is available to the party concerned then it falls under jurisdictional or preliminary facts.



In each case, the court has to consider whether the party seeking relief has an alternative remedy which is equally efficacious. Hence, when the party claims title or possession over the property then in such case equally efficacious remedy is by way of suit.

In a petition under Article 226 of the Constitution of India the High Court has the jurisdiction to try the issue both on facts and law. Exercise of jurisdiction is, no doubt, discretionary but discretion must be exercised on sound judicial principle. When the petitioner raises complex question of law and facts which may, for their determination, require oral evidence to be taken, then in that case the court should ordinarily restrain to exercise the discretionary remedy.

The Apex Court elaborated the same view in the case of Real Estate Agencies Vs. State of Goa and Ors. (2012) 12 Supreme Court Cases 170 where certain development works/raising construction over some plot of land was in dispute though the title over the land was not in dispute but it was held that the writ court may refuse to interfere if the process of determination of the issue, the disputed question of fact or title would be required to be adjudicated. Paragraph 16 reads as follows:-



“16. A reading of the order of the High Court would go to show that its refusal to interdict the developmental works undertaken or about to be undertaken is on the ground that the Petitioner has an efficacious alternative remedy, i.e. a suit for injunction. The Writ Court exercising jurisdiction under Article 26 of the Constitution is fully empowered to interdict the State or its instrumentalities from embarking upon a course of action to detriment of the rights of the citizens, though, in the exercise of jurisdiction in the domain of public law such a restraint order may not be issued against a private individual. This, of course, is not due to any inherent lack of jurisdiction but on the basis that the public law remedy should not be readily extended to settlement of private disputes between individuals. Even where such an order is sought against a public body the Writ Court may refuse to interfere, if in the process of determination disputed questions of fact or title would require to be adjudicated.”

High Court exercises very wide power under Article 226 of the Constitution of India in exercise of the said power, it can issue a writ, direction or order for enforcement of fundamental rights as also for any other right or purpose. At the same time, however, High Court is not expected to convert itself into a fact



finding authority or a court of first instance in cases where seriously disputed questions of fact or mixed questions of fact and law are involved. In a petition under Article 226 of the Constitution of India, High Court has jurisdiction to try issues of facts and laws but this jurisdiction is discretionary in nature, hence such discretion must be exercised on sound judicial principles.

Similarly, the Apex Court in the case of Union of India and Others Vs. Ghaus Mohammad AIR 1961 Supreme Court 1526, held that a proceeding under Article 226 of the Constitution of India is not an appropriate forum to seek relief if such relief is based on disputed question of facts. Paragraph 9 reads as follows:

“9. The question whether the respondent is a foreigner is a question of fact on which there is a great deal of dispute which would require a detailed examination of evidence. A proceeding under Art. 226 of the Constitution would not be appropriate for a decision of the question. In our view, this question is best decided by a suit and to this course neither party seems to have any serious objection. As we propose to leave the respondent free to file such a suit if he is so advised, we have not dealt with the evidence on the record on the question of the respondent's nationality so as not to prejudice any proceeding that may be brought in the future.”



Same view has been reiterated by the Apex Court in the case of State of Rajasthan Vs. Bhawani Singh and Others, AIR 1992 SC 1018, holding that disputed questions relating to title cannot be satisfactorily gone into or adjudicated upon in a writ proceeding. Paragraph 9 reads as follows:

“9. Having heard the counsel for the parties, we are of the opinion, that the writ petition was misconceived insofar as it asked for, in effect, a declaration of writ petitioner's title to the said plot. It is evident from the facts stated hereinabove that the title of the writ petitioner is very much in dispute. Disputed question relating to title cannot be satisfactorily gone into or adjudicated in a writ petition.”

In the case of D.L.F. Housing Construction (P) Ltd Vs. Delhi Municipal Corpn. and Others, (1976) 3 Supreme Court Cases 160, the question related to the right of ownership over a land, a Four Judge Bench of the Apex Court held that in a case where the basic facts are disputed and complicated question of law and fact depending on evidence are involved, the writ court is not a proper forum for seeking relief. Paragraph 18 reads as follows:

“18. In our opinion, in a case where the basic facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ



court is not the proper forum for seeking relief. The right course of the High Court to follow was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may if so advised, seek their remedy by a regular suit.”

In the present case, the issue raised cannot be decided in a summary proceeding under the provisions of Bihar Public Land Encroachment Act, since the fundamental facts have not been brought on record through pleadings and counter pleadings whether the land in question is a public land or still it is a private land. Such issue can be decided only after leading of evidence properly in a suit before Civil Court.

Accordingly, this writ application is disposed of with liberty to the petitioner to seek remedy before appropriate forum.

(Dinesh Kumar Singh, J)

Amrendra/-Anil/

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