

AD-04
Ct No.01
Jalpaiguri
31.01.2023
TN

**Calcutta High Court
In The Circuit Bench at Jalpaiguri
Appellate Side**

CO 65 of 2022

Netra Bahadur Sarki and another
Vs.
Nar Bahadur Sarki and another

Ms. Rima Sarkar,
Ms. Sidhi Sethia

...for the petitioners

Mr. Jagriti Mishra,
Mr. Subhankar Dutta,
Mr. Subham Gupta,
Mr. Debayan Goswami,
Mr. Reshab Kumar,
Mr. Raj Kumar Mitra

....for the opposite parties

Learned counsel for the petitioners contends that the petitioners are the son and daughter-in-law respectively of the opposite party no.1. The present challenge has been preferred against an order of the Sub-Divisional Magistrate concerned, whereby eviction of the petitioners was directed at the behest of the opposite party no.1 in a proceeding under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (for short “the 2007 Act”).

Learned counsel for the petitioners contends that the said proceeding is not maintainable in view of Section 4 of 2007 Act contemplating that only in cases where the petitioner in the case is not able to maintain himself/herself, such an application is maintainable. In the present case, however, the opposite party no.1 is an ex-BSF personnel and enjoys pension. That apart, it is submitted that the present land was given jointly by way of a *Patta* issued by the Government in favour of opposite party no.1, that is, the father of the petitioner no.1 as well as the mother of the petitioner no.1. As such, upon subsequent demise of the mother, the petitioner no.1 has also acquired interest by inheritance in the property jointly with the opposite party no.1. Hence, it cannot be said that the opposite party no.1 is the sole owner of the property.

It is also argued by learned counsel for the petitioners that by a registered deed, the opposite party no.1 himself had transferred the property in favour of a third party namely one Dilip Chhetri. The said third party subsequently has instituted a suit, *inter alia*, for *khas* possession of the property against the opposite party no.1, which is now pending. It is contended that in view of the pendency of the said suit and the existence of the registered deed, the opposite party no.1 had no *locus*

standi to obtain the order impugned in the present revisional application.

Learned counsel appearing for the opposite party no.1, at the outset, challenges the maintainability of the present application under Article 227 of the Constitution of India.

It is submitted that initially the order of the Sub-Divisional Magistrate was challenged by way of a writ petition under Article 226 of the Constitution. Upon being turned down, subsequently an appeal was preferred before the Division Bench. The Division Bench, it is submitted, was of the opinion that the issue as to whether an application under Article 226 or 227 would be maintainable was left to be decided by the learned Single Judge.

Subsequently, the matter came back to the learned Single Judge concerned and another coordinate Bench, while deciding the same, was of the opinion that an application under Article 227 and not one under Article 226 would be maintainable against an order of the first forum.

Learned counsel for the opposite party no.1 further argues that the petitioners went for forum shopping by subsequently challenging the order of the Magistrate in a miscellaneous appeal before the appropriate appellate forum, that is, the District Magistrate concerned.

The District Magistrate, however, was of the opinion that the appeal was not maintainable.

Learned counsel for the opposite party no.1 next places reliance on an unreported Division Bench judgment of this court in the Circuit Bench at Port Blair in the matter of *Ms. Sahidun Nisa vs. The Lieutenant Governor & others* dated October 31, 2017 in support of the proposition that the 2007 Act was enacted for institutionalization of a suitable mechanism for protection of life and property of older citizens. The insistence upon life as well as property enures to the benefit of the opposite party no.1 in the present context, it is submitted.

Heard learned counsel for the parties.

Inasmuch as the question of maintainability of the present application under Article 227 is concerned, in view of the last order of the coordinate Bench passed in the previous writ petition filed by the present petitioners, whereby it was held that an application under Article 227 and not one under Article 226 is maintainable, there cannot be any doubt regarding the maintainability of the same.

Inasmuch as the preference of an appeal against the order of the Sub-Divisional Magistrate by the present petitioners is concerned, the non-mention of the same does not have a fatal bearing on the present case. This is

so because the District Magistrate/appellate forum was ultimately of the opinion that an appeal is not maintainable and, as such, the present application under Article 227 of the Constitution of India, from that perspective as well, is entirely in consonance with the said order of the District Magistrate and there cannot arise any question of suppression of the factum of appeal, since the same would not have affected the outcome of the present application under Article 227 in any event.

Moreover, on merits, the petitioners have made out a strong case, at least at a *prima facie* level, with regard to the opposite party no.1 not being a dependent or without means to support himself, as contemplated within the purview of Section 4 of the 2007 Act.

That apart, the execution of a purported registered deed by the opposite party no.1 himself, coupled with the fact that the property thereby transferred substantially tallies with the subject-matter of the *Patta* granted in favour of the petitioners' parents, itself is a sufficient indicator that the opposite party no.1 had no *locus standi* to maintain the proceeding under the 2007 Act.

That apart, since the matter is *sub judice* in a civil suit between the opposite party no.1 and a third party/transferee, it cannot be said at this stage

conclusively that the opposite party no.1 is entitled to maintain the proceeding under the 2007 Act.

Inasmuch as the contention of the opposite party no.1 as regards the property covered by the said deed and the present property being different, the same cannot be accepted, in view of the two being identical inasmuch as the schedule of the said registered deed and the present *Patta* as well as the subject-matter of the present proceeding is concerned.

Insofar as the Division Bench judgment cited by the opposite party no.1 is concerned, the only observation made therein which might have been remotely of relevance is that Section 22(2) of the 2007 Act even goes to the extent of providing for the State Government to prescribe a comprehensive action plan for providing protection of life and property of senior citizens. It was held that the scheme of the Act provides, *inter alia*, for protection of life and property of older persons.

It was also observed that nowhere the Act specifically excludes passing of an order of eviction/vacation by a competent tribunal in respect of a property where an elderly parent or a senior citizen has a right or interest, if the same is required to be passed for the purpose of protection of both life and property of the older persons.

However, in view of the above discussions, a cloud is cast on the question as to whether the opposite party no.1 is at all a person who is unable to maintain himself, in view of the specific allegation of the petitioners that the opposite party no.1 is a retired pensioner.

Moreover, in view of the existence of a registered deed, which purportedly indicates that the opposite party no.1 transferred his rights in the property in favour of a third party, it is also doubtful as to whether the opposite party no.1 has any *locus standi* to maintain proceeding under the 2007 Act against the petitioners.

That apart, the petitioner no.1 has claimed a specific right in the property-in-dispute, on the basis of the *Patta* granted initially in the name of the petitioners' parents, which ought also to be considered at the time of deciding a proceeding under the 2007 Act.

Since the impugned order does not take into consideration any of the above factors, the same is patently perverse and vitiated and passed *de hors* the jurisdiction of the Sub-Divisional Magistrate concerned.

Accordingly, CO 65 of 2022 is allowed on contest, thereby setting aside the impugned order dated November 22, 2019 passed by the Sub-Divisional Magistrate, Jalpaiguri in connection with Petition Case No.676 of 2019 dated September 3, 2019 and sending the matter back on remand to the Sub-Divisional

Magistrate of Jalpaiguri for a fresh reconsideration and rehearing of the matter in the light of the observations made herein. The Sub-Divisional Magistrate shall decide the matter afresh in accordance with law and finally conclude the hearing of the same and pass orders thereon as expeditiously as possible, preferably within six months from the date of communication of this order to the said Sub-Divisional Magistrate at Jalpaiguri.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)