

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4254 of 2019

1. Janardan Rai @ Janardan Raut, son of late Bhola Rai.
2. Srimati Bhikhain Devi, wife of Shiv Mangal Yadav.
3. Agindar Rai, son of late Jokhan Rai.
4. Kalawati Devi, wife of Rajendra Rai.
5. Nagina Prasad Yadav, Son of Late Jokhan Rai.
6. Srimati Jhalpati Devi, Wife of Late Yogindar Rai.

All are resident of Village-Khutiyarwa, Police Station-Sugauli,
District- East Champaran at Motihari.

... .. Petitioners

Versus

1. The State of Bihar.
2. The Collector-cum-District Magistrate, East Champaran at Motihari.
3. The District Fishery Officer-cum- the Chief Executive Officer, District East Champaran at Motihari.
4. The Sub Divisional Officer, Sadar Motihari, District East Champaran at Motihari.
5. The Circle Officer, Circle- Sugauli, District- East Champaran at Motihari.
6. Harilal Yadav, son of Rudal Yadav, resident of village- Khorha, P.S.- Sugauli, District- East Champaran at Motihari.

... .. Respondents

Appearance :

For the Petitioners	:	Mr. Dronacharya, Sr. Advocate
For the Respondents	:	Md. Khurshid Alam, AAG-12

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR

ORAL JUDGMENT

Date : 08-01-2024

In this case, the petitioners are challenging the general notice dated 25.01.2019 (Annexure-9) by which the Circle Officer, Sugauli, District-East Champaran, has directed for auction of settlement of a pond appertaining to thana no.14, khata no. 87, khesra no. 85, total area of 142 decimals situated on a *Gair Mazarua Malik* land, on 03.2.2019 at 11:00 A.M. in



his chambers/office but, the same was deferred to 08.02.2019 due to engagement of the Circle Officer, Sugauli, in the Parliamentary Election 2019.

2. The case of the petitioners is that the ex-land lord Mahant Ramavatar Nath was the owner of tauzi no.783, khata no.87, plot no.85, *Gair Mazarua Malik* land having an area of 1.42 acres, who settled the aforesaid land in favour of one Onkar Nath Giri and accordingly a *patta* was granted to the setlee. The settlement includes R.S. Plot nos. 84 and 85 of Khata no.87. After vesting of Jamindari in the year 1955, return was filed and Jamabandi was created in the Sirista of the State of Bihar in favour of Onkar Nath Giri. There was a ditch over the plot no.85 and after the settlement of land in favour of Onkar Nath Giri, he cleared the ditch and used to rear the fish in the same.

3. It is also the case of the petitioners that on 09.02.1988 said Onkar Nath Giri sold the land appertaining to khata no. 87, plot no. 85, area 1.42 acres by four registered sale deeds in name of petitioners and their ancestors. After which, their names were also mutated and Jamabandi were created in their names. Since purchasers are from one family, some of the villagers instigated the Circle Officer, Sugauli, on wrong facts



and accordingly the Circle Officer, Sugauli informed the Sub-Divisional Officer, Sadar, Motihari, who initiated the proceeding under section 144 of Criminal Procedure Code over the plot no.85 and thereafter the said proceeding was converted in proceeding under section 145 of Criminal Proceeding Code and ultimately the land was attached under section 146 of Criminal Procedure Code on 11.4.1989.

4. According to the petitioners, they requested the Sub Divisional Officer, Motihari to drop the proceeding but he did not accept their request and as such, the petitioners sent legal notice to the Collector, East Champaran as well as the Circle Officer, Sugauli under section 80 of Civil Procedure Code but, it also went in vein. Thereafter, the purchasers filed Title Suit no.157 of 1989. In the said suit, the State of Bihar through the Collector, East Champaran and the Circle Officer, Sugauli were made defendants but, in spite of service of notice, only the Circle Officer, Sugauli appeared before the Sub Judge, Motihari. By order dated 12.6.1990 the Circle Officer was directed to pay Rs.100/- as cost to accept his written statement but, after that he left *pairavi* in the suit. Hence, Title Suit no.157 of 1989 was decided ex parte against the defendants vide judgment and decree dated 19.12.1990 and 08.1.1991



respectively by the Sub Judge, I, Motihari. The defendants in the Suit, filed a petition under Order IX Rule 13 of Civil Procedure Code for setting aside *ex parte* decree, which was also dismissed for default on 09.07.1998.

5. According to the petitioners, the judgement and decree dated 19.12.1990 and 08.1.1991 respectively passed in Title Suit no. 157 of 1989 have become final because till the date same has not been challenged in any Court. After the said judgement and decree in favour of plaintiffs, one of the plaintiffs i.e. Plaintiff no.5, Janaradan Raut (petitioner no.1 herein) filed an application before the Executive Magistrate, Sadar, Motihari, who vide his order dated 28.6.1991 in T.R. no. 111 of 1991, has dropped the proceeding and directed to send the information about the same to the Circle Officer and Officer-in-Charge of Sugauli Police Station for taking necessary action. It is the case of the petitioners that they also sought information from District Fishery Officer-cum- Chief Executive Officer, East Champaran, whether the pond standing over the land in question is a Government Jalkar, who vide letter contained in memo no.311 dated 17.8.1990 certified that this very plot has not been transferred by the Circle officer, Sugauli as a Government Jalkar.



6. It is also the case of the petitioners that after judgement and decree passed by the Sub Judge, I, Motihari and order dated 28.6.1991, they applied for mutation which was allowed and Jamabandi nos. 1678 to 1681 were issued in their favour and rent receipt were also issued till 2016-17 in their favour. Again, on the complaint of local people against petitioners, the Circle Officer, Sugauli called for a report from the local revenue clerk and accordingly he submitted his report to the Circle Officer, Sugauli disclosing that earlier the land was of one Onkar Nath Giri, son of Mahant Ramavtar Giri but thereafter different Jamabandi were created in favour plaintiffs of Title Suit no. 157 of 1989 and accordingly the Circle Officer, Sugauli informed the Officer-in-Charge, Sugauli Police Station vide letter dated 10.2.2015. When the petitioners realized that some antisocial elements are trying to take out the fishes from their pond, they represented before the Sub Divisional Officer, Sadar, Motihari vide letter no.343 dated 06.04.2016 and requested the Circle Officer and Officer-in-Charge of Sugauli Police Station to provide protection and take necessary action in the matter, which was taken note by the Circle Officer, Sugauli but, in spite of all these facts, the Circle Officer, Sugauli issued a general notice dated 25.01.2019 for auction of settlement of



pond in question, which is impugned in the present petition. During the pendency of the writ petition, one Harilal Yadav (respondent no.6) was declared successful bidder and had deposited an amount of Rs.3,10,200/- in the auction.

7. Learned counsel for the petitioner has relied upon a judgement of the Hon'ble Supreme Court rendered in the case of *Deo Kuer & Another vs. Sheo Prasad Singh & Ors.* reported as *AIR 1966 SC 359* and submitted that a suit for declaration of title without a claim for possession would still be competent and it is not necessary to ask for the relief of delivery of possession where the defendant is not in possession and is not able to deliver possession, which, it is not disputed.

8. In this case, the State has appeared and filed its counter affidavit. In the counter affidavit, it has been stated that the writ petitioners have never been in possession of the pond situated over the *Gair Majarua Malik* land and the pond in question has been in possession of the State of Bihar. Further, argument of the State is that the land in question has been settled to the highest bidder i.e. respondent no.6. The pond in question never came in possession of the family of writ petitioners rather they illegally tried to possess the pond in question and as such, a proceeding was initiated under section 144 of Criminal



Procedure Code, after which the pond was attached under section 146 of Criminal Procedure Code.

9. I have considered the submissions of learned counsel for the parties and perused the materials on record. Basically, the dispute between the parties and the State is with regard to ownership of the pond in question which is claimed by the petitioners. The claim of the petitioners has been decreed in Title Suit No.157 of 1989 and the judgement and decree of the Civil Court in favour of the petitioners has become final. The contention of the State is that the petitioners were never in possession of the pond in question and the mutation in their favour was illegal and the Register-II was not available but, they have not been able to deny the judgement and decree passed in Title Suit No.157 of 1989 and the rejection of their application for setting aside the *ex parte* judgement and decree. In the opinion of this Court, the contention of the State that the petitioners were never in possession of the pond in question does not find favour of this Court as it is the State authorities who have mutated the names of the petitioners and earlier the State authorities including the Circle Officer have regularly found the possession of the petitioners over the pond in question.



10. Moreover, the Supreme Court in the case of ***Deo Kuer & Another vs. Sheo Prasad Singh & Ors. (supra)*** has held in paragraph nos. 3 to 6 as under:-

- “3. *The only point argued in this appeal was whether in view of the attachment, the appellants could have in their suit asked for the relief for delivery of possession to them. If they could not, the suit would not be hit by the proviso to section- 42. The parties seem not to dispute that in the case of an attachment under section 146 of the Code as it stood before its amendment in 1955, a suit for a simple declaration of title without a prayer for delivery of possession is competent. The respondents contend that the position in the case of an attachment under section 145 of the Code is different, and in such a case the magistrate holds possession for the party who is ultimately found by him to have been in possession when the first order under the section was made. It was said that a suit for declaration of title pending such an attachment is incompetent under the proviso to section 42 unless recovery of possession is also asked for. It appears that the attachment under section 145 in the present case is still continuing and no decision has yet been given in the proceeding's resulting in the attachment.*
4. *In our view, in a suit for declaration of title to property filed when it stands attached*



under section 145 of the Code, it is not necessary to ask for the further relief of delivery of possession. The fact, if it be so, that in the case of such an attachment, the magistrate holds possession on behalf of the party whom he ultimately finds to have been in possession is, in our opinion, irrelevant. On the question however whether the magistrate actually does so or not, it is unnecessary to express any opinion in the present case.

5. *The authorities clearly show that where the defendant is not in possession that not in a position to deliver possession to the plaintiff it is not necessary for the plaintiff in a suit for a declaration of title to property to claim possession: see **Sunder Singh Mallah Singh Sanatan Dharm High School, Trust v. Managing Committee, Sunder Singh Mallah Singh Rajput High School**, 65 Ind App 106: (AIR 1938 PC 73). Now it is obvious that in the present case, the respondents were not in possession after the attachment and were not in a position to deliver possession to the appellants. The magistrate was in possession, for whomsoever, it does not matter, and he was not of course a party to the suit. It is pertinent to observe that in **Humayun Begam v. Shah Mohammad Khan**, AIR 1943 PC 94 it has been held that the further relief contemplated by the proviso to section 42 of the Specific Relief*



*Act is relief against the defendant only. We may add that in **K. Sundaresa Iyer v. Sarvajana Sowkiabil Virdhi Nidhi Ltd, ILR (1939) Mad.986 : (AIR 1939 Mad 853)** it was held that it was not necessary to ask for possession when property was in custodia legis. There is no doubt that property under attachment under section 145 of the Code is in custodia legis. These cases clearly establish that it was not necessary for the appellants to have asked for possession.*

6. *In **Dukkan Ram v. Ram Nanda Singh AIR 1961 Pat 425** a contrary view appears to have been taken. The reason given for this view is that the declaratory decree in favour of the plaintiff would not be binding on the magistrate and he was free in spite of it to find that possession at the relevant time was with the defendant and deliver possession to him. With great respect to the learned Judge deciding that case, the question is not whether a declaratory decree would be binding on the magistrate or not. The fact that it may not be binding would not affect the competence of the suit. The suit for a declaration without a claim for the relief for possession would still be competent in the view taken in the cases earlier referred to, which is, that it is not necessary to ask for the relief of delivery of possession where the defendant is not in possession and is not able to deliver*



*possession, which, it is not disputed, is the case when the property is under attachment under section 145 of the Code. We think that **Dukkan Ram’s case AIR 1961 Pat. 425** had not been correctly decided. We may add that no other case taking that view was brought to our notice.”*

11. For the afore-stated reasons and also the law laid down by the Hon’ble Supreme in the case of **Deo Kuer & Another vs. Sheo Prasad Singh & Ors. (supra)**, this writ application is allowed. Accordingly, the notice dated 25.01.2019 issued by the Circle Officer, Sugauli, District-East Champaran, is hereby quashed and the auction of settlement of the pond in question in favour of the respondent no.6 is held to be illegal. The State authorities are directed to pay the auction amount of Rs.3,10,200/-, collected from respondent no.6, to the petitioners and they are also directed not to interfere in the possession of the petitioners in future.

(Sandeep Kumar, J)

pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
Uploading Date	10.01.2023
Transmission Date	

