
(2012) 08 PAT CK 0020
In the Patna High Court
Case No : CWJC No. 7347 of 2007

Faiz Murtaza Ali

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 28-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3A

Citation : (2013) 1 PLJR 705

Hon'ble Judges : Prakash Chandra Verma, J

Bench : Single Bench

Advocate : Ambuj Nayan Chaubey, for the Appellant; Naresh Kr. Malhotra, Basant Kr. Tripathy, Binod Kr. Sinha -2, Shailendra Kr. Dwivedi, Lakshman Lal Pandey, Ranjan Kr. Dubey, R.S. Dwivedi, Dilip Kr., Shashank Shekhar Jha, Gajendra Pratap Singh, Rajesh Mohan, Sanjay Kr. Upadhyaya and Uma Kant Prasad, for the Respondent

Final Decision : Dismissed

Judgement

Prakash Chandra Verma, J.—This writ application has been filed for quashing the judgment and decree dated 22.5.2003 passed by the Subordinate Judge-VII, Patna in Title Suit No. 58 of 2003 (Annexure-5) and also for a direction to the respondent 1st Set to preserve, protect and maintain the property as directed by this Court.

Facts and submissions:

The facts of the case are that late lamented Hassan Imam Purchased the property in question known as "RIZWAN" located in Fraser Road, Patna in the year 1925 in the name of his second wife namely Mrs. Nattiee Imam. From the first wedlock born out one son namely late Syed Mehdi Imam, and two daughters namely Mrs. Mahmooda Sami and Mrs. Asma Jafar Imam. The late lamented Mr. Syed Mehdi Imam was survived by his wife Saiyeeda Mehdi Imam and his daughter Shamim Amna Imam. The said daughter died on 23.5.1998 leaving behind her mother alone as the sole surviving heir. Subsequently, the said sole

heir also died on 22.2.2004. Due to death of Saiyeeda Mehdi Imam, her estate was inherited by the present writ petitioner being son of Justice Murtaza Fazal Ali, who being the full brother of Saiyeeda Mehdi Imam inherited the estate of her daughter Mrs. Shamim Amna Imam. Syed Hassan Imam married the second time with Bibi Nattie Imam and from his wedlock, S.A.H.A. Angustive Imam @ Tootoo Imam was born. Tootoo Imam is blessed with S.H. Francis Imam and M.S. Nattiee Shabet Imam.

2. That the said property has been divided into two blocks comprising block of 10 annas and block of 6 annas respectively by an award dated 6th May 1936, specially on the point of "RIZWAN". 6 annas portions was made over to Mrs. Nattiee Imam second wife of late Syed Hassan Imam as Mutawalli and in respect of 10 annas block beneficiaries were Mr. Syed Mehdi Imam and his two sisters namely, Asma Zafar Imam & Mrs. Mahmuda Sami. A total area of the land in question according to 10 annas has 76.49 Kathas and 6 annas has 45.70 Kathas. These facts are admitted by all the parties in Award dated 6th May, 1936. After passage of 30 years, 10 annas property in question was divided into three blocks i.e. Block-A 5 annas, Block-B 2.5 annas and Block-C 2.5 annas by the order of this Hon'ble Court dated 23rd March, 1967 passed in Misc. Appeal No. 260 of 1966. The respondent 4th Set has made an agreement with owner of 6 annas share holder i.e. Respondent 2nd Set namely, S.A.H.A.A. Imam @ Tutoo Imam on 8.7.1989 for agreement to sale admeasuring area of 72 Kathas 23 dhurs and 13 dhurkees. After passage of 9 years again with an evil design, they modified the said agreement to sale on 17.5.1998 and reduced area of the said land as 51 Kathas.

3. Learned counsel for the petitioner submits that from perusal of modified agreement for sale dated 17.9.1998 it would be evidently clear that how the respondent No. 3 & respondent No. 6 have made agreement collusively in presence of the witnesses, respondent No. 3 S.A.H.A. Imam have signed in presence of two witness on 17.5.1998 at Hazaribagh and on the other hand respondent No. 6 has signed over it on 12.7.1998. Both the parties have exercised their power in his own town i.e. Hazaribagh & Patna with their own witnesses. The entire agreement is fake fraudulent and without manner of law and on the basis of the said agreement to sale entire proceeding in the said T.S. No. 58/2003 and execution Case No. 3 of 2003 is an evil thought and game plan to defeat the process of law and hit and try method to achieve indirectly which they could not succeed directly. Regarding T.S. No. 176 of 1986, it has been beyond the jurisdiction of the Hazaribagh Court, because the property in question which situate at Patna only and no part of it situate at Hazaribagh. The decree obtained by respondent No. 3 by fraud, which has been challenged in T.S. No. 160 of 1999 before Civil Court, Patna and learned Court-below granted injunction on 21.8.1999 and restrained not to alienate and interfere in "RIZWAN" property on the basis of decree obtained in T.S. No. 176 of 1986 till disposal of the T.S. No. 160 of 1999 and the instant petitioner has been substituted in place of plaintiff. Intervener petition in the said T.S. No. 160 of 1999. There is no

question of any right, title and interest either respondent No. 3 or respondent No. 6 to keep the property of the share of 10 annas block. If "RIZWAN" is a waqf property, respondent No. 3 has no authority to transfer it in favour of respondent No. 6. If at all respondent No. 3 has right in the "RIZWAN", it is only to the extent of 6 annas as has been finally adjudicated by the Hon'ble Arbitrators in the year 1936. They can be in charge of 6 annas block of the "RIZWAN" only in terms of the condition laid down in the award of 1936. By any stretch of imagination he cannot deal or part with or negotiate to transfer the entire "RIZWAN" as 10 annas of the block belong to others including the writ petitioner and respondent nos. 4 & 5. There could not be transfer or contract in violation of the orders of injunction inter alia passed in Title Suit No. 160 of 1999 by the learned Court-below. When title and possession has been decided, then how can the Respondent No. 6 got title and interest on the decree passed in T.S. No. 58/2003 which is only for specific performance of contract. However, the said title suit is still pending for the same property in question in which injunction was already granted.

4. Learned counsel for the petitioner further submitted that it is also important to mention here that on perusal of the order of CWJC No. 98 of 1992 and CWJC No. 228 of 1992 decided on 9.4.1993 and MJC No. 947 of 1993 decided on 27.8.1993 by the Division Bench of this Hon'ble Court, it would transpire that how the writ petitioner has obtained decree in the teeth of the Hon'ble Court order regarding the property in question.

5. Learned counsel for respondent No. 4 submitted that late lamented Hassan Imam purchased the property in question known as "RIZWAN" located in Fraser Road, Patna in the year 1925 in the name of his second wife. From the first wedlock born out one son namely, late Syed Mehdi Imam and two daughters namely, Mrs. Mahmooda Sami and Mrs. Asma Zafar Imam. The respondent No. 4 is the only child of late Syed Akbar Imam, who was the only son of late Mrs. Asma Jafar Imam, Mutawalli in beneficiary of Block-B of 2.5 annas. From perusal of genealogical table it will be clear that the present respondent No. 4 is beneficiary of 2.5 annas part out of 10 annas. The said property has been divided into two blocks comprising block of 10 annas and block of 6 annas respectively by an award dated 6th May, 1936 especially on the point of "RIZWAN". 6 annas portions was made over to Mrs. Nattiee Imam second wife of late Hassan Imam as Mutawalli and in respect of 10 annas block beneficiaries were Mr. Mehdi Imam and his two sisters namely Asma Zafar Imam & Mrs. Mahmooda Sami and total areas in 10 annas block is 76.49 Kathas (Mutwalli) and 6 annas is 45.70 Kathas. The Respondent No. 6 has made an agreement with owner of 6 annas share holder namely, S.A.H.A.A. Imam @ Tutoo Imam on 8.7.1989 for agreement to sale admeasuring area of 72 Kathas 23 dhurs and 13 dhurkees. After passage of 9 years again with an evil design, they modified the said agreement to sale on 17.5.1998 and reduced area of the said land as 51 Kathas. From perusal of modified agreement for sale dated 17.9.1998, it would be evidently clear that how the respondent No. 3 & Respondent No. 6 have made agreement colluding in

presence of the witnesses both the parties have exercised their power in his own town i.e. Hazaribagh & Patna with their own witnesses. The entire agreement is fake, fraudulent and without manner of law and on the basis of the said agreement to sale the entire properties of the said T.S. No. 58 of 2003 and Execution Case No. 3 of 2003 is an evil thought and game plan to defeat the process of law and hit and try method to achieve indirectly, which they could not succeed directly. T.S. No. 176 of 1986 has been filed beyond the jurisdiction of the Hazaribagh Court because the property in question which situate at Patna only and no part of it situate at Hazaribagh. The decree obtained by the respondent No. 3 namely, S.A.H.A.A. Imam @ Tutoo Imam by fraud, which has been challenged in T.S. No. 160 of 99 before Civil Court, Patna and learned Court below granted injunction on 21.8.1999 and restrained not to alienate and interfere in "RIZWAN" property on the basis of decree obtained in T.S. No. 176/86 till disposal of the T.S. No. 160/99. That there is no question of any right, title and interest to the Respondent No. 3 & Respondent No. 6 to keep the property of the share of 10 annas block.

6. It is further stated that the "RIZWAN" is a Waqf property and respondent No. 3 has no authority to transfer it in favour of Respondent No. 6, if at all respondent No. 3 has right in the "RIZWAN", it is only to the extent of 6 annas as has been finally adjudicated by the Arbitrators in the year 1936. They can be in charge of 6 annas block of the "RIZWAN" only in terms of the award of 1936. He cannot deal or part with or negotiate to transfer the entire "RIZWAN" as 10 annas of the block belong to others including the writ petitioner and respondent Nos. 4 & 5. There could not be a contract for transfer in gregarious and deliberate violation of the orders of injunction inter alia passed in Title Suit No. 160 of 99 by the learned Court-below.

7. Learned counsel for respondent No. 6 has submitted that in the entire writ application, the petitioner has tried to make out case that this answering respondent No. 6 by playing fraud upon him and in connivance with respondent 2nd Set has obtained a judgment and decree passed in Title Suit No. 58/2003 for the property in question popularly known as "Rizwan" over which he claims his right title. It is apt to state here that Title Suit No. 58 of 2003 was filed by the present answering respondent No. 6 for grant of decree of specific performance of contract against respondent 2nd set in pursuance of an agreement for sale executed by him for a part of landing property known as "RIZWAN" which has been exclusively allotted to respondent 2nd set by the Arbitral award in the year 1936 as well as by the judgment dated 9.4.1993 passed by Division Bench of this Hon'ble Court in CWJC No. 92 of 1998. It is also equally relevant to state that the suit was decreed and the said decree was levied for execution in a duly instituted execution case. In pursuance of order passed by executing court the Nazir had delivered possession to decree holder, the respondent No. 6 on the basis of writ issued by the learned Executing Court. The petitioner is challenging the said judgment and decree in the present writ application, on the ground that the same has been obtained by playing fraud upon him and further on the

ground that without impleading him as party in the suit, the decree has been obtained.

8. It is further submitted that obviously the suit was for specific performance of contract entered into in between the answering respondent No. 6 and respondent 2nd set. Therefore, there was no occasion to implead the present petitioner as party defendant in that suit. Now it is submitted that there is specific remedy available to the petitioner to challenge the aforesaid judgment and decree by resorting to provision contained in Order XXIII Rule 3A of the CPC by filing a Misc. Case before the same Court, which has passed the decree. The contention of the petitioner in the present writ application is that the answering respondent No. 6 and respondent 2nd set by playing fraud upon him wrongly entered into compromise and on the basis thereof the compromise decree has been passed. In a recent judgment of Hon"ble Apex Court in case of Horil Vs. Keshav and Another, has been held that a fraudulent compromise decree which has been passed on the basis of compromise entered into between the parties, can only be questioned before the same Court that recorded the compromise. In the said judgment, it has been held that even a fresh suit for setting aside compromise decree is barred. Hence, a challenge to a compromise decree on the ground that it was obtained by fraudulent means would fall under Rule 3A of Order XXIII of the C.P.C. Thus, it is manifest that the petitioner has got specific alternative remedy of filing Misc. Case and further all other remedies are barred in view the aforesaid provision contained in Rule 3A of Order XXIII of the C.P.C. and present writ application is absolutely not maintainable and fit to be dismissed.

9. Learned counsel for the respondent No. 6 submitted that the petitioner has filed this writ application by suppressing a very material fact which in fact debars him from raising any question with regard to right, title and interest in the property in question known as "RIZWAN". Here it will be relevant to state that in fact in year 2007 this petitioner had filed an M.J.C. application before a Division Bench of this Hon"ble Court being M.J.C. No. 596 of 2005. In the said M.J.C. application respondent 2nd set (herein) against whom the answering respondent No. 6 has got impugned judgment and decree, was also a party. In the said M.J.C. application, the petitioner had sought modification of order dated 27.8.1993 passed in M.J.C. Nos. 770, 1010 and 974 of 1993 and for a declaration that the 10 Annas Block was his personal property and he could do with it as he wished. The Division Bench of this Court considering the background of case was pleased to hold in paragraph-11 of the order as under:--

We, therefore fail to see what interest the present petitioner may have in the property. Not being in the line of descendents of Syed Hasad Imam, the waqf for all one knows, he would not be even a beneficiary to the property. Since Syed Murtaza Ali claims under Syed Mehdi Imam. It appears all the more ironical because both her husband and she herself spent their" in paragraph-12 of the said order their Lordships have further observed as under:--

for the reasons discussed above we have not hesitation in holding that the claim

of Faiz Murtaza Ali is utterly frivolous and untenable and there is no merit in his prayer for modification of the order dated 27.8.1993 passed by the court.

10. It is stated that the aforesaid order passed against the present writ petitioner has attained finality because the same has not been challenged before any Court. It is needless to say that so long as the order passed by this Hon"ble Court the petitioner has got no right to raise same question. This material fact has been suppressed by the present petitioner in the instant writ application. He has deliberately suppressed the said fact and has obtained interim order from this Hon"ble Court vide order dated 19.6.2007. It is submitted that the petitioner has invoked the discretionary jurisdiction of this Hon"ble Court. It is also well settled principle of law as laid down by the Hon"ble Supreme Court in case of Prestige Lights Ltd. Vs. State Bank of India, that if the petitioner comes invoking discretionary jurisdiction but suppresses the material fact which is decisive for the case then he becomes disentitled to get any relief for suppression of that material fact. In this case also, the present petitioner has deliberately suppressed a very important/material fact that a Division Bench of this Hon"ble Court has recorded a finding that he has got no right, title, interest in the property in question, therefore, he is not entitled to get any relief for suppression of that material fact and on this score alone this writ application is fit to be dismissed. Since the Division Bench of this Hon"ble Court has recorded specific finding that "We, therefore, fail to see what interest the present petitioner may have in the property. Not being in the line of descendents of Syed Hasan Imam, the waqf for all one knows, he would not be even a beneficiary to the property" he has got no locus to challenge/raise any dispute with regard to the said property, simply because he cannot be a persons aggrieved. In view of the principle of law of "Doctrine of Issue Estoppel" this petitioner is debarred from raising the same issue with regard to his right, title and interest in the property in question for which judgment and decree has been passed in favour of the answering respondent and is being challenged by the petitioner in the present writ application. In case of Bhanu Kumar Jain Vs. Archana Kumar and Another, has been held that "there is distinction between "issue estoppels" and "res judicata". Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine of issue estoppels is invoked against the party. If such an issue is decided against him, he would be stopped from raising the same in the latter proceeding". Apparently, in the present case also the doctrine of issue estoppel has got its application and the petitioner is being estopped from raising the issue of right, title and interest in the "RIZWAN" property in view of the finding recorded by the Division Bench of this Hon"ble Court as aforementioned in a proceeding contested between the writ petitioner and respondent 2nd set, particularly in view of the fact that the said finding has attained finality. Thus, facts stated hereinabove sufficiently established that the present writ application is meritless and is liable to be dismissed. Therefore, the writ petition is dismissed. No order as to cost.