

(1983) 09 PAT CK 0017
In the Patna High Court
Case No : A.F.O.O. No. 193 of 1981

Shri 108 Pujay Pad Advait Panch Parmeshwar Panchayati
Akhara Bara Udasin Nirman and Another

APPELLANT

Vs

Rameshwar Mandal and Others

RESPONDENT

Date of Decision : 06-09-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 101, 41, 47
Transfer of Property Act, 1882 — Section 111

Citation : AIR 1984 Patna 95 : (1984) PLJR 79

Hon'ble Judges : Yadunath Sharan Singh, J;S.K. Choudhuri, J

Bench : Division Bench

Advocate : Devendra Sharma, Ramanugrah Prasad Singh and Binod Kumar Roy,
for the Appellant; A.K. Chaudhary and Vijendra Mishra, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Choudhuri, J.—This appeal by the decree-holders-appellant is directed against the order dated 30th July 1981 passed by the Second Additional Subordinate Judge, Monghyr, in Execution Case No. 4 of 1978, directing the appellants to restore possession to the two judgment-debtors, who are respondents Nos. 1 and 2.

2. Title Suit No. 120/22 of 1970/77 was filed by the appellants, which was decreed on contest. In the first appeal filed before this Court, which was registered as First Appeal No. 421 of 1978, the judgment and decree of the trial court were confirmed and the appeal was dismissed. Special leave to appeal to the Supreme Court was also refused. In the meantime, the decree passed in favour of the appellants was executed which was registered as Execution Case No. 4 of 1978. In that case writ of delivery of possession was issued on 26th June, 1981, which was made returnable by 7th July 1981. It is said that delivery of possession was effected on 30th June, 1981 and respondents Nos. 1 and 2 were thrown out of their respective shop premises, which were in their

possession Thereafter a petition was filed by respondent No. 1 Rameshwar Mandal on 2nd July 1981 and another petition was filed by respondent No. 2 Anil Kumar Mandal on 3rd July 1981. It may be stated here that before Rameshwar Mandal (respondent No. 1) could file the petition, a petition was filed by Arun Kumar Mandal (respondent No. 24 in this appeal), who was not a party to the suit. By these applications, they made a prayer to restore their possession on the ground that no decree for khas possession was passed against them and they were in occupation of the shops" premises from which they have been thrown out in execution of the aforesaid decree. It may be stated here that Arun Kumar Mandal (respondent No. 24) and Anil Kumar Mandal (respondent No. 2), who are full brothers, claimed to be tenant of one shop-room whereas Rameshwar Mandal (respondent No. 1) claimed to be tenant of another shop-room. The appellants contested the said petitions filed by respondents Nos. 1, 2 and 24 by filing a rejoinder. After hearing the parties, the court below passed the impugned order. In this impugned order the court below has held that no decree for khas possession was passed against respondents Nos. 1 and 2, who are defendants Nos. 19 and 20 respectively in the suit, and it was a mistake of the officers of the court to give vacant possession by ousting these two tenants.

The impugned order shows that a prayer was made by the appellants to make enquiry as to whether respondents Nos. 1 and 2 were tenants of the two shops" premises. The executing court has referred to the plaint and has stated that in clear terms it has been mentioned therein that they are tenants, and, therefore, it is not necessary to make any enquiry on this point. Accordingly, the executing court passed the impugned order directing respondents Nos. 1 and 2 to be restored to possession over their shop premises from which they had been dispossessed, as the decree under execution was not for khas possession by evicting the tenants.

3. It is argued by Mr. Devendra Sharma, learned Counsel appearing on behalf of the appellants that the court below acted illegally in not holding an enquiry and take evidence in the matter as to whether respondents Nos. 1 and 2 were tenants of the two shop-rooms in question. It is contended by him that these respondents claimed to be the tenants in their petitions filed before the executing court for restoration of their possession, which fact was denied by the decree-holder-appellants in their rejoinder. In that view of the matter, according to the learned Counsel, it was incumbent duty on the court below to hold an enquiry and decide the point after taking evidence in accordance with law.

4. In order to appreciate the contention of the learned Counsel for the appellants, it will be necessary to go into the nature of the suit and the decree passed in that suit. It is not disputed that a suit was filed by the appellants for declaration that the institution known as "Sadar Bazar Durga Asthan"" or "Sadar Bazar Durga Bari" within Jam-alpur Municipality was founded by Maha Prayag Dasjee, a Sadhu of Udasin sect and it always belonged to and has been held and possessed as a "Asthan" of Udasin sect of Hindu religion, and has been held and

managed by a Sadhu of Udasin sect as its Mahanth and She-bait. A further declaration sought for was that the defendants first party or the public professing Sanatan Dharma have no right and title to own and possess Sadar Bazar Durga Asthan or to manage the affairs of the Sadar Bazar Durga Asthan, Further relief sought for was for declaration of their title to and confirmation of their possession over the suit lands and in the alternative for a decree for possession over the suit lands in the event they are found dispossessed from the suit lands or from any portion of them. In paragraph 25 of the plaint it was specifically pleaded that the defendants first party (i. e. defendants Nos. 1 to 15), were the persons who alleged themselves as President and other office-bearer and members of the fictitious and so-called managing committee and brought the previous suit and the defendants second party (i. e. Defendants Nos. 16 to 30) are the present tenants occupying the house, khatahs, apartments, stall and shop in the said Durga Asthan, Rameshwar Mandal (defendant No. 19), who figured as a member of the so-called Managing Committee,. holds a shop also under the Durga Asthan. It has also been stated in that paragraph that in the category of defendant 1st party the names of these old members, who have not been re-elected, have been left out and the names of the new members elected have been included, Thus it is clear that no relief for khas possession against the defendants second party, who are defendants Nos. 16 to 30 and admitted to be tenants in the plaint, were asked for. It appears from the judgment of the trial court that a contesting written statement was filed by defendants Nos. 1 to 6, 8 to 15 of the defendants first party and the defendant 4th party, the Bihar Hindu Religious Trust Board, None of the tenants, namely, defendants Nos. 16 to 30, who were pleaded in the plaint to be tenants occupying different shop-rooms of the Durga Asthan contested the suit. It appears that as no relief for khas possession after evicting them from the shop-rooms was prayed for against them, they did not choose to appear in the suit. The operative part of the decree which was passed in the suit reads thus:--

"... It is ordered and decreed that the suit is decreed on contest against defendants Nos. 1 to 6 and 8 to 15 with costs and against defendant fourth party without cost and ex parte against the remaining defendants. Pleader's fee of Rs. 32/- allowed. The defendants first party are hereby directed to deliver possession of the institution in question and the suit properties to the plaintiff within two months of the date of this order failing which the plaintiff would be entitled to recover possession through the process of the Court."

It is, therefore, manifest that the direction to deliver khas possession of the institution was against the defendants first party who were held to be managing the institution through an illegally formed committee. Thus it has been rightly argued by Mr. M. K. Choudhry learned Counsel for respondents Nos. 1 and 2 that the executing court was justified in passing the impugned order restoring possession to respondents Nos. 1 and 2. The plaint and the judgment and the decree of the suit which were affirmed by the High Court in the aforesaid first appeal clearly show that no relief for khas possession was asked for nor a decree

for khas possession was passed against the tenants who were defendants second party and therefore the decree-holder-appellants could get only symbolical possession so far as the tenants-defendants are concerned.

It was also argued that the other tenants, who are also members of the defendants second party, have been allowed to continue in possession of the shop premises in their occupation in execution of the decree passed in the suit, and only these two respondents have been thrown out from their shop premises. It was, therefore, rightly contended that the decree for recovery of possession was passed only against the defendants first party, who were members of the illegally formed Managing Committee and were managing the properties of Durga Asthan, who could not give vacant possession in respect of the tenanted portion. The tenants, who were defendants second party in the suit were required only to attorn the decree-holders as their landlords. Thus in my view, the court below was perfectly justified in saying that it was the mistake of the officers of the court in giving khas possession to the decree-holders by evicting respondents Nos. 1 and 2. Learned Counsel for respondents Nos. 1 and 2 was right in his submission that in execution of the said decree, the executing court should have given symbolical possession as was done in the case of other tenants, who were also members of the second party.

5. The submission that court below should have taken evidence and thereafter come to the conclusion as to whether respondents Nos. 1 and 2 were tenants when the said fact has been denied in their rejoinder, has been reiterated before this Court. This argument was rightly rejected by the court below in view of the clear averments made in the plaint that the members of the second party are the tenants occupying different portions of the shop premises. There was also no decree passed in the suit against them for khas possession. In support of the aforesaid arguments, learned Counsel for the appellants relied upon a single Judge decision, of the Allahabad High Court in *Lal Behari Lal Vs. Chaubey Gulzari Lal and Another*, . In that case an application was filed under Order XXI Rule 100 of the CPC alleging that he has been wrongfully dispossessed from the property. The executing court shut out any evidence to be adduced on behalf of the decree-holder, who was petitioner before the High Court in proof of his allegation that it was the judgment-debtor who was in possession and not the applicant under Order XXI Rule 100 of the CPC and allowed the application under Order XXI, Rule 100 of the Code of Civil Procedure, holding that he has been wrongfully dispossessed of the property. It was under these circumstances that the appellant's contention that the court below acted illegally and with material irregularity in exercise of its jurisdiction in not allowing the petitioner to adduce evidence in support of his case was accepted and the case was sent back to the court below. The two decisions which have been referred to in the Allahabad decision, namely, *Sardhari Lal v. Ambika Prasad*, (1888 ILR 15 Cal 521) and *Najimunnessa Bibi Vs. Nacharaddin Sardar*, have been distinguished. The present case under consideration, however, is completely different from the facts dealt with in the case which was before the Allahabad High Court. Therefore, the said

decision does not help in any way the appellant. The other case relied upon is the case of Krishna Prasad Singh Vs. Adyanath Ghatak and Another, . I fail to appreciate as to why this decision was cited. The portion of the passage relied upon is dealt with at page 82 and is covered by placitum (b). It shows that when the judgment-debtor's tenant is in possession and only symbolical possession is delivered then the judgment-debtor's adverse possession is interrupted. This principle has no application to the present case. In view of the discussions made above, it is manifest that the court below was right in not allowing the appellant to adduce evidence on the point as to whether the defendant-second party were tenants occupying different portions of the shop premises.

6. It was next contended by the learned Counsel for the appellant that the petitions filed by respondents Nos. 1 and 2 under Order XXI, Rule 99 of the CPC were not maintainable, as such petitions do not come within the clear language of the aforesaid Rule. True it is that those applications do not come under Order XXI, Rule 99 nor Rule 100 or 101 of the Code of Civil Procedure, but the question raised, in my view; is a question relating to the execution, discharge and satisfaction of the decree within the meaning of Section 47 of the Code of Civil Procedure, and such question can be raised even after delivery of possession. It is also not disputed that respondents Nos. 1 and 2 were party defendants in the suit, and, therefore though the labelling of the applications was wrong, would not come on the way of the court in applying the correct provision of law.

No other point was raised before this court.

7. In the result, there is no merit in the appeal and it is dismissed. In the circumstances, there shall be no order as to costs.

Yadunath Sharan Singh, J.

I agree.