
(1956) 10 PAT CK 0006
In the Patna High Court
Case No : Civil Revision No. 517 of 1956

Sm. Lali Bai

APPELLANT

Vs

Ramniklal Devji Ghelabhai Parmar and Others

RESPONDENT

Date of Decision : 05-10-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, 115

Citation : AIR 1957 Patna 715

Hon'ble Judges : Dayal, J;Choudhary, J

Bench : Division Bench

Advocate : S.C. Mazumdar and Sudhir Chandra Ghosh, for the Appellant; R.S. Chatterji and R.S. Sinha, for the Respondent

Final Decision : Allowed

Judgement

Choudhary, J.—This application by defendant No. 3 is directed against the order of the learned Subordinate Judge at Dhanbad dated the 21st of May, 1956, directing the petitioner to vacate the house in which she was living. The facts giving rise to the application, stated shortly, are these. There were three brothers, Devji, Damji and Lakhamshi. Devji and Damji are dead. Lakhamshi is defendant No. 1. His three sons and his wife are plaintiffs. The son and the widow of Damji are defendants 2 and 3 respectively. Similarly, the son and the widow of Devji are defendants 4 and 5 respectively. The plaintiffs instituted a suit for partition of their 4/15th share in certain collieries including buildings appertaining thereto against the defendants.

On the 15th of December, 1950, a compromise was arrived at between the plaintiffs and defendant No. 1 on the one side and defendant No. 2 on the other. Later on, this compromise was challenged by the plaintiffs as a result of which the court refused to record the same. An appeal preferred by defendants 2 and 3 against the order refusing to record the compromise filed in this Court failed and the matter is pending before the Supreme Court. In the meantime on the the Supreme Court. In the meantime on the 23rd of November, 1955, a preliminary

decree was passed in the partition suit against which defendants 2 and 3 have filed a first appeal in this court, which is numbered as F.A. 148 of 1956.

This appeal is pending. On the 25th of January, 1956, an application was made for taking possession of a certain bungalow from defendant No. 3. The learned Subordinate Judge, Sri K.K. Bose, rejected that application holding that defendant No. 3 being equally a coparcener there could be no justification for dislodging her from the bungalow in question before partition by metes and bounds. Later on the 7th of March, 1956, again another application was made by the plaintiffs for the same relief, namely, for directing defendant No. 3 to vacate the said bungalow. On the 9th of March, 1956 the same Subordinate Judge, namely, Sri K.K. Bose, without taking notice of his previous order refusing the same prayer made by the plaintiffs passed an order directing defendant No. 3 to vacate the said bungalow.

It has been said here on affidavit that this order was passed without hearing the petitioner. This statement has not been controverted by the plaintiffs in their counter affidavit which they have filed. On the 16th of April, 1956, the petitioner put in a petition for recalling the above order. That application was rejected on the 21st of May, 1956. While rejecting that application the Subordinate Judge Sri K.K. Bose directed that if defendant No. 3 did not vacate the bungalow, appropriate measures for delivering possession through police will have to be taken. The petitioner has, therefore, come up to this Court in revision against the order of the Court below directing her to vacate possession of the bungalow.

2. It may be mentioned here that in the suit even before the passing of the preliminary decree defendant No. 2 was appointed receiver and on subsequent applications being made by the plaintiffs they were authorised by the court to supervise the work and check the accounts of the receiver. It may also be mentioned that some time in April, 1956, defendants 2 and 3 jointly filed an application - in the Supreme Court in Civil Miscellaneous Petition No. 479 of 1956 for stay under Order 45, Rules 1 and 5 of the Supreme Court Rules.

In that application they also stated that the court had ordered defendant No. 3 to vacate the residential house and that it was necessary that status quo should be maintained till the decision of the appeal. In the relief portion, however, they did not claim any relief with regard to this matter. The application filed by them in the Supreme Court is not on the record. But a copy of the same which was served on the plaintiffs has been produced before us. The prayers that were made by defendants 2 and 3 as appears from that application are as follows:

"It is, therefore prayed that till the decision of the appeal further proceeding of the suit-Title Suit 13/1950 pending in Sub-Judge's Court at Dhanbad be stayed and (i) the plaintiff and defendant No. 1 may not be allowed to interfere with properties in suit which they have already parted by registered sale-deed. (ii) that the court will not proceed to deal with plaintiff and defendant No. 1 as if they have got share till the decision of this appeal (iii) that plaintiffs and

defendant No. 1 may not be allowed to get possession of any of the outside Cutch properties (iv) that the hearing on the appeal may be expedited or such other order or orders may be passed as may be deemed fit and proper."

On this application the Supreme Court passed the following order:

"On respondent No. 3 (defendant No. 1) Stating through his counsel that the costs of taking accounts in accordance with the terms of the preliminary decree should be debited in the first instance against his share subject to adjustments, if any, as a result of the decree in this appeal before us and on the respondents agreeing that no final decree shall be passed before the disposal of this appeal, no order for stay except that costs will be costs in the appeal. The hearing of the appeal be expedited."

3. Mr. Ghose appearing for the petitioner has contended that the final decree not having been passed in the suit, the court had no jurisdiction to direct a co-sharer in possession of a house to vacate that house and to give possession of the same to another co-sharer. He has also submitted that the court having originally refused to grant the prayer of the plaintiffs for a direction to vacate the house acted illegally and with material irregularity in the exercise of its jurisdiction in passing a contrary order directing her to vacate the house without having heard her. The contentions appear to be well-founded. As already stated, on the 25th of January, 1956, the learned Subordinate Judge, after hearing all the parties concerned, passed an order in presence of the petitioner that she could not be dislodged from the bungalow in question until the partition by metes and bounds.

From the subsequent order of the same Subordinate Judge on the 9th of March, 1956, it does not appear that any fresh material was placed before him for taking a different view of the matter; nor does it appear from his order that he was apprised of his previous order refusing the prayer for vacating the house. As the uncontroverted statement of the petitioner stands, the court did not even hear her on this matter when it passed a different order against her. In my opinion, the procedure adopted by the learned Subordinate Judge is unknown to law. If he wanted to revise his previous order, he should have given a hearing to her and should have stated in the order sheet why he thought fit to take a different view of the matter. The order passed by the learned Subordinate Judge on the 9th of March, 1956, was vitiated by irregularity and illegality in the exercise of his jurisdiction.

4. Mr. Chatterji has conceded that if a receiver had not been appointed by the court, the plaintiffs had no remedy before it to remove defendant No. 3 from the house. He, however, submits the defendant No. 2 was appointed receiver who under the provisions of Order 40 of the Code of Civil Procedure, was entitled to take possession of the entire subject-matter of the suit including the bungalow in question because it is undisputed that the bungalow in question is also a part of the subject-matter of the suit. The receiver, however, has not appeared before us though he is a party in this application. If the receiver has any grievance against

any of the parties to the suit, he has his remedy which he can avail of.

It does not, however, lie in the mouth of the plaintiffs to complain on behalf of the receiver that the receiver is resisted from taking possession by some of the parties in the suit. If the plaintiffs are dissatisfied with the receiver for his not taking proper action to get possession of the house even from a co-sharer, if he can dispossess a co-sharer from house, about which I am very doubtful, the plaintiffs must take appropriate steps before the court for removing him from receivership on that ground. But, in my opinion, they cannot take up the cause of the receiver and ask for possession being given to them by dispossessing a co-sharer in occupation of the house.

5. Mr. Chatterji has also contended that the prayer by defendant No. 3 for maintaining a status quo in the sense that she should not be directed to vacate the bungalow in question having been impliedly refused by the Supreme Court, this Court should not interfere with the order passed by the court below. I, however, do not agree with him with regard to his interpretation of the order of the Supreme Court. As already stated, no relief was sought by defendants 2 and 3 in the Supreme Court for staying the operation of the order passed by the court below on the 9th of March, 1956, directing defendant No. 3 to vacate the house. That being so, the order of the Supreme Court that no order is made on the notice of motion for stay does not in my opinion, mean that the Supreme Court refused to grant the stay of operation of the said order.

6. For the reasons given above, it is manifest that the order of the court below directing the petitioner to vacate the bungalow is without jurisdiction or at least suffers from irregularity and illegality in the exercise of its jurisdiction, and must, therefore, be set aside. Accordingly, the application is allowed. The orders of the court below passed on the 9th of March, 1956, and the 21st of May, 1956, directing the petitioner to vacate the house are set aside. The petitioner is entitled to her costs. Hearing fee Rs. 32/-.

Dayal, J.

7. I agree.