

(2013) 04 PAT CK 0084
In the Patna High Court
Case No : Criminal Writ No. 1184 of 2011

Syed Ainul Alam

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 10-04-2013

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Penal Code, 1860 (IPC) — Section 34

Citation : (2013) 3 PLJR 179

Hon'ble Judges : Ashwani Kr. Singh, J

Bench : Single Bench

Advocate : Baxi S.R.P. Singh, for the Appellant; Sanjay Kumar for the Respondent Nos. 7 to 9 and Mr. Pramod Kumar Sinha for the State, for the Respondent

Final Decision : Dismissed

Judgement

Ashwani Kr. Singh, J.—Heard Mr. Baxi S.R.P. Sinha, learned senior counsel appearing for the petitioner, Mr. Pramod Kumar Sinha, learned A.C. to A.A.G.-II for the State and Mr. Sanjay Kumar, learned advocate for the respondent Nos. 7 to 9. In this writ application filed under Articles 226 & 227 of the Constitution of India, the prayer of the petitioner reads as follows:--

This is an application for issuance of an appropriate, writ/and/or direction and/or order (or commanding the respondents to grant the following reliefs to the petitioner:--

- (a) The possession of the petitioner and his family members be ordered to be restored forthwith over their house at 381, A-1, Exhibition Road, Kabari Gali Patna;
- (b) The gun license and cartridges kept in the almirah in the aforesaid house be not misused or otherwise disposed of by the private respondents and the same be ordered to be kept in the safe custody;

(c) The private respondents be ordered not to disturb, dismantle or otherwise damage the lawyers chamber of the petitioner consisting of the rare law books and other valuable articles; and

(d) The Officer-in-Charge be directed to conclude the investigation of the criminal case lodged by the petitioner against the private respondents at the earliest.

2. At the outset, learned senior counsel for the petitioner submitted that since the police has already submitted charge-sheet in the criminal case instituted by him, he would not be pressing the writ application for that relief. He has further conceded that the prayer made in respect of the gun license and cartridges kept in the almirah may not be possible to be adjudicated in the present writ petition and as such, he would not be pressing the writ application for that refill also. However, he has vehemently argued that so far as the other two prayers as stated in clauses (a) and (c) of para 2 are concerned, the petitioner has no other alternative remedy, equally efficient and adequate.

3. He contended that the wife of the petitioner, namely, Soghara Begum owns a four storied building standing at 381, A/1, Exhibition Road, Kabari Gali, Patna. The petitioner resided in one of the floor of the house with his family members. He possessed a gun in his name and used to keep the same with license and cartridges in a steel almirah in the residential portion of his house. Many of the family members of the petitioner are settled abroad for many years and as such the petitioner with his family used to visit them leaving the house vacant for long times. However, in order to keep a watch on the house, the petitioner had engaged Md. Shahzada (respondent No. 7) as a care taker for the house. His duty was only to look after the house and had no right, title and interest in the house.

4. Learned senior counsel contended that the petitioner had gone to Bangalore for his treatment and on 23.7.2011, when he came back to Patna alongwith his son and tried to enter into his house, he was stopped by the respondent No. 7 and others. It transpired that in his absence, they had occupied the house completely. When the petitioner and his son asserted their right over the house, they were threatened and misbehaved. They removed the name-plate of the petitioner and threw his valuables from the upper floor. The petitioner, being left with no option rushed to Gandhi Maidan Police Station and lodged an FIR vide Gandhi Maidan P.S. Case No. 216 of 2011 dated 23.7.2011 under Sections 448, 379, 406, 487, 506 read with 34 of the Indian Penal Code against respondent Nos. 7 to 10 and others unknown.

5. It is further contended that despite the institution of the case, the police took no action in the matter. The petitioner having lost faith in the investigating Officer approached the Director General of Police, Bihar on 9.9.2001 and requested him to look into the matter and direct the police to do a proper and fair investigation and arrest the accused persons of the case. The Director General of Police directed the City Superintendent of Police to call for the records

of the case and take a decision after hearing both the parties.

6. Learned senior counsel further submitted that the petitioner and his family members have been illegally and forcibly dispossessed of their residential house by the private respondents unlawfully and, as such, they are entitled for the reliefs prayed for in the present writ petition.

7. Per contra, learned counsel for the private respondents submitted that the writ petition has been filed suppressing material facts and on erroneous grounds. The case of the private respondents is that the wife of the petitioner namely, Soghara Begum, is the owner of 2042 Sq. ft. equal to 1 katha 9 dhoors land appertaining to Tauzi No. 524, plot No. 822 situated at Mohalla-Exhibition Road, Kabari Gali, Patna. The house situated over the said plot is numbered as House No. 381, A-1. Soghara Begum being the absolute owner of the property, in question, publicly announced to sell the land and the house thereon. The respondent No. 7 being interested in purchase of the property negotiated with her and the value of the property was fixed at Rs. 35,00,000/-. On 28.12.2005 Soghara Begum, executed an agreement for sale in presence of her daughter and in presence of the witnesses who also signed on the agreement for sale in favour of respondent No. 7. Pursuant to the agreement, the private respondents were put in possession over the house in question. The respondent No. 7 paid Rs. 31.45,350/- against the total amount of Rs. 35 lacs to Soghara Begum. When respondent No. 7 requested Soghara Begum to execute the sale deed after receiving the balance payment, she avoided to do so on one pretext or another. However, she never raised any objection to the right of possession of private respondents over the property in question. Being left with no option, the respondent No. 7 instituted Title Suit No. 526 of 2011. in the Court of Sub-Judge, Patna on 29th July, 2011, for specific performance of contract. It has also been prayed in the said suit that the defendant Soghara Begum be restrained by an order of ad interim injunction from interfering in peaceful possession of respondent No. 7 and his wife in respect of the suit property.

8. Learned counsel submitted that Soghara Begum is the absolute owner of the house. She has already received over 31 lacs from respondent No. 7 against the consideration price of the property in question. He contended that respondent No. 7 is not a caretaker of the petitioner rather he is a purchaser of the property from Soghara Begum.

9. Learned counsel further contended that the petitioner has no locus standi in the matter. The property is not in his name and the owner of the property namely, Soghara Begum, the wife of the petitioner, has not been made a party in the case for the reasons best known to the petitioner. As a matter of fact, Soghara Begum is aware of the fact that a title suit has been filed in the court but she is deliberately not appearing in the suit.

10. Learned counsel further contended that after execution of the agreement for sale, Soghara Begum had given vacant possession of the house to respondent

No. 7 and thus, it is wrong to allege that there was any library, office, gun or any belonging of the petitioner in the said house.

11. A counter affidavit has also been filed on behalf of the respondent Nos. 3 to 6 which has duly been sworn by the Deputy Superintendent of Police, Town-Patna. The stand of the official respondents in the counter affidavit is that in course of investigation of the case mentioned above, it transpired that the petitioner is not residing at Patna since last 6-7 years. He had vacated the house in question alongwith his entire bag and baggage. The wife of the petitioner namely, Soghara Begum, after executing agreement with respondent No. 7 and his wife Wahida Parveen had given possession of the house to them and in lieu of the said agreement Rs. 30,097,200/- had already been paid by the respondent No. 7 in the account of Soghara Begum and her son Syed Samar Anwar Alam.

12. Learned counsel for the State has further submitted that the petitioner had instituted Gandhi Maidan P.S. Case No. 216 of 2011 against the private respondents whereas respondent No. 7 had instituted Gandhi Maidan P.S. Case No. 217 of 2011 against the petitioner and his son Syed Samar Anwar Alam. Both the cases were investigated in an impartial manner under the supervision and control of superior police officers. The private respondents have already been granted bail in Gandhi Maidan P.S. Case No. 216 of 2011. In that case, on conclusion of investigation, the police submitted charge-sheet for the offence under Sections 341, 504, 506, 406 read with 34 of the Indian Penal Code against the private respondents. However, the allegations were not found true under other Sections of the FIR such as, 448, 379 and 387 of the Penal Code.

13. In reply, learned counsel for the petitioner submitted that the police has gone in collusion with respondent No. 7. There is no legal evidence on the basis of which the police could come to a conclusion that the petitioner and his family members had vacated the house long back and given peaceful possession of the same to the private respondents.

14. Be that as it may, taking into consideration the facts and circumstances of the case, it is to be seen by this Court as to whether or not the reliefs prayed for by the petitioner in the present writ petition can be allowed. Admittedly, the petitioner is not the owner of the property in question. The property belongs to his wife. According to the respondents, the wife of the petitioner entered into an agreement for sale with respondent No. 7 and his wife and put them in vacant possession of the house. Though, this fact is disputed by the petitioner but the private respondents have brought on record several pay-in-slips in order to show that the payments were made in the account of wife and son of the petitioner. For the reasons best known to the petitioner, his wife has not filed the writ petition. The respondent No. 7 has already filed a suit for specific performance of contract on 29th July, 2011, in the Court of Sub-Judge, Patna against the wife of the petitioner. The present writ petition has been filed almost five months after the filing of aforesaid title suit. In course of investigation, the police found that the petitioner and his family members had given vacant possession of the

property in dispute to the respondent No. 7 and his wife nearly 6-7 years back pursuant to an agreement for sale entered into between the owner of the property on the one hand and respondent No. 7 and his wife on the other. Of course, the petitioner has alleged mala fide on the part of the police in conducting investigation of the case but such disputed facts cannot be adjudicated merely on the basis of affidavits filed on behalf of the parties in a summary proceeding under writ jurisdiction and more so when the petitioner's wife who is the admitted title holder of the house in dispute has not come before the court and no explanation has been furnished to the petitioner in that regard.

15. It is well settled that issues of title, possession and eviction cannot be determined in a summary proceeding under Articles 226 & 227 of the Constitution of India. If a person has been dispossessed from immovable property otherwise than in due course of law, he has a right to file a suit to recover its possession. Section 6 of the Specific Relief Act specifically provides for such a suit to recover the possession of the property.

16. In order that a writ of mandamus may be issued, there must be a legal right with the party asking for the writ to compel the performance of some statutory duty cast upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation.

17. In the present case, admittedly, the petitioner is not the owner of the property and as such there is no legal right vested in him. The petitioner has also not been able to show that there is any statute or rule having the force of law which casts a statutory duty on respondent Nos. 1 to 6 which they failed to perform. As a matter of fact the petitioner is seeking a writ of mandamus against a private individual.

18. In *Qamruddin vs. Rasul Baksh* in SLP (C) No. 9362 of 1988 and Civil Appeal No. 815 of 1989, the Supreme Court in para 4 has held as under:--

.....A writ of mandamus cannot be issued to a private individual unless he is under a statutory duty to perform a public duty. The dispute involved in the instant case was entirely between two private parties, which could not be a subject matter of writ of mandamus under Article 226 of the Constitution. The learned Single Judge ignored this basic principle of writ jurisdiction conferred on the High Court under Article 226 of the Constitution. There was no occasion or justification for issue of a writ of certiorari or mandamus.....

19. Following the above decision of the Supreme Court, a Full Bench of the Allahabad High Court in *Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others*, , has reiterated the same principle which reads as follows:--

The opinion expressed by the Supreme Court in *Qamaruddin* case (supra) to the extent that a writ of mandamus cannot be issued to a private individual unless he is under statutory duty to perform a duty is in accord with well established principles regarding writ of certiorari and mandamus and need no reiteration or

elaboration at our hand.

20. In *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, , the Apex Court held as under:--

If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus.

21. In *Sohanlal Vs. The Union of India (UOI)*, , the respondent Jagan Nath had filed a petition under Article 226 of the Constitution in the Allahabad High Court which was allowed. The High Court had ordered the respondent, Union of India and the appellant, Sohan Lal to forthwith restore possession of house No. 35 situated in West Patel Nagar, Delhi to Jagan Nath. Against the order of the High Court, the appellant filed an appeal in the Supreme Court. The Supreme Court while allowing the appeal and setting aside the order of the High Court held in paragraph Nos. 7 and 8 as under:--

7. The eviction of Jagan Nath was in contravention of the express provisions of S. 3 of the Public Premises (Eviction) Act. His eviction therefore, was illegal. He was entitled to be evicted in due course of law and a writ of mandamus could issue to or an order in the nature of mandamus could be made against the Union of India to restore possession of the property to Jagan Nath from which he had been evicted if the property was still in possession of the Union of India. The property in dispute, however, is in possession of the appellant. There is no evidence and no finding of the High Court that the appellant was in collusion with the Union of India or that he had knowledge that the eviction of Jagan Nath was illegal. Normally, a writ of mandamus does not issue to or an order in the nature of mandamus is not made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty (Halsbury's Laws of England, Vol. 11, Lord Simonds Edition, p. 84). If it had been proved that the Union of India and the appellant had colluded, and the transaction between-them was merely colourable, entered into with a view to deprive Jagan Nath of his rights, jurisdiction to issue a writ to or make an order in the nature of mandamus against the appellant might be said to exist in a Court. We have not been able to find a direct authority to cover a case like the one before us, but it would appear that so far as election to an office is concerned, a mandamus to restore, admit, or elect to an office will not be granted unless the office is vacant, if the office is in fact full, proceedings must be taken by way of injunction or election petition to oust the party in possession and that a mandamus will go only on the supposition that there is nobody holding the office in question. In *R. vs. Chester Corporation*, 1855-25 LJQB 61 (E), it was held that it is an inflexible rule of law that where a person has been de facto elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a quo warranto information. A

mandamus will not lie unless the election can be shown to be merely colourable. We cannot see why in principle there should be a distinction made between such a case and the case of a person, who has, apparently, entered into bona fide possession of a property without knowledge that any person had been illegally evicted therefrom.

8. In our opinion, the High Court erred in allowing the application of Jagan Nath filed under Art. 226 of the Constitution and making the order it did. The appeal is accordingly allowed and the order of the High Court is set aside. In the circumstances of the present case, however, we are of the opinion that each party should bear their own costs in this Court and in the High Court.

22. In *Krishna Ram Mahale (Dead), by his Lrs. Vs. Mrs. Shobha Venkat Rao*, , the Supreme Court at page 2100 held as under:--

It is well settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law if any authority were needed for that proposition, we could refer to the decision of Division Bench of this Court in *Lallu Yeshwant Singh Vs. Rao Jagdish Singh and Others*, . This Court in that judgment cited with approval the well known passage from the leading Privy Council case of AIR 1924 144 (Privy Council) where it has been observed (p. 208) (of SCR): (at p. 622 of AIR): "In India persons are not permitted to take forcible possession: they must obtain such possession as they are entitled to through a Court.

23. Taking into consideration the facts of the present case and the law laid down by the Apex Court, the nature of dispute raised by the petitioner cannot be settled by this Court under writ jurisdiction. It is evident from the facts stated, hereinabove, that there is dispute relating to property between the private parties. Respondent No. 7 and his wife have already filed a title suit in the Court of Sub-Judge which is pending adjudication. The disputed questions relating to property cannot be satisfactorily gone into or adjudicated in a writ petition. Apparently, it is not a case where the private respondents have captured the property forcibly by creating terror by brute force in collusion with the State or its functionaries. It is also not a case where the petitioner has been dispossessed from the property by brazen acts of lawlessness by or with the help of anti-social element. Admittedly, the private respondents are in possession of property and even on assumption that they have no right to remain on property they cannot be dispossessed except by recourse to law. The rights are purely of private character and thus, no mandamus can be issued.

24. In the ultimate eventuate, I do not find any merit in the present writ petition. It is dismissed, accordingly. This order, however, in no manner would preclude the petitioner from approaching the appropriate forum of competent jurisdiction in accordance with law for the redressal of his grievance. It is needless to say that in case, the petitioner or his wife resorts to any other available alternative

remedy for the redressal of his/her grievance, the same shall be considered on its own merit without being prejudiced in any manner from the observations made in the present case.