

Ashok Kumar and Others. Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Oct-21-2010

Judge : S.C. Agarwal, J.

Appeal No. : Criminal Misc. Writ Petition No.13939 of 2010

Appellant : Ashok Kumar and Others.

Respondent : State of U.P. and Others

Advocate for Def. : Sri. Rajesh Pachauri

Advocate for Pet/Ap. : Sri. Utpal Chatterji

Judgement :

1. Heard Sri Utpal Chatterji, learned counsel for the petitioners, learned A.G.A. for the respondents no.1, 2 & 3 and Sri Rajesh Pachauri, learned counsel for respondent no.4.

2. This writ petition under article 226 of the Constitution of India has been filed with a prayer to issue writ, order or direction in the nature of certiorari quashing order dated 20.3.2010 passed by Sessions Judge, J.P. Nagar (annexure 19 to the writ petition) as well as order dated 9.3.2010 passed by respondent no.2 (annexure 18 to the writ petition). A further prayer has been made for issuing a writ, order or direction in the nature of mandamus directing respondents no.2 & 3 to restore the possession of house in question to maintain status quo ante as it was prior to the

passing of revisional order dated 20.3.2010.

3. Petitioners and respondent no.4 belong to the same family. Admittedly, House no.105 situated in Mohalla Mandi Chob, Tehsil Amroha, District J.P. Nagar was initially owned by Mithlesh Kumari wife of Raj Narayan. She died during life time of her husband Raj Narayan. Subsequently, Raj Narayan also passed away on 4.5.2001. They had no children. Raj Narayan had five brothers namely, Prayag Narayan, Jai Narayan, Ravindra Narayan, Rohtash Narayan and Ram Narayan. Petitioners no.1 to 5 are the sons of Jai Narayan, petitioner no.6 is the son of Laxmi Narayan, petitioner no.7 is the son of Prayag Narayan and respondent no.4 is the real son of Ram Narayan, but claims to be the adopted son of Raj Narayan. Respondent no.4, claiming himself to be the adopted son of Raj Narayan and alleging to inherit the disputed house through Will dated 27.3.2001, filed Original Suit No.202 of 2001 in the Court of Civil Judge (Jr. Div.), Amroha for injunction, claiming that the defendants were interfering in his possession on the suit property. Other brothers of Raj Narayan also filed Suit No.216 of 2001 against respondent no.4 and his real father Ram Narayan seeking permanent prohibitory injunction, alleging that respondent no.4 and Ram Narayan were trying to dispossess them. Thereafter, Amin Commissioner was appointed by the Civil Court to inspect the property. The Amin submitted a report dated 31.5.2001 showing possession of respondent no.4. A copy of the Amin's report is annexure 3 to the writ petition. The petitioners moved an application before the S.D.M. (respondent no.2) under section 145 Cr.P.C. alleging apprehension of breach of peace. On 24.5.2001, preliminary order under section 145 (1) Cr.P.C. was passed by respondent no.2. On 4.6.2001, an order under section 146 (1) Cr.P.C. was passed attaching the property in dispute. Consequently, on 6.6.2001, the disputed house was attached and given in the supurdgi of one Mahesh Chandra. Against the orders dated 24.5.2001 and 4.6.2001 passed by respondent no.2, respondent no.4 filed criminal revision no.187 of 2001, which was allowed vide judgment and order dated 11.2.2003 passed by Sessions Judge, J.P. Nagar (annexure 8 to the writ petition). Impugned order dated 24.5.2001 and consequent further proceedings conducted by learned S.D.M. were quashed. No order regarding delivery of possession was passed by learned Sessions Judge. Thereafter, learned S.D.M. vide order dated 24.3.2003 sought opinion from D.G.C. (Crl.) and

after receipt of the opinion of D.G.C. (Crl.), learned Magistrate held that since matter was pending in the Civil Court, no further action was required. This order dated 2.2.2003 was challenged by respondent no.4 by filing criminal revision no.48 of 2003, which was allowed by Additional Sessions Judge / Fast Track Court No.1, J.P. Nagar vide judgment and order dated 4.3.2004 and learned S.D.M. was directed to take action in pursuance of judgment passed in criminal revision no.187 of 2001. Thereafter, vide order dated 29.3.2004, learned Magistrate passed an order that till the decision of the Civil Court, the property in dispute shall continue to remain under attachment.

4. Order dated 29.3.2004 passed by S.D.M. was again challenged by respondent no.4 by means of criminal revision no.44 of 2004, which was allowed vide judgment and order dated 4.10.2006 passed by Additional Sessions Judge, F.T.C. Court No.4, J.P. Nagar and order dated 29.3.2004 passed by S.D.M. was set-aside.

5. The revisional order dated 4.10.2006 was challenged by the petitioners before this Court through criminal revision no.6219 of 2006, which was disposed of on 7.12.2006 with a direction to the Magistrate to decide the matter in the light of report of Amin dated 31.5.2001. It was observed that the report of Amin regarding possession was a good evidence to show that respondent no.4 was in possession of property in question.

6. Thereafter, an objection was filed by the petitioners before the S.D.M. mentioning therein that they had filed an objection against the Amin report in the Civil Court, which remained undisposed and, therefore, no judgment be passed on the basis of Amin's report and the said report may not be considered. Another application was also filed by the petitioners before the Magistrate stating therein that Smt. Mithlesh Kumari wife of Raj Narayan had executed a Will in favour of the petitioners and their names have also been mutated in the records of the Municipal Board. Learned Magistrate considered the submissions of both the parties and in the light of judgment of this Court dated 28.11.2006, found that at the time of attachment, the property was in possession of respondent no.4 and it was attached from his possession. This finding was recorded on the two grounds,

firstly, that in the report of Amin Commissioner, possession of respondent no.4 was found over the disputed property, and secondly, that in pursuance of the order dated 19.9.2001 passed by Additional District Judge, the locks of the disputed property were opened to take out the educational certificates of brother of respondent no.4. Learned Magistrate vide order dated 9.3.2010 dropped the proceedings declaring the possession of respondent no.4 and the supurdgar was directed to hand over the possession of property in dispute to respondent no.4.

7. The petitioners filed criminal revision no.30 of 2010 against order dated 9.3.2010 before Sessions Judge, J.P. Nagar, which was dismissed by judgment and order dated 20.3.2010 passed by Sessions Judge, Amroha. Hence, this petition.

8. Sri Utpal Chatterji, learned counsel for the petitioners submitted that learned Magistrate committed illegality in relying on the report of Amin Commissioner, as objections were filed by the petitioners against the same and Amin's report was not yet confirmed by the Civil Court and their objections were still undisposed. Learned Sessions Judge has also not considered this point. The mutation in the name of petitioners were also ignored by both the courts below and Amin was not authorized to mention in his report as to which party was in possession. It was further contended that respondent no.2 erred in placing reliance upon the educational certificates of brother of respondent no.4 taken out from the property in dispute and contended that there was no evidence to show that these certificates belonged to the brother of respondent no.4. It was, however, admitted by learned counsel for the petitioners that in pursuance of order passed by the Magistrate and as affirmed by Sessions Judge, possession of the property in dispute has been handed over by the supurdgar to respondent no.4.

9. Learned A.G.A. and learned counsel for respondent no.4 supported the impugned orders and contended that Amin's report is a good evidence regarding possession and in pursuance of orders passed by the Sessions Court, the locks of the disputed property were got opened to take out the educational certificates of brother of respondent no.4 and this fact further corroborates the assertion of respondent no.4 that property in dispute was in his possession.

10. In *Shio Prasad v. Banshi Mohan Agarwal and another*, 2006 (65) ALR 386, this Court has held that the report of Amin cannot be brushed aside easily saying that it is inadmissible document in evidence.

11. By order dated 7.12.2006 passed by this Court in criminal revision no.6219 of 2006, this Court had observed that the report of Amin is good evidence that Neeraj Sharma was in possession of the property in dispute and the Magistrate was directed to consider the report of Amin dated 31.5.2001 filed before Civil Judge and to pass a reasoned order under section 146 Cr.P.C. In pursuance of the aforesaid order, learned Magistrate considered the Amin's report and also the fact of educational certificates of brother of respondent no.4 being found in the disputed property and concluded that the property in dispute had been in possession of respondent no.4.

12. The order passed by learned Magistrate was in consonance with the order passed by this Court and I do not find any error or illegality in the same. The revisional court has also considered all the relevant facts and rightly rejected the revision. The possession of the property in disputed has already been delivered to respondent no.4 by the supurdgar. The civil suits filed by both the parties are still pending in the Civil Court. After delivery of possession to respondent no.4 in pursuance of order under section 146 Cr.P.C., this Court cannot direct redelivery of possession to supurdgar and the petitioners may amend their pleadings before the Civil Court to seek relief of possession, if they so like and can claim the relief of possession on the basis of their title, if they succeed in proving it.

13. In view of the above, I do not find any error or illegality in the impugned orders passed by S.D.M. as well as learned Sessions Judge.

14. The writ petition is devoid of merit and is accordingly dismissed.

15. The petitioners may seek their remedy in the Civil Court, if so advised.

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