

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.381 of 2013

- =====
1. Dular Chand Sah S/O Late Nanhku Sah Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
 2. Rajnath Prasad S/O Late Ganga Dayal Sah Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
 3. Shyam Kishore Prasad S/O Gorakh Sah Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
 4. Sita Devi W/O Late Ramrup Prasad Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
 5. Vikas Kumar Minor S/O Shiv Shankar Prasad, Under The Guardianship Of Their Grandmother Sita Devi Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
 6. Ranjan Kumar, S/O Shiv Shankar Prasad, Under The Guardianship Of Their Grandmother Sita Devi Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
 7. Jitendra Prasad S/O Late Ramrup Prasad Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
 8. Santosh Kumar @ Santosh Kumar Prasad S/O Late Ramrup Prasad Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
 9. Pushpendra Saurav S/O Late Ramrup Prasad Resident Of Mohalla + P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.

Plaintiffs.... Appellant/s

Versus

1. Devnath Sah S/O Late Parmeshwar Sah Resident Of Mohalla+ P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
2. Baidyanath Prasad S/O Late Parmeshwar Sah Resident Of Mohalla+ P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.

..... Defendant Ist Party ---- Respondent Ist Set.

3. Panchdeo Yadav S/O Late Kali Charan Ram Resident Of Mohalla+ P .O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
4. Saryu Yadav S/O Late Bhuwar Yadav Resident Of Mohalla+ P .O- Chandwa, P.S- Ara Nawada, District- Bhojpur.
5. Khakhoran Yadav S/O Late Bhuwar Yadav Resident Of Mohalla+ P .O- Chandwa, P.S- Ara Nawada, District- Bhojpur.

.....Defendants 2nd party Respondents 2nd set.

6. Smt. Lilawati Devi W/O Late Hiralal Singh Resident Of Mohalla Sankatmochan Nagar, Ara, P.S+ P.O- Ara, Nawada, District- Bhojpur.

.....Defendant 3rd party Respondent 3rd set.

7. Raj Kishore Prasad S/O Late Gorakh Sah Resident Of Mohalla+ P.O- Resident Of Mohalla+ P.O- Chandwa, P.S- Ara Nawada, District- Bhojpur.

..... Defendant 4th Party Respondent 4th Set.

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Pushkar Narain Shahi, Sr. Advocate.
Mr. Sanjeet Kumar Singh, Advocate.
Mr. Atal Bihar Pandey, Advocate.

For the Respondent/s : Mr. Jitendra Kishore Verma,
Mr. Anjani Kumar, Advocates.

=====

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT
Date: 17.9.2015

=====

Heard the parties.

2. In the present appeal the appellants are challenging the order dated 15.3.2013 passed by the 7th Sub-ordinate Judge, Bhojpur at Ara in Title Suit No.977 of 2012 by which he has rejected the injunction petition filed on behalf of the appellants under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure for restraining the defendants Ist party and 6th party i.e. respondent Ist set and 4th set from alienating the suit property and also from making any construction thereupon.

3. Plaintiffs are the appellants who have filed Title Suit No.977 of 2012 for confirmation of family arrangement dated 10.12.1956 declaring the sale deed dated 14.11.2012 executed by defendant Ist party in favour of defendant 6th party in respect of the suit property described in Schedule “Ga” of the plaint to be illegal conferring no right, title and interest on the vendee, also for partition of the property described in Schedule “Kha” of the plaint in between the plaintiffs and defendant 4th party besides certain other reliefs.

4. It appears from the plaint that Bhajan Sah was the common ancestor of defendant Ist party and defendant IVth party. He had four sons, namely, Jhulan Sah, Ramsharik Sah, Nanhku Sah and Butan Sah. Ram Sharik Sah and Butan Sah died issueless. Parmeshwar Sah was the son of Jhulan Sah and he had two sons, namely Devnath Sah and Baijnath Prasad are defendant Ist set and who are principal defendants. Nanhku Sah had four sons, namely, Ganga Dayal Sah, Yamuna Sah, Gorakh Sah and Dularchand Sah (plaintiff no.1) Yamuna Sah died issueless. Ganga Dayal Sah had one son, namely, Rajnath Prasad (plaintiff no.2). Gorakh Sah had three sons, namely Ramashray Prasad, Shyam Kishore Prasad (plaintiff no.3) and Raj Kishore Prasad (defendant no.7) and Sita Devi (plaintiff no.4) is wife of Ramashray Prasad. It has been claimed that on 10.12.1956 a Panchnama of the family was prepared. Parmeshwar Sah walked out from the family after taking his share. Ram Sharik Sah and Nanhku Sah remained joint from the earning of the family jointly acquired the property in dispute having an area of 1 Acre and 59 decimals on 16.2.1957 in the name of Ram Sharik Sah and and Kalicharan Ram came to the share of the plaintiffs, defendant IVth party as also defendant IInd party i.e. heirs of

Kalicharan Ram. In the plaint it has been claimed that defendant Ist party Devnath Sah and Baijnath Prasad defendant Ist party have no concern with the joint family property of the appellants. As after separation from the branch by Parmeshwar Sah, his branch has no concerned with the land and wrongly and illegally executed the sale deed dated 14.11.2012 relating to 6 1/4th decimals of land of Plot No.1545 under Khata No.299 at Mauza Parki Yabar, P.S. Udwanthnagar, District Bhojpur.

5. Defendant Ist party appeared and filed their written statement raising objection with regard to genealogy and claimed that predecessor in interest, namely, branch of Parmeshwar Sah is also entitled to the share in property described in Schedule "Kha" of the plaint. It has been claimed that Parmeshwar Sah has remained joint with his two brothers, namely, Ram Sharik Sah and Nanhku Sah, property purchases by the family in the year 1957 was also funded by Parmeshwar Sah. It has been claimed in the written statement that defendant Ist set has also the right and title with the land having an area of 1 Acre 62 decimals of land and further claimed that half of the land belongs to the family of Kalicharan and remaining half of the land mentioned in

Schedule Kha belongs to the plaintiffs, defendant Ist set and defendant IV set and accordingly having a right to the extent of their shares in the suit property.

6. Injunction petition was filed. The court below has refused to grant injunction on the ground that nature of the relief that has been sought is for declaration of family arrangement dated 10.12.1956 be legal and valid, the claim of the appellants dependent on the said declaration which is under adjudication, if this issue goes in favour of the plaintiff the court will have ample power to give direction to hand over the vacant possession of the land.

7. Learned counsel for the appellants submits the defendant Ist party has sold the land in 2012 and is further intending to sale other portion of land which is apparently clear from the subsequent sale affected by him. If the defendants would be allowed to alienate the property in that event the corpus which is subject matter of the title suit would dissipate and as such it requires preservation by this Court in view of the fact that the size of the land which has been sold is meant for construction of the house in the event of success it will be very difficult to remove construction and restoration of land. He has further submitted that on reading

of the written statement of defendants it is clearly apparent that defendants are themselves accepting half share in the disputed property.

8. Learned counsel for the respondent has vehemently opposed the argument of the learned counsel for the appellants and submits that the plaintiffs-appellants have mischievously created unregistered document showing their ancestor have walked out from the joint family with the sole purpose to show the property that has been created after his walk out, automatically it will go to the appellants but the fact is that the three brothers were remained joint, the so called document of 1956 has been created with the sole purpose of depriving the respondent Ist set. He has further argued that even the plea of the appellants is accepted that in the year 1956 Parmeshwar Sah has walked out from the family after taking his share it will be deemed that other two members of family too separated unless it is shown that Ram Sharik Sah and Nanhku Sah remained joint. He has further submitted that present suit is in the nature of declaration of memorandum of family arrangement legal and valid is not in the nature of partition but limited partition has been sought in the branch of the appellants and defendant 4th party and as

such any statement made in the written statement cannot be a basis for granting of injunction as plaintiffs will succeed on his own strength not on the weakness of the respondents. It has further been submitted that as the suit is completely dilatory in nature with a relief of unregistered document to be legal and valid, and as such the plaintiffs will not be in a state of irreparable loss, if he succeeds then the court below will give direction to hand over the vacant possession of land and so much so the land is in the possession of the defendants is apparently clear from the memo of plaint where it has been mentioned that defendant no.6 are digging the earth for foundation of the house itself suggest that plaintiffs are not in possession of land, if the court would arrive to the finding of possession of defendant Ist set with regard to the land then the suit itself will fail on account of mischief of Section 34 of the Specific Relief Act. It is also apparently clear that document is unregistered which can be created at any time before presentation of the same and does not inspire confidence having not same value as registered document. In support of his contention he has relied on the following judgments:

1. Union of India and others v. Vasavi Cooperative Housing

Society Limited and others, reported in (2014)2 SCC 269, paras 15 to 19

2. Joseph John Peter Sandy v. Veronica Thomas Rajkumar and Another, reported in AIR 2013 SC 2028, para 16

3. Thiruvengada Pillai v. Navaneethammal and Another, reported in AIR 2008 SC 1541, para 17

4. Bhagwati Prasad Sah and others v. Dulhin Rameshwari Kuer and another, reported in AIR 1952 SC 72, para 7

5. Raghubir Prasad and Another v. Amir Sah @ Amar Sah and others, reported in 2003(4) PLJR 406, para 3.

6. Kanhaiyaji Sahay and others v. Kamla Prasad and another, reported in 1990 (1)PLJR 661 para 9

7. Best Sellers Retail (India) Private Limited v. Aditya Birla Nuvo Limited and others, reported in (2012) 6 SCC 792, paras 29 and 30

8. Kaliaperumal v. Rajagopal and Another, reported in (2009) 4 SCC 193 (SC)

9. Sakhahari Parwatrao Karahale and another V. Bhimashankar Parwatrao Karahale, reported in (2002) 9 SCC 608, para 3.

9. On that strength he has argued that co-sharer of the branch of family has equal right over the joint family

property and as such he has right to sale his own share and if the plaintiffs succeeds the same can be adjusted and effected by the judgment and decree of the trial court, will not be led to inference to irreparable injury and court below has not committed any illegality.

10. Let us examine the judgment that has been placed for reliance by the parties.

11. It is well know principle of law that the plaintiffs have to succeed on its own strength of their own title. The onus to prove the title to the property in question is always with the plaintiff has been exposited in judgment of the Hon'ble Supreme Court in the case of Vasavi Cooperative Housing Society Limited (supra) paragraph nos. 17 to 19. The Hon'ble Supreme Court has held that legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title, that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the fact question whether the defendants have proved their case or not.

12. The Hon'ble Supreme Court in the case of Bhagwati Prasad Sah (supra) has held that a Hindu family is

presumed to be joint unless the contrary is proved but when one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that rest of the coparceners continued to be joint. There is no presumption on the plaintiff's side too that because one member of the family separated himself, there has been separation with regard to all. It will be relevant to quote relevant portion of paragraph no.7 of the aforesaid judgment:

“7. The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved but as it is admitted here that in Imrit, one of the coparceners, did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that rest of the coparceners continued to be joint. There is no presumption on the plaintiff's side too that because one member of the family separated himself, there has been separation with regard to all.”

13. The Hon'ble Supreme Court in the case of Sakhahari Parwatrao Karahale (supra) has held that once a finding is recorded that there was no partition in joint family, each member of the joint family is co-sharer and possession of one is possession of all even exclusive

possession of the joint family property before partition, would be in possession on behalf of all the members and it is inconceivable that injunction could be granted to one co-sharer against other co-sharers.

14. As in the present case the plaintiff has based his case on un-registered document which will be considered at the time of trial but the Hon'ble Supreme Court in the case of Thiruvengada Pillai (supra) in paragraph 17 has held that when the execution of an un-registered document put forth by the plaintiff was denied by the defendants it was for the plaintiff to establish that the document is not forged or concocted. The party who asserts something has to prove that thing. The party who propounds the document will have to prove it. For example if the plaintiff had come to the Court stating that the first defendant had executed an agreement of sale in his favour, the first defendant having denied it, the burden was on the plaintiff to prove that first defendant had executed the agreement and not on the first defendant to prove the negative.

15. The aforesaid principle has been reiterated in the case of Joseph John Peter Sandy (supra).

16. The person who is seeking injunction has to

satisfy the Court three ingredients, namely, prima facie case, balance of convenience and irreparable loss. If any of the ingredients is missing the Court would refuse to grant injunction. Satisfaction of prima facie case by itself is not sufficient to grant injunction. The Court has to satisfy itself that non-interference by the Court would result in irreparable injury to the party seeking relief and there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be a material one, namely, one that cannot be adequately compensated in terms of money. Even where prima facie case is made out in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable. It will be relevant to quote paragraph nos. 26, 29, 30 and 36 of the judgment in the case of *Best Sellers Retail (India) Private Limited (supra)*:

“26. It has been held by this Court in *Kishoresinh Ratansinh Jadeja v. Maruti Corpn*, (2009) 11 SCC 229 that it is well established that while passing an interim order of injunction

under order 39 Rules 1 and 2 CPC, the Court is required to consider:

- (i) whether there is a prima facie case in favour of the plaintiff;
- (ii) whether the balance of convenience is in favour of passing the order of injunction; and
- (iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for.

Hence, we only have to consider whether these well-settled principles relating to grant of temporary injunction have been kept in mind by the trial court and the High Court.

29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction, if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.

30. In *Dalpat Kumar v. Prahlad Singh* this Court held: (SCC p.721, para 5)

“5.Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in ‘irreparable injury’ to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages.”

36. To quote the words of Alderson, B. in *Attorney General v. Hallett* (ER p.1321)

“... I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the court can pronounce in the result of the cause.”

17. The aforesaid judgment was dealing with the case of Specific Relief Act where alternative relief was sought by way of granting damage and the Court has set aside the order of injunction. As the Court has held that if the plaintiff succeeds he would be entitled to damage as claim and prove it before the Court.

18. This Court in the case of Kanhaiyaji Sahay (supra) has held that if a transfer is made during pendency of the suit the said sale is hit by the doctrine of lis-pendens and in that event it is open for the plaintiff not to implead such persons as party to the suit. The suit also cannot be thrown out on account of a transfer being made during the pendency of the suit. In that view of the matter this Court has held that the plaintiff would suffer an irreparable injury is not correct. Placing reliance of the judgment in the case of Hazrat Surat Sah v. Abdful Saheb, reported in 1988(4) Judgments Today 232 wherein the Court has held that such injury can be compensated in terms of money and if there is no irreparable injury there is no question of grant of injunction.

19. In the case of Raghubir Prasad (supra) this Court in paragraph no.3 while adjudicating the issue of granting

injunction the Court has held that the plaintiff and defendant are co-sharers and they got their right absolutely over their share of the immovable property, in that way no restraint can be put on any co-sharer regarding alienation etc. with regard to their shares. It will be relevant to quote paragraph 3 of the aforesaid judgment:

“3. The admitted position remains that the will had not yet been probated and no letters of administration has been granted as yet. In that way no action can be taken either by Bank or any local authorities on the basis of any averments made in favour of any beneficiary in that will. In that way even if no restraint order is there the Bank authority cannot act on the will unless the will is probated. Be it what it may I do not find that there is any scope of passing any restraint order in respect of alienation. Regarding immovable property both plaintiffs and the defendants are co-sharers and they got their right absolutely over their share of the immovable property. In that way no restraint can be put on any co-sharer regarding alienation etc. with regard to their shares. In that way I do not find that the injunction order has been passed validly in the eye of law. Balance of convenience, prima facie case and irreparable loss have not been considered by the learned court below in its proper perspective.”

20. The satisfaction of triple tests is condition precedent for the purposes of granting injunction. From the averment of the plaint it appears that the basis for seeking injunction is the family settlement of the year 1956



whereby Parmeshwar Sah had walked out from the family taking his own share and in 1957 the plot in question was purchased in the joint name of Ram Sharikh Sah and Kalicharan Ram as Ram Sharikh Sah died in jointness with Nanhku Sah, the property standing in the name of Ram Sharikh Sah was inherited by Nanhku Sah. The claim is based on unregistered document which is called family arrangement which has been disputed by the respondents claiming the said document to be forged and having no value in the eye of law, so much so having claimed share in the said property. The story of walked out from the family is wrong story with the sole motive to deprive the respondent Ist party from the share in the said property and submitted that he has sold the land to the extent of his share, lis-pendency will apply which will be subject to the result of the suit. If it would be declared the entire land belongs to the plaintiff branch then the executing court will be well within the power for handing over the land and being co-sharer of the property cannot be prohibited to sell the property up-to the share.

21. On conspectus of the submission of the parties basically the claim is based on the family arrangement of



1956. If the appellant would be able to prove in the trial that Parmeshar Sah walked out from the family taking his share then in that circumstances he has to prove Nanhku Sah and Ram Sharikh Sah remained joint that will be seen at the trial, not at this stage. If plaintiffs-appellant would fail then certainly the respondents will have a share in the property, in that circumstances, any alienation effected by defendant will not be bad in law.

22. Another objection has been raised by the respondents side that there is no relief sought for partition with regard to the land with Ist party defendant but only prayer has confined to the partition of schedule “Kha” land in his own branch. The land is plain having no structure over the same, but as per plaintiff, Lilawati, one of the purchaser has been digging earth for construction of permanent structure. The said memorandum of family arrangement has challenged by defendant Ist set claiming to be forged, in such situation plaintiff is obliged to prove the document legal and valid but one thing is clear that appellant has also share in the land.

23. Looking to the factor of consideration, in view of the judgment in the case of Dharam Nath Ojha v.

Raghunath Ojha, reported in 2001(2) PLJR 268 and Maharwal Khewaji Trust (Regd.) V. Baldev Dass, reported in (2004) 8 SCC 488 where the Hon'ble Supreme Court as well as this Court has opined that the suit property should remain preserved so that at the end of the trial the party who succeeds may get the benefit arising from the outcome of the suit. It will be appropriate to quote paragraph 10 of the aforesaid judgment of the Hon'ble Supreme Court in Maharwal Khewaji Trust (supra):

“10. Be that as it may, Mr. Sachar is right in contending that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further led to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the scheduled property to better use. We do not think in the facts and circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property, whatever may be the conditions on which the same is done. In the event of the appellant's claim being found baseless ultimately, it is always open to the respondent to claim damages or, in an appropriate case, the court may itself award damages for the loss suffered, if any, in this



regard. Since the facts of this case do not make out any extraordinary ground for permitting the respondent to put up construction and alienate the same, we think both the courts below, namely, the lower appellate court and the High Court erred in making the impugned orders. The said orders are set aside and the order of the trial court is restored.”

24. In such view of the matter, this Court will have to take a pragmatic approach in deciding the matter as the case of the plaintiff is based on family arrangement is unregistered document legality and genuineness has to be proved. during the trial. The respondents are co-sharers of the property, in such situation the respondents can alienate the property to the extent of their share but will be subject to the result of the suit. At the same time to preserve the property for avoiding the future complication, the parties to the suit or the purchaser will not change the feature of the land by making any permanent construction save and except boundary wall or temporary structure over the land.

25. In that view of the matter this appeal is dismissed with the aforesaid observation.

(Shivaji Pandey, J)

Vinay/-

U			
---	--	--	--