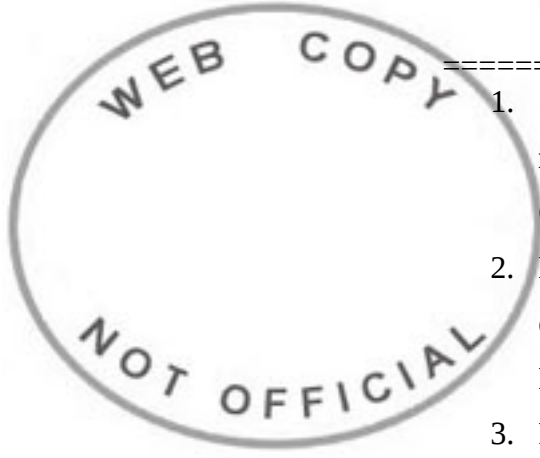


IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.1513 of 2013

In
C.R. 165 of 2012



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1. Shashi Bhusan Gupta son of late Mukti Narain Prasad Gupta, resident of old Exchange Road, P.O. and P.S. Raxaul District-East Champaran.
 2. Manju Gupta @ Manju Devi, wife of Sri Kamla Prasad Gupta, daughter of late Mukti Narain Prasad Gupta, resident of Pakri Mohalla-Pakri, P.O. and P.S. Arrah District-Bhojpur.
 3. Ranjana Gupta, wife of Arbind Kumar Gupta, Daughter of late Mukti Narain Prasad Gupta, resident of Mohalla-Abarpur Par, P.O and P.S. Arrah, District-Bhojpur. Petitioner/s

Versus

1. Bharat Bhusan Gupta son of late Mukti Narain Prasad Gupta, resident of old Exchange Road, P.O. and P.S. Raxaul District-East Champaran.
2. Anju Devi, wife of Ram Prasad, daughter of Mukti Narain Prasad Gupta, resident of Mal Godown Road, Balia, P.O. and P.S. Balia, District-Balia (Uttar Pradesh).
3. Rajesh Kumar Gupta son of late Mukti Narain Prasad Gupta, resident of old Exchange Road, P.O. and P.S. Raxaul District-East Champaran. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Suman Kumar, Adv.
For the Respondent/s : Mr. Ashutosh Jha, Adv.
Mr. Pravin Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL ORDER

8 19-01-2016

Heard the learned counsel for the parties.

Calling in question the legal sustainability of the impugned order by which the prayer of the plaintiff in the partition suit no. 177 of 2009 for withdrawing the said suit with liberty to

file fresh suit has been allowed, the present application under Article 227 of the Constitution of India has been filed.

The facts are not in dispute before this Court that the suit for partition was filed by the plaintiff-respondent no. 1 in the year 2009. The defendants after notice appeared and filed their written statement wherein they admitted 1/6 share of the plaintiff in the suit property. However, the plaintiff filed a petition on 25.07.2011 praying for withdrawal of the said suit with liberty to file fresh suit. The defendant-petitioners filed rejoinder contesting the prayer of the plaintiff for withdrawing the suit and also filed a petition praying for their transposition as plaintiffs in the suit. The learned court below after hearing the parties has allowed the prayer of the plaintiff to withdraw the suit with liberty to file suit afresh on new facts.

The learned counsel for the defendant-petitioners has submitted that the learned court below has committed error in not appreciating that the plaintiff has failed to establish sufficient cause for withdrawing the suit. It has been also submitted by the learned counsel that the ground taken by the plaintiff in his petition that he instructed his advocate to file a suit for declaration of title and possession but the said advocate in collusion with the defendants filed the suit for partition, is not convincing and cannot

be accepted as sufficient cause. It has also been canvassed by the learned counsel for the petitioners that the learned court below has failed to impose appropriate cost by exercising its power under Section 35 A of the C.P.C.

The learned senior counsel appearing for the plaintiff-respondent, in turn, has submitted that the plaintiff has absolute power to withdraw the suit as envisaged under Order 23 Rule 3 C.P.C. It has also been submitted by placing reliance on the judgment of the Apex Court in the case of **Jai Singh Vs. Municipal Corporation of Delhi, 2010 (9) SCC 385** that the jurisdiction of this under Article 227 of the Constitution of India is circumscribed by limitations. It has also been submitted by the learned counsel that from the impugned order, it does not appear that the defendants have made any prayer for imposition of cost.

After considering the submissions and the materials on record, it is manifest that the suit for partition was filed by the plaintiff in the year 2009. The defendants appeared and filed their written statement wherein they admitted that the plaintiff had got 1/6th share in the suit property. Later on, the plaintiff filed the petition dated 25.07.2011 (Annexure-4) raising the plea that the suit for partition had been filed by the lawyer against the instructions of the plaintiff and in collusion with the defendants

and on that basis the prayer was made to withdraw the suit. The learned court below has considered the pleadings and submission made on behalf of the parties and by the impugned order has allowed the prayer of the plaintiff rejecting the prayer of the defendants for transposition as plaintiff.

It is apparent from the materials on record as well as impugned order that the plaintiff has totally disowned the suit with the assertion that he never intended to file the suit for partition rather he had instructed his advocate to file the suit for declaration of title and confirmation of possession over the suit properties. The allegations of fraud and collusion have also been made in the process of filing the suit. In such a fact situation, the learned court below has rightly concluded the suit did not remain a suit for partition where the plaintiff for any reason had declined to pursue it further and had sought withdrawal in which case the transposition of the defendant as plaintiff was legally possible whereas in the present case the basis of the suit had itself been denied by the plaintiff. In this backdrop, this Court has not been persuaded to find that the discretion exercised by the learned court below is unreasonable or perverse in any manner in view of the dictum in the decision by 3 judge Bench in the case of **Bijayananda Patnaik Vs. Satrughna Sabu, A.I.R. 1963 SC**

1566 laying down the principle that a plaintiff has got an absolute power to withdraw his suit or abandon any part of his claim. It is also not the case of the petitioners that the prayer on their behalf in the court below was made for imposing cost upon the plaintiff before allowing the prayer for withdrawal of the suit. As such, in view of the principle as laid down in the case of **Jai Singh** (supra), this Court is not inclined to exercise its jurisdiction under Article 227 of the Constitution of India to interdict the impugned order.

The application is, accordingly, dismissed.

(V. Nath, J)

Devendra/-

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