

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.545 of 2013

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1. ARJUN TIWARY @ ARJUN KUNWAR S/O RAM NARESH KUNWAR R/O VILL-KOPA, TOLA-BHATWALIA KOPA, P.O.-BHATWALIA, VIA-KOPA, PARGANNA-BAL, DISTT-SARAN

.... PETITIONER/S

VERSUS

1. BINAY SHARMA S/O LATE UGAMDEO SHARMA(ORIGINAL PLAINTIFF) R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

2. AJAY SHARMA S/O LATE UGAMDEO SHARMA(ORIGINAL PLAINTIFF) R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

3. SHAILAJ SHARMA S/O LATE UGAMDEO SHARMA(ORIGINAL PLAINTIFF) R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

4. GITA SHARMA DAUGHTER OF LATE UGAMDEO SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

5. RITA SHARMA DAUGHTER OF LATE UGAMDEO SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

6. BABY SHARMA DAUGHTER OF LATE UGAMDEO SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

7. SITA DEVI W/O LATE DIGVIJAY SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

8. PANKAJ SHARMA S/O LATE DIGVIJAY SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

9. JAILAJ SHARMA S/O LATE DIGVIJAY SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

10. RANI KUMARI DAUGHTER OF LATE DIGVIJAY SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

11. BABY KUMARI DAUGHTER OF LATE DIGVIJAY SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

12. BACHAN DEVI W/O LATE UGAMDEO SHARMA R/O VILL&P.O.-BHATWALIA, P.S.-KOPPA, DISTT-SARAN

13. PANCHAM SHARMA S/O LATE BALESHWAR SHARMA

14. DEVNAL SHARMA S/O LATE BALESHWAR SHARMA

15. KUSHESHWAR SHARMA all sons of LATE BALESHWAR SHARMA, all resident of Village Kapa, Tola-Bhatwalia, P.O. & P.S. Kopa, Dist.Saran.

.... RESPONDENT/S

Appearance :

For the Petitioner/s : Mr. Binod Kumar Singh-Advocate

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

04 01-03-2016

Heard learned counsel for the petitioner as well as learned counsel for the respondents.

Petitioner, who is defendant has challenged the order dated 11.10.2012 passed by Munsif 1st, Saran at Chapra in Title

Suit No.132 of 1991 whereby and whereunder the learned lower Court had declined to accede with the prayer made on behalf of petitioner/ defendant for appointment of the Pleader Commissioner.

To substantiate such plea, the learned counsel for the petitioner submitted that respondents/ plaintiffs had filed instant suit for grant of permanent injunction restraining the defendant from interfering with their cultivating possession over the land while the defendant, by way of written statement, had controverted the pleading and submitted that the land happens to be barren one having herbs and shrubs standing unruly manner. Therefore, to have a prima facie evidence on the record which could have facilitated the Court to decide the lis whether the land under dispute happens to be under cultivating condition or is barren one substantiating the plea of the plaintiff or the defendant and that being so, the report of Pleader Commissioner was essential which the learned lower Court should have allowed. It has also been submitted that appointment of Pleader Commissioner is not at all guided with the stage of the suit. It has further been submitted that purpose for appointment of Pleader Commissioner is not for collecting the evidence on behalf of plaintiff or defendant exclusively rather it also happens to be at the wisdom of the Court



to have a report with regard to physical feature which could have enabled an opportunity before the Court to appreciate case of either of the party. So, in either of the way, the learned lower Court should have allowed the prayer. Further, to substantiate such plea, the learned counsel for the petitioner relied upon ***Bal Manohar Jalan v. Dr. Braj Nandan Sahay reported in 2012 (3) P.L.J.R. 221.***

At the other end, the learned counsel for the respondents/ plaintiffs has controverted such plea and submitted that at an earlier occasion also similar kind of prayer was made, which was rejected vide order dated 14.05.2012. Therefore, petitioner should not be allowed to re-agitate the same. It has further been submitted that while rejecting the prayer made on behalf of petitioner the learned lower Court had elaborately dealt with the reasons, grounds and that substantiate as well as justify the finding recorded by the learned lower Court.

In terms of Section 101 to 103 of the Evidence Act, obligation is on the party to prove its case, who comes to Court for having a finding in his favour. That means to say, it is the plaintiff, who carries burden and further, is under obligation to discharge the burden. In the aforesaid background, when a suit for permanent injunction has been filed at the behest of the plaintiff, then in that



event, it was upon the plaintiff to substantiate his plea whereunder it could be inferred that the defendants are the trespassers or strangers relating to the property in dispute whereupon they should be forbidden. That means to say, it is the plaintiff, who has to win or lose. Unless and until, there happens to be cross-case at the end of the defendant, no decree is found in favour of the defendant in any kind of the suit, save and except Partition Suit. Therefore, inconsistent plea relating to the plea of the plaintiff whatever been averred in the plaint, by the defendant is the plea to be looked into when the burden shift. The matter under controversy is to be seen in the aforesaid background. Two kinds of provision have been made available under Order-26, the first one regarding appointment of Pleader Commissioner and the second one regarding appointment of Survey Knowing Pleader Commissioner. The appointment of Pleader Commissioner, apart from others is also with regard to report over the physical feature, as per direction of the Court, which may be invoked by an individual that happens to be reason behind that Order-26, Rule-9 of the C.P.C. authorizes the Court on that very score. For better appreciation, ***Order-26, Rule-9 of the C.P.C.*** is quoted below:-

“9. Commissions to make local investigations- In any suit in which the Court deems a local investigation



to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

Now, coming to the present controversy, plaintiff had already adduced his evidence, intervener-defendant had already adduced their evidence and now, in term of petitioner/ defendant no.2. First of all, he has to place by oral as well as documentary evidence and in order to bring on record the actual physical feature relating to land in dispute, expected to convince the Court for elucidating the controversy, he may procure the report of the Pleader Commissioner. But, for the present, he is yet to produce his evidence and that being so, the present stage appears to be premature.

On account thereof, instant petition stand disposed of, however in case, the Court will find that presence of Pleader Commissioner's report is found necessary for proper adjudication

of the lis, then in that event, will pass appropriate order in accordance with law.

The stay so granted at an earlier occasion is hereby vacated.

(Aditya Kumar Trivedi, J)

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