

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 3 of 2010

Badri Prasad Gupta (Died) Through Lrs

1. (A) Sunder Bai Aged about 75 Years Wd/o Late Badriprasad Gupta

1. (B) Kailash Gupta Aged about 50 Years S/o Late Badri Prasad Gupta

1. (C) Shridhar Gupta Aged about 56 Years S/o Late Badri Prasad Gupta

All R/o Main Road, Kargi Road Kota, Tahsil Kota, District Bilaspur (Chhattisgarh)

---- Appellants

Versus

1. Ajay Gupta S/o Late Jagannath Prasad Gupta, Aged About 35 Years R/o Deepak Nagar, Durg (Chhattisgarh).....(Plaintiff)
2. Januma Prasad Gupta (Died) (Deleted)
3. Raj Kumar S/o Late Laxmi Prasad, Aged About 50 Years R/o Dhampur Chowk Champalal Plot No. 20, Jabalpur (Madhya Pradesh)
4. Smt. Sheelabai Wd/o Om Prakash Gupta, Aged About 38 Years
5. Ku. Nidhi D/o Late Om Prakash Gupta, Aged About 15 Years Minor, Through Legal Guardian Mother Smt. Sheela Bai Wd/o Om Prakash
6. Ankit Gupta Aged About 19 Years
7. Ku. Neha, Aged About 23 Years
8. Ku. Megha, aged about 21 years

All the three sons and daughter of Om Prakash R/o Manand Tahsil Nagar, District Jabalpur (Madhya Pradesh)

9. Smt. Bhagwati Bai Wd/o Shankarlal Gupta, Aged About 65 Years R/o Village Manghanwar Tahsil, Manghanwa District Satna (Madhya Pradesh)
10. Ratanchand Gupta Aged About 38 Years
11. Radhekishan Gupta Aged About 35 Years

12. Deenanath Gupta Aged About 32 Years

13. Laxminarayan Aged About 30 Years

14. Sudha Gupta Aged About 28 Years

10 to 14 S/o Harbansh Gupta, R/o House No. 58, Gora Bazar, Tahsil Nagar, District Jabalpur (Madhya Pradesh)

15. Smt. Godawari Bai W/o Banshilal Gupta, Aged About 57 Years R/o Bhilai Sector - 4 Road No. 37, House No. 30, Bhilai Nagar, District Durg (Chhattisgarh)

16. Smt. Rukmanibai W/o Prahlad Gupta, Aged About 54 Years R/o Babupara Raigarh Tahsil & District Raigarh (Chhattisgarh)

17. Smt. Shyama Bai Gupta Wd/o Jagannath Prasad Gupta, Aged About 68 Years R/o Jawahar Nagar, Durg, District Durg (Chhattisgarh)

18. Smt. Shobha Gupta W/o Rakesh Gupta, Aged About 39 Years R/o Auditor Co-Operative Bank Jawahar Nagar, Durg (Chhattisgarh)

19. Smt. Jyoti Gupta W/o Sandhir Hiralal Agrawal, Aged About 31 Years R/o Telibandha Raipur, Tahsil & District Raipur (Chhattisgarh)

---- Respondents

For Appellants	:	Shri Anand Kumar Gupta, Advocate
For Respondent No.1	:	Shri Jitendra Gupta, Advocate

S.B.:Hon'ble Shri Justice Manindra Mohan Shrivastava

C A V Judgment

22/01/2016

1. This miscellaneous appeal arises out of order dated 19.11.2009 passed by learned 2nd Additional Sessions Judge in Civil Suit No.17-A/2008 by which learned trial Court has granted temporary injunction to the plaintiff to the effect that defendants No. 1 & 2 or their sons, grand-sons shall not

dispossess plaintiff and his tenant from the disputed house and land.

2. Respondent- plaintiff filed a suit seeking decree of declaration that the house and land was given to Late Jagannath Gupta (father of the plaintiff and defendants No. 19 & 20 and husband of defendant No. 18) in oral partition in the family and he be granted possession of 1/4th of his share from the suit property after partition from defendant No. 1 to 17. It was also prayed that plaintiff be granted possession of the part of the disputed land on which defendants are raising construction after encroachment, by getting the construction removed and also restrain defendants by decree of permanent injunction from interfering with their enjoyment of possession over the share of the plaintiff.

According to the plaint, one Ramsnehi had four sons namely Laxmi Prasad Gupta, Badri Prasad Gupta, Dwarika Prasad and Jagannath Prasad. Plaintiff -Ajay Gupta is the son of Jagannath, defendant- Shyambai Gupta is the widow of Late Jagannath and defendants Smt. Shobha Devi and Smt. Jyoti are daughters of Jagannath. It is the case of the plaintiff that the joint family property was partitioned amongst the four brothers on 1.12.1970, acknowledged under acknowledgment dated 1.12.1970. A part of the property indicated in the map attached with the plaint was kept open as a common access. Further case of the plaintiff is that later on Laxmi and Jagannath mutually exchanged their respective share and thus the land in dispute and house came to the share of Jagannath which consisted of a house and land. A part of the house has been given on rent to one Manoj Gupta and remaining property has been kept reserved by the plaintiff for his own use. It was further pleaded that as the plaintiff and defendants No. 18 to 20 and defendants No. 3 to 9 are residing in other stations, taking undue advantage, defendant No. 1 & 2 encroached upon the land of the plaintiff and started raising construction and has also closed & encroached upon the land reserved for common use. Therefore, decree be granted as prayed for.

3. According to plaint, the plaintiff also moved an application for grant of temporary injunction under Order 39 Rule 1 & 2 r/w Section 151 CPC.
4. Defendants No. 1 & 2, in their reply to application for temporary injunction, denied the partition in the manner as sated in the plaint and stated that the partition had taken place on 9.7.1965 and a memo of the said partition was prepared on 16.12.1965 under which Jagannath & Laxmi Prasad were given gold and cash and the land in dispute was given to defendant No. 1 & 2 namely Badri and Dwarika Prasad. The memo of settlement dated 16.12.1965 was duly signed by all the parties including Jagannath & Laxmi Prasad. Therefore, the plaintiff has no right to claim in respect of the land in dispute.
5. Learned trial Court held that from the pleadings and documents placed on record, a prima facie case is made out in favour of the plaintiff as, prima facie, the land in dispute appears to have been given to Jagannath in partition and in respect of other land, defendant No. 1 & 2 have been granted share. Aggrieved by this order, this appeal has been preferred.
6. Learned counsel for the appellant argued that the learned trial Court committed gross and patent illegality and perversity in granting temporary injunction, completely ignoring the plaint allegation, which shows that the plaintiff is not in possession of the land in dispute and even according to plaint, defendants No. 1 & 2 have encroached upon the land and raising construction. It is submitted that as against the plea of partition of 1970, the defendants have clearly pleaded and placed on record memo dated 16.12.1965 which prima facie shows that the land in dispute was given to defendant No. 1 & 2 in family partition which was duly signed by Laxmi and Jagannath. The plaintiff himself has stated in the plaint that land in dispute be partitioned and he be given his 1/4th share.
7. On the other hand, learned counsel for the respondent submitted that the learned trial Court has found it a prima facie strong case in favour of the

plaintiff because the plaintiff has placed on record the document which shows that the land in dispute came to the share of Laxmi Prasad Gupta and exchanged with Jagannath and later on, the house has been given on rent to one Manoj ,whereas remaining part of the land is continuing in possession of the plaintiff, which the defendants have illegally encroached and started raising construction.

8. It is well settled legal position that plaintiff is entitled to temporary injunction only when he is able to establish three requirement i.e. prima facie case, balance of convenience and irreparable injury.
9. In the present case, the plaintiff and the defendants have set up case of partition according to their respective pleadings. While according to the plaintiff, the partition had taken place in the year 1970 under which land in dispute was allotted to the share of Laxmi Prasad which was given by him to Jagannath by way of mutual exchange of their share, on the other hand, defendants have come out with a case of partition having taken place on 9.7.1965 in respect of which a memorandum dated 19.12.1965 was written. According to defendants, in the partition, Jagannath and Laxmi were given gold and cash, whereas the landed property was given to defendant No. 1 & 2. Thus, there is a serious question between the parties and as the issue of partition is a serious question to be tried, therefore, in these circumstances, a prima facie case is made out in the sense that a serious question is required to be decided by the Court as to whether the partition was according to the so called partition of the year 1970 or partition had taken place according to memorandum of partition dated 19.12.1965.
10. However, as the plaintiff allegations show, the plaintiff himself has pleaded that the defendants are in possession and raising construction. At more than one places in the plaint, the plaintiff has clearly stated that the defendants have encroached upon the land of the plaintiff and have

started raising construction. It has also been stated that defendants have enclosed open access of the land reserved for common use. The prayer in the suit is that the land in dispute be partitioned and plaintiff's $\frac{1}{4}$ share be granted to him by delivering possession. Thus, even according to plaint, the plaintiff is not in possession of disputed land. Whether the possession of the defendant is illegal or not is a matter required to be decided during trial as the defendants have come out with the plea of partition on 9.7.1965 in respect of which they are relying upon a memorandum of partition dated 19.12.1965.

11. It would thus be seen that prima facie though a serious question is to be tried with regard to the issue of partition amongst members of the family, even according to the plaint allegation, plaintiff is not in possession of the land in dispute but the land in dispute is in possession of the defendant. However, the plaintiff pleaded regarding his tenant Manish occupying the tenanted premises. The pleadings and the prayer so read conjointly, prima facie, show that plaintiff, on the pleading that the defendants have encroached upon the land and raising construction unauthorizedly, has prayed for partition, possession and injunction.
12. Learned trial Court while granting injunction of the nature stated in the impugned order ignored to look into this aspect. Therefore, the balance of convenience does not lie in favour of the plaintiff in so far as open land is concerned. However, it is prima facie found that construction part is said to be in possession of the tenant.
13. In view of the above consideration, the form in which the injunction order has been granted by the learned trial Court in favour of the plaintiff cannot be sustained under the law and the order is set aside and it is directed that it is only the tenanted premise occupied by the plaintiff's tenant in respect of which the defendants shall not interfere during the pendency of the suit. Further, as far as the other part of disputed property which consists of land

is concerned, the defendants shall not alter its condition by raising any further construction and status quo, as it exists on the date of this order, shall be maintained in respect of the open land, till final decision in the suit.

14. The appeal is accordingly partly allowed to the extent and in the manner indicated herein-above.

Sd/-
(Manindra Mohan Shrivastava)
Judge