

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.20007 of 2012

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1. Sushil Kumar
 2. Sunil Kumar
 3. Sanjay Kumar
 4. Pankaj Kumar

All sons of late Ram Anup Ojha@ Gonaur Ojha Resident of Village and P.O. Chaumukh , P.S. Bochahan, District- Muzaffarpur.

.... Petitioners

Versus

1. Sri Krishna Kumar Chaudhary @ Kameshwar Chaudhary
2. Sri Krishna Kumar Chaudhary @ Kameshwar Chaudhary S/O Late Mohan Chaudhary R/O Village And P.O.- Chaumukh, P.S.- Bochahan, District- Muzaffarpur
3. Sri Nageshwar Chaudhary S/O Late Mohan Chaudhary R/O Village And P.O.- Chaumukh, P.S.- Bochahan, District- Muzaffarpur
4. Sri. Nageshwar Chaudhary Both sons of late Late Mohan Chaudhary Resident of Village and P.O. Chaumukh , P.S. Bochahan, District- Muzaffarpur.
5. Gangeshwar Chaudhary S/O Late Mohan Chaudhary R/O Village And P.O.- Chaumukh, P.S.- Bochahan, District- Muzaffarpur
6. Gangeshwar Chaudhary Son of late Mohan Chaudhary Resident of Village and P.O. Chaumukh, P.S. Bochahan, District- Muzaffarpur.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Pankaj Kumar Singh, Advocate
Mr. Vijay Kumar Singh, Advocate

For the Respondent/s : Mr. Kali Prasanna Dubey, Advocate

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR
ORAL ORDER

9 15-11-2017

This application has been filed for setting aside the order dated 07.08.2012 passed by learned Munsif, East Muzaffarpur in Title Suit No.54 of 2008 whereby and whereunder the learned Munsif rejected the petition filed by the original defendant-petitioner for abatement of title suit under the provision of Section 4B and 4C of the Bihar Consolidation of Holdings and



Prevention of Fragmentation Act, 1956.

2. The plaintiffs-respondents had filed a Title Suit No.54 of 2008 against the defendant-petitioner for declaration of title and recovery of possession over 2 decimals land of Khesra No.288/2625 of Khata No.264 fully detailed in Schedule II of the plaint. The plaintiffs-respondents sought a relief for decree of mesne profit from the date of dispossession till the date of recovery of possession.

3. The defendant-petitioner filed written statement on 02.02.2009 and a petition on 25.11.2010 praying therein to abate the suit as the land in dispute falls in the area notified under Section 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act. The said area has not been denotified under section 26A of the Consolidation Act and so the suit is fit to be abated. The plaintiffs-respondents filed rejoinder and the court below as per the order dated 07.08.2012 rejected the petition of the defendant-petitioner.

4. Heard learned counsel for the petitioners and the respondents.

5. It is not in dispute that the ancestor of plaintiffs executed sale deed in favour of respondents with respect to 14 dhoor land of Khesra No.288. The defendant-petitioner has



admitted this fact at paragraph 11 of the written statement. He has stated that the grandfather of plaintiffs (Mohan Chaudhary) sold an area of 15 decimals of Khesra No.288 to the father of defendant (Late Arjun Ojha) as per sale deed dated 23.01.1967 and father of the defendant constructed his house and the defendant lives therein along with his family. The defendant-petitioner at paragraph 12 has further stated that the land mentioned in Schedule II of the plaint is not the ancestral land of plaintiffs rather its eastern portion is part and parcel of his above purchased land by virtue of registered sale deed dated 23.01.1967 and the western portion of the Schedule II land is part and parcel of road land.

6. Thus, the above averments clearly show that the suit land mentioned in Schedule II of the plaint is being claimed as their purchased land from the grandfather of the respondents and after constructing house the defendant is residing in the said house. The nature of land admittedly has changed to homestead land. In the ruling reported in **1979 BBCJ 738 (Ram Pratap Mahto & Ors. Vs. Diplal Mahto & Ors.)** it has been observed that in case of controversy whether a house is a homestead or not the court should first decide the question before applying the provisions of section 4(1) (c) – ‘Homestead’ is covered and provisions of Section 4 (1) (c) applies. It further appears that the



defendant has not taken the plea of abatement of suit under the provision of Section 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act in the written statement. The land in question is not the agricultural land and there appears mixed question of law and facts for adjudication with regard to nature of land and claim of parties. This requires trial and it cannot be decided as preliminary issue.

7. In view of the above fact, I do not find any merit in this application. Accordingly, this writ application is dismissed.

(Sanjay Kumar, J)

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