

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.646 of 2016**

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1. Salama Khatoon wife of Harun Rasid Resident of village- Ujari Sikathi
P.S. Bhabua District- Kaimur

.... Defendant-Petitioner/s

Versus

1. Ramayan Singh

2. Ram Kishun Singh both sons of Late Meghan Singh Resident of village-
Ujari Sikathi P.S. Bhabua District- Kaimur

..... Plaintiffs-Respondent 1st set

3. Ram Singhasan Singh son of late Ram Surat Singh

4. Rama Shankar Singh son of Shiv Murat Singh

5. Sharda Devi wife of Sri Jagadish Singh

6. Ram Nagina Singh son of Late Jai Ram Singh All are Resident of village-
Ujari Sikathi, P.S. Bhabua District- Kaimur (Bhabua)

.... Defendant 2nd set-Respondent 2nd set

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Appearance :

For the Appellant/s : Mr. Arabind Nath Pandey

For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR
JHA
ORAL ORDER**

6 12-12-2017 The petitioner has filed this civil miscellaneous petition for setting aside the order dated 09.05.2016 passed by Additional District Judge V, Kaimur at Bhabhua in Civil Misc. Appeal No.16 of 2015/17 of 2016.

The petitioner is defendant 1st set in Title Suit No.36 of 2014. The plaintiffs are respondents 1st set in the present case. Plaintiffs filed suit for grant of permanent injunction restraining the defendant 1st set from taking possession over the suit land. The plaintiff sought further relief that the defendant 1st set be directed to execute the sale deed in favour of the plaintiff after receiving



the consideration amount with regard to the dwelling house purchased by the defendant 1st set from defendants 2nd set.

The defendants appeared and filed written statement. The plaintiffs filed petition under Order 39 Rule 1 and 2 C.P.C.(hereinafter referred to as the Code) for grant of temporary injunction restraining the defendant 1st set from taking possession over the land. Learned Sub Judge dismissed the petition on 19.06.2015 for grant of injunction. The plaintiff filed Misc. Appeal No.16 of 2015 and the learned Additional District Judge restrained the defendant 1st set from taking possession over the dwelling house purchased by her from the defendants 2nd set vide order dated 09.05.2016. The petitioner-defendant 1st set being aggrieved by the aforesaid order moved this case.

Mr. T.N.Maitin, learned senior counsel appearing on behalf of the petitioner made two folds argument. Firstly, it is submitted that plaintiffs-respondents 1st set have stated in the plaint that the plaintiffs and the defendants 2nd set owned the joint property and khatian was prepared showing equal shares in the name of all the sons of Mahipat Singh. The plaintiffs admitted that there was a partition between plaintiffs and the defendants 2nd set with regard to the agricultural land. Once it is admitted that there was a partition between the coparceners, there shall be a



presumption that partition took place by metes and bounds and the parties who alleges jointness has to prove the fact that there was no partition by metes and bounds. The application of Section 4 of the Partition Act is applicable only when there was no partition by metes and bound and a coparcener is entitled for presumption under Section 4 of the Partition Act if another coparcener sells the dwelling house to a stranger. The learned counsel placed his reliance in support of his submission on the judgment reported in **AIR 1952 Patna 382(Chhatradhari Mahton and others v. Akleshwar Mahton and others)**, **AIR 1983 Patna 129(Most. Marjadi Devi and others v. Jagarnath Singh and others)** and **AIR 1966 Patna 179(Ramnagina Sah and others v. Harihar San and others)**.

On the contrary, the learned counsel for the respondents submitted that the plaintiff has very categorically stated in the plaint that no partition took place between the sons of Mahipat Singh. The descendants of Mahipat Singh partially partitioned the agricultural land and their dwelling house is joint and they are living together. The defendants filed written statement but no averment is made nor any document is produced to show that there was a partition between the plaintiff and defendants 2nd set by metes and bounds. The averment of the



plaintiffs that there is jointness with regard to dwelling house is a question of fact and the plaintiffs have to prove this fact during the course of hearing of the suit. Presently, the defendants 2nd set sold the dwelling house to a stranger who belongs to other religion.

From perusal of the plaint, it appears that plaintiff has stated in the plaint that the plaintiff and defendants are living jointly on the suit land, Plot No.251 and 560, Khata No.86. Without any partition, the defendant Nos.2 to 5 executed a sale deed with regard to part of the dwelling house in favour of Salama Khatoon, defendant 1st set on 21.10.2013 but the defendants 1st set did not take possession and the plaintiffs filed the suit restraining the defendants from forcefully taking possession over the land. The defendants 1st set stated that there was partition between the plaintiffs and defendants 2nd set and defendant No.5 executed sale deed on 15.07.1963 and disclosed the name of other coparceners in the boundary of the land. The defendants 1st set have also given examples for dealing with the lands separately by the coparceners.

The only question arises for consideration whether the learned Additional District Judge has committed any jurisdictional error in granting injunction in favour of the plaintiff.

In the case of **Most. Marjadi Devi and others v. Jagarnath Singh and others**, AIR 1983 Patna 129, it has been



held in para 15 of the judgment that "there is a presumption of jointness in a Hindu family. The jointness in the Hindu family comes to an end when a partition is proved. When a partition is proved, then it will be presumed that the partition was by metes and bounds, unless it is rebutted in evidence by the other side."

In the present case also, the plaintiff has stated in the plaint that of course there was a partial partition with regard to the agricultural land between the plaintiffs and the defendants 2nd set but the dwelling house remained joint. Unless it is proved that there is partition by metes and bounds there shall be a presumption that there is a jointness in the joint Hindu family.

In the case of **Chhatradhari Mahton and others v. Akleshwar Mahton and others**, AIR 1952 Patna 382, Division Bench of this court has held that "if a person alleged that some family properties remained joint has to prove his case that certain properties remained joint. Of course, the onus is on the plaintiff to show that the certain properties were excluded from partition particularly if it is pleaded that there was a partition." In the present case also, the plaintiff himself claimed that the dwelling house remained joint among the coparceners and they are living together, therefore, the onus is on him to prove this fact but before discharge of this onus by the plaintiff at the initial stage for



consideration of injunction petition it cannot be presumed that there can be a partition by metes and bounds among coparceners.

Mr. T.N.Maitin secondly submitted that Section 4 of the Partition Act gives right of pre-emption to the coparcener if the strange purchaser of the dwelling house from other coparceners filed suit for partition. The petitioner did not file any suit for partition and, therefore, in a suit filed by plaintiff-respondent, the petitioner cannot claim the right to pre-empt share purchased by stranger. The learned counsel for the petitioner placed his reliance on the judgment of the Supreme Court reported in **AIR 2001 Supreme Court 61(Gautam Paul v. Debi Rani Paul and others)**.

On the contrary, the learned counsel for the respondents 1st set submitted that a special Bench of the Calcutta High Court in a case of **Siba Prosad Bhattacharyya and others v. Bibhuti Bhusan Bhattacharjee and another, reported in AIR 1989 Cal. 35** has held that “the right of pre-emption u/S.4 is available to a co-sharer of an undivided family dwelling house even when he himself files a suit for partition and the stranger purchaser is arraigned as defendant and irrespective of the fact whether the stranger purchaser has actually applied for partition or for separate allotment of his share or not. The parties of the suit



for partition being interchangeable the right to claim separate allotment is germane in any party be he the plaintiff or defendant in the suit for partition and in such case the right of pre-emption cannot be defeated only because on or before the filing of the application for pre-emption under S.4 the stranger purchaser as defendant did not ask for separate allotment.” It has further been held that “S.4 ought to be liberally interpreted. The object of S.4 is to prevent the disintegration of the family dwelling house by preventing to introduce stranger therein. The stranger is adequately, compensated by the market value of the property purchased so that dwelling house of the family be preserved. The view that S.4 must be strictly construed and that until and unless the stranger either sues for partition as a plaintiff or asks for separate allotment as defendant the right of pre-emption cannot be claimed, if be accepted then the whole object of S.4 would be frustrated. The word "to sue" would include both "to prosecute" and "to defend" and only if such a view is taken the object of S.4 is not frustrated.”

The learned counsel for the respondent 1st set further submits that “Section 44 of the Transfer of Property Act and Section 4 of the Partition Act are complementary to each other. The terms undivided family and dwelling house have the same



meaning in both the Sections”. It is further submitted that “Section 44 does not give a transferee of a dwelling house belonging to an undivided family a right to joint possession and confer a corresponding right on the other members of the family to deny the right to joint possession to a stranger transferee, Section 4 of the Partition Act gives a right to a member of the family who has not transferred his share to purchase the transferee's share on a value to be fixed in accordance with law when the transferee filed a suit for partition. Both these are valuable rights to the members of the undivided family whatever may be the object or purpose for which they were conferred on such members. In some cases it is stated that the right to joint possession is denied to a transferee in order to prevent a transferee who is an outsider from forcing his way into a dwelling house in which the other members of his transferee's family have a right to live. In some other cases giving joint possession was considered to be illegal and the only right of the stranger purchaser is to sue for partition. All these considerations would go only to show that denying an injunction against a transferee in such cases would prima facie cause irreparable injury to the other members of the family.”

In the case of Gautam Paul(supra), AIR 2001 Supreme Court 61, the Apex Court has held that the application of Section 4



arises only when a stranger transferee of a dwelling house of a family filed suit for partition and to carve out a separate share. It appears that Apex Court has also considered the Special Bench judgment rendered in **Siba Prosad Bhattacharyya and others(supra), AIR 1989 Cal. 35** and overruled the judgment following the ratio of **AIR 1997 Supreme Court 471** but in paragraph 23 of the aforesaid judgment, the Apex Court held as follows:

“23. We are in agreement with this opinion. There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of preemption,



under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above one of the conditions is that the outsider must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsider does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants.”

In the case of **Dorab Cawasji Warden v. Coomi Sorab Warden and others**, AIR 1990 Supreme Court 867, the Apex Court while dealing with provisions of Section 44 of the T.P.Act held in para 25 of the aforesaid judgment as follows:

“25. The next question for consideration is whether irreparable injury would be caused to the appellant which could not be compensated in terms of money and whether the balance of convenience is in favour of the appellant. While section 44 does not give a transferee of a dwelling house belonging to an undivided family a right to joint possession and confer a corresponding right on the other members of the family to deny the right to joint possession to a stranger transferee, section 4 of the Partition Act



gives a right to a member of the family who has not transferred his share to purchase the transferee's share on a value to be fixed in accordance with law when the transferee filed a suit for partition. Both these are valuable rights to the members of the undivided family whatever may be the object or purpose for which they were conferred on such members. As we have pointed out in some cases it is stated that the right to joint possession is denied to a transferee in order to prevent a transferee who is an outsider from forcing his way into a dwelling house in which the other members of his transferee's family have a right to live. In some other cases giving joint possession was considered to be illegal and the only right of the stranger purchaser is to sue for partition. All these considerations in our opinion would go only to show that denying an injunction against a transferee in such cases would prima, facie cause irreparable injury to the other members of the family.”



In the present case also, the plaintiff firstly seeks relief that the defendants 1st set be restrained from taking possession of the joint family dwelling house by virtue of the sale deed executed by the defendants 2nd set, the common descendants of Mahipat Singh in favour of defendant 1st set-petitioner and the alternative relief is defendant 1st set is directed to execute sale deed under Section 4 of the Partition Act in favour of the plaintiffs. Section 44 of the T.P. Act clearly says that a stranger transferee from a coparcener of a joint Hindu dwelling house does not give right to joint possession and confer a corresponding right on the other members of the family to deny the right to possession to a stranger transferee in the joint family dwelling house. It appears that the petitioner is admittedly a stranger and belonged to another religion. If in such case, the plaintiff is denied injunction restraining the petitioner from taking possession of the joint dwelling house irreparable loss will cause to the plaintiffs-respondents 1st set and on the facts aforesaid, the balance of convenience also lies in favour of the plaintiffs-respondents 1st set and therefore, in my view, learned Additional District Judge has rightly granted injunction in favour of the plaintiffs-respondents 1st set.

Having considered the facts aforesaid, I do not find any



material illegality and jurisdictional error in the order impugned.

Accordingly, this civil miscellaneous petition is dismissed.

(Prabhat Kumar Jha, J)

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