

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1821 of 2017

1. Lala Prakash Singh son of Late Ramashish Singh.
2. Nishant Gunjan son of Lala Prakash Singh.
3. Prashant Gunjan.
4. Shashank Gunjan Both minor sons of Learner Appellate Authority Prakash Singh under the guardianship of their father Lala Prakash Singh
5. Smt. Seema Singh wife of Lala Prakash Singh. All Residents of Village- Prasadi English, Post Office and Police Station Arwal, District Arwal at present residing in Mohalla Pakshimi Mohan Bigaha, Dehari, Post Office Dalmianagar, District Rohtas at Sasaram.

... .. Petitioner/s

Versus

Smt. Ramkali Devi wife of Shri Rajdeo Singh Resident of Mohalla New G.T. Road, Mohan Bigaha Dehari, Police Station Dehari, Post Office Dehari, District Rohtas at Sasaram.

... .. Respondent/s

with

CIVIL MISCELLANEOUS JURISDICTION No. 189 of 2018

1. Lala Prakash Singh, Son of Late Ramashish Singh
2. Nishant Gunjan Son of Lala Prakash Singh
3. Prashant Gunjan.
4. Shashank Gunjan. Both Minor Sons of Lala Prakash Singh, Under Guardianship of their Father Lala Prakash Singh
5. Smt. Seema Singh, Wife of Lala Prakash Singh All Resident of Village-Prasadi English, Post Office-And Police Station-Arwal, District-Arwal At Present residing at Nohalla-Pakshimi Mohan Bigaha, Dehri, Post Office-Dalmianagar, District-Rohtas at Sasaram.

... .. Petitioner/s

Versus

Smt. Ramkali Devi, Wife of Shri Rajdeo Singh, Resident of Mohalla-New G.T. Road, Mohan Bigaha Dehri, Police Station-Dehri, Post Office-Dehri, District-Rohtas at Sasaram.

... .. Respondent/s

Appearance :

(In CIVIL MISCELLANEOUS JURISDICTION No. 1821 of 2017)

For the Petitioner/s : Mr. Kamal Nayan Choubey, Sr. Advocate
Mr. Ashok Kumar Garg, Advocate
Mr. Dineshwar Pandey, Advocate
Mr. Animesh Kumar, Advocate



For the Respondent/s : Mr. Ravi Kumar, Advocate
Mrs. Priya Chubey, Advocate
Mr. Rajiv Ranjan Singh, Advocate
(In CIVIL MISCELLANEOUS JURISDICTION No. 189 of 2018)
For the Petitioner/s : Mr. Kamal Nayan Choubey, Sr. Advocate
Mr. Ashok Kumar Garg, Advocate
Mr. Dineshwar Pandey, Advocate
Mr. Animesh Kumar, Advocate
For the Respondent/s : Mr. Ravi Kumar, Advocate
Mrs. Priya Chubey, Advocate
Mr. Rajiv Ranjan Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA
ORAL ORDER

3 05-03-2018 Learned counsel for the petitioners seeks permission to withdraw the Civil Miscellaneous No. 1821 of 2017 as the same has become infructuous.

Accordingly, Civil Miscellaneous No. 1821 of 2017 is dismissed as withdrawn.

Heard both sides.

The petitioners filed Civil Miscellaneous No. 189 of 2018 against the order dated 05.12.2017 passed in Title Appeal No. 46 of 2014 by which the learned Additional District Judge, VII, Rohtas at Sasaram did not pass any order on the petition of the petitioners filed under Section 41 Rule 5 of the C.P.C. and directed both the parties to present their case before the Execution Court in view of the order passed by this Court in I.A. No. 4494 of 2014 filed in First Appeal No. 109 of 2014.

Mr. Kamal Nayan Choubey, learned Senior Counsel appearing on behalf of the petitioners, has submitted that the



wife and children of the petitioner No. 1 filed Title Partition Suit No. 475 of 2004 against Sudama Devi and others in which the petitioners are also respondents. During the pendency of Title Partition Suit No. 475 of 2004, Sudama Devi executed four sale deeds with regard to some portions of plot No. 161 in favour of the sole respondent, namely, Smt. Ram Kali Devi. The sole respondent filed Title Suit No. 28 of 2005 for declaration of title on the basis of the sale deed executed in her favour by Sudama Devi and for recovery of possession. The Title Partition Suit No. 475 of 2004 was partly decreed and it was held that the lands sold by Sudama Devi is the exclusive property of Sudama Devi and she acquired the lands of Plot No. 161 out of her *Stri Dhan* against which the petitioners filed First Appeal No. 109 of 2014 in this Court. The petitioners also filed Title Appeal No. 46 of 2014 against the judgment and decree passed in Title Suit No. 28 of 2005. Ram Kali Devi filed Execution Case No. 10 of 2014. It is further submitted that the petitioners filed a petition in Title Appeal No. 46 of 2014 for restraining the respondent for forcibly taking possession of the suit land purchased by him.

This Court vide order dated 11.10.2017 (Annexure-3) directed the respondents not to take forcible possession of the suit land, but at the same time, gave liberty to the Defendant No.



9A/Respondent No. 11 of the appeal to take appropriate step for recovery of possession in accordance with law. Thereafter, the petitioners filed petition under Order 41 Rule 5 of the C.P.C. to stay the Execution Case No. 10 of 2014 in Title Appeal No. 46 of 2014. It is submitted that admittedly, respondent No. 1 is a stranger to the family. She purchased the land from Sudama Devi during pendency of the partition suit and filed the Title Suit No. 28 of 2005 for declaration of title and for recovery of possession. The petitioners have got right under Section 44 of the Transfer of Property Act to get injunction against a stranger taking possession of homestead land by virtue of a sale deed.

It has been held by the Apex Court in the case of ***Dorab Cawasji Warden V. Coomi Sorab Warden and others in AIR 1990 SC 867*** that the co-sharer is entitled to get order of restraint under Section 44 of the T. P. Act from taking possession of the joint house by a stranger.

On the other hand, learned counsel for the sole respondent contending the submissions of learned counsel for the petitioners submitted that the petitioners are not co-sharers of the vendor, Sudama Devi who purchased the land out of her *Stri Dhan* and the Court has recorded the finding that the lands of Plot No. 161 sold by Sudama Devi was purchased by her *Stri*



Dhan. Therefore, the petitioners are not entitled to get any order of restraintment or stay of the Execution Case No. 10 of 2014.

Admittedly, the sons and wife of the petitioner No. 1 filed Title Partition Suit No. 475 of 2004, for the partition of ancestral property as well as property jointly acquired by the family members. Petitioner No. 1 was one of the defendants along with Smt. Ramkali Devi, respondent of the present case. During pendency of Title Partition Suit No. 475 of 2004, Sudama Devi sold the portions of Plot No. 161 to Smt. Ramkali Devi by executing four sale deeds. Thereafter, Smt. Ramkali Devi also filed Title Suit No. 28 of 2005 for declaration of title and recovery of possession. Title Partition Suit No. 475 of 2004 and Title Suit No. 28 of 2005 was heard together. Title Partition Suit No. 475 of 2004 was decreed partly and it was held that the portions of Plot No. 161, which was sold by Sudama Devi in favour of Smt. Ramkali Devi is the self acquired property of Sudama Kaur and the same cannot be partitioned among co-parcener. At the same time, Title Suit No. 28 of 2005 was also decreed holding that the purchaser Smt. Ramkali Devi has got title and she is entitled to recover possession from the petitioners. Against the judgment and decree passed in Title Partition Suit No. 475 of 2004, the petitioners filed Title Appeal



No. 109 of 2014 and the petitioners also filed Title Appeal No. 46 of 2014 against the judgment and decree passed in Title Suit No. 28 of 2005. The petitioners by filing I.A. No. 4494 of 2014 prayed to restrain the defendant-respondents from dispossessing the appellants from the residential house standing on plot Nos. 161 and 162. This Court vide order dated 11.10.2017 in paragraph-7 of the order held as aforesaid:-

“Since defendant no. 9A /respondent No. 11 is stranger to the joint family of appellants and remaining respondents, it would not be proper to allow her to get possession of her purchased portion till disposal of this appeal because her entry in dwelling house shall create a lot of problems to other member of joint family. Therefore, in my view, I.A. No. 4494 of 2014 does have merit and accordingly, it is ordered that the respondent no. 11/defendant no. 9A shall not take forcible possession of her purchased area till disposal of this appeal and the same order shall apply to all those persons who make attempt to take forcible possession of purchased area of defendant no. 9A/respondent No. 11 on her behalf. It is made clear that defendant no. 9A/respondent no. 11 may take possession of aforesaid purchased area through the established procedure of law, if the concerned court thinks it fit. It is also made clear that observations/findings given in this order shall not prejudice to the mind of concerned court while considering the stay of Execution Case No. 10 of 2014 and both parties shall be at liberty to raise their pleas before the Execution Court.”

In pursuance of the aforesaid order, the petitioners filed



petition under Order 41 Rule 5 of the C.P.C. in Title Appeal No. 46 of 2014 for stay of the Execution Case No. 10 of 2014. The learned Additional District Judge posted the petition for orders on 05.12.2017 after hearing both sides on 28.11.2017, but on 05.12.2017, the learned Additional District Judge instead of either allowing or dismissing the petition filed under Order 41 Rule 5 of the C.P.C, ordered that he did not think it proper to pass any order in view of the order passed in First Appeal No. 109 of 2014. This Court while disposing of I.A. No. 4494 of 2014 directed to raise the point of stay before the execution Court. Admittedly, respondent No. 1 is a stranger of the family of the petitioners and she purchased a portion of residential house in which the appellants and other members of the family of the appellants including Sudama Devi are residing. Section 44 of the Transfer of Property Act clearly says that:-

“Where one of two or more co-owners of immovable property giving the right to the transferee to joint possession or other common or part enjoyment of the property and to enforce a partition of suit. The transferee of a share of a dwelling house belonging to undivided family shall not be entitled to joint possession or other common or part enjoyment of the house.”

Therefore, I find that of course, the trial court has given finding that Sudama Devi sold some portions of plot No. 161 in



favour of Smt. Ramkali Devi and the same was acquired by her out of her *Stri Dhan* but the finding is under challenge and Smt. Ramkali Devi (transferee) is a stranger to the family. In view of the provision of Section 44 of the T.P. Act she is not entitled to take possession of dwelling house and thus, I find that the learned Additional District Judge has failed to exercise the jurisdiction vested in him by law. Accordingly, the order dated 05.12.2017 is set aside. The Civil Miscellaneous is allowed. The Execution Case No. 10 of 2014 is stayed till the disposal of Title Appeal No. 46 of 2014.

The learned Additional District Judge, who is in seisin of Title Appeal No. 46 of 2014, is directed to dispose of the appeal within six months from the date of receipt/production of a copy of this order.

(Prabhat Kumar Jha, J)

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