

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.763 of 2017

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1. Bishwanath Prasad, S/o Ram Kripal Sah @ Ram Kripal Prasad.
 2. Vijay Kumar, S/o Bishwanath Prasad,
 3. Vidya Kumari, D/o Sri Bishwanath Prasad, All residents of Mohalla- Makhaniya Kuan, P.S. Pirbahor, District- Patna.

... .. Appellant/s

Versus

1. Veena Kumari,
2. Vibha Kumari, Both daughters of Bishwanath Prasad, Resident of Mohalla- Makhaniya Kuan, P.S.- Pirbahor, District- Patna.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. D.K. Sinha, Sr. Advocate
		Mr. Bajrangi Lal
For the Respondent/s	:	Dr. Anand Kumar.

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

C.A.V. JUDGMENT

Date : 04-05-2018

Heard learned counsel for the appellants and learned counsel for the respondents on this miscellaneous appeal and perused the records.

2. This miscellaneous appeal has been preferred against the Order dated 02.08.2017 passed by Sub Judge 1st, Patna in Title Partition Suit no. 135 of 2016 whereby learned lower court allowing the petition of the plaintiffs-respondents filed under Order 40 Rule 1 CPC appointed Shashi Bhushan Prasad, advocate of the plaintiffs-respondents as Receiver of the



property in question.

3. Factual matrix of the case is that the plaintiffs Veena Kumari & another filed Title Partition Suit no. 135 of 2016 against the respondents Vishwanath Prasad & Ors. for partition of the property in question with the case in succinct that common ancestor of the parties was Ram Kripal Sao, who had four sons, namely, Bishwanath Prasad, Rajendra Prasad, Sachidanand Prasad and Uma Shankar Prasad. Bishwanath Prasad (appellant no. 1) has one son namely, Vijay Kumar (appellant no. 2) and three daughters, namely, Vidya Kumari (appellant no. 3), Veena Kumari (respondent no. 1) and Vibha Kumari (respondent no. 2). The property, in question, belonged to Bishwanath Prasad and his scion. Brothers of Bishwanath Prasad have got no interest in the aforesaid property. Said Bishwanath Prasad purchased the property in question in the name of his wife Rukmani Devi bearing holding no. 90(A) and 90(B) and new holding no. 122/126 and 123/127 located in old Ward no. 9 and new Ward no. 41 municipal survey plot nos. 377, 388 and 391 at Mohalla, Makhaniya Kuan, Naya Tola, P.S.-Pirbahore, district-Patna vide sale deed dated 9.2.1963 from Bihari Lal Murarka and Smt. Brahama Devi. There are several tenants in the said property and there is a girls hostel



also, and total rental income from the aforesaid tenanted accommodation is Rs. 3,20,200/- which are being realized by Vidya Kumari. Vidya Kumari has been utilizing the said income and has not paid any penny to the plaintiffs-respondents. Against the said plaint case, by filing the written statement the appellants-defendants have taken the case *inter alia* that the plaintiffs-respondents have given incomplete genealogical table of the family and giving its own genealogical table, they have stated that Ram Rekha Sao had one son, namely, Ram Kripal Sao. Ram Kripal Sao had four sons, namely, Uma Shankar Prasad, Bishwanath Prasad, Rajendra Prasad and Sachidanand Prasad. Said Bishwanath Prasad has one son, namely, Vijay Kumar and three daughters, namely, Veena Kumari, Vidya Kumari and Vibha Kumari. Wife of Bishwanath Prasad was Kanti Devi. They have given the name of heir of other brothers of Bishwanath Prasad in the genealogical table also. Further case of the defendants-appellants is that Ram Rekha Sao and Ram Kripal Sao were members of a joint Hindu Mitakshara family and they were in joint possession of the entire joint family properties. The said Ram Rekha Sao died in state of jointness leaving behind his son Ram Kripal Sao and his four grandsons, namely, Vishwanath



Prasad, Rajendra Prasad, Uma Shankar Prasad and Sachidanand Prasad, who came in joint possession of the entire joint family properties. Vishwanath Prasad and his minor son Vijay Kumar Prasad filed Title Partition Suit no. 91 of 1970 against Ram Kripal Sao and others in the court of Sub Judge 1st, Gaya for partition of their share in the joint family properties. The aforesaid suit was compromised and by virtue of compromise, the land and house bearing holding no. 125 and 127 situated at Mohalla- Makhania Kuan, P.S. Pirbahor, District-Patna was allotted to Vishwanath Prasad and Vijay Kumar defendant-appellant nos. 1 and 2 exclusively and since then the aforesaid defendants-appellants are in possession of the aforesaid property as absolute owner thereof. Subsequently, there was another private partition of the entire joint family properties between Vishwanath Prasad on one side and Vijay Kumar Prasad on the other hand 18 years ago and by said partition the lands of village-Kukra, P.S. Oncut, District-Gaya was allotted to Vishwanath Prasad and his wife and the land and house of Mohalla-Makhania Kuan, P.S. Pirabhore, District-Patna was allotted to Vijay Kumar Prasad and they came in possession of the aforesaid property allotted to them as absolute owner thereof. Wife of Vishwanath Prasad, namely, Kanti Devi died



in the year 2011 leaving behind her son Vijay Kumar Prasad and three daughters, namely, Veena Kumari, Vidya Kumari and Vibha Kumari and her husband Vishwanath Prasad. Thus Vijay Kumar Prasad is absolute owner of the property in question and is in possession thereof in the aforesaid capacity.

4. During pendency of the aforesaid suit, plaintiffs-respondents filed a petition under Order 40 Rule 1 CPC for appointment of Receiver to realize the rent from the tenants of the joint family property and maintain their proper account with the case, in succinct, that the plaintiffs and defendants, both are residents of the suit property. There are several tenants in the suit premises and a girls hostel is also running in it. The rental income from the said property is Rs. 3,20,200/-. The said income is being realized by defendant no. 3 (Vidya Kumari) and is also being utilized by her in her own use. She has not given a single penny to the plaintiffs though they are entitled for 2/5th share in the aforesaid income. She is a man of means and also maintains a muscle power and in collusion of other defendants, she is misappropriating the aforesaid rental income of the property in question.

5. Defendants-appellants by filing rejoinder against the aforesaid petition, apart from taking the aforesaid case as



taken by them in their written statement, have stated that the defendant-appellant no. 2 (Vijay Kumar), subsequently, became abnormal and physically weak and his affair is being managed by defendant no. 3 (Vidya Kumari) with the permission and consent of the said defendant. The defendant no. 3 is running her own girls hostel in the aforesaid property and has also been realizing the rent from the other tenants of the property and handing over the same to defendant no. 2. Plaintiffs and defendant no. 3 are leaving in the suit property with permission of defendant no. 2 while defendant no. 1 is residing at Gaya and pay visit the suit house of and on to meet his son and daughters. The earning of girls hostel runs by defendant no. 3 is her own while income from the rents of the property in question is self-income of the defendant no. 2. Assailing the quantum of the income as stated by the plaintiffs-respondents, the defendants-appellants have stated that the income of rent from other tenants is about 45,000/- while that from girls hostel is about 1,50,000/- and the plaintiffs-respondents are not entitled for any share in the said income.

6. After hearing the parties and perusing the record, learned lower court passed the aforesaid Order as detailed in earlier paragraph.



7. Being aggrieved and dissatisfied with the impugned order, the defendants-appellants have preferred this miscellaneous appeal.

8. From perusal of the aforesaid case of the parties, it appears that the plaintiffs-respondents are claiming the property in question and its rental income as joint family property, and have claimed their 2/5th share in the said property and rental income. While defendants-appellants have taken the case that the property, in question, is the absolute property of the appellant no. 2 Vijay Kumar, and appellant no. 3 Vidya Kumari is running a girls hostel on the said property of her own and she has also been realizing rent from other tenants of the said property and paying rent of the said tenants and of her own hostel to appellant Vijay Kumar and said rent is also the own property of Vijay Kumar and plaintiffs-respondents have no concern and they have got no share in the same.

9. The plaintiffs-respondents have filed the aforesaid petition under Order 40 Rule 1 CPC to appoint Receiver to realize the rents from the tenants of the aforesaid property and maintain proper account submitting that due to usurping the entire rental income by the appellant no. 3 (Vidya Kumari), they have been suffering irreparable loss regarding the



said rental income. The plaintiffs-respondents have not claimed any emergency or danger or loss to the property in question demanding immediate action for appointment of Receiver. Merely showing a case of adverse and conflicting claims to property will not suffice rather plaintiff has to show some emergency or danger or loss to the property demanding immediate action. In such a case, right of the plaintiff must be reasonably clear and free from doubt and in addition to that the element of danger to the suit property is very important in such matters and the court should appoint a Receiver only when there is a great imminent danger to the property demanding immediate relief.

10. This High Court in *Mostt. Patri Devi @ Girja Devi and Another-Appellant Vs. Ganesh Lal Pradhan and Others-Respondents reported in A.I.R. 2004 Patna 29* has been pleased to rule that when a case is made out of decay and destroyance of the property in lis then from saving the property the Court is to take custody of the property and then as its representative a Receiver is to be appointed who remains answerable to the Courts, as provided under Order 40 Rule 1 CPC. The Court after going through various decisions given by Courts in India and also the Hon'ble Apex Court enumerated



following principles when a Receiver can be appointed:

- (i) it is the discretionary power of the Court, although, such discretion has to be applied judiciously.
- (ii) plaintiff must show that he has very excellent chances of success in the suit.
- (iii) he must not only show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss demanding immediate action & of his own right he must be reasonably clear and free from doubt.
- (iv) no order will be made to deprive the defendant of de facto possession.
- (v) the Court will usually refuse to interfere unless his conduct has been free from any blame.

11. This Court in the case of *Vijai Kumar v. Smt. Kiran Devi and Ors.*, AIR 2007 Patna 166 following the well known leading decision of the Madras High Court, A.I.R. 1955 Madras 430 held that while considering the appointment of receivership, the following five principles must be considered by the courts which are known as 'Punch Sadachar':

- (i) Appointment of a receiver pending a suit is a matter resting in the discretion of the Court;
- (ii) No receiver should be appointed except upon proof



that plaintiff has a very excellent chance of succeeding in the suit;

(iii) Plaintiff must show some emergency or danger or loss demanding immediate action;

(iv) Receiver should not be appointed where it has the effect of depriving a defendant of his 'de facto' possession; and

(v) The Court should look into the conduct of the party who makes application”.

12. From perusal of the aforesaid case of the plaintiffs-respondents, it appears that the plaintiffs-respondents have not claimed any emergency or danger or loss to the property in question demanding immediate action. Learned lower court appears to have allowed the aforesaid petition merely finding that in case of not appointing the Receiver, there would be loss of rental income to the plaintiffs-respondents. Though, it has also found that there would be loss of property, but he has not given its finding as to how the property, in question, would be destroyed or what is the imminent danger or emergency or loss to the property in question demanding appointment of Receiver.

13. In view of the aforesaid facts and discussion made by me hereinabove, I find that the impugned order passed



by learned court below is contrary to law and, hence, it is set aside. Accordingly, this miscellaneous appeal is allowed.

(Prakash Chandra Jaiswal, J)

rohit/-

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