

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.395 of 2016

Manohar Prasad Sinha, S/o Late Madan Mohan Prasad Narayan Sinha, R/o Rai Bahadur Shah Shankar Sahar Road, Gumti no. 2, P.S. Tilkamanjhi, District-Bhagalpur.

... .. Appellant/s

Versus

1. Sri Pawan Kumar Mishra, S/o Sri Awdhesh Kumar Mishra, R/o Jagganathpur, P.S. Kahalgaon, District-Bhagalpur.
2. Sri Vivekanand Singh, S/o Late Ugramohan Singh, R/o Choudhary Tola, Kahalgaon, P.S. Kahalgaon, District-Bhagalpur.
3. Santosh Kumar Sinha, S/o Late Madan Mohan Prasad Narayan Sinha, R/o Mohalla-Tilkamanjhi, near teaching point school, P.S. Tilkamanjhi, district-Bhagalpur.
4. Sri Ajay Kumar Sinha, S/o Madan Mohan Prasad Narayan Sinha, R/o Behind B.Ed. College, William Town, P.S. Deoghar, District-Deoghar (Jharkhand)
5. Smt. Asha Singh, W/o Sri Binod Kumar Sharma D/o Madan Mohan Prasad Narayan Sinha, R/o R.B.S. Road, near blind school, Bhikhunpur, P.S. Tilkamanjhi, District-Bhagalpur.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Sanjeet Kumar, Advocate
		Mr. Digvijay Narayan Singh, Advocate
For the Respondent/s	:	Mr. Alok Kumar Choudhary, Advocate
		Mr. Nagendra Kumar, Advocate
		Mr. Kula Nand Jha, Advocate

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date : 25-04-2018

Heard learned counsel for the appellant 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 23.02.2016 passed by learned Sub-Judge-1st, Bhagalpur in Title Suit no. 433 of 2008 whereby the learned lower court rejected the injunction petition filed by the appellant under Order 39 Rule 1 & 2 read with Section 151 CPC.

3. Being aggrieved and dissatisfied with the aforesaid Order, the appellant has preferred the present appeal.

4. It is the case of the appellant that the property in question is the un-partitioned residential house. Earlier, it was belonging to Madan Mohan Prasad Narayan Sinha, who executed the agreement to sell in favour of representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited. Said Madan Mohan Prasad Narayan Sinha passed away leaving behind his widow, three sons and one daughter. Subsequently, his widow also passed away and now, three sons and one daughter including the appellant happen to be the joint owner of the property in question. Sister of the appellant has relinquished her share in the property in question in favour of the appellant and his two brothers. His two brothers namely, Santosh Kumar Sinha and Ajay Kumar Sinha sold out their undivided share in the property in question in favour of aforesaid representative of Pawan Kumar Mishra by different



sale deeds. But as the property in question is undivided dwelling house, the aforesaid sale deed executed by his brothers is wrong and illegal and the vendee has no right to dispossess the appellant from the said property. But the vendees are adamant to dispossess the appellant from the property in question and raise construction over it. For that, he has collected the building materials. Hence, the said vendee i.e. representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited is to be restrained from dispossessing the appellant from the property in question and change the nature of property.

5. On the other hand, it is the case of the respondent that the original owner of the property in question was Madan Mohan Prasad Narayan Sinha. He had executed agreement to sell in favour of representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited on 02.08.2007, but as he did not execute the sale deed in favour of aforesaid representative of Pawan Kumar Mishra, the said Pawan Kumar Mishra filed a Title Suit no. 433 of 2008 for Specific Performance of Contract against Madan Mohan Prasad Narayan Sinha. During pendency of the said suit, said Madan Mohan Manohar Prasad Narayan Sinha passed away leaving behind his



widow, three sons and one daughter. Subsequently, the widow also expired and his daughter relinquished her share in favour of her three brothers. Out of the aforesaid three brothers, two namely, Santosh Kumar Sinha and Ajay Kumar Sinha executed sale deed in favour of aforesaid representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited regarding their respective share in property in question but the appellant who happens to be one of the co-sharer of the said property has not executed sale deed in his favour in compliance of the aforesaid agreement to sell. As respondent no. 1 Pawan Kumar Mishra has purchased the aforesaid property for construction of building thereon, hence, in case of giving injunction in favour of the appellant, his entire purpose would stand frustrated. Hence, the balance of convenience does not lie in favour of the appellant rather in favour of representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited. Learned counsel for the respondents has relied upon a case law of ***Kishorsinh Ratansinh Jadeja Vs. Maruti Corporation & Ors.*** reported in AIR 2009 Supreme Court 2882 in buttress of its case.

6. From perusal of record it appears that it is the admitted case of the parties that property in question was of



Madan Mohan Prasad Narayan Sinha. Said Madan Mohan Prasad Narayan Sinha had executed agreement to sell regarding the said property in favour of representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited. vide agreement to sell dated 2.08.2007. But as he did not execute the sale deed in compliance of the aforesaid agreement to sell, said Pawan Kumar Mishra filed Title Suit no. 433 of 2008 for Specific Performance of Agreement against the said Madan Mohan Prasad Narayan Sinha. During pendency of the said suit, said Madan Mohan Manohar Prasad Narayan Sinha passed away leaving behind his widow, three sons and one daughter. Subsequently, his widow also expired and his daughter relinquished her share in favour of her three brothers. Out of the aforesaid three brothers, two namely, Santosh Kumar Sinha and Ajay Kumar Sinha executed sale deed in favour of aforesaid representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited regarding their respective share in property in question but the appellant who happens to be one of the co-sharer of the said property did not execute sale deed in its favour in compliance of the aforesaid agreement to sell. It is also admitted to the parties that the property in question is dwelling house and the appellant is residing in the said house as



one of its co-sharer. It is also admitted to the parties that the property in question has not been partitioned by meets and bounds as yet. As the property in question is un-partitioned dwelling house of the parties and representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited happens to be stranger to the family, it is not entitled to joint possession or other common or part enjoyment of the said house as per Section 44 of the Transfer of Property Act.

7. Hon'ble Apex Court in ***Dorab Cawasji Warden Vs. Coomi Sorab Warden and Ors.*** reported in AIR 1990 S.C. 867 has been pleased to rule that where appellant/plaintiff and his brother are holding disputed dwelling house, belonged to an undivided family and the property is not divided by meets and bounds, transfer of brothers' share by his widow and sons on dying appellants' brother intestate would come within mischief of second paragraph of Section 44 of the T.P. Act and in case of vendee taking possession of the house irreparable injury likely to be caused to plaintiff and balance of convenience was also in his favour. So interim mandatory injunction against vendors and vendees regarding possession can be issued. Hon'ble Apex Court in ***Gajara Vishnu Gosavi Vs. Prakash Nanasaheb Kamble and Ors.*** reported in (2009) 10 Supreme Court Cases



654 has been pleased to rule that in absence of partition in property by meets and bounds, either by decree of a court in a partition suit, or by settlement among the co-sharers, possession cannot be handed over to the vendee. The case law of Kishorsinh Ratansinh Jadeja (supra) relied upon by the respondent, in my considered opinion, is not applicable in the case under hand as in the aforesaid case, the property in question was not dwelling house rather was open land.

8. In the aforesaid facts and circumstances of the case, as the representative of Pawan Kumar Mishra namely, Pratima Injicon Private Limited is trying to construct the building after dismantling the property in question and has allegedly collected the building materials therefor, in my considered opinion, the appellant has got good *prima facie* case and balance of convenience also lies in his favour and in case of not restraining the aforesaid representative of Pawan Kumar Mishra from its aforesaid act, irreparable injury will be caused to the appellant. Hence, the impugned order passed by learned lower court is bad in law and is hereby set aside and respondent no. 1 Pawan Kumar Mishra and his representative, namely, Pratima Injicon Private Limited is directed not to make any construction over the property in question and not to disturb the



possession of the appellant over it during pendency of the suit.

Accordingly, this miscellaneous appeal is allowed.

(Prakash Chandra Jaiswal, J)

rohit/-

AFR/NAFR	AFR
CAV DATE	N.A.
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