

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.573 of 2014

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S.M. Homaid Obaidullah, Son of S.M. Obaidullah Resident of Mohalla -
Jogiyamath, Under Town, Ward No. - 11, P.O. - HPO, P.S. - Town, Distric -
Muzaffarpur.

... .. Appellant/s

Versus

1. Syed Abul Barkat, Son of Late Syed Abdul Bari, Resident of Mohalla -
Jogiyamath, Ward No. - 11, P.S. and Distt. - Muzaffarpur, At Present
Resident of Village - Mohammadpur, Mubarak, P.S. - Maniari, District -
Muzaffarpur.
2. Syed Md. Nishat
3. Syed Md. Irshad
Respondent nos. 2 and 3 both sons of Late Syed Abdul Bari, Resident of
Village - Mohammadpur Mubarak, P.S.- Maniari, P.O. - Purshottampur,
District. - Muzaffarpur.
4. Hafza Khatoon, D/o Late Syed Abdul Hari, W/o- Zafirul Haque Resident of
Village and P.O. - Daudnagar, P.S. and District. - Muzaffarpur.
5. Najma Khatoon, D/o Late Syed Abdul Bari, W/o - Late Bashir Ahmad,
Resident of Village - Chehra Kala, P.S. and P.O. - Bakosma, Distt. - Vaishali.
6. S.M. Kamal
7. S.M. Sohail
both respondent nos. 6 and 7 Sons of Abdul Samad, Resident of Mohalla -
Jogiyamath, Under Town Ward No. - 11, P.O. - HPO, P.S. - Town, District. -
Muzaffarpur
8. Sadara Khatoon, D/o Late Abdul Samad, W/o - Sanaul Hasan, Resident of
Mohalla - Hall Saheb Ki Kothi, Chandwara, P.O. - HPO, P.S. - Town,
District. - Muzaffarpur.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Md. Anis Akhtar, Adv.
For the Respondent no.7. : Md. Fazal Rahman, Adv,
Mr. Anisur Rahman, Adv.

CORAM: HONOURABLE MR. JUSTICE S. KUMAR
CAV JUDGMENT

Date : 01.10.2019

Heard the parties.

2. This miscellaneous appeal has been filed by the defendant no.8/appellant for setting aside the order dated 04.07.2014 passed in Partition Suit No. 243 of 2010 by learned Sub-Judge, 5th Muzaffarpur by which modification application filed by defendant no.8/appellant pursuant to order dated 24.01.2014 passed by Hon'ble High Court in Miscellaneous Appeal No. 182 of 2013 has been rejected as well as order dated 11.02.2013 passed on injunction petition filed by plaintiff and defendant no.7 to maintain *status quo* over the suit land during pendency of suit.

3. Plaintiff has filed suit for partition of Schedule-I property as detailed in plaint which is ancestral properties of parties and parties are having joint possession and joint ownership over the suit land. Suit land were recorded in the name of Syed Abdul Samad and Syed Abdul Bari having equal shares. Parties are their descendants.



4. Syad Abdul Samad died leaving behind 3 sons namely S.M. Obaidullah (father of defendant no.8), S.M. Kamal (defendant no.7) and S.M. Sohail (defendant no.6) and a daughter namely Sarda Khatoon (defendant no.9), S.M. Obaidullah settled in England and is stated to be dead, who orally gifted his share to his wife Qaudra Khatoon (defendant no.5) and his son Md. Humaid (defendant no. 8).

5. Syed Abdul Bari also died leaving behind 3 sons namely Syed Abdul Barkat (plaintiff), Syed Md. Nishat (defendant no-1) and Syed Md. Irsahd (defendant no.2) and 03 daughters namely Hafza Khatoon (defendant no.3), Quadra Khatoon (Defendant no.5) and Najma Khatoon (defendant no.4) and after death of recorded tenants parties separated in mess and residence but suit land remained in joint possession of plaintiffs and defendants. Defendant no. 3 and 4 are contemplating to sell the land without partition. On account of family necessity partition was sought but same being denied plaintiff filed suit for partition. Plaintiff claim 2/18th share in the suit land measuring 3 and ½ kathas under 2 khatas and 9 plots.

6. Plaintiff filed a petition under Order 39 Rule 1 & 2 of the Code of Civil Procedure for grant of injunction



against defendant nos. 6 and 8 as they were making construction over the suit land without any partition on the land of their choice. Defendant no. 6, 7, 8 and 9 appeared and filed their statements. Defendant nos. 6 and 7 have supported the case of plaintiff for partition and stated that there is unity of title and possession over the suit land. Defendant no.7 also filed injunction petition to restrain defendant no.8/appellant from making any construction over the part of suit land.

7. Defendant no.8/appellant in his written statement has stated that there is nothing joint and there is no unity of title and possession among the parties with respect to suit property described in Schedule -I of the plaint and Schedule- I property has already been amicably partitioned on 24.12.2007 and parties are in possession over their respective share and some of the parties have already sold their portion of the land allotted to them in said Schedule-I property.

8. Plaintiff has acted upon said partition of Schedule-I property and constructed his boundary wall and also 12 rooms and let-out to different tenant and is receiving Rs. 15,000/- per month as rent from different tenants.



Defendant no.1, who is brother of plaintiff has already sold more than 04 kathas of land allotted to him in said amicable partition to different persons and delivered possession to them and purchasers have constructed their house. Defendant no.2 Syed Md. Irshad, own brother of plaintiff has sold an area of 01 katha and 10 dhurs of the suit land to the strangers and delivered possession to them. Defendant no.3 Hafza Khatoon and defendant no. 4 Najma Khatoon own sisters of plaintiff have sold an area of 6 kathas and 10 dhurs of the suit land which was allotted to them in said amicable partition. Defendant no. 6, S.M. Kamal has sold an area of 04 and 1/2 dhurs of land and 05 dhurs of land by registered sale deed dated 27.04.2012. Defendant no. 7, S.M. Sohail has also acted upon said amicable partition between the parties and along with defendant nos.1, 2 and 6 transferred an area of 03 kathas by oral gift on 01.01.2008 and transferee is in possession over the property and same has been finally confirmed by an award dated 12.02.2008 passed by Permanent Lok Adalat, Muzaffarpur and he is in possession of remaining land of his share which was allotted to him in said amicable partition. Defendant no.9, Bibi Sadra Khatoon also sold an area of 03 kathas which was allotted to



her in said partition and delivered possession to the purchaser and in his possession over the remaining portion of land which was allotted to her in said partition.

9. After hearing all the parties the learned Sub-Judge, 5th Muzaffarpur by order dated 11.02.2013 allowed injunction application and directed all parties to the suit to maintain *status quo* and not to make any alienation of suit property or change the nature of suit property.

10. Present appellant/defendant no.8 aggrieved by the order dated 11.02.2013 filed Miscellaneous Appeal No. 182 of 2013 and same was disposed of by this Hon'ble Court by order dated 24.01.2014 with liberty to defendant no.8/appellant to file modification application and seek modification of the order dated 11.02.2013 and in view of said liberty appellant filed modification petition to permit him to make construction over the part of suit land with specific undertaking that if the suit is decreed and previous partition is not proved then he will demolish the construction made during pendency of this suit or will relinquish his claim over that portion of suit land. Defendant no. 5 and defendant no.9 in their reply stated that they have no objection if the modification petition is allowed, however,



defendant nos. 6 and 7 objected for any modification of the order of *status quo*.

11. Defendant no.8 in his modification petition has prayed that in amicable partition of 24.12.2007, 07 kathas 15.75 dhurs of suit land was allotted in his share and thereafter he came in possession over the land and raised boundary wall upon his allotted share. The court below has observed that there is no evidence with respect to partition of Schedule-I land between the parties in 2007 although from the records it appears that parties have alienated part of Schedule- I land by different transactions but most are during pendency of suit and will be hit by principle of lis pendens. The trial court has observed that there is no evidence or material on basis of which it can be inferred that there has been a previous partition with respect to Schedule-I land of the plaintiff in the year 2007 and portion upon which defendant no.8/appellant wants to make construction was allotted to him in said partition. There is no documentary proof of said partition and rejected the modification application filed by appellant/defendant no.8 against which present appeal has been filed by appellant/defendant no.8.

12. After hearing the parties and considering the



materials available on record it is an admitted position even by the appellant/defendant no.8 that prior to alleged amicable partition dated 24.12.2007 there was unity of title and possession of the parties over the suit land and there was no partition by metes and bounds. Alleged amicable partition dated 24.12.2007 has not been admitted by any of the parties. pleadings about said partition is also vague and unspecific. There is no written document effectuating such partition. No details has been provided about the alleged partition with respect to share of parties, area and plot number and their boundary allotted to each co-sharer in said partition, if partition was done in 2007 appellant /defendant no.8 ought to have raised his boundary wall in 2007 itself but he started making construction only after filing of the partition suit. Under such circumstances the trial court had rightly found prima facie case balance of convenience in favour of plaintiff and defendant no.7.

13. Appellant/defendant no.8 had earlier filed Miscellaneous Appeal No. 182 of 2013 against the order dated 11.02.2013 granting *status quo* and this court had not interfered in the order granting status quo as such petitioner is precluded to challenge said order again in this



miscellaneous appeal and this court had only granted limited liberty to appellant/defendant no.8 for modification of order to permit him to make construction with certain conditions which has been refused by the court below.

14. For the reasons stated above, this court does not find any error or infirmity in the order dated 04.07.2014 dismissing the modification application filed by appellant/defendant no.8 accordingly the present miscellaneous appeal is dismissed.

(S. Kumar, J)

Rajiv/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	
Transmission Date	NA

