

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1888 of 2017

Mahendra Prasad, Son of Khenar Sah, Resident of Village and P.O. Dharfari,
P.S. Deoria, District-Muzaffarpur.

... .. Petitioner

Versus

1. Uma Shankar Prasad, Son of Late Sukhdeo Sah, Resident of Village and P.O. Dharfari, P.S. Deoria, District-Muzaffarpur.
2. Smt. Savitri Devi, Wife of Jagarnath Sah and Daughter of Late Sukhdeo Sah, Resident of Village and P.O. Jafarpur, P.S. Paroo, District-Muzaffarpur.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. S.B.K. Manglam, Advocate with Ms. Anita Kumari, Advocate
For the Respondent/s	:	Mr. Bhubneshwar Prasad, Advocate with Mr. Manoj Kumar Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA

CAV JUDGMENT

Date : 20-07-2023

Heard learned counsel for the parties.

2. This Civil Miscellaneous Application has been filed under Article 227 of the Constitution of India against the order dated 22.06.2017 passed by the learned District Judge Muzaffarpur in Miscellaneous Appeal No. 10 of 2016 whereby and whereunder the learned District Judge has dismissed the Miscellaneous Appeal filed by the petitioner against the order



dated 01.10.2016 passed by the learned Munsif, West, Muzaffarpur, in Title Suit No. 49 of 2016 by which he has directed both parties to maintain 'status quo' over the suit land till further order.

3. Brief facts of the case are that the plaintiff / respondent No. 1 had filed Title Suit No. 49 of 2016 in the Court of learned Munsif, West, Muzaffarpur for pre-emption with respect to the suit property stating that the disputed land is a portion of ancestral dwelling house of plaintiff. In the partition, 17 decimal of RSP No. 878 was allotted to Sukhdeo Sah, father of the plaintiff in two blocks of 8 1/2 decimal each. After death of his father, the land allotted to his branch became subject matter of partition Suit No. 142/93 which is pending. Despite the pending of said title suit, the sister of plaintiff who is respondent No. 2 has sold an area of 14 dhur out of the homestead plot bearing RSP No. 878 to a stranger i.e. petitioner / defendant No. 1. It is claimed by the plaintiff that the said sale of suit land by defendant No.2 / respondent No. 2 who is the sister of plaintiff is without any knowledge and consent of the plaintiff, hence he filed the suit of pre-emption to get back his land on same consideration.

4. In the suit the petitioner appeared and filed his



written statement and denied the claim of the plaintiff / respondent No. 1. The plaintiff filed a petition under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure for grant of interim injunction which was allowed vide order dated 01.10.2016. The petitioner challenged the said order of trial Court by filing Miscellaneous Appeal No. 10 / 2016 and the same was also dismissed by the learned Court below vide the impugned order dated 22.06.2017.

5. Learned counsel for the petitioner has submitted that there is no dwelling house in the disputed plot rather it is open land which has been purchased by the petitioner and was constructing his house on the said land. Further he has submitted that the petitioner has purchased open land which cannot be included as part of dwelling house. In this regard, he referred the definition of dwelling house given by Black's Law Dictionary. As per Black's Law Dictionary the meaning of dwelling house is that the house in which a man lives with his family; a residence; abode; habitation; the apartment or building, or group of buildings occupied by a family as a place of residence. He further submits that learned Advocate Commissioner in his report did not mention that any dwelling house of the plaintiff / respondent No. 1 is situated on disputed



plot rather he had clearly mentioned that half portion of the disputed land is yet a ditch and half of it has been filled with earth and the construction of the house is going on. He has further submitted that the plaintiff has got no *prima facie* case and there is no balance of convenience in favour of plaintiff and also no irreparable loss would incur to the plaintiff if injunction is not granted. Further, he submits that Section 44 of T.P. Act as well as Section 4 of Partition Act is applicable only in case of dwelling house and the same is not applicable in the present case.

6. Learned counsel for the petitioner further submits that the plaintiff has no *prima facie* case for injunction. The petitioner has already invested a big amount on construction etc. over the disputed land and thus, balance of convenience lies in favour of the petitioner. The plaintiff will not suffer any injury, if the injunction is not granted as in case of success the plaintiff will be entitled to get the disputed land transferred without praying any compensation of the construction made by the petitioner.

7. On the other hand learned counsel for the respondents submits that the Title Suit (Partition) No. 142 of 1993 is still pending for partition of the suit properties and



during the pendency of the aforesaid suit the petitioner has purchased the land, the part of the residential house from Savitri Devi / respondent No. 2 and the land alongwith house is also subject matter of Partition Suit No. 142 of 1883.

8. He has further submitted that the learned court below after hearing the parties found *prima facie* case and the balance of convenience in favour of the respondent No. 1 and irreparable loss would cause to plaintiff if injunction not granted and passed the order dated 01.10.2016 in Title Suit No. 49 of 2016 and accordingly ordered to maintain status quo and the learned Appellant Court also found no merit in the appeal filed on behalf of the petitioner and dismissed the same on merit. The petitioner has no valid ground and this Civil Miscellaneous Application is liable to be rejected.

9. The object of the provision 44 is to prevent the intrusion of strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share therein in favour of a stranger. The provisions under Section 4 of Partition Act and Section 44 of T.P. Act are complementary to each other and the terms 'undivided family' and 'dwelling house' have the same meaning in both the sections. Even if family is divided in status in the



sense that they were holding the property as tenants in common but undivided qua the property that is the property had not been divided by metes and bounds it would be within the provisions of Section 44 of the Act.

10. In order to attract second paragraph of Section 44 of T.P. Act the subject matter of the transfer has to be dwelling house belonging to an undivided family and the transfer is a share in the same to a person who is not a member of the family.

11. The learned Courts below find that the suit land is part of homestead land bearing RSP Plot No. 878 which finds corroboration from documents and the petitioner has constructed a thatched marai. Admittedly, partition suit filed by plaintiff is pending and during pendency of the same sister of plaintiff sold the land to the petitioner who is stranger to the family. It is further stated that the Advocate Commissioner report shows that the defendant is adamant to change the physical feature of disputed land by demolishing the old wall and by putting new thatched hut. The impugned sale deed shows that the vendor of the petitioner has not transferred her share rather specific land showing boundary of the homestead land though there was no partition and partition suit is pending.



When the suit is pending the suit property sold by any of the party is also hit by doctrine of *lis pendence*. The learned Court below find *prima facie* case over the disputed land in favour of defendant No. 1 / respondent No. 1 and balance of convenience also lies in favour of plaintiff / respondent No. 1 and irreparable loss will incur to plaintiff / respondent No. 1 if injunction is not granted. The suit property is required to be preserved till pendency of suit. A member of family transfers his share in the dwelling house to a stranger then paragraph 2 of Section 44 of T.P. Act comes into play and transferee does not become entitled to joint possession or any joint enjoyment of the dwelling house although he would have the right to enforce a partition of his share.

12. It is well settled that 'dwelling house' belonging to an undivided family is not one where the plaintiff actually resides but includes all other appurtenance used by the members of that undivided family as part of their residential house. Whether a particular plot of adjacent land is or not necessary for the enjoyment of a house is to be determined upon evidence.

13. In view of the aforesaid facts and circumstances and the law discussed above, this Court does not



find any jurisdictional error or illegality in the impugned order passed by the learned Court below.

14. Accordingly, this Civil Miscellaneous Application is dismissed with no order as to costs.

(Sunil Dutta Mishra, J)

shweta/-

AFR/NAFR	NAFR
CAV DATE	04.05.2023
Uploading Date	20.07.2023
Transmission Date	

