

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.790 of 2019

Devendra Kumar Srivasatava son of Late Brij Narain Lal presently resident of
Nai Basti, Mahadeva, P.S., P.O. and Town- Siwan, District- Siwan.

... .. Petitioner

Versus

1. Prabhat Kumar Srivastava @ Bachchanjee son of Late Radha Prasad resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
2. Rajendra Narain son of Late Dr. Kapildeo Narain resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
3. Gajendra Narain son of Late Dr. Kapildeo Narain resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
4. Priti Bala @ Sarlo daughter of Late Dr. Kapildeo Narain resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
5. Shila Narain, wife of Late Dr. Sushil Kumar, daughter of Late Dr. Kapildeo Narain, resident of Qr. No.- 2097, Sector- 4 D, Bokaro Steel City, Jharkhand- 827004.
6. Kumkum Srivastava wife of Dr. Dinesh Kumar Srivastava, daughter of Late Dr. Kapildeo Narain resident of Sumitra Sadan, Bindyavasni Nagar, Gorakhpur, Uttar Pradesh.
7. Anil Kumar son of Late Chandradeo Narain resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
8. Sunil Kumar son of Late Chandradeo Narain resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
9. Pramil Kumar @ Gope Babu son of Late Chandradeo Narain resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
10. Sunita Prasad wife of Ganeshwar Prasad, daughter of Late Chandradeo Narain resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
11. Swati Sinha wife of Yash Sinha, daughter of Late Dr. Rita Dayal resident of I- 101, Palm Court Complex, Behind D Mart, Link Road, Malad West, Mumbai- 400064, permanent resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
12. Nishant Dayal son of Late Dr. Rita Dayal resident of 103, Dr. R.D. Place, Near A.N. College, Boring Road, Patna- 800013, permanent resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
13. Anand Bihari Srivastava son of Late Radha Prasad resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.



14. Deepak Srivastava @ Pappu son of Late Satya Narain Prasad Srivastava resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
15. Diwakar Srivastava @ Guddu son of Late Satya Narain Prasad Srivastava resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
16. Vandana Sinha @ Pappi wife of Shashi Prakash Sinha, daughter of Late Satya Narain Prasad Srivastava resident of 1203, Stellar Jiwan Apartment, Greater Noida West, Uttar Pradesh- 201306.
17. Smt. Shail Srivastava wife of Sri Devendra Prasad Srivastava resident of Village- Gidaha Dhanha, P.O.- Naumunda, P.S.- Hatakotwali, District- Kushinagar, Uattar Pradesh, permanent resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwa, District- Siwan.
18. Usha Verma wife of Late Brajesh Kumar Verma resident of Mohala- Rajapur Pul, Near Andhra Bank, in front of Ganga Gate No. 32, P.S. - Sri Krishnapuri, District- Patna, permanent resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
19. Pradeep Kumar son of Late Malti Prasad resident of Bhagvattayan Shuklatoli, Hinoo, P.O.- Doranda, P.S. Doranda, District- Ranchi, Jharkhand- 834008.
20. Praveen Kumar son of Late Malti Prasad resident of Bhagvattayan Shuklatoli, Hinoo, P.O.- Doranda, P.S. Doranda, District- Ranchi, Jharkhand- 834008.
21. Pratibha Kumari daughter of Late Malti Prasad resident of Bhagvattayan Shuklatoli, Hinoo, P.O.- Doranda, P.S. Doranda, District- Ranchi, Jharkhand- 834008.
22. Punam Kumari daughter of Late Malti Prasad resident of Bhagvattayan Shuklatoli, Hinoo, P.O.- Doranda, P.S. Doranda, District- Ranchi, Jharkhand- 834008.
23. Priti Kumari wife of Samir Saurabh, daughter of Late Malti Prasad resident of Gali No.- 5, Lower Balihar New Area, Morabadi, Ranchi, Jharkhand- 834008.
24. Pankaj Kumar @ Hani son of Late Krishna Murari Srivastava permanent resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
25. Prashant Kumar @ Mani son of Late Krishna Murari Srivastava permanent resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
26. Prateek Kumar @ Kani son of Late Krishna Murari Srivastava permanent resident of Mohalla- Babunia Road, P.S., P.O. and Town- Siwan, District- Siwan.
27. Asha Rani @ Pinky wife of Rabi Bhushan Verma, daughter of Late Krishna Murari Srivastava C/o Satyaranjan Prasad, Near Gandhi Murti, Road No. 0, Patel Nagar, Patna- 800 023.
28. Md. Mustaque son of Late Md. Saleem resident of Village- Sidhwal, Paragna- Pachlakh, P.S.- Hussainganj, District- Siwan.



29. Subetara wife of Md. Mustaque resident of Village- Sidhwal, Paragna- Pachlakh, P.S.- Hussainganj, District- Siwan.
30. Armaan minor son of Md. Mustaque through their father and natural guardian Md. Mustaque, resident of Village- Sidhwal, Paragna- Pachlakh, P.S.- Hussainganj, District- Siwan.
31. Kamraan minor son of Md. Mustaque through their father and natural guardian Md. Mustaque, resident of Village- Sidhwal, Paragna- Pachlakh, P.S.- Hussainganj, District- Siwan.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Kamal Nayan Choubey, Sr. Advocate Mr. Jitendra Kishore Verma, Advocate Mr. Makardhwaj Upadhyay, Advocate
For the Respondent/s	:	Mr. Prabhakar Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA

CAV JUDGMENT

Date : 08-08-2023

Heard learned counsel for the parties.

2. This Civil Miscellaneous Application is directed against the order dated 02.04.2019 passed by learned Sub Judge-1, Siwan, in Title (Partition) Suit No. 151 of 2019 by which he has admitted the said Title Suit filed by the plaintiff for partition of the properties.

3. The brief facts of the case are that father of the plaintiff namely Late Radha Prasad had earlier filed the Title (Partition) Suit No. 151 of 1991 in the Court of learned Sub-Judge, Siwan for partition of joint properties and by order of this Court dated 17.07.1997 in M.J.C. No. 746 of 1992 proceeding of the said Title (Partition) Suit No. 151 of 1991 was transferred



to Civil Court, Patna where it proceeded in the Court of Sub-Judge, Patna. The Civil Review No. 175 of 1997 was filed against the judgment dated 17.07.1997 passed in M.J.C. No. 746 of 1992 which was dismissed by this Court vide order dated 25.01.2002 passed in Civil Review No. 175 of 1997 with cost of Rs. 2500/-.

4. The original plaintiff Radha Prasad had died and his sons and daughters have been substituted in his place. The substituted plaintiffs stopped pursuing the suit due to that reason the said suit was dismissed in default in 2011. Prabhat Kumar Srivastava who is the son of Late Radha Prasad again filed partition suit at Siwan being Title (Partition) Suit No. 151 of 2019 for partition of said properties. The petitioner filed a Caveat registered as Miscellaneous Case No. 40 of 2019 raising the objection that the Title (Partition) Suit No. 151 of 1991 was earlier filed by the father of petitioner which was transferred by this Court to Patna Civil Court and the review petition against transfer order was also dismissed with certain directions and imposing cost and the said suit was dismissed in default in 2011, then filing of the present Partition Suit is liable to be not heard. The said Miscellaneous Case No. 40 of 2019 was dismissed vide order dated 02.04.2019 and the suit has been admitted vide



separate order dated 02.04.2019 on the ground that in partition suit cause of action is recurring.

5. Learned senior counsel for the petitioner has submitted that earlier Title (Partition) Suit no. 151 of 1991 and present Title Partition Suit No. 151 of 2019 are the one and same. Further, he has submitted that the learned Court below completely failed to appreciate that Order 9 Rule 9 C.P.C. mandates that the plaintiff is precluded from bringing a fresh suit but deliberately ignoring this the learned Court below illegally admitted the fresh suit on false and frivolous story of the plaintiff. He has further submitted that learned Court below also failed to appreciate that the so called remedy to the plaintiff was to take steps for revival of the earlier Title (Partition) Suit No. 151 of 1991 at Patna in which the pleadings were completed. He further submits that the party to a suit must come to the Court with clean hands and the plaintiff *mala fide* instituted another suit at Siwan and thus repeated institution of frivolous suit / proceeding is *per se* contempt of this Court in view of the fact that the earlier suit was transferred by this Court from Siwan to Patna Court. Lastly, he has submitted that the present suit is liable to be transferred from Siwan Civil Court to Civil Court at Patna.



6. Learned senior counsel for the petitioner referred the judgment of Hon'ble Supreme Court in **S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & Ors. (AIR 1994 SC 853)** wherein it has been observed that "the Courts of Law are meant for imparting Justice between the parties. One who comes to the Court, must come with clean hands."

7. He also referred the judgment of Calcutta High Court in **Raj Rajeshwari Jiu and Ors. Vs. Gati Krishna Chakrabarti and Ors. (1924 Calcutta 453)** wherein it was observed that "It is unquestionable that the breach of an undertaking given to the Court by a litigant, pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction is misconduct amounting to contempt. It is further well settled that when a person is guilty of such contempt he places himself in a perilous situation so as not to be heard by the Court till he has purged his contempt."

8. On the other hand, learned counsel for the plaintiff / respondent No. 1 has submitted that partition is a recurring cause of action till the property is not partitioned finally and thus the subsequent partition suit when the previous partition suit was dismissed in default cannot be held to be



barred by the law under Order 9 Rule 9 of C.P.C. as it was not adjudicated finally. The dismissal of previous suit under Order 9 Rule 8 of C.P.C. does not create a bar for filing a fresh Partition Suit under Order 9 Rule 9. He has further submitted that after death of Late Kapildeo Narayan and Late Radha Prasad a compromise talk started between the parties due to which pairvi in Suit No. 151 of 1991 became slow and lastly, it was dismissed in default. He has further submitted that petitioner is not even the party in the Suit and with *mala fide* filed the petition to delay the proceeding in the suit which is liable to be rejected. The procedure for initiation of contempt is separate proceedings which cannot be invoked in fresh suit proceeding. He has further submitted that for rejection of suit the proper grounds are stated in order VII Rule 11 C.P.C. and the petitioner instead of filing such petition filed Miscellaneous (Caveat) Case No. 40 of 2019 which has been rightly rejected vide order dated 02.04.2019 which has not been challenged by the petitioner and the petitioner challenged the order dated 02.04.2019 passed in T.S. No. 151 of 2019 by which the suit has been admitted for hearing on the ground that in Partition Suit there is recurring cause of action. He has referred the judgments of this Court in **Ram Krishna Thakur Vs. Om Prakash Thakur 2010(1)**



PLJR 293 and Sheo Nandan Singh Vs. Ram Bali Singh & Ors. 2010(1) PLJR 567 wherein it was observed that partition is recurring cause of action till the property is not partitioned finally, thus, the subsequent partition suit could not be held to be barred under the Order XXII Rule 9 so long the properties concerned remain joint. This Court had followed the decision of Division Bench of this Court in **Dilo Rana and Anr. Vs. Munshi Kunj Behari Prasad and Ors. AIR (35) 1948 Patna 244** in which it was held that partition is a recurring cause of action so long as property is joint. Hence, in such a case plaintiff's right of partition will subsist even after the abatement of previous suit for partition. There is no jurisdictional error or illegality in the impugned order requiring interference by this Court in Supervisory jurisdiction under Article 227 of the Constitution of India.

9. Heard the learned counsel for the parties and perused the material on record, it appears that admittedly earlier suit filed by the father of plaintiff for partition being Title (Partition) Suit No. 151 of 1991 was transferred to Patna Civil Court which was lastly, dismissed in default in 2011. The Review petition against the transfer of the said suit was also dismissed by this Court with certain observation and direction.



The trial court admitted the fresh suit being Title (Partition) Suit No. 151 of 2019 observing that in partition suit, recurring cause of action arises. It was also observed that in Miscellaneous Case No. 40 of 2019 which has been filed as Caveat, the petitioner of Caveat petition Devendra Kumar Srivastava is not named in defendant column.

10. In partition suit, the principle is well settled that the cause of action in fact is a recurring one and the contention with regard to Order IX Rule 9 or Order XXII Rule 9 C.P.C. bar of subsequent suit is without substance. Even after dismissal of the former suit, the jointness continues and there is a continuing cause of action. In the present case, the earlier suit was not decided on merit but dismissed for default / non-prosecution. The petitioner if wants to transfer the suit from Siwan Civil Court to Patna Civil Court he can file the appropriate petition before this Court if so advised. The question whether the plaintiff / Respondent No.1 has violated any order of this Court and committed contempt cannot be decided in the present proceeding.

11. In view of the aforesaid facts and circumstances, I do not find any jurisdictional error or illegality in the impugned order and this Miscellaneous Application is



devoid of merit and liable to be dismissed.

12. This Civil Miscellaneous Application is,
accordingly, dismissed.

(Sunil Dutta Mishra, J)

shweta/-

AFR/NAFR	AFR
CAV DATE	03.08.2023
Uploading Date	08.08.2023
Transmission Date	

