

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1468 of 2019

- 1.1. Sunanda Singh W/o Late Ajay Kumar Singh @ Ajay Kr. Singh R/o Village-Hardi, P.S. Kathaiya, District- Muzaffarpur.
- 1.2. Digvijay Kumar S/o Late Ajay Kumar Singh @ Ajay Kr. Singh R/o Village-Hardi, P.S. Kathaiya, District- Muzaffarpur.
- 1.3. Shammi Kumari D/o Late Ajay Kumar Singh @ Ajay Kr. Singh, W/o Sri Niraj Kumar Chaudhary R/o Mohalla- Kapoor Bagh, Kanhauli, P.S.- Mithanpura, Distt.- Muzaffarpur.
- 1.4. Aditya Kumar S/o Late Ajay Kumar Singh @ Ajay Kr. Singh R/o Village-Hardi, P.S. Kathaiya, District- Muzaffarpur.

... .. Petitioner/s

Versus

1. Smt. Soni Shahi, W/o Rakesh Prasad Shahi, R/o Village- Harpur, P.O. Hardi, P.S. Kathaiya, Anchal- Motipur, Distt- Muzaffarpur.
2. Shri Sanandan Singh, Son of Late Satrujit Prasad, R/o Village- Hardi, P.O. Hardi, P.S. Kathaiya, Anchal- Motipur, Distt- Muzaffarpur.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. S.S. Dwivedi, Sr. Advocate Mr. Jai Prakash Verma, Advocate
For the Respondent/s	:	Mr. Vinod Keshri Singh, Sr. Advocate Mr. Chandrakant, Advocate Mr. Navin Kumar, Advocate Mr. Sunil Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT

Date : 09-05-2023

Re.: Interlocutory Application No. 01 of 2019

This Interlocutory Application has been filed for condonation of delay in filing the present Miscellaneous Application on the ground that the original petitioner inadvertently filed Second Appeal No. 471 of 2018 before this Court challenging the impugned judgment dated 13.08.2018



passed by the learned 13th Additional District Judge, Muzaffarpur in Miscellaneous Appeal No. 01 of 2018 whereby order dated 04.01.2018 passed in Miscellaneous Case No. 08 of 2016 was affirmed.

However, on the prayer of learned senior counsel appearing on behalf of petitioners, the said second appeal was permitted to be withdrawn by Coordinate Bench of this Court vide order dated 26.08.2019 with liberty to the petitioners to prefer Civil Miscellaneous under Article 227 of the Constitution of India against both the impugned orders.

Learned counsel for the petitioners submits that the time consumed in preferring the present Miscellaneous Application is due to pendency of the aforesaid second appeal and there is no intentional or deliberate delay by the original petitioner in preferring the Miscellaneous Application within time. He further submits that if delay in preferring the present Miscellaneous Application is not condoned the petitioners would suffer irreparable loss and injuries.

Learned counsel for respondents has not opposed this application.

Having heard learned counsel for the parties and considering the facts and circumstances of the case, I find that



the delay in filing this Civil Miscellaneous Application has been sufficiently explained. Accordingly, I.A. No. 01 of 2019 is allowed. Delay in filing the Civil Miscellaneous Application is condoned.

Re.: Civil Miscellaneous Jurisdiction No. 1468 of 2019

Heard the parties.

2. This Civil Miscellaneous Application has been filed under Article 227 of the Constitution of India against the judgment dated 13.08.2018 passed by the learned Additional District Judge-13th, Muzaffarpur in Miscellaneous Appeal No. 01 of 2018 whereby the order dated 04.01.2018 passed in Miscellaneous Case No. 08 of 2016 by learned Sub-ordinate Judge- 1st, Muzaffarpur (West) in Miscellaneous Case No. 08 of 2016 filed under Section 22 of Hindu Succession Act, 1956 (hereinafter referred to as 'the Act'), was affirmed under which Miscellaneous Case was rejected invoking Order VII Rule 11 (a) as well (d) of the C.P.C.

3. The original petitioner (now substituted by his heirs / legal representatives on his death) filed a Miscellaneous Case No. 08 of 2016 under Section 22 of the Act in the Court of learned Sub Judge-1st, Muzaffarpur for a decree for preferential right to acquire suit property in favour of the petitioner and for



direction to respondent No. 1 to execute sale deed in favour of the petitioner.

4. The case of the petitioner is that the petitioner and respondent No. 2 are legal heirs and successors of late Gopal Prasad Narayan Singh and they have jointly succeeded and inherited his estate including suit land on which there are bricks built constructed shop. The partition for other property has been done by metes and bounds to the family arrangement but the suit land is not divided. They came and continued in possession of suit land besides other property which are ancestral property and jointly succeeded according to Hindu Succession Act, 1956 although during Revisional Survey operation the suit land recorded in the name of Satrujit Prasad Singh (father of O.P. No. 2) in R.S. Khatiyani. The further case of the petitioner is that respondent No. 2 executed a sale deed no. 23695 dated 17.12.2015 in respect of suit land in favour of the respondent No. 1 ignoring the preferential right of the petitioner. The petitioner claims that he has got the preferential right to acquire suit property. Further case of the petitioner is that the petitioner is ready to pay the consideration amount of Rs. 8,10,000/- but the respondent No. 1 refused to execute the requisite sale deed in respect of suit land on the same terms and conditions.



5. The respondent No. 1 filed a petition dated 28.09.2016 stating, inter alia, that Miscellaneous Case filed by the petitioner is not maintainable. The petitioner hide that the previous partition took place in Title Suit No. 59 / 1943 in which father of applicant, namely, Bhupnath Prasad Narayan Singh and father of opposite second party, namely, Satrujit Prasad Narayan Singh were defendants in which they were awarded separate patti, they continued in separate and exclusive possession over their respective allotted patti of the properties. Their names got recorded in R.S. Survey having separate jamabandi, Chak Khatiyani and R.S. Khatiyani. The O.P. No. 2 sold the suit land out of his exclusive landed properties in favour of O.P. No. 1 and put him in possession and the buyer has also got mutated his name with respect to purchased suit land. No immovable property on death of its holder devolved upon the petitioner and property possessed by Shatrujit Prasad Narayan Singh (father of O.P. No. 2) devolved upon O.P. No. 2, who is class I legal heir specified in Section 8 of the Hindu Succession Act, and the petitioner is not class I heir.

6. The respondent No. 1 filed another petition dated 10.10.2017 under Order VII Rule 11 (d) C.P.C. in continuation of his said earlier petition dated 28.09.2016 praying to reject the



case stating that it is admitted case of the applicant / petitioner that the petitioner and respondent No. 2 are grandson of two different persons, namely, Babu Baldeo Pd. Narayan Singh and Babu Suryug Pd. Narayan Singh respectively who were sons of Gopal Pd. Narayan Singh. From reading of the case petition, it is admitted that the petitioner has not inherited any property of either Babu Baldeo Prasad Narayan Singh or Babu Saryug Prasad Narayn Singh as Class I legal heir accordingly provision of Section 22 of Hindu Succession Act, 1956 does not apply and liable to be rejected.

7. The petitioner opposed the said petitions by filing rejoinder stating that applicant and O.P. No. 2 are legal heirs and successors of Late Gopal Prasad Narayan Singh and the suit land is joint.

8. The learned trial court found the petition under Order VII Rule 11 (d) of C.P.C. maintainable and applicable and thereby rejected the Miscellaneous Application which was affirmed in appeal.

9. Learned senior counsel for the petitioner has submitted firstly that Order VII Rule 11 C.P.C. applies only in a case of plaint in suit and Miscellaneous case under Section 22 of the Hindu Succession Act, 1956 is not a plaint in suit rather it is



a petition. Accordingly, Order VII Rule 11 C.P.C. is not applicable in this case.

10. He has further submitted that in the instant case, the Court has wrongly relied only the factual statement in the rejoinder as well as in the petition of respondent No. 1 to hold that it is barred by Order VII Rule 11 CPC. Learned counsel for the petitioner submits that the trial court although observed that the Court has only to consider the overall contents of the averments made in the plaint so as to decide whether the present plaint is liable to be rejected or not but the Court has considered the plea taken by the respondent in its application.

11. Learned senior counsel for the petitioner has further submitted that whether suit property is joint or the petitioner and respondent No. 2 are class I heirs or not is a matter of evidence which can't be decided in the application under Order VII Rule 11 C.P.C. He has further submitted that in the present case, some other properties were partitioned by metes and bounds by family arrangements but the suit property is a joint property. There are various modes of partition and it is not necessary for partition that joint family property is divided by every bit of it and some property could be used by the coparceners as joint tenant. Further he submits that in paragraph



14 of the petition cause of action was stated but the learned court below failed to appreciate the said facts.

12. On the other hand learned Senior counsel for the respondents submits that the petition under Section 22 (1) of the Act is in nature of a plaint in the suit although it was filed as Miscellaneous Case. He has pointed out that the petitioner has himself in paragraph nos. 4, 5, and 12 and also in verification described and treated the petition as plaint in the Suit and the plea now taken that it is not plaint and Order VII Rule 11 C.P.C. is not applicable is self contradictory and not tenable. He has submitted that Section 141 C.P.C. provides with respect to miscellaneous proceedings that the procedure provided in the code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. He further submits that Rules 457 and 458 of Civil Court Rules of High Court of Judicature at Patna also provide that an application filed under different provisions stated therein to be treated as Suit. Further, he has submitted that admittedly, the petitioner is not Class I heir as brother's sons are not included in this category. Lastly, it is submitted that the learned trial court as well as the appellate court rightly rejected the Miscellaneous Case under Order VII Rule 11 (a) and (d) and there is no



illegality or error for interference by this Court in its supervisory jurisdiction.

13. The point for consideration in this Miscellaneous Application is whether the petition under Section 22 (1) of the Act can be deemed to be a plaint and whether the trial court is justified in rejecting the said miscellaneous case under Order VII Rule 11 (a) & (d) C.P.C., which has been affirmed by the appellate Court.

14. Section 22 of the Hindu Succession Act was incorporated with reason that strangers must be kept out and the integrity of the property may be maintained and with this end in view a preferential right in the remaining Class I heirs was conferred. Burden cast on the intending transferor heir to put the remaining Class I co-heirs on notice of his intention to make the transfer. Section 22 of the Hindu Succession Act does not refer to a pre-emptory right, but describes the right as a preferential one.

15. The word “application” is found in Section 22 (2), while, nothing as such is found in Section 22 (1) of the Hindu Succession Act. Sub-section (2) of Section 22 of the Act provides for a cheap and speedy remedy for determination of ‘consideration’, for which any interest in the property or



business of the deceased “may be transferred under the Section.” Sub-section (2) of Section 22 of the Act does not create any right wholly independent of that created by Sub-section (1) of Section 22. If transfer has been effected, an application under Section 22 (2) is not maintainable. Under Section 22 (1) of the Act a right is conferred but there is nothing in this Sub-Section to indicate what procedure is to be followed in the matter of enforcement of that right. It is useful to look into the various decision of the High Courts dealing with Section 22 of the Act to understand the nature of proceeding under Section 22 (1) of the Hindu Succession Act.

16. The Division Bench of Kerala High Court in the case of **Valliyil Sri Devi Amma Vs. Subhadra Devi & Ors. (AIR 1976 Ker 19)** held that the ordinary procedure for enforcement of any civil right has to be resorted by the co-heir who wish to enforce their rights under Section 22 (1) of the Act. In other words, the remedy is by way of regular Civil Suit before the competent court. The main purpose of such a suit instituted by the co-heir will necessarily be the enforcement of the right conferred by Section 22 (1) of the Act. The question of invalidity of the sale effected by co-heir in favour of strangers will be incidentally investigated and decided.



17. The Madhya Pradesh High Court in the case of **Mrs. Gherwala Jain Vs. Mr. Hanuman Prasad (A.I.R. 1981 M.P. 250)** also agreed with the said observation made by the aforesaid Division Bench of Kerala High Court in the case of **Valliyil Sri Devi Amma Vs. Subhadra Devi & Ors. (Supra)**. It was observed that an application under Sub-section (2) of the Act cannot be regarded to be maintainable after transfer has been effected.

18. The Calcutta High Court in the case of **Mr. Tarak Das Ghosh Vs. Sunil Kumar Ghosh (AIR 1980 Cal 53)** held that under Sub section (2) of Section 22 of the Act an application may be made to the Court but the scope of that application is quite limited. Such application may be made only for the purpose of determination of the amount of consideration and not for the purpose of enforcing the right conferred by Sub section (1). In cases where statute creates a right without specifying the procedure for enforcement of such right, the person intending to enforce such right shall have to resort to the procedure contained in the Code of Civil Procedure for enforcement of his right. Accordingly, the right conferred by Section 22 can be enforced only by institution of a regular suit.

19. Similarly, the Orissa High Court in the case of



Sri Muralidhar Das Vs. Mr. Bausidhar Das, (AIR 1986 Ori 119) observed that Sub-section (2) provides for determination of consideration when there is difference between the parties, namely the one intending to acquire and the other proposing to transfer. It does not apply to a situation where the interest had been transferred and third party transferees have come into the picture or where co-heirs are not agreeable to transfer their shares to the co-heirs exercising right of pre-emption under Section 22 (1) of the Act.

20. The Division Bench of this Court in the case **Bhola Nath Rastogi and Ors. Vs. Santosh Prakash Arya & Ors.** reported in **AIR 1975 Patna 336** considered Section 22 of the Hindu Succession Act and observed that by use of the words 'heirs specified in class I of the Schedule' in Section 22 (1) of the Act, it is clearly intended that this Section should have no application to a case where the property devolves by rule of survivorship on surviving coparceners. Unless a case of inheritance is made out, it must be held that Section 22 will have no application.

21. The Division Bench of this Court in judgment dated 12.11.2011 **Basudeo Singh Vs. The State of Bihar (LPA No. 1036 / 2013)** quoted the principle that the object behind



right of pre-emption, either based on custom or Statutory Law, is to prevent intrusion of a stranger into the family holding or property. A co-sharer under the Law of pre-emption has right to substitute himself in place of a stranger in respect of a portion of the property purchased by him. The Hon'ble Supreme Court in the case of **Suresh Prasad Singh Vs. Dulhin Phulkumari Devi & Ors. (2010) 6 SCC 441** was also of the similar view.

22. The Division Bench of Allahabad High Court in the case of **Umesh Chandra Saxena & Ors. Vs. Administrator General & Ors.** reported in **AIR 1999 All. 109** in para 46 agreed the observation of Single Judge who referred Section 141 C.P.C. which provides that the procedure provided in the Code of Civil Procedure in regard to suits would be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction and he was of the view that the proceeding for grant of Letter of Administration was one in which the Court exercised its Civil Jurisdiction and as such all rigours of the Code of Civil Procedure would be applicable. Further referred Rule 39 of Chapter XXX of the Allahabad High Court Rules to say that when the matter become contentious the application for letters of administration would be treated and registered as a suit and the petition was to be read as plaint and the objection as



written statement, and, as such the testamentary suit was a suit for all purposes under the Code of Civil Procedure and no exception could be taken to invocation of Order 7 Rule 11 C.P.C.

23. Section 295 of Hindu Succession Act which provides procedure in contentious cases states that in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, accordingly to the provisions of the Code of Civil Procedure, 1908 in which the petitioner for probate or letters of administration, as the case may be, shall be plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

24. From the aforesaid discussion of the observation made by the High Courts and also on perusal of the petition under Section 22 (1) of the Act filed by the petitioner before the Court below, in my view, the petition can be treated as plaint and the provision under Order 7 Rule 11 C.P.C. is applicable in this Case.

25. Now it is well settled that for the purpose of invoking Order VII Rule 11(d) C.P.C. no amount of evidence can be looked into and only averments made in the plaint are



relevant.

26. The Hon'ble apex Court in the case of **Abdul Gaffur Vs. State of Uttrakhand (2008 (10) SCC 97)** held that if the High Court is convinced that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order VII Rule 11 of the Code.

27. The Hon'ble Supreme Court in the Judgment dated 20.07.2012 in **Bhau Ram vs. Janak Singh and Ors.** (Civil Appeal No. 5343 of 2012) held that the law has been settled by this Court in various decisions that while considering an application under Order VII Rule 11 C.P.C., the Court has to examine the averments in the plaint and the pleas taken by the defendant in its written statement would be irrelevant. Accordingly, the law is well settled that only the averments in the plaint can be looked into while deciding the application under Order VII Rule 11 C.P.C.

28. This Court in the case of **I.T.C. Ltd. Vs. Shakuntala Devi** reported in **2012 (2) PLJR 592** held that:-

“In view of the aforesaid principles and also on the basis of the apex Court on the issue of rejection of plaint under Order VII Rule 11 (d) CPC, the following broad principles can be culled out:

(I) The averments made in plaint are



germane have to be taken as correct;

(ii) The whole plaint has to be read not in formal but in a meaningful manner;

(iii) No part of defence or evidence is to be considered

(iv) Being summary in nature, the Court should exercise this jurisdiction only when it becomes absolutely certain that the litigation is doomed to fail.”

29. The Hon’ble Supreme Court in the case of **P.V.**

Guru Raj Reddy Vs. P. Neeradha Reddy & Anr. 2015 (2)

PLJR (Supreme Court) 205 in Paragraph 5 and 6 held as follows:

“Rejection of the plaint under Order VII, Rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII, Rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under order VII, Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex-facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situation, the claims will have to be adjudicated in the course of the trial.



In the present case, reading the plaint as a whole and proceedings on the basis that the averments made therein are correct, which is what the Court is required to do, it cannot be said that the said pleadings ex-facie discloses that the suit is barred by limitation or is barred under any other provision of law. The claim of the plaintiffs with regard to the knowledge of the essential facts giving rise to the cause of action as pleaded will have to be accepted as correct. At the stage of consideration of the application under Order VII, Rule 11 the stand of the defendants in the written statement would be altogether irrelevant.”

30. On perusal of the Order dated 04.01.2018 passed by the learned trial court, it appears that the learned trial court observed that Section 22 of the Hindu Succession Act, 1956 deals with preferential right to acquire property in certain cases is available only to a person, who is a Class I legal heirs of schedule on whom the interest of the intestate in immovable properties or business devolves.

31. The learned trial court further observed that the Miscellaneous Case as filed by the applicant is squarely on the basis of the right conferred under Section 22 of Hindu Succession Act, 1956 which has very limited scope. The applicant and Opposite Party II are distant cousin brothers as per the genealogical table and even their grand father were different persons who had survived their father, who was common



ancestor and admittedly they are not Class I heirs of Late Gopal Prasad Narayan Singh.

32. The appellate Court also discussed and considered the facts and circumstances of the case affirmed the judgment of the trial Court vide the impugned judgment dated 13.08.2018 assigning the reason for the same.

33. In the light of the above discussion and in view of the settled legal provision as mentioned above, in my considered opinion there is no illegality in the impugned order for interference by this Court in the jurisdiction under Article 227 of the Constitution of India.

34. In the result, this Civil Miscellaneous Application is dismissed. There shall be no order as to costs.

(Sunil Dutta Mishra, J)

shweta/-

AFR/NAFR	AFR
CAV DATE	10.02.2023
Uploading Date	09.05.2023
Transmission Date	

