

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.176 of 2023**

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Uday Kant Singh Son of Late Bhagwat Prasad Singh Resident of Mohalla-
Dollar House Chowk Sipahi tola (Hindustan Paper Agency Holder)
Madhubani, P.S.-K.Hat, Distt-Purnia, PIN-854301

... .. Petitioner/s

Versus

1. Jaykant Singh Son of Late Bhagwat Prasad Singh R/o Mohalla-Nath Nagar
(Sahpur), P.S.-Nath Nagar, District-Bhagalpur, PIN-812006.
2. Navkant Singh S/o Late Bhagwat Prasad Singh, R/o Mohalla-Nath Nagar
(Sahpur), P.S.-Nath Nagar, District-Bhagalpur, PIN-812006.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Md. Waliur Rahman, Advocate Mr. Nishant Kumar Sinha, Advocate
For the Respondent/s	:	Mr. Vikram Singh, Advocate Mr. Manish Kr. No.2, Advocate

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**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date : 30-01-2024

The instant petition has been filed for quashing/setting aside the order 26.11.2022 passed by the learned Additional District & Sessions Judge-IX, Purnea in Misc. Appeal No. 07 of 2021(CIS No. 07/2021) and Misc. Appeal No. 08 of 2021 (CIS No. 08/2021).

02. The case of the parties as it appears from the record is that the respondent-1st set is plaintiff before the learned trial court and petitioner and respondent-2nd set are defendants. All of them are brothers. The suit has been filed by the plaintiff/respondent-1st set for declaration that the plaintiff was having 1/3rd share in the suit land having area 7.14 acre and for



carving out the same from the suit property in favour of the plaintiff/respondent-1st set. The plaintiff has also filed a Title Suit No. 205 of 2010 prior to filing of present suit, i.e., Title Suit No. 423/2013 for partition. The earlier filed suit is also with regard to same suit property and the plaintiff sought declaration of possession over 2.38 acres of land/1/3rd share in the suit land. During pendency of the Title Suit No. 423/2013, plaintiff/respondent-1st set filed an application under Order 39 Rule 1 & 2 stating therein that the petitioner/defendant threatened the plaintiff with alienation of the Schedule-A property of the plaint and prayed for grant of permanent injunction. The learned Sub. Judge-I, Purnea, vide order dated 2nd of March, 2021, dismissed the application of the plaintiff/respondent-1st set finding no merit in it. Being aggrieved by the order dated 02.03.2021, the plaintiff/respondent -1st set and respondent-2nd set preferred Misc. Appeal No. 07/2021 and Misc. Appeal No. 08/2021 respectively and challenged the order of the learned Sub. Judge-I, Purnea. The learned Additional District Judge-IX, Purnea allowed the said appeals vide order dated 26.11.2022 while setting aside the impugned order. The said order dated 26.11.2022 has been challenged before this Court.



03. Learned counsel appearing on behalf of the petitioner submitted that the learned appellate court went on surmises and conjecture and without recording any finding with regard to *prima facie* case, balance of convenience and irreparable loss, allowed the appeals. The learned first appellate court did not consider the facts of the case and did not further consider the fact that the suit has been filed for partition of joint family property and no injunction can be granted. Learned counsel relied on the decisions of the different Co-ordinate Benches of this Court in the case(s) of ***Baldeo Prasad Yadav v. Kedar Nath Yadav***, reported in **(2006) 2 PLJR 437** [Paras-4 & 5], ***Krishna Lal Yadav v. Shambhu Kumar Yadav***, reported in **(2005) 4 PLJR 716** [Para-5] and ***Murli Manohar Jalan v. Bal Manohar Jalan***, reported in **(2001) 2 PLJR 606** [Para-4] to stress the fact that grant of injunction has been deprecated on a joint family property. Learned counsel further submitted that the petition for injunction has been filed merely on apprehension and mere apprehension can never be the basis for grant of injunction, unless the triple ingredients, i.e., *prima facie* case, balance of convenience and irreparable loss as contemplated for grant of injunction are present. The learned counsel further submitted that the learned first appellate court has not



considered the case of the petitioner/defendant at all that the petitioner got the suit property in a family settlement on 17.06.1985 and the plaintiff/respondent -1st set was suitably compensated and the plaintiff/respondent-1st set has no claim at all over the suit property. The compromise petition was prepared in presence of the respectable persons of the society and also in presence of the four brothers, one of whom, namely, Manikant Singh, has not been made party by the plaintiff/respondent-1st set in his suit. The said memorandum of partition was acted upon by all. So, there was no *prima facie* case in favour of the plaintiff/respondent-1st set, to begin with. The learned Sub. Judge-I, Purnea appreciated all these facts and rejected the application of the plaintiff/respondent-1st set for injunction holding that no case of ad-interim injunction is made out in a partition suit where there is unity of title and possession relying on a decision of this Court passed in ***Misc. Appeal No. 354 of 2017 (Ram Ran Vijay Pratap Shahi and Anr Vs. Sri Kaushlendra Pratap Shahi and Ors)***. Thus, the learned counsel submitted that the order of the learned first appellate court is not sustainable and the same be set aside.

04. *Per contra*, it has been submitted on behalf of the respondent-1st set that there is no infirmity in the impugned



order. The partition in the family of the petitioner took place in Title Suit No. 17 of 1970. After partition in the family, the petitioner and the respondents bought the suit land measuring 7.14 acres on 10.07.1974 and the *vendees*, i.e., the petitioner and the respondents are entitled to identical share of $1/3^{\text{rd}}$ each and for this reason, the plaintiff has filed the partition suit for $1/3^{\text{rd}}$ share. Effectively, it is not a suit for partition of joint family property, rather it is a suit for declaration for title over $1/3^{\text{rd}}$ of the suit property filed by the plaintiff/respondent 1st set. The deed of partition dated 17.06.1985 is an unregistered document and no reliance could be placed on it. Learned counsel further submitted that the petitioner/defendant has alienated the suit land during pendency of the suit. Further, the respondent 1st set/plaintiff is a co-purchaser and it is an admitted fact so, the plaintiff has a joint interest in the suit land and being a joint property, the plaintiff/respondent-1st set is supposedly in possession. Hence, balance of convenience also lies in his favour. Therefore, any alienation on part of the defendant/petitioner would cause irreparable loss. Hence, the plaintiff/respondent-1st set has got all the ingredients for grant of injunction in his favour and for this reason, the learned appellate court rightly allowed the appeals of the respondents.



05. I have given my thoughtful consideration to the rival submission of the parties and have gone through the record. Certain facts are admitted. The petitioner and respondents are full brothers. A partition has taken place in the family in Title Suit No. 70 of 1970 for ancestral property and, thereafter, the suit property has been purchased in the names of these petitioner and the respondents.

06. Now, the case before the learned Sub. Judge-I, Purnea in Title Suit No. 423 of 2013 has filed seeking following relief(s):-

“i) Let it be decided, declared and adjudicated by the court that the plaintiff has got one/third share in the suit land.

ii) After the above declaration, a preliminary decree of one third share of plaintiff be passed in favour of plaintiff against the defendants directing the defendants to partition the suit land amicably in consonance with preliminary decree within a time to be fixed by the court failing which a survey knowing Advocate Commissioner be appointed to carve out separate Takhta of one third share of plaintiff in the suit land in consonance with preliminary decree and after receiving report of survey knowing Advocate Commissioner final decree be passed in terms of separately carved out Takhta of plaintiff's share in the suit land over the requisites non-judicial stamp supplied by plaintiff and exclusive possession be delivered to the plaintiff with



the help of survey knowing commissioner through processes of the court over separately carved out Takhta of the plaintiff.

iii). Cost of the suit together with such other relief or reliefs to which the plaintiff is entitled also be decreed in favour of the plaintiff.”

07. From the submission made on behalf of the parties and also from the relief portion in Title Suit No. 423 of 2013, the issue before this Court is the right of a co-owner to seek injunction against the other co-owner when there is claim and counter claim by the parties with regard to possession and ouster from the suit property. In this regard, it would be beneficial to consider the rights and obligations of co-owner *inter-se*. The Division Bench of Punjab & Haryana High Court in the case of ***Sant Ram Vs. Daya Ram and others***, reported in ***AIR 1961 P&H 528*** has summarized the propositions in the following manner:-

“(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of the joint property by one co-owner is, in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of



one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and denies that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate, parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition.

(8) The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

(9) Where a portion of the joint property is by common consent of the co-owners, reserved for a



particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.”

08. In the instant case, apparently, the plaintiff/respondent-1st set has claimed 1/3rd share in the suit land and has also sought preliminary and final decree and carving out of his share in the suit property to the extent of 1/3rd share. So, whatever may be the claim of the plaintiff/respondent-1st set, his suit appears to be a suit for partition and it has come in written statement of the defendant/petitioner that plaintiff has also filed a suit for declaration of possession over the same suit property. When there is unity of title and unity of possession, grant of ad-interim injunction is out of question. Obviously there could not be any *prima facie* case in favour of the plaintiff/respondent-1st set even supposing that the plaintiff is having 1/3rd share. Further, an alienation would be subject to Section 52 of the Transfer of Property Act and will be hit by the principle of *lis pendens*. So, there could be no question of irreparable loss. Obviously, balance of convenience would follow the *prima facie* case and if story of shared and joint property of plaintiff/respondent 1st set is taken into consideration, then the balance of convenience



would lie equally in favour of both the parties.

09. From the discussion made here-in-above, I am of the considered opinion that the learned appellate court failed to take into account that the appellants are the co-owners and even if it is taken that they are not co-sharers of joint family property, there would be no material change in their status.

Having considered the matter in its entirety, I think the present petition needs to be allowed. In the result, the impugned order dated 26.11.2022 passed by the learned Additional District & Sessions Judge-IX, Purnea in Misc. Appeal No. 07 of 2021(CIS No. 07/2021) and Misc. Appeal No. 08 of 2021 (CIS No. 08/2021), respectively, is set aside and the order dated 02.03.2021 passed in by the learned Sub. Judge-I, Purnea, in Title Suit No. 423 of 2013 is hereby affirmed.

10. Accordingly, the present Civil Misc. Petition stands allowed.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	NAFR
CAV DATE	05-01-2024
Uploading Date	30-01-2024
Transmission Date	NA

