

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.285 of 2019

- 1.1. Shanti Devi, Wife of late Khojendra Singh, Resident of Shahkherha, Paghari, P.S. Baheri, District- Darbhanga.
- 1.2. Dharmendra Kumar Singh, Son of late Khojendra Singh, Resident of Shahkherha, Paghari, P.S. Baheri, District- Darbhanga, at Present residing C/o Pushpa Singh, Flat No. 01 (B), Block- 4, Tirath Project, Salua, P.S. Kolkata Airport, Rajarhat, Distt.- North-24 Pargana , West Bengal.
- 1.3. Shailendra Kumar Singh, Son of late Khojendra Singh, Resident of Shahkherha, Paghari, P.S. Baheri, District- Darbhanga at present residing at S-1, Rohtas Nagar Phase-2, Satakshi Garden, Khajuri Kalan, Piplani, Huzur, P.S. Awadhपुरi, Distt. Bhopal, (Madhya Pradesh).
- 1.4. Jainendra Kumar Singh, Son of late Khojendra Singh, Resident of Shahkherha, Paghari, P.S. Baheri, District- Darbhanga, at Present Residing Kanak Bhawan, Laxmipur, Balbhadrapur, P.S. Laheriasarai, District- Darbhanga.

... .. Petitioner/s

Versus

Raj Kumar Singh, S/o Sri Mithilesh Prasad Singh Resident of Village-Sankherha P.O. Baheri, P.S. Baheri, District-Darbhangha

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. J.S. Arora, Sr. Advocate Mr. Prabhat Ranjan Singh, Advocate
For the Respondent/s	:	Mr. Ram Bali Jha, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA

CAV JUDGMENT

Date : 14-08-2024

The present petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 25.10.2018 passed by the learned Sub Judge-1, Darbhanga in Partition Suit No. 56 of 2008 whereby and whereunder the learned trial court rejected the petition dated 04.09.2015 filed by the original petitioner under Order 7 Rule 11 of the Code of



Civil Procedure (hereinafter referred to as 'the Code').

2. The conspectus of the case, as it appears from the record, is that the respondent filed a Partition Suit No. 56 of 2008 on 29.03.2008 in the court of learned Sub Judge-1, Darbhanga impleading the original petitioner as defendant 1st set and other 122 persons as defendants 2nd and 3rd set. The Partition Suit No. 56 of 2008 has been filed seeking following reliefs :

“(1) That on the consideration of the fact as stated above the court be pleased to set aside the decree passed in partition suit no. 136/70 by the court of Sub Judge, Darbhanga.

(2) That the court be pleased to hold and declare that the decree passed in partition suit no. 136/70 in the garb of compromise was fraudulently obtained in collusion with the father and grand father of the plaintiff and did no peruse the compromise arrived at as a result of which the court proceeded ex-parte and they did not save the interest of the plaintiff and as such be pleased to hold that the said decree is not binding on the plaintiff.

(3) That the court be pleased to hold and pass a decree afresh after setting aside the decree aforesaid as not binding on the plaintiff.

(4) That the court be pleased to hold and declare that the partition of the property standing in the name of the grand father or his brother could not have been made subject



matter of partition rather the same was exclusive property of the family of the plaintiff and the grand father of the plaintiff over looked to raise any objection with respect to the same, which is described in schedule 1 & 2 of this plaint and also the same schedule is in previous suit.

(5) That the court be pleased to pass a decree for cost”.

3. The original petitioner appeared and filed his written statement on 01.12.2009 denying the allegations/ averments made by the respondent and prayed for dismissal of the instant suit and during pendency of the suit, the original petitioner filed a petition on 04.09.2015 before the learned trial court under Order 7 Rule 11 read with Sections 11 and 151 of the Code with a prayer to reject the plaint. Another petition in continuation of the aforesaid petition dated 04.09.2015 has been filed by the original petitioner on 07.06.2017. The learned trial court vide the impugned order dated 25.10.2018 rejected the petition dated 04.09.2015, which has been challenged in the present petition.

4. Mr. J.S. Arora, learned senior counsel appearing on behalf of the petitioners, vehemently contended that the rejection order of the learned trial court is not sustainable in the



eyes of law as the plaint filed by the respondent is covered within the four corners of doctrine of *res judicata*. The plaintiff has categorically admitted in his plaint that the same issue already stood decided between the same parties not only by the learned trial court but also by the High Court. The learned trial court has also failed to consider that relief sought for by the respondent is beyond the jurisdiction of the learned trial court and, as such, the plaint filed by the respondent is not maintainable. The learned trial court has no jurisdiction to set aside the judgment and decree passed by a court of coordinate jurisdiction, which has already been confirmed up to the High Court in the year 1978 itself. The learned trial court ought to have considered that the respondent is bound by the judgment of the trial court as well as the High Court passed in Partition Suit No. 136/1970 as well as in First Appeal No.349/1978, respectively in respect of the same land between the same parties. Mr. Arora further submitted that the dissatisfaction of the respondent with the earlier judgment and decree passed by a competent court could not be a ground for filing a suit over the same issue and same cause of action since earlier decisions have attained finality. Mr. Arora further submitted that the original petitioner filed Partition Suit No. 136/1970 in which father of the respondent was described as minor under the guardianship of his



father Bisheshwar Singh along with others defendants, who were co-sharers and purchasers. This fact has been admitted in the plaint itself. The respondent has filed the instant partition suit only on the ground that father of the plaintiff was not properly represented and his right and interest were not safeguarded and protected by the grandfather of the respondent. Mr. Arora further submitted that with such far-fetched ground, the instant suit has been filed. The learned trial court has also overlooked the fact that during pendency of the suit, the father of the respondent attained majority, but he did not challenge the decree. The father of the respondent has rather accepted the partition and acting upon it, executed a sale deed dated 18.07.2018 for share of his land in favour of his son/respondent herein. So, the respondent has also dealt with the property which his father got in partition and he cannot be allowed to take a contradictory plea in the title suit. There is specific recital in the sale deed about the earlier partition. Mr. Arora further submitted that the respondent was born much after the decree in Partition Suit No.136/1970 and the malafide intent of the respondent in challenging the same is evident from the aforesaid fact. Mr. Arora relied upon the decision of the Hon'ble Supreme Court in the case of *Dahiben vs. Arvinbhai Kalyanji Bhanusali and Ors.* reported in (2020) 7 SCC 366 on the proposition that if the



court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the court has no option, but to reject the plaint. Mr. Arora further relied upon the decision of the Hon'ble Supreme Court in the case of ***Colonel Shrawan Kumar Jaipuriyar vs. Krishna Nandan Singh and another*** reported in ***(2020) 16 SCC 594*** on the point that a mere contemplation or possibility that a right may be infringed without any legitimate basis for that right, would not be sufficient to hold that the plaint discloses a cause of action.

5. Mr. Arora further submitted that the suit is barred under Order 23 Rule 3A of the Code as no suit would lie to set aside a decree on the ground that the compromise on which the decree was based was not lawful. Thus, Mr. Arora submitted that the learned trial court has completely failed to appreciate the legislative intent of Order 7 Rule 11 and Order 23 Rule 3A of the Code and, as such, passed a wrong order which could not be sustained.

6. On the other hand, learned counsel appearing on behalf of the respondent countered the argument made on behalf of the petitioners. The learned counsel for the respondent submitted that the partition suit filed by the respondent is maintainable and the impugned order has been passed considering the facts and circumstances of the case. The learned



counsel admitted that the respondent was not even born when the partition suit was filed by the original petitioner and when it was decreed. The appeal against the partition suit of the original petitioner was dismissed by the High Court in 1989 when the respondent was a minor. The learned counsel further submitted that as the father of the respondent was a minor at the time of filing of the Partition Suit No.136/1970, his interest should have been protected by the court, but no written statement was filed on behalf of the minor defendant by the GAL appointed by the court. Even the grandfather of the respondent did not take any interest and did not produce any evidence. It was an *ex-parte* decree against the family of the respondents and their rights have been seriously affected and prejudiced due to negligent act of the grandfather and father of the respondent, respectively. Due to careless and negligent attitude of the father and grandfather of the respondent, share and interest of the joint family have not been rightly decided. Thus, the interest of the plaintiff was jeopardized. The learned counsel further submitted that though a compromise is stated to have taken place in the earlier partition suit, but the same was vitiated due to improper representation of the father of the respondent. The learned counsel further submitted that for these reasons, the suit is not barred and the petitioner could challenge the earlier compromise



and decree based on such compromise in the present suit. Similarly, there could be no application of the doctrine of *res judicata* since the respondent was not a party in the earlier suit and even his father was minor and there was no proper representation.

7. I have given my thoughtful consideration to the rival contention of the parties. Admittedly for the same suit property earlier Partition Suit No. 136/1970 was filed by the original petitioner against the grandfather of the respondent and his brothers as well as the father of the respondent stated to be a minor at the time of filing of the Partition Suit No.136/1970. It is also evident from paragraph 12 of the plaint of Partition Suit No. 56/2008 filed by the respondent that during pendency of the Partition Suit No. 136/1970, the father of the respondent attained majority. It further transpires that the partition suit was decreed. If the father of the respondent was having grievance, it was incumbent upon him to take steps for setting aside such decree within three years of attaining majority which the father of the respondent did not do. Rather, it appears, he accepted the orders of the court with regard to partition and sold a piece of land from his share as it appears from the sale deed dated 18.07.2018, that too, in favour of the respondent. It also appears that father and grandfather of the respondent preferred First



Appeal No. 349/1978 before the High Court in the year 1978 and the same came to be dismissed in 1989. So, it could not be said that there has been no effort or attempt made by the ancestors of the respondent to safeguard their interest. When the respondent was not a party to the original partition suit, whatever might be his allegations at this point of time, the same could not have the effect of bestowing any right over the respondent. The respondent could not be allowed to unsettle the facts which have attained finality way back in the year 1989, i.e., after dismissal of the first appeal filed by his father and grandfather. Moreover, the respondent has been making challenge to the acts of his ancestors, namely father and grandfather and his brothers, when the respondent was not even in womb and was not having any right. If the father of the respondent was having any grievance, he could have taken steps in this regard and asserted his rights. There are two possibilities. If no such steps have been taken within the statutory limitation period, the right gets extinguished and if such steps have been taken by the father of the respondent and he lost, again the same result. Thus, from bare perusal of the plaint, the fact which comes out in open is that the plaint is having the same subject matter and has been filed on same cause of action with same parties, in which Partition Suit No. 136/1970 had been filed and



has attained finality with dismissal of First Appeal No. 349/1978 in 1989.

8. Now, the learned trial court has held that the plaint shows sufficient cause of action based on facts and it was not possible to dispose of the matter without consideration of evidence. The learned trial court further held that the plaint was not barred by any law. Perusal of the impugned order shows a cryptic and non-speaking order without discussion of the material facts and law on the point. Perusal of the impugned order shows it has not discussed what would be the effect of admitted facts in the plaint with regard to earlier filed Partition Suit No. 136/1970 between the same parties. Section 11 of the Code reads as under :

“11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was



instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the



execution of that decree.

Explanation VIII.—An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]”

9. If a matter has been directly and substantially in issue in formal suit between the same parties, the same shall not be tried by a court in a subsequent suit. This is the established principle of law. Then Order 7 Rule 11 reads as under :

“11. Rejection of plaint.—*The plaint shall be rejected in the following cases:—*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;



(f) where the plaintiff fails to comply with the provisions of Rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff”.

10. Now, Order 7 Rule 11 (d) specifically bars a suit which appears from the statement in the plaint to be barred by any law. Perhaps, the learned trial court missed the point that the suit of the respondent is barred by the principles of *res judicata* as provided under Section 11 of the Code.

11. From the discussion of the facts as made here-in-before, I have no hesitation in holding that the averments made in the plaint of Partition Suit No. 56/2008 clearly spell out matter directly and substantially in issue in both the suits is the same and parties are also the same. So, the subsequent Partition Suit No. 58/2008 is hit by the doctrine of *res judicata* and, therefore, the plaint is liable to be rejected under Order 7 Rule 11 (d). This point was clearly missed by the learned trial court and there appears no requirement of consideration of the



evidence on the point.

12. Another aspect which was also overlooked by the learned trial court was whether it has got jurisdiction to set aside the decree passed in Partition Suit No. 136/1970 by a court of coordinate jurisdiction or whether it has jurisdiction to set aside the compromise alleged to be fraudulently obtained in collusion with the father and grandfather of the respondent, at the instance of the plaintiff/respondent, who was not even born during the earlier proceeding, by way of passing decree in the present proceeding.

13. Order 23 Rule 3A of the Code specifically bars institution of another suit for the purpose of setting aside a decree on the ground that the compromise on which the decree was based was not lawful. Order 23 Rule 3A of the Code reads as under :

“3A. Bar to suit.- No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful”.

When legislature has provided that no suit shall lie to set aside a decree on the ground that the compromise on which the decree was passed was not lawful, the suit of the respondent could not have been allowed to proceed. Hence, in the light of the specific provision of Order 23 Rule 3A of the Code, again



the suit of the plaintiff/respondent is barred.

14. Normally the Court under Article 227 of the Constitution of India would not entertain the petition filed against an order rejecting the petition filed under Order 7 Rule 11 of the Code. But in the peculiar facts and circumstances of the case and considering the completely perverse finding recorded by the learned trial court in the impugned order in erroneous exercise of jurisdiction, the present petition has been entertained. The difference and distinction between the entertainability and maintainability of a petition under Article 227 of the Constitution of India has been considered by the Hon'ble Supreme Court in the case of ***Raj Shri Agarwal @ Ram Shri Agarwal and another vs. Sudheer Mohan and Ors.***, reported in ***2022 SCC OnLine SC 1775***, wherein it was held that the remedy under Article 227 of the Constitution of India is a constitutional remedy and in a given case the Court may not exercise the power under Article 227 of the Constitution of India, if in its opinion, the aggrieved party has another efficacious remedy available under the CPC. But to say that the writ petition under Article 227 of the Constitution of India shall not be maintainable at all is not tenable. Once the matter came up before this Court and the same was heard, relegating the petitioner for filing another petition is simply unwarranted and



would result in wastage of time if this Court could entertain the petition under Article 227 of the Constitution of India.

15. In the light of the discussion made here-in-before, I come to the irresistible conclusion that the learned trial court has passed the impugned order under complete error of jurisdiction and hence, the impugned order dated 25.10.2018 passed in Partition Suit No. 56/2008 by learned Sub Judge-1, Darbhanga is set aside. Consequently, the petitions dated 04.09.2015 and 07.06.2017 are allowed.

16. As a result, the instant petition stands allowed.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	20.08.2024
Transmission Date	NA

