

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.379 of 2023

1. Md. Ali Reza @ Md. Ali Raza @ Shamser Son of Late Abdul Gaffar, Resident of Village - Salempur, P.O. - Mohiuddinur, P.S. - Jagdishpur, District- Bhagalpur.
2. Md. Anwar Reza, Son of Late Abdul Gaffar, Resident of Village - Salempur, P.O. - Mohiuddinur, P.S. - Jagdishpur, District- Bhagalpur.
3. Bibi Furkana Sagir Begum @ Meena Wife of Late Ali Asha @ Quaisar Alam Resident of Village - Salempur, P.O. - Mohiuddinur, P.S. - Jagdishpur, District- Bhagalpur.
4. Md. Rahwar Alam @ Rahbar Alam @ Sonu Son of Late Quaisar Alam, Resident of Village - Salempur, P.O. - Mohiuddinur, P.S. - Jagdishpur, District- Bhagalpur.
5. Md. Sakib Quaisar, Son of Late Quaisar Alam, Resident of Village - Salempur, P.O. - Mohiuddinur, P.S. - Jagdishpur, District- Bhagalpur.
6. Nesara Khatoon @ Milu, Wife of Md. Imran, D/o Late Abdul Gaffar, Resident of Village and P.O. - Bujurg Harna, P.S. Nawada Bazar, District- Banka.
7. Most. Bibi Maimuna Khatoon Wife of Late Abdul Gaffar, Resident of Village- Salempur, P.O.- Mohiuddinpur, P.S. - Jagdishpur, District- Bhagalpur.

... .. Petitioner/s

Versus

1. Firaza Khatoon Wife of Md. Jahir Ahmad @ Jahid Mukhia, Gram Panchayat - Kajraili, P.O. and P.S. - Kajraili, District - Bhagalpur.
2. Shami Ahmad Son of Late SK. Ajmal Ali resident of Village, P.O. and P.S. - Kajraili, District- Bhagalpur.
3. Shamseer Ahmad, Son of Late SK. Ajmal Ali, resident of Village, P.O. and P.S. - Kajraili, District- Bhagalpur.
4. Bibi Sahnaz @ Sanno D/o Late Abdul Gaffar, Wife of Md. Ezaz Ahmad, Resident of Village and P.O. - Khaira, P.S. Shahkund, District - Bhagalpur.
5. Rizwana Parwez @ Fudro, D/o Late Abdul Gaffar, Wife of Hassan Ahmad, resident of Village - Salempur, P.O. - Mohiuddinpur, P.S. - Jagdishpur, District - Bhagalpur.
6. Md. Ashmat Reza @ Munna Son of Late Abdul Gaffar., resident of Village- Salempur, P.O. - Mohiuddinpur, P.S. - Jagdishpur, District - Bhagalpur.
7. Abdul Wari, Son of Late Noor Uddin, Resident of Village - Salempur, P.O. - Mohiuddinpur, P.S. - Jagdishpur, District - Bhagalpur.
8. Mahendra Pd. Singh, Son of Late Kishan Pd. Singh, Resident of Village, P.O. and P.S. - Kajraili, District- Bhagalpur.
9. Md. Monajir, Son of Late Md. Athar Hosain, Resident of Village- Salempur, P.S. Mohiuddinpur, P.S. - Jagdishpur, District - Bhagalpur.
10. Ammar Hosain Son of Late Rauf, Resident of Village- Salempur, P.S.

Mohiuddinpur, P.S. - Jagdishpur, District - Bhagalpur.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Bishwa Nath Chaudhary Mr. Ajay Mukherjee, Advocate
For the Respondent/s	:	Mr. Waliur Rehman, Advocate Mr. Najmul Hoda, Advocate Mr. S.P. Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT
Date : 14-08-2024

The instant petition has been filed under Article 227 of the Constitution of India challenging the orders dated 04.02.2023 passed by learned Additional District and Sessions Judge-V, Bhagalpur in Misc. Civil Appeal No. 21 of 2022 and dated 16.06.2022 passed by learned Sub-Judge-V, Bhagalpur in Title Suit No. 537 of 2021. The learned trial court dismissed the petition filed by the petitioners under Order 39 Rule 1 &2 read with Section 151 of the Code of Civil Procedure (hereinafter "the Code") vide the Order dated 16.06.2022 which was affirmed by the learned Additional District Judge-V, dismissing the appeal against the said Order of the learned trial court.

2. The conspectus of the case of the parties is that the petitioners who are plaintiffs before the learned trial court filed a suit for declaring certain survey entry in the Revisional Survey Khatiyan as wrong, incorrect and not binding on the plaintiffs and defendant nos. 5, 6 & 7, mentioned as defendant 4th party,

who are respondent nos. 4, 5 & 6 in the present petition. It has further been prayed that judgment and decree of appellate court dated 28.09.2010 and 27.10.2010 respectively, in Title Appeal No. 89 of 2004 was not binding upon the plaintiffs and defendants 4th party. The suit property is having area 15 decimal of Khata No. 622 (New) 142 (Old), Khesra No. 1344 (New)/997(Old) of Mauza Kajraili, Thana No. 395, Thana Kajraili, Anchal Nathnagar, Sub-division Bhagalpur, District Bhagalpur. The boundary of the suit property has been shown as follows:

North: Ganesh Shah

South: Khesra No.1312

East: Aziz Ahmad

West: Sadak Amarpur Road

The case of the plaintiffs is that one Abdul Gaffar was common ancestor of plaintiffs and defendant 4th party who acquired the Schedule 'A' land through a registered sale deed dated 22.06.1962 from one Shambhu Nath Mukherjee. The vendee came in possession of the suit land and got it mutated in the revenue records of the State of Bihar and started paying rent to the State. Abdul Gaffar died in 1971. Revisional Survey Khatian was prepared and published in the year 1976.

However, the suit land was shown in the named of "Anabad Sarv Sadharan". Though it is claimed that it should have been recorded in the name of plaintiffs and defendant 4th party. Defendant 3rd party who are respondent nos. 2 & 3 started cutting soil from the land to which the plaintiffs and defendant 4th party raised their objection and defendant 3rd party/ respondent nos. 2 & 3 stopped their activity. Subsequently, the plaintiffs came to know that defendant 3rd party/ respondent nos. 2 & 3 had obtained judgment and decree in Title Appeal No. 89 of 2004 from the Court of learned 3rd Additional District Judge, Bhagalpur. After getting the certified copy of Title Appeal No. 89 of 2004 and Title Suit No. 10 of 1996, the plaintiffs further came to know that defendant 3rd party/ respondent nos. 2 & 3 obtained a decree in relation of the property in question by playing fraud upon the Court and also without addition of the parties the heirs and legal representatives of the deceased Abdul Gaffar. The plaintiffs further claimed that the suit land is the purchased land of their ancestors and it was never used by anyone as public land. It has been recorded as public land in absence of and without knowledge of the plaintiffs and for this reason the entry in Revisional Survey Khatiyani of the year 1976 is incorrect. With the aforesaid averments the petitioners filed

their title suit.

On notice, defendant 3rd party/ respondent nos. 2 & 3 appeared and filed the written statement denying the allegations made by the plaintiffs. The defendant 3rd party/ respondent nos. 2 & 3 also claimed that the Revisional Survey Khatiyān was wrongly prepared in the name of 'Anabad Sarv Sadharan'. The defendant 3rd party claimed the suit property on the basis of adverse possession and their contention was upheld by the first appellate Court. During pendency of the suit, the plaintiffs filed a petition on 30.05.2022 under Order 39, Rule 1 & 2 and Section 151 of the Code for restraining the defendant 3rd party/ respondent nos. 2 & 3 from making construction over the suit land. The contention of the plaintiffs in injunction application was controverted by the defendant 3rd party who filed their rejoinder. The learned trial court *vide* order dated 16.06.2022 dismissed the injunction petition. Thereafter, the plaintiffs preferred Misc. Civil Appeal No. 21 of 2022 and the learned lower appellate court after hearing both the parties dismissed the miscellaneous appeal. Aggrieved by the aforesaid two orders, the plaintiffs have preferred the instant petition.

3. The learned counsel for the plaintiffs/petitioners submits that the impugned orders are entirely against the

material on record and against the law. The learned Sub-ordinate Courts did not consider the fact that the suit property was purchased by the ancestor of the plaintiffs/defendant 4th party through registered sale deed on 22.06.1962 and were having rent receipt till 1969-70. Learned counsel further submits that the learned Sub-ordinate Courts further failed to appreciate that defendant 3rd party/respondent nos. 2 & 3 have obtained the decree by playing fraud upon the Court in respect of the suit land. In the Title Suit No. 10 of 1996, no documents were produced and the learned trial court rightly dismissed the suit of the defendant 3rd party. In Title Appeal No. 89 of 2004 no relief of title on the basis of adverse possession has been sought and the plaintiffs/petitioners were not even made parties. The learned Sub-ordinate Courts also failed to consider the conduct of the defendant 3rd party/ respondent nos. 2 & 3 in keeping quiet till 2010-2021 after obtaining the decree with regard to title on the basis of adverse possession without making the plaintiffs parties. The learned counsel further submits that the learned Sub-ordinate Courts have not properly considered the fact that the three basic ingredients of *prima facie* case, balance of convenience and irreparable loss are in favour of the plaintiffs/petitioners and they have also not taken into

consideration the long silence of the defendant 3rd party/ respondent nos. 2 & 3 over the suit property. Learned counsel further submits that both the Courts below failed to appreciate that not a chit of paper has been produced by defendant 3rd party in support of their claim of title. The courts proceeded in the matter on the basis of decision in Title Appeal No. 89 of 2004 wherein it has been held that the defendant 3rd party were entitled to get the decree on the basis of adverse possession when there was no prayer as such in the plaint of the defendant 3rd party in Title Suit No. 10 of 1996. Learned counsel further submits that existence of sale deed of 1962 in favour of the ancestors of the plaintiffs shows a *prima facie* case in favour of the plaintiffs. Plaintiffs claim their possession since the date of the registration of sale deed and if the defendant 3rd party are allowed to make any construction over the suit land, the same will cause much inconvenience to the plaintiffs. If the defendant 3rd party are not restrained, irreparable loss would be caused to the plaintiffs. Thus, the learned counsel submits that the impugned orders are not sustainable and the same be set aside.

4. On the other, learned counsel appearing on behalf of defendant 3rd party/ respondent nos. 2 & 3 vehemently contended that there is no infirmity in the impugned order and

the same is quite proper and correct. The learned counsel submitted that the land in question never came in possession of the petitioner/plaintiffs and the vendor of the ancestors of the plaintiffs had no *locus standi* or right to execute sale deed in favour of the ancestors of the plaintiffs. The land in question was *Gairmajarua Aam "Parti Qadim"* since the days of old survey. The said land was shown as Anabad Bihar Sarkar during revisional survey in 1976 and one *Zafar Mian* was shown as *Awaidh Dakhalkar*. There is no separate area of 15 decimal suit land rather the same is part of C.S. Plot No. 997 having area 1.91 acre which was converted into Revisional Survey Plot No. 1311 having an area of 15 decimal and Revisional Survey Plot No. 1312 having area of 11 decimal under Khata No. 622 total area 26 decimal and further 46 decimal of RS Plot No. 1310 as *khatiyani* land of the defendants 3rd party. The land is situated in one block and the same has been coming in the peaceful possession of the defendants 3rd party since 1920-21. There are 20 shops and a private '*Haat*' on the suit land on Plot No. 1310 and 1312. When the Revisional Survey entry was published in 1976 in the name of Anabad Sarv Sadharan, defendant 3rd party/ respondent nos. 2 & 3 filed Title Suit No. 10 of 1996 which was dismissed *vide* judgment and decree dated 09.09.2004 and

23.09.2004 respectively. Thereafter the defendant 3rd party preferred Title Appeal No. 89 of 2004 against the judgment and decree of the learned trial judge and the appeal was allowed *vide* order dated 28.09.2010 by setting aside the judgment and decree passed in Title Suit No. 10 of 1996. The learned counsel further submitted that the plaintiffs have utterly failed to show any *prima facie* case or balance of convenience or irreparable loss in their favour and hence their petition of injunction has been rightly rejected. Learned counsel further submitted that although the learned trial court observed that a *prima facie* case appears to be in favour of the plaintiffs but said finding is not correct as it was recorded only on the basis that there existed a registered sale deed in favour of the ancestor of the plaintiffs but it is not clear from the record that the sale deed pertains to the suit land. Moreover, the suit land having area 26 decimal of RS Plot No. 1311 and 1312 has been mutated in favour of the defendant 3rd party/ respondent nos. 2 & 3 *vide* Mutation Case No. 398 of 2014-15 and *Jamabandi* No. 1709 was created in favour of defendant 3rd party. The mutation was done on the basis of judgment and decree of Title Appeal No. 89 of 2004 which has attained finality since it has not been challenged in second appeal. Now, after more than 45 years the plaintiffs filed

Title Suit No. 537 of 2021 against the wrong entry in R S Survey Khatiyani for the land which is in peaceful possession of the defendant 3rd party for more than hundred years. The learned counsel further submitted that even the suit of the plaintiffs is not maintainable as they are challenging the judgment and decree of Title Appeal No. 89 of 2004 in the present suit which is not permissible. After 45 years, the entry of Revisional Survey Khatiyani is being challenged and the same is clearly time barred.

Learned counsel further submitted that for a case of injunction, the party seeking injunction must show that he has a *prima facie* case in his favour. Balance of convenience or inconvenience must be clearly spelt out as to where the same would lie in case injunction is not granted. Furthermore, it is to be seen whether any irreparable loss or injury would be caused to the party seeking injunction if injunction is not granted. The plaintiffs have failed on all three counts. Once Title Appeal No. 89 of 2004 has been decided in favour of the defendant 3rd party who has been coming into possession of the suit land, the claim of the plaintiffs about *prima facie* case on the basis of sale deed does not remain sustainable. Moreover, the revenue records show the possession of the defendant 3rd party and naturally

balance of convenience would favour the defendant 3rd party as grant of injunction would cause more hardship to the defendant 3rd party and the inconvenience which the defendant 3rd party is likely to suffer would be much greater than the plaintiffs in case of grant of injunction. The plaintiffs are not in possession and hence no harm would come to them if any construction is made on the suit land.

Learned counsel further submitted that the petition is also not maintainable on the ground that two Courts have taken a concurrent finding in favour of the defendant 3rd party/respondent nos. 2 & 3 and hence, this Court should refrain from making any interference in the impugned orders. Learned counsel relied on the decision of the Hon'ble Supreme Court in the case of ***Prakash Harishchandra Muranjan Vs. Mumbai Metropolitan Region Development Authority and Anr.*** reported in ***(2009) 3 SCC 432*** and referred to paragraph 20 which reads as under:

“It is well settled when prayer for injunction is concurrently refused by two courts, this court, in a proceeding under Article 136 of the Constitution, will be very slow and cautious before it can take a different view. This court can only do so, if it finds that the judgment of the court below is perverse. In the facts of this case, discussed above, the court cannot arrive at such a finding. Therefore, we do not find any merit in this appeal, which is accordingly dismissed. No costs.”

On the same point the decision of this Court dated 02.07.2024 passed in ***Civil Misc. Jurisdiction No. 312 of 2022*** has also been referred. Thus the learned counsel submits that there is no infirmity in the impugned orders and the same needs to be sustained.

5. I have given my thoughtful consideration to the rival submission of the parties. Admittedly, the claim of the defendant 3rd party/respondent no. 2 & 3 is based on a decision of a Court of competent jurisdiction with regard to suit property. There is no denial that the suit property was the subject matter of relief sought before the learned first appellate Court in Title Appeal No. 89 of 2004. The plaintiffs have not taken any recourse against the judgment and decree of Title Appeal No. 89 of 2004. Rather they have come before this Court by filing the Title Suit No. 537 of 2021 assailing the orders of the first appellate court in Title Appeal No. 89 of 2004 which is not permissible as the same is not within the competence of the learned trial court. Except for the sale deed and some revenue receipts of the period 1962-1969 there is no other document in favour of the plaintiffs. If the status of the land was *Gairmajarua Aam "Parti Qadim"*, and the same status continued in Revisional Survey as Anabad Sarv Sadharan, it was

incumbent upon the plaintiffs to show the rights of their vendor, a duty in which the plaintiffs failed. Taking this fact together with the judgment and decree of Title Appeal No. 89 of 2004, hardly any *prima facie* case appears to be in favour of the plaintiffs.

Further, it is the claim of the defendant 3rd party that there exists their shops and private '*Haat*' on the suit land. Again, considering the same with the unequivocal finding of the learned first appellate court in Title Appeal No. 89 of 2004 that the defendants 3rd party are in possession of the suit property, there being no evidence to contrary, the possession of the defendants 3rd party would be presumed to be continuing in respect of the suit property. If the defendant 3rd party are continuing in possession, granting injunction of any kind will cause more inconvenience to the defendant 3rd party/respondent nos. 2 & 3. Further, there is hardly any material on record to show in what manner the plaintiffs are going to suffer irreparable loss if injunction is not granted.

06. Taking all these facts together, I am of the view that the plaintiffs/petitioners have not been able to show the presence of the ingredients of triple test of *prima facie* case, balance of convenience and irreparable loss in their favour.

Hence, I do not find any infirmity in the impugned orders. Moreover, the impugned orders reflect concurrent findings by two separate Courts, this Court would be least inclined to interfere with such orders as no perversity or material irregularity or illegality has been pointed out in the impugned orders by the learned counsel for the petitioners. Therefore, the impugned orders are affirmed.

07. As a result, the present petition stands dismissed.

08.This Court has not made any observation on the merits of the cases and whatever observation has been made it is for the disposal of the present petition and the learned trial court is expected to proceed in the matter uninfluenced by any of the observation made by this Court.

(Arun Kumar Jha, J)

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AFR/NAFR	AFR
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Uploading Date	20.08.2024
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