

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1317 of 2017

1. Vijay Kumar Dubey
2. Ajay Kumar Dubey
3. Shailesh Kumar Dubey
4. Amit Kumar Dubey
All Sons of Late Satyavrat Dubey, R/o Village - Barka Gaon, Post Office - Barka Gaon, Police Station - Bhatpar Rani, District Devariya, Uttar Pradesh at present -Bareja Parsahi, Post Office - Bareja, Police Station - Daud Nagar, Pargana - Bal, District - Saran.

... .. Petitioner/s

Versus

1. Shatrughan Prasad Tiwari, Son of Late Bishambhar Prasad Tiwari
2. Dhananjay Prasad Tiwari Son of Late Birendra Prasad Tiwari Both residents of Village - Parsahi, Bareja, Post - Bareja, Police Station - Daud Nagar, Pargana - Bal, District Saran.

... .. Respondent/s

with
CIVIL REVISION No. 128 of 2017

1. Vijay Kumar Dubey
2. Ajay Kumar Dubey
3. Shailesh Kumar Dubey
4. Amit Kumar Dubey
All Son of Late Satyavrat Dubey, R/o Village- Barka Gaon, Post Office- Barka Gaon, Police Station- Bhatpar Rani, District- Devariya, Uttar Pradesh at Present- Bareja Parsahi, Post Office- Bareja, Police Station- Daud Nagar, Pargana- Bal, District- Saran.

... .. Petitioner/s

Versus

1. Shatrughan Prasad Tiwari, Son of Late Bishambhar Prasad Tiwari,
2. Dhananjay Prasad Tiwari, Son of Late Birendra Prasad Tiwari, Both Resident of Village- Parsahi, Bareja, Post- Bareja, Police Station- Daud Nagar, Paragana- Bal, District- Saran.

... .. Respondent/s

Appearance :

(In CIVIL MISCELLANEOUS JURISDICTION No. 1317 of 2017)

For the Petitioner/s : Mr. Parth Gaurav, Advocate

For the Respondent/s : Mr.

(In CIVIL REVISION No. 128 of 2017)

For the Petitioner/s : Mr. Parth Gaurav, Advocate



For the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT

Date : 05-09-2024

Civil Revision No. 128 of 2017

Heard learned counsel for the petitioners.

2. The instant civil revision petition has been filed against the order dated 29.08.2016 passed by the learned Sub Judge, 1st, Saran, Chapra in Title Partition Suit No. 1110/2013 whereby and whereunder the learned Sub Judge has rejected the petition of the defendants dated 05.08.2015 filed under Order 7 Rule 11 of the Code of Civil Procedure (hereinafter referred to as 'the Code').

3. The learned counsel for the petitioners submits that the petitioners are defendants before the learned trial court and challenged the maintainability of the title partition suit on two grounds. Already a partition had been taken place in Collectorate Case No.11/1933-34 between the predecessors of the plaintiffs and the defendants. The defendants claim the property through Will for which probate was granted and Letters of Administration was issued in favour of defendants by the learned Additional District and Sessions Judge, 1st, Saran at Chapra in Probate Case No.07/1972 on 26.11.1984. Since the testator of the Will has got the property in partition, the



subsequent partition was barred as the plaintiffs suppressed this material facts. Further, there is no cause of action between the parties inasmuch as there is no unity of title and possession between the parties, which is condition precedent for maintainability of a partition suit. The learned counsel further submits that the suit is also barred under the Limitation Act as the defendants have got the land mutated in their favour and had been paying the rent to the State and this fact was known to the plaintiffs and their ancestors since beginning.

4. Having considered the submission made on behalf of the petitioners, I do not think the submission has got any merit. The same issues were raised before the learned trial court and the learned trial court has passed the order after consideration of all the points raised by the defendants/petitioners. Moreover, issue raised by the petitioners about *res judicata* and limitation cannot be decided at this preliminary stage since they constitute mixed question of law and fact and need detailed hearing. In any case, issue of limitation in partition suit is hardly material and no question could arise on this aspect of the matter. Similarly, an absence of cause of action is not forthcoming from the plaint.

5. In the light of the aforesaid discussion, I do not



find any illegality or material irregularity in the impugned order and hence, the same is affirmed.

6. As a result, the instant petition stands dismissed.

7. Pending application bearing I.A.No. 1 of 2019 also stands disposed of.

Civil Misc. No.1317 of 2017

8. Heard learned counsel for the petitioner.

9. The instant petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 28.04.2017 passed by the learned Sub Judge-1, Saran, Chapra in Partition Suit No. 1110/2013 whereby and whereunder the learned Sub Judge has rejected the petition of the defendants dated 04.11.2016 filed under Section 151 of the Code for recalling the order dated 29.08.2016 whereby the petition of the defendant filed under Order 7 Rule 11 of the Code has been rejected.

10. I think the instant civil miscellaneous petition against the impugned order is not maintainable as against an order rejecting a petition under Order 7 Rule 11 of the Code, only a revision would lie and there could not be any exercise of inherent power under Section 151 of the Code for recall of the such order. Invoking the inherent jurisdiction of the Court was



certainly uncalled for and the petitioners have already taken recourse to the option of filing civil revision albeit unsuccessful as Civil Revision No.128 of 2017 filed against that order dated 29.08.2016 has been dismissed by this Court.

11. In the light of aforesaid facts and circumstances, the instant petition does not survive for consideration and, hence, the same is dismissed.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	09.09.2024
Transmission Date	NA

