

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1101 of 2017

1. Mohan Prasad Keshari Son of Late Chamari Ram
2. Chandan Kumar Keshari Son of Sri Mohan Prasad Keshari Both residents of Mohalla - Tekari Road, P.S. - Kotwali, Town and District - Gaya, Pin Code - 823001 Bihar.

... .. Petitioner/s

Versus

1. Kundan Kumar Keshari and Ors Son of Sri Mohan Prasad Keshari Both residents of Mohalla - Tekari Road, P.S. - Kotwali, Town and District - Gaya, Pin Code - 823001 Bihar.
2. Smt. Jyoti Kumari Keshari Wife of Sri Krishna Kumar Keshari Resident of C/o Sri Raghunandan Prasad Keshari, Main Road, Japla, District - Palamu, Pin Code - 822116 Jharkhand.
3. Smt. Gomti Kumari Keshari Wife of Sri Prashant Kumar Keshari Resident of C/o Prashant General Store, 62/58A, Loknath Chowk, Allahabad U.P..
4. Smt. Rekha Kumari Wife of Sri Loknath Keshari Resident of Mohalla - Ganga Hari Lane, near Kanya Pathshala, Kandu Tola, Deoghar, Pin Code - 814112 Jharkhand.
5. Smt. Sangeeta Kumari Keshari Wife of Sri Prakash Kumar Keshari Resident of C/o near Heera Tyre Ydyog, Indane Naka, Khandwa, Madhya Pradesh, Pin Code - 450001.
6. Sunita Kumari Keshari Daughter of Shri Mohan Prasad Keshari Resident of Mohalla - Alpawas Grih, Infront of Purani Jail Khana, N.K. Lal Road, District - Gaya Bihar.
7. Ishani Kumari Minor daughter of Krishna Kumar Keshari
8. Ishika Kumari Minor daughter of Krishna Kumar Keshar
9. Kushagra Kumar minor son of Krishna Kumar Keshari, Sl. No. 7 to 9 are minor under the guardianship of their father Resident of Mohalla - Bhagwan Niwas, H.K. Sah Lane, Deoghar, Pin Code - 814112 Jharkhand.
10. Sunil Kumar Jain Son of Sri Panna Lal Jain Resident of Mohalla - Laharia Tola, P.S. - Kotwali, Town and District - Gaya, Pin Code - 823001 Bihar.
11. Vivek Kumar son of Sri Suresh Prasad Resident of Mohalla - Gurudwara Road, near Shiksha Mandir School, P.S. - Kotwali, Town and District - Gaya, Pin Code - 823001 Bihar.
12. Shashi Kumar son of Late Kapil Deo Prasad Resident of Mohalla - Murarpur, Devi Asthan, near Mathurasini Transport, P.S. - Kotwali, Town and District - Gaya, Pin Code - 823001 Bihar.
13. Riyaz Ahmad Son of Late Sardar Khan Resident of Mohalla - Khwaja Noor Colony, Railway Bridge, Panchayati Akhara, P.S. - Kotwali, Town and District - Gaya, Pin Code - 823001 Bihar.



14. Smt. Asha Devi Wife of Sri Rajendra Prasad Agrawal Resident of Mohalla - Murarpur, Devi Asthan, near Mathurasini Transport, P.S. - Kotwali, Town and District - Gaya, Pin Code - 823001 Bihar.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Binod Kumar Singh, Advocate
Mrs. Vagisha Pragya Vacaknavi, Advocate
Ms. Ankita Roy, Advocate
For the Respondent/s : Mr. J.S. Arora, Sr. Advocate
Mr. Ravi Bhatia, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 29-02-2024

The instant petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 11.05.2017 passed by learned Sub Judge VIIIth, Gaya in Partition Suit No. 201 of 2016/544 of 2016 by which the prayer of the petitioners under Order VII Rule 11(a) & (d) of the Code of Civil Procedure (hereinafter as 'Code') has been rejected.

2. The factual matrix of the case leading to impugned order is that the plaintiff/respondent no. 1 filed Partition Suit No. 201 of 2016/544 of 2016 claiming 1/9th share in the suit property against the petitioners, who are defendant nos. 1 and 2 apart from other defendants, who are respondent nos. 2 to 14. Petitioner no. 1 is the father of petitioner no. 2 and respondent no. 1. The plaintiff has got one brother and seven sisters, out of which one sister died at the age of 11 years and another elder sister died leaving behind her husband, two daughters and a son.



The youngest sister of the plaintiff is still unmarried. This youngest unmarried sister Sunita Kumari filed Partition Suit No. 186 of 2015 for partition of the entire joint family property and carving out of her separate takhta against her father and both the brothers and also against all the sisters. The said Partition Suit No. 186 of 2015 is still pending before the court of learned Sub-Judge III, Gaya. In the said case the petitioner no. 1/defendant no. 1 appeared and filed his written statement wherein it has been submitted that mother of the plaintiff/respondent no. 1 had filed a partition suit bearing No. 158 of 1990 in which a compromise was filed and accordingly, a compromise decree was passed on 30.03.1992. It was also contended that in exercise of his legal rights, title and interest, the plaintiff/respondent no. 1 sold one of his allotted holding to meet the legal necessities of his own family and his mother also sold two of her allotted holdings in the year 1996-97. Further case of the plaintiff is that the plaintiff had no knowledge about the partition suit filed by the mother of the plaintiff, being guardian of the plaintiff against the father of the plaintiff, petitioner no. 1 herein and his brother, petitioner no. 2 herein. Based on these facts, the plaintiff/respondent no. 1 filed the Partition Suit No. 201 of 2016/544 of 2016, *inter alia*, claiming



that compromise decree was not legal and justified.

3. After service of notice the defendant nos. 1 and 2/petitioners herein appeared in the Partition Suit No. 201 of 2016/544 of 2016 and they filed a petition dated 12.01.2017 under Order VII Rule 11(a) & (d) of the Code submitting that plaintiff has no cause of action to file the suit for partition and the suit was barred by law in view of the compromise decree passed in the year 1992 in Partition Suit No. 158 of 1990 filed by the mother of the plaintiff on her behalf and on behalf of her minor children against defendant no. 1. On 3rd February, 1917, the plaintiff filed his rejoinder to the petition dated 12.01.2017 objecting the prayer of the plaintiff on the ground that the compromise decree has never been acted upon. Therefore, his suit for partition was maintainable.

4. Learned counsel for the petitioners, Mr. Binod Kumar Singh submitted that the suit of the plaintiff is barred under Order 23 Rule 3A of the Code since the compromise decree cannot be challenged by filing another suit. Further the plaintiff has got no cause of action because his sisters has already filed a partition suit in which the share of the plaintiff could be decided. Against the compromise decree, the plaintiff has remedy to file a proper case challenging the validity of the



compromise and not the suit for partition because share of the parties had already been allotted in the compromise decree passed in Partition Suit No. 158 of 1990. If the plaintiff is challenging the compromise decree in the present suit, his suit is barred under Order 23 Rule 3A of the Code. Learned counsel further submitted that while disposing of the petition filed under Order VII Rule 11 (a) & (d) of the Code, the learned trial court exceeded its jurisdiction and declared the compromise decree to be void, bogus and illegal. The compromise decree cannot be brushed aside in this manner by saying that the same is a sham document. Such finding of the learned trial court is not based on legal consideration and is fit to be set aside. Further the learned trial court held that since the compromise decree is a void document and hence, no declaration to that effect was required and further held the suit to be maintainable whereas the learned trial court has got no such jurisdiction because the same could be done by the same court which has passed the compromise decree. Mr. Singh further submitted that unless and until compromise decree is set aside, fresh suit for partition is not maintainable in view of Order 23 Rule 3A of the Code. Learned counsel further submitted that from bare perusal of paragraphs 15 to 20 of the plaint it would appear that the plaintiff has stated



that the compromise decree is not a lawful document but illegality of the said document cannot be examined in a fresh partition suit. Since the cause of action for filing the partition suit was compromise decree, validity of which cannot be examined in partition suit, the finding recorded by the learned trial court would cause prejudice to the petitioners. Mr. Singh thus submitted that the learned trial court has erroneously rejected the prayer of petitioners under Order VII Rule 11(a) & (d) of the Code holding that the compromise decree is bogus and does not require specific declaration while ignoring the fact that compromise decree has been passed by a competent court and the finding recorded by the learned trial court is erroneous and has been passed without jurisdiction. On the aforesaid grounds the learned counsel for the petitioners assailed the order of the learned trial court.

5. Per contra, learned senior counsel, Mr. J.S. Arora, appearing on behalf of respondent no. 1 has submitted that there is no illegality in the impugned order and same is sustainable. Learned senior counsel further submitted that the plaintiff/respondent no. 1 has explained the circumstances in his plaint why the necessity of filing the suit arose. The compromise decree, passed in Partition Suit No. 158 of 1990, was fraudulent



as the suit was filed at the behest of petitioner no. 1, the father of respondent no. 1 and the decree was against the interest of minor respondents who were aged about 9-10 years at the time of filing of said suit. By virtue of the compromise decree the property was allotted to different persons in unequal share. Answering respondent was allotted property much less in area and value in comparison to others supposedly having equal share. The compromise decree never came into effect and it was never acted upon by the parties. Petitioner no. 1 continued dealing with the property of respondent no. 1 even when he became major and petitioner no. 1 filed an Eviction Suit against a tenant in the property allotted in share of respondent no. 1 and thereafter, again let out the said premises on rent. Since the respondent has been deprived of all the benefits of joint family property or even the property which was allegedly allotted to this respondent on the basis of a so called compromise decree, this respondent was compelled to file partition suit for the coparcenary property including the property which was allotted to deceased mother of the respondent. Mr. Arora further submitted that it is the settled law that prayer for rejection of plaint has to be considered on the basis of statement made in the plaint only and when it has been pleaded that so called compromise decree



had never been acted upon nor was operative nor all the properties were subject matter of the so called compromise decree, in such a case plaint could not be rejected. Learned senior counsel further submitted that the provisions of Order 23 Rule 3A of the Code has got no application in the present facts and circumstances of the case before the learned trial court. Mr. Arora also raised the issue about jurisdiction submitting that Civil Miscellaneous case is not maintainable since in the given situation the civil revision would lie.

6. Mr. Arora further submitted that part of the plaint cannot be rejected and the plaint can be rejected fully or not at all and he relied on the decision of the Hon'ble Supreme Court in the case of ***Kum. Geetha, D/o Late Krishna & Ors Vs. Nanjundaswamy & Ors*** passed in ***Civil Appeal No. 7413 of 2023 (Arising out of S.L.P. © No. 8147 of 2016)*** reported in ***(2023) SCC OnLine SC 1407*** wherein the Hon'ble Supreme Court held that it was impermissible to reject the plaint in part and it can only be rejected as a whole or not at all. On the same proposition, learned senior counsel further relied on the decision in the case of ***Biswanath Banik and Anr. Vs. Sulanga Bose and Ors.*** reported in ***AIR 2022 Supreme Court 1519***. Mr. Arora also submitted that the aforesaid decision of the Hon'ble Apex



Court is on the point that while considering the application under Order VII Rule 11 of the Code, Court has to go through entire plaint averments and cannot reject the same by reading only few lines/passages and ignoring other relevant parts of plaint. Learned senior counsel further submitted that the plaint cannot be rejected only against some of the defendants in exercise of power under Order VII Rule 11(d) and the application under this provision of the Code cannot be preferred only in respect of some of the defendants. Again the plaint has to be rejected as a whole or not at all in exercise of such power. If the plaint survives against certain defendants and or property, Order VII Rule 11 of the Code will have no application at all and the suit as a whole must then proceed to trial as held by the Hon'ble Supreme Court in the case of *Madhav Prasad Aggarwal and Another Vs. Axis Bank Limited and Another* reported in *(2019) 7 Supreme Court Cases 158*.

Thus, Mr. Arora submitted that there is no infirmity in the impugned order and the instant petition is devoid of merit and same be dismissed.

7. Replying to the contention of the learned senior counsel, learned counsel appearing on behalf of the petitioners submitted that respondent no. 1 cannot take benefit of clever



drafting to create an illusion of cause of action. If the suit is barred under Order 23 Rule 3A of the Code, if a party to a consent decree based of compromise wants to challenge the same on the ground that the decree was not lawful, he has to approach the same court which recorded the compromise and a separate suit challenging the consent decree is not maintainable. Clever drafting would not permit the plaintiff to make the suit maintainable which otherwise would not be maintainable or barred by law. On the aforesaid aspect, learned counsel relied on a decision of Hon'ble Supreme Court in the case of *M/s. Sree Surya Developers and Promoters Versus N. Sailesh Prasad and Ors.* reported in (2022) 5 SCC 736. Learned counsel further submitted that the plaintiff/respondent no. 1 has tried to circumvent the bar created by Order 23 Rule 3A of the Code and at this stage, this Court is not required to look into the merits or the validity of the compromise decree.

8.At the outset it must be pointed out that an issue has been raised by learned senior counsel appearing on behalf of the respondents that the instant Civil Miscellaneous Petition is not maintainable. But there is difference between maintainability and entertainability. In other circumstances, this Court would have refrained from entertaining such petition challenging an



order rejecting a prayer made under Order 7 Rule 11 of the Code. However, when parties have advanced their submission on merits of the case, I do not think any useful purpose would be served in relegating the matter to the civil revisional jurisdiction of this Court under Section 115 of the Code. So there is no issue of maintainability of the present petition and the same can be entertained by this Court in its Civil Miscellaneous jurisdiction.

9. From the rival contention it is clear that the dispute between the parties lies in a narrow compass as to whether the compromise decree passed in Partition Suit No. 158 of 1990 would render the plaint of the plaintiff/respondent no. 1 in Partition Suit No. 201 of 2016/544 of 2016 liable for rejection on the ground of bar created under Order 23 Rule 3A of the Code.

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.”

So there is no dispute on the point that no suit can be brought to set aside a decree on the ground that the compromise was not lawful. In the instant case there has been a decree based on compromise in a partition suit in which



plaintiff/respondent no. 1 was one of the parties though being a minor, he was represented by her mother. The claim of the plaintiff that the said compromise decree was not acted upon is belied by the subsequent act of the plaintiff/respondent no. 1. The plaintiff after attaining majority sold one of his properties wherein the recital has been made about partition between defendant no.1/ petitioner no. 1, plaintiff/respondent no. 1 and the mother of the plaintiff through registered document. So the plaintiff cannot avoid the compromise as he was having knowledge and he did not take any immediate step after attaining majority for setting aside the compromise decree within the period of limitation.

10. Since the compromise decree cannot be challenged by filing another suit and in the present case the plaintiff/respondent no. 1 has filed a partition suit on the ground of compromise decree being illegal, inoperative and showy document which never came in effect, therefore, in normal circumstances, the suit of plaintiff would not be maintainable as it would be hit by bar of Order 23 Rule 3A of the Code. Such type of situation is squarely covered under the decision of the Hon'ble Supreme Court in *M/s. Sree Surya Developers and Promoters Versus N. Sailesh Prasad and Ors.(supra)* and *R.*



Janakiammal Vs. S.K. Kumarasamy (Deceased) Through Legal Representatives and Others reported in ***(2021) 9 SCC 114.***

11. However, there are other factors which need to be taken into consideration. The plaintiff/respondent no. 1 has filed a suit for partition not only against defendant nos. 1 and 2 who were parties to the earlier compromise decree but also against other co-parceners. Prior to filing of the suit by the plaintiff, one of his sisters also filed Partition Suit No.186 of 2015. Therefore, in 2016 the plaintiff filed the suit for partition. If only defendant nos. 1 and 2 would have been the parties in the partition suit of the plaintiff, the suit of the plaintiff could not have been held maintainable. There could not be a rejection of a plaint in part/only against one or two defendants in exercise of power under Order 7 Rule 11(d) of the Code and the Hon'ble Supreme Court has frowned upon the courts rejecting the plaint in part. Reliance could be placed on the Hon'ble Apex Court decision in the case of ***Kum. Geetha, D/o Late Krishna & Ors Vs. Nanjundaswamy & Ors (supra)***, ***Biswanath Banik and Anr. Vs. Sulanga Bose and Ors. (supra)*** and ***Madhav Prasad Aggarwal and Another Vs. Axis Bank Limited and Another (supra)***. So the plaint of the plaintiff/respondent



no. 1 could not be rejected against defendant nos. 1 and 2, petitioners herein. It has been consistently held by the Hon'ble Apex Court that the plaint could either be rejected as a whole or not at all. The Hon'ble Apex Court has held time and again that it is not permissible to reject the plaint qua any particular portion of a plaint or some of the defendant(s) while continuing the same against others. If the plaint survives against certain defendants and/or properties, Order 7 Rule 11(d) of the Code will have no application at all, and the suit as a whole must then proceed to trial.

12. In the light of the aforesaid proposition of law, the plaint of the plaintiff could not be rejected since its a partition suit and there are other defendants apart from the petitioners. To that extent the impugned order is sustainable.

13. However, it must be added here that the learned Sub Judge VIIIth, Gaya has widely exceeded its jurisdiction in venturing to check the correctness of the compromise decree in a partition suit before him and declaring it to be void, bogus and illegal. The learned Sub Judge acted against the specific provisions of law under Order 23 Rule 3A. Such finding recorded against the specific provision of law cannot be allowed to be sustained and for this reason such findings stand set aside.



14. It has also come on record that one of the sisters of the plaintiff has already filed Partition Suit No. 186 of 2015 in which the plaintiff is also a party, and the learned trial court has been proceeding in the subsequent suit of the plaintiff. Therefore, the learned trial court is directed to amalgamate the suit of the plaintiff being Partition Suit No. 201 of 2016/544 of 2016 with Partition Suit No. 186 of 2015 and proceed in the matter thereafter. The parties are at liberty to raise all issues in Partition Suit No. 186 of 2015 which have been raised before this Court. It is also made clear that this Court has not expressed its opinion on the merits of the case of the respective parties and learned trial court will proceed to dispose of the matter within a year uninfluenced by the observations of this Court.

15. Accordingly, the order dated 11.05.2017 passed in Partition Suit No. 201 of 2016/544 of 2016 is partly set aside and the instant petition stands allowed in part.

(Arun Kumar Jha, J)

DKS/-

AFR/NAFR	A.F.R.
CAV DATE	30.01.2024
Uploading Date	29.02.2024
Transmission Date	N.A.

