

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CIVIL MISCELLANEOUS JURISDICTION No.981 of 2023**

Sanjay Kumar Singh @ Sanjay Singh @ sanjay Kumar Son of Late Maheshwar Singh Resident of Village-Morsand, Police Station- Runisaidpur, District-Sitamarhi.

... .. Petitioner/s

Versus

1. Manoj Singh Son of Late Dinesh Singh Resident of Village-Morsand, Police Station-Runisaidpur, District-Sitamarhi.
2. Ranjana Kumari Daughter of Late Maheshwar Singh, Wife of Tappu Thakur, Resident of Village-Basua, Police Station-Aurai, District-Muzaffarpur
3. Soni Kumari Daughter of Late Maheshwar Singh, Wife of Lakshman Thakur Resident of Village-Ganguli, Police Station-Aurai, District-Muzaffarpur

... .. Respondent/s

**Appearance :**

|                      |   |                                                                    |
|----------------------|---|--------------------------------------------------------------------|
| For the Petitioner/s | : | Md. Waliur Rahman, Advocate<br>Mr.Pushpendra Kumar Singh, Advocate |
| For the Respondent/s | : | Mr.Ratan Kumar Sinha, Advocate<br>Mr. V.R.P. Singh, Advocaee       |

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

**Date : 11-04-2025**

Heard learned counsel for the parties and I intend to dispose of the petition at the stage of admission itself.

2. The petitioner is aggrieved by the order dated 01.08.2023 passed by learned Sub Judge-VI, Sitamarhi in Title Suit No. 420 of 2022, whereby and whereunder application dated 17.10.2022 filed on behalf of defendant no.1/petitioner herein has been rejected.

3. Learned counsel for the petitioner submits that the petitioner filed an application before the learned trial court on



17.10.2022 that the Title Suit No. 420 of 2022 is hit by the principle of *res judicata* and therefore, a preliminary issue be framed on this point. But the learned trial court in a mechanical manner rejected the application of defendant no.1/petitioner. The learned trial court failed to appreciate that though generally *res judicata* is a mixed question of facts and law but in appropriate case this could be determined as preliminary issue. Learned trial court did not consider the provisions of Order 14 Rule 2 of the Code of Civil Procedure in its true perspective. Learned trial court has not given the proper reasons for rejecting the application of the petitioner and dismissed the petition mentioning in one line that the *res judicata* is mixed question of facts and law. Learned counsel further submits that the learned trial court failed to appreciate that earlier Partition Suit No. 44 of 1960 was filed by the grandfather of the defendant against one Mangal Dayal Singh and 16 others and one Ram Jogan Singh was defendant no. 7 and plaintiff of this case is grandson of Ram Jogan Singh. The said suit was filed for partition of Schedule I of the suit property to the extent of 1/3rd share. The suit property included the suit property of Title Suit No. 420 of 2022 but this fact was not taken note by the learned trial court. Partition Suit No. 44 of 1960 was decreed and the first appellate



court set aside the judgment passed in the said partition suit and the plaintiff of the suit approached this Court in Second Appeal No. 277 of 2002. The said second appeal is still pending. In these circumstances, there has been no decision in Partition Suit No. 44 of 1960, if pendency of second appeal is taken into consideration and learned counsel very fairly submits that if pendency is considered then the present Title Suit No. 420 of 2022 would be hit by principles of *res subjudice*. In any case as the share of the parties have already been decided by the decree of the learned trial court, the matter should have attained finality. Thus, learned counsel submits that the impugned order is not sustainable.

4. Learned counsel appearing on behalf of respondent no. 1 submits that there is no infirmity in the impugned order and the learned trial court has considered the law in its true perspective as law is settled that if the issue of *res judicata* is raised, the same could not be decided only on the point of law as the facts are required to be appreciated to consider whether the subsequent suit is hit by the principle of *res judicata* and for this the conditions prescribed in Section 11 of the Code of Civil Procedure is required to be considered. Learned counsel referred to a decision of Hon'ble Supreme



Court in the case of *Sathyanath & Anr. Vs. Sarojamani* passed in *Civil Appeal No. 3680 of 2022* in support of his contention that in cases where issues, both of law and of fact, arise in the same suit and the court is opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, if it relates to jurisdiction of the Court or a bar to the suit created by law for the time being in force. But the code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue. Now, *res judicata* is a mixed question of law and facts and the same cannot be decided as a preliminary issue. Thus, learned counsel submits that there is no infirmity in the impugned order and the same may be affirmed.

5. I have given my thoughtful consideration to the rival submission of the parties and perused the record. In the present case, apart from the clear position of law that mixed question of law and fact cannot be tried as preliminary issue and *res judicata* being mixed question of facts and law in the given facts and circumstances, the same cannot be decided as a preliminary issue. Further when appreciation of fact is required,



the applicability of Order 14 Rule 2 of the Code of Civil Procedure becomes restricted as it provides that only issue on law could be framed as preliminary issue and **no other issue** touching upon the questions of facts as well as law or facts alone could be a preliminary issue. For this reason, I do not find any infirmity in the impugned order and the same is affirmed.

6. Accordingly, the present petition stands dismissed.

**(Arun Kumar Jha, J)**

DKS/-

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