IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.150 of 2019

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Suresh Rai, Son of Late Ram Surat Rai, Resident of Mohalla- Dahiyawan Tola Municipal Chowk, Town- Chapra, P.O.- Chapra, P.S.- Chapra Town, District- Saran

.....Petitioner/s

Versus

1. Urmila Devi, Wife of Suresh Rai Resident of Mohalla- Dahiyawan Tola, Town- Chapra, P.O.- Chapra, P.S.- Chapra Town, District- Saran
2. Raju Kumar Rai Son of Suresh Rai Resident of Mohalla- Dahiyawan Tola, Town- Chapra, P.O.- Chapra, P.S.- Chapra Town, District- Saran
3. Sonu Kumar minor Son of Suresh Rai through Urmila Devi mother guardian Resident of Mohalla- Dahiyawan Tola, Town- Chapra, P.O.- Chapra, P.S.- Chapra Town, District- Saran
4. Mamta Devi Daughter of Suresh Rai and wife of Shiv Rai Resident of Village- Takia, P.S.- Khaira, District- Saran
5. Birendra Rai Son of Late Ram Surat Rai Resident of Mohalla- Dahiyawan Tola Municipal Chowk, Town- Chapra, P.O.- Chapra, P.S.- Chapra Town, District- Saran
6. Sunil Rai Son of Late Ram Surat Rai Resident of Mohalla- Dahiyawan Tola Municipal Chowk, Town- Chapra, P.O.- Chapra, P.S.- Chapra Town, District- Saran
7. Raj Kumar Rai Son of Late Ram Surat Rai Resident of Mohalla- Dahiyawan Tola Municipal Chowk, Town- Chapra, P.O.- Chapra, P.S.- Chapra Town, District- Saran
8. Lal Muni Devi Daughter of Late Ram Surat Rai and Wife of Harendra Rai Resident of Village- Natha Chapra, P.O.- Pojhi, P.S.- Dariyapur, District-Saran

.....Respondent/s

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Acts/Sections/Rules:

- Order 14 Rule 2 (2), Order 7 Rule 11 of the Code of Civil Procedure
- Sections 14 and 16 of the Hindu Succession Act

Cases referred:

- Sathyanath and anr. v. Sarojamani reported in (2022) 7 SCC 644
- Rohit Chauhan vs. Surinder Singh and Ors. reported in 2014 (1) PLJR 64 (SC)
- Madhav Prasad Aggarwal and another vs. Axis Bank Limited and another reported in (2019) 7 SCC 158
- P.V. Guru Raj Reddy & anr. vs. P. Neeradha Reddy and ors. reported in (2015) 8 SCC 331

- Satti Paradesi Samadhi and Pillayar Temple Vs. M. Sankuntala (Dead) through Legal representatives and Ors. reported in (2015) 5 SCC 675
- Satti Paradesi Samadhi and Pillayar Temple Vs. M. Sankuntala (Dead) through Legal representatives and Ors. reported in (2015) 5 SCC 675

Application - filed for setting aside the order passed in Partition Suit whereby the petition filed by the petitioner questioning the maintainability of the suit had been rejected.

Partition suit was filed by the wife and children of petitioner. The property in dispute was gifted to mother of petitioner.

The moot question before this Court is that whether a suit filed for partition of property inherited by sons from their mother which was the self-acquired property of the mother could be the subject-matter of partition and such suit would be maintainable.

Held - A female Hindu holds the property as an absolute owner and there is no question of any coparcenary with regard to such property and the same could not be considered as part of joint family property in which coparcener might have any right. If suit has been filed for partition of such property with vague assertion that there are some other property which might be later on added in the subject matter of the suit, on such vague assertion suit could not be found to be maintainable, if present subject matter is a property devolved upon the sons of a female Hindu. (Para 13)

Learned trial court committed an error of jurisdiction and wrongly refused to exercise its jurisdiction vested in it. The learned trial court ought to have framed the preliminary issue regarding the maintainability and ought to have disposed of the same in accordance with law. (Para 16)

Application is allowed. (Para 18)

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8. Lal Muni Devi Daughter of Late Ram Surat Rai and Wife of Harendra Rai Resident of Village- Natha Chapra, P.O.- Pojhi, P.S.- Dariyapur, District- Saran

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr.Nagendra Rai, Advocate
Mr. Navin Nikunj, Advocate
Mr. Koshalendra Rai, Advocate
For the Respondent/s : Mr. Ashok Kumar Dubey, Advocate
Ms.Mamta Vijaya, Advocate

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 23-07-2024

The instant petition has been filed under Article 227 of the Constitution of India for setting aside the order dated

25.06.2018 passed in Partition Suit No.92 of 2014 by the learned Sub Judge-V, Chapra whereby and whereunder the petition dated 25.06.2015, filed by the petitioner questioning the maintainability of the suit has been rejected.

2. Briefly stated the case of the parties, as it appears from the record, is that the plaintiffs/respondents 1st set have filed Partition Suit No.92 of 2014 against the petitioner and respondents 2nd set claiming 4/25 share in the disputed properties as mentioned in Schedule-1 of the plaint. The parents of the petitioner were Ram Suran Rai and Chhatho Devi, who had four sons and one daughter including the petitioner. The father of Chhatho Devi was Gaya Rai, who gifted the properties of Schedule 1 of the plaint to his daughter by a registered deed of gift dated 30.12.1966. Chhatho Devi came in possession after accepting the gift deed. When Chhatho Devi died, her husband and her children inherited the suit properties. The respondents 1st set are the wife, sons and daughter of the petitioner, who filed the suit for partition claiming that the petitioner has developed drinking habits and has been squandering the properties. The petitioner and the respondent nos. 5 to 7 appeared and filed the written statement putting a defence that the plaintiffs have no right in the suit properties during the life time of the petitioner.

Hence, the suit is not maintainable and there is no unity of title and possession. The sons of Chhatho Devi have already partitioned the suit properties and came in separate possession of their allotted shares. On the basis of aforesaid facts, the petitioner filed a petition on 25.06.2015 praying to decide the question of maintainability of the suit as a preliminary issue. The plaintiffs/respondents 1st set filed rejoinder on 11.08.2015 opposing the prayer. However, even in the rejoinder it was admitted that the original owner of the property was Gaya Rai. The learned trial court heard the parties and rejected the petition of the defendant/petitioner vide order dated 25.06.2018. This order has been challenged in the present civil miscellaneous petition.

3. The learned counsel for the petitioner submitted that the impugned order is simply perverse and the learned trial court has passed the order without application of judicial mind and against the provisions of law. The learned trial court has failed to consider that question of maintainability was a pure question of law inasmuch as the disputed land is not ancestral property, but inherited property of the petitioner from her mother and for this reason not liable to be partitioned during the life time of the petitioner. Since the property is not ancestral or coparcenary, no

right accrues to the petitioner and there is no cause of action for bringing the suit. The learned counsel further submitted that the learned trial court has wrongly come to the conclusion that the question involved enquiry into the facts and issues requiring enquiry of the facts cannot be tried as a preliminary issue. The Hon'ble Supreme Court in the case of ***Sathyanath and anr. v. Sarojamani*** reported in ***(2022) 7 SCC 644,*** in paragraph 21**,** has held that preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the court or the bar to the suit is made out, the court may decide such issues with the sole objective for the expeditious decision. Thus, if the court lacks jurisdiction or there is a statutory bar, such issue is required to be decided in the first instance so that the process of civil court is not abused by the litigants, who may approach the civil court to delay the proceedings on false pretext. The learned counsel further submitted that Order 14 Rule 2 (2) of the Code of Civil Procedure (hereinafter referred to as 'the Code') provides that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court, or a bar to the

suit created by any law for the time being in force. This provision has been introduced to cut-short the litigation and save the harassment of the parties. This, learned counsel submitted that the impugned order is not sustainable and the same be set aside.

4. However, learned counsel appearing on behalf of the respondents 1st set vehemently opposed the submission made on behalf of the petitioner. The learned counsel for the respondents 1st set submitted that the property of the mother which was inherited by the petitioner and his other brothers could come under the nature of coparcenary property and the respondents 1st set/plaintiffs have vested right. In this regard, the learned counsel relied upon the decision of this Court in the case of ***Rohit Chauhan vs. Surinder Singh and Ors.*** reported in ***2014 (1) PLJR 64 (SC)***. The learned counsel further submitted that the maintainability of the suit is being challenged on the ground there being no cause of action. The learned counsel further referred to the decision of the Hon'ble Supreme Court in the case of ***Madhav Prasad Aggarwal and another vs. Axis Bank Limited and another*** reported in ***(2019) 7 SCC 158*** on the point that all the defendants have not come forward challenging the maintainability of the suit and hence the suit cannot be

dismissed qua the petitioner only. The learned counsel further referred to the decision of the Hon'ble Supreme Court in the case of ***P.V. Guru Raj Reddy & anr. vs. P. Neeradha Reddy and ors.*** reported in ***(2015) 8 SCC 331*** to stress the fact that for rejection of plaint under Order 7 Rule 11, whole of the averments of the plaint is to be taken into account and not only certain parts. The learned counsel further submitted that in the present case, in paragraph 6, the plaintiffs/respondents 1st set have also made averment about existence of some joint family property for which they would move amendment in the suit later on. Therefore, there has been cause of action and the suit is not barred by any law. The learned counsel further submitted that when an issue requires inquiry into facts, the same cannot be tried as preliminary issue and on this aspect, he relied on the decision of the Hon'ble Supreme Court in the case of ***Satti Paradesi Samadhi and Pillayar Temple Vs. M. Sankuntala (Dead) through Legal representatives and Ors.*** reported in ***(2015) 5 SCC 675.***

5. I have given my thoughtful consideration to the issues in dispute. The moot question before this Court is that whether a suit filed for partition of property inherited by sons from their mother which was the self acquired property of the

mother could be the subject matter of partition as claimed by the wife and sons of one of such female and such suit would be maintainable. Further, question of maintainability on this ground could be raised as preliminary issue under Order 14 Rule 2 (2) of the Code.

6. Order 14 Rule 2 (2) of the Code reads as under :

> ***"2. Court to pronounce judgment on all issues****.—(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.*
>
> *(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—*
>
> *(a) the jurisdiction of the Court, or*
>
> *(b) a bar to the suit created by any law for the time being in force,*
>
> *and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue".*

7. Order 14 Rule 2 before amendment by Act 104 of 1976 reads thus:

> *"**2. Issues of law and fact**.—Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."*

8. The said provision came up for consideration before the Hon'ble Supreme Court in the case of ***S.S. Khanna v. F.J. Dillon*** reported in ***AIR 1964 SC 497*** and the Hon'ble Supreme Court has held that under Order 14 Rule 2 of the Code where issues, both of law and of fact, arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and postpone the settlement of the issues of fact until other issues of law have been determined. It was held as under :

> *"18. ... Under Order 14 Rule 2 Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law*

apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court : not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."

9. The present case would come under category where the suit is barred by law for the reason that the estate of a female Hindu is not to be treated as a joint family property and Hindu Succession Act bars partition of such property at the instance of her sons or sons of her son or the daughter-in-law of such female.

10. Now a question arises, if from the averments made in the plaint a preliminary issue could be framed about the subject matter not being a coparcenary property and for this reason not liable for partition, could a suit be allowed to proceed, when maintainability of such suit has been challenged?

11. The law relating to framing of preliminary issue has come up before the Hon'ble Supreme Court in a number of cases and in the case of ***Sathyanath*** (supra), the Hon'ble Supreme Court has held in paragraph 21 as under :

> ***"21.*** *The provisions of Order 14 Rule 2 are part of the procedural law, but the fact remains that such procedural law had been enacted to ensure expeditious disposal of the lis and in the event of setting aside of findings on preliminary issue, the possibility of remand can be avoided, as was the language prior to the unamended Order 14 Rule 2. If the issue is a mixed issue of law and fact, or issue of law depends upon the decision of fact, such issue cannot be tried as a preliminary issue. In other words, preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the court or the bar to the suit is made out, the court may decide such issues with the sole objective for the expeditious decision. Thus, if the court lacks jurisdiction or there is a statutory bar, such issue is required to be decided in the first instance so that the process of civil court is not abused by the litigants, who may approach the civil court to delay the proceedings on false pretext".*

12. The facts of the present case make it amply clear that the suit has been brought for partition of a property which devolved upon the sons of Chhatho Devi which she got through a gift deed from her father and this is admitted position of the parties. Could such property be said to be a coparcenary property? Coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the

estate of common ancestor. Section 14 of the Hindu Succession Act, 1956 provides that any property possessed by a female Hindu, whether acquired before or after commencement of the Act, shall be held by her as full owner and not as a limited owner. Even the coparcenary property coming in the hands of a female Hindu becomes the property capable of being disposed of by her by testamentary disposition. Section 16 of the Act provides for order of succession and manner of distribution among heirs of a female Hindu dying intestate.

13. So combined reading of the aforesaid provisions especially Sections 14 and 16 of the Hindu Succession Act makes it clear that a female Hindu holds the property as an absolute owner and there is no question of any coparcenary with regard to such property and the same could not be considered as part of joint family property in which coparcener might have any right. If suit has been filed for partition of such property with vague assertion that there are some other property which might be later on added in the subject matter of the suit, on such vague assertion suit could not be found to be maintainable, if present subject matter is a property devolved upon the sons of a female Hindu.

14. In the light of the decision of the Hon’ble Supreme

Court in the case of ***Sathyanath*** (supra), even the issue of maintainability of the suit arising out of the facts of the plaint could be framed and disposed of as a preliminary issue.

15. So far as the authority cited by the respondents 1st set is concerned, I think these authorities have no bearing on these issues involved in the present petition. The reliance placed by the learned counsel for the respondents 1st set on the decision rendered in the case of ***Rohit Chauhan*** (supra) is completely misconceived as in the said case it has never been held that the property in the hand of a female Hindu would become a joint family property open for partition even at the instance of wife and sons of one of the son of such a female Hindu. Similarly, the other authorities cited by the learned counsel for the respondents 1st set are on different propositions of law, which are not at all applicable in the present case.

16. In the light of discussion made so far, I am of the view that the learned trial court committed an error of jurisdiction and wrongly refused to exercise its jurisdiction vested in it. The learned trial court ought to have framed the preliminary issue regarding the maintainability and ought to have disposed of the same in accordance with law.

17. Accordingly, the impugned order dated 25.06.2018

is set aside and the learned trial court is directed to frame a preliminary issue with regard to maintainability and dispose of the same in terms of Order 14 Rule 2 (2) of the Code.

18. The instant petition stands allowed.

19. The respondents 1st set are at liberty to agitate their rights before the appropriate forum in appropriate manner in accordance with law.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	27.06.2024
Uploading Date	23.07.2024
Transmission Date	NA