

Court No. - 5

Reserved

A.F.R.

Case :- MATTERS UNDER ARTICLE 227 No. - 1015 of 2024

Petitioner :- Sanjay Kumar Tripathi And Another

Respondent :- Suryakali Tripathi

Counsel for Petitioner :- Anuj Kumar Srivastava, Nisheeth Yadav

Counsel for Respondent :- Manu Srivastava, Vivek Kumar
Srivastava

Hon'ble J.J. Munir, J.

1. This petition under Article 227 of the Constitution is directed against an order passed by Mr. Vinay Singh, Additional District Judge, Court No.21, Kanpur Nagar, allowing Misc. Civil Appeal No.103 of 2023 and setting aside the ad interim injunction dated 19.09.2023, granted by the learned Additional Civil Judge (Jr. Div.), Court No.8, Kanpur Nagar in O.S. No.1341 of 2023.

2. The petitioners are the plaintiffs of O.S. No.1341 of 2023, whereas the sole defendant-respondent to this petition is their mother. The property in dispute, that is the suit property, is agricultural land, wherein both the plaintiff-petitioners (for short, 'the plaintiffs') and the defendant-respondent (for short, 'the defendant') hold shares as they claim. The suit property is admittedly undivided. The details of this property are given at the foot of the plaint, giving rise to the suit, whereas in paragraph Nos.2 and 3, the plaintiffs disclose their shares in the suit property and that of the defendant. The cause of action, which the plaintiffs set forth in the plaint, is that the defendant, who is a co-sharer of the plaintiffs and their mother, under the influence of the plaintiffs' sister, Anita Mishra and her husband, with whom, the defendant resides, has transferred an area of 155.33 square yards (125.69 square meters) of land out of

Khasra No.164, *Khata* No.00298, admeasuring a total of 0.3160 hectare, situate at Village Hora Bangar, Tehsil, Pargana and District Kanpur Nagar, *vide* registered sale deed dated 17.09.2019 in favour of one Rajesh and another Deepak. It is also pleaded that the plaintiffs and the defendant together, out of the same plot, sold off an area of 75.25 square meters *vide* registered sale deed dated 04.07.2017, but the defendant, in connivance with the plaintiffs' sister, Anit Mishra, has misappropriated the sale consideration. The plaintiffs plead that the defendant has no right to transfer her share in the suit property, which is unpartitioned, unless it is partitioned in accordance with law with the precise shares of parties determined.

3. It is also their case that the defendant has offered for sale the suit property jointly owned by the plaintiffs and the defendant, leading to a broker entering upon the said property and attempting to lay a foundation thereon. It is the plaintiffs' case that upon resistance by them, he picked up an altercation, compelling them to report the matter to the Police. Saying that the entire suit property is the joint holding of the plaintiffs and the defendant, the plaintiffs' case is that the defendant has no right to transfer her share without a partition being effected. It is on the foot of this case and cause of action that the plaintiffs have claimed the following reliefs (translated into English from Hindi):

“A. that by a decree of permanent injunction in the plaintiffs' favour and against the defendant, the Court may restrain the defendant from transferring land comprising Khata No.00071, Khasra No.101, admeasuring 0.7270 hectare; Khata No.00141, Khasra No.59, 0.2030 hectare, situate at Village Hora Bangar, Tehsil and District Kanpur Nagar; Khata No.00298, Khasra No.162, 0.3160 hectare, situate at Village Hora Bangar, Tehsil and District Kanpur Nagar; Khata No.00072, Khasra No.99, 0.1020

hectare; Khata No.00137, Khasra Nos.206, 208, 205, 216, 217, 218, 219, 0.4300 hectare, 0.1230 hectare, 0.4710 hectare, 0.1430 hectare, 0.3280 hectare, 0.2770 hectare, 0.5740 hectare; Khata No.00138, Khasra No.176, area 0.3940 hectare, situate at Village Hora Kachhar, Pargana, Tehsil and District Kanpur Nagar; Khata No.00211, Khasra No.79, 0.4530 hectare situate at Village Hora Kachhar, Pargana, Tehsil and District Kanpur Nagar, as per boundaries given at the foot of the plaint or any part thereof in favour of any third party by way of sale, will, hiba, agreement etc.

B. The Court, by a declaration, may declare the plaintiffs' co-sharers in possession of a 1/4th share in Khata No.00071, Khasra No.101, admeasuring 0.7270 hectare; Khata No. 00141, Khasra No.59, 0.2030 hectare, situate at Village Hora Bangar, Tehsil and District Kanpur Nagar; Khata No.00298, Khasra No.162, 0.3160 hectare, situate at Village Hora Bangar, Tehsil and District Kanpur Nagar; Khata No.00072, Khasra No.99, 0.1020 hectare; Khata No.00137, Khasra No.206, 208, 205, 216, 217, 218, 219, admeasuring 0.4300 hectare, 0.1230 hectare, 0.4710 hectare, 0.1430 hectare, 0.3280 hectare, 0.2770 hectare, 0.5740 hectare; Khata No. 00138, Khasra No.176, 0.3940 hectare, situate at Village Hora Kachhar, Pargana, Tehsil and District Kanpur Nagar; and in the rest of the plots, the plaintiffs be declared owners of a half share and the defendant and other co-sharers owners of the other half share; and further, in Khata No.00211, Khasra No.79, admeasuring 0.4530 hectare, situate at Village Hora Kachhar, Pargana, Tehsil and District Kanpur Nagar, the plaintiffs and the defendant be declared owners of a 1/3rd share each in 1/2 of the said land."

4. Along with the suit, the plaintiffs made an application for temporary injunction, expressing an apprehension that the defendant without a partition was intending to sell off her undivided share to third parties, which would prejudice the plaintiffs' interest and snatch away their sole source of livelihood, all at the instance of the plaintiffs' sister and the defendant's daughter, Anita Mishra. The plaintiffs claimed a temporary injunction to the effect that the defendant be restrained from transferring the suit property or any part thereof in favour of any third, either by sale, will, *hiba* or agreement pending suit.

5. The learned Trial Judge, before whom the temporary injunction application came up on 19.09.2023, upon perusing the plaint, the application for temporary injunction and the affidavit together with papers filed in support, found it to be a case where the interest of the plaintiffs was required to be protected by an ad interim injunction and that it would be defeated by the delay in issuing notice to the other side. The learned Judge, therefore, issued notice returnable on 19.10.2023 and ordered both parties until the said date to maintain *status quo* and forbear from transferring the suit property in favour of any third party.

6. The defendant appealed this order to the learned District Judge, giving rise to Misc. Civil Appeal No.103 of 2023 on the file of the learned District Judge. The Misc. Appeal came up for determination before the Additional District Judge, Court No.21, Kanpur Nagar on 09.01.2024, who by the order impugned, set aside the ad interim injunction dated 19.09.2023 passed by the Trial Judge, leaving him free to decide the temporary injunction application on merits within 15 days.

7. Aggrieved by the said order, this petition under Article 227 of the Constitution has been instituted by the plaintiffs.

8. Heard Mr. Nisheeth Yadav, learned Counsel for the plaintiffs and Mr. Abhishek Tandon, Advocate holding brief of Mr. Anurag Singh, learned Counsel appearing on behalf of the sole defendant.

9. The learned Judge has found the suit instituted before the Court to be barred by the provisions of Section 206 (2) read with Item No.16 of the Second Schedule to the Uttar Pradesh Revenue Code, 2006 (for short, 'the Revenue Code'). In addition, the learned Judge has held that there is no law, which

may give right to a co-sharer to prevent another co-sharer of his to alienate his undivided share. The learned Judge in the Court of appeal has opined that the plaintiffs acknowledge the defendant's share in the suit property, and, therefore, if they had to sue, it had to be for partition. The learned Judge has found upon the plaintiffs' case that the relief which they seek that the defendant may not transfer her share in the suit property unless partitioned, is not countenanced by law. It is also opined by the learned Judge in the Court of appeal that where the Court has no jurisdiction to grant a permanent injunction, a temporary injunction cannot be granted. It is on the basis of all this reasoning that the learned Judge in the Court of appeal has set aside the order of temporary injunction granted by the Trial Judge.

10. A bare reading of the plaint, in particular the relief, shows that the plaintiffs admit the defendant to be a co-sharer in the suit property along with them. The foremost question, therefore, is if the plaintiffs can seek any injunction forbearing the defendant from transferring her unpartitioned share in the suit property. It is on first principle that a co-sharer, who has an unpartitioned share, is always free to sell or otherwise assign it to a third party. It is true that the owner of a share cannot transfer any particular portion of the property without a partition by metes and bounds. It is not the plaintiffs' case that the defendant has effected a transfer by metes and bounds of a particular portion of the suit property commensurate to her share. It is also not the plaintiffs' case that the defendant has transferred or is proceeding to transfer more than her share in the suit property in favour of third parties. There is absolutely no right inhering in the co-sharer of a property to prevent another co-sharer by the Court's injunction from transferring that other's

unpartitioned share. In a case like the present one, the defendant's transferee would not be entitled to possession, or so to speak *khas* possession, over any portion of the suit property. He would become the owner of the share or the area of land transferred, which such transferee can, like the defendant or any other co-sharer, seek partition of through a suit instituted for the purpose. In no event, the plaintiffs would, therefore, be entitled to an injunction of the kind they claim, seeking to restrain the defendant, a co-sharer in the suit property from transferring her unpartitioned share in favour of a third party.

11. Likewise, the other relief, which they seek, is as misconceived as the first. It is a declaration, which the plaintiffs seek of their own share and that of the defendant in the different *khatas* of the suit property. Section 34 of the Specific Relief Act, 1963 (for short, 'the Act of 1963') reads:

"34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

12. All that the proviso to Section 34 of the Act of 1963 intends to provide is that where substantial relief of a particular

kind is envisaged by law, provided in law or necessary, a bare declaration cannot be granted. It would be an absurdity to imagine about a plaintiff seeking a declaration that the defendant owes him a particular sum of money, say 'X' and nothing more. That kind of a declaration can never be granted. The proviso to Section 34 would bar such a declaration and oblige the plaintiff to sue for recovery of money or accounts or other substantial relief, appropriate to the cause of action. Likewise, a plaintiff, who is out of possession and seeks to recover it from the defendant, who denies the plaintiff's title, must sue for the relief of recovery of possession. It is another matter that if the plaintiff's title in a case like that is thickly and arguably disputed, the plaintiff in certain cases may be obliged to seek a declaration together with the relief of possession. A classical case of this kind would be if the plaintiff, the owner of the land says that he has been dispossessed by the State or an instrumentality of the State from his land that he owns, without the State acquiring it in accordance with law. In such a case, perhaps the plaintiff need seek a declaration together with a consequential decree for recovery of possession. In none of these cases, however, the plaintiff can just seek a declaration of his title even with an injunction. Like the first illustration, about the claim for money, the plaintiff cannot be permitted to sue for declaration that the defendant owes him a liquidated sum of money, say 'X', together with a consequential mandatory injunction against the defendant, directing him to pay the money owed. These kind of reliefs would be absolutely barred by the proviso to Section 34 of the Act of 1963.

13. A declaration is a general relief, which is neither to be sought nor granted in a case where there are other substantive reliefs known to law. A suit for rendition of accounts would

involve the plaintiff asking for a decree for accounts, and likewise, in a case where the money owed to the plaintiff is secured by a mortgage, a decree for foreclosure or sale of the mortgaged property. A plaintiff, who has a cause of action against a co-sharer in an undivided estate, is obliged by law to sue for the relief of partition, specifically pleading the share that he claims. The Court would then try the suit and pass a preliminary decree for partition, declaring the share of parties. The preliminary decree in a suit for partition is in fact a declaration of the parties' share, which includes the plaintiff and all other co-sharers. After the preliminary decree for partition is passed, it is open to the plaintiff to apply for the preparation of a final decree, where according to the shares of parties and the myriad factors that are relevant, the Court would pass a suitable final decree for partition, demarcating and delivering *khas* possession of the plaintiff's share in the suit property.

14. Of course, it would also be open to the defendant or defendants, whose shares are declared by the preliminary decree to likewise apply for a final decree, partitioning their share by metes and bounds upon payment of requisite court fee. In the nature of the remedy open to a co-sharer, division of holdings, as it is now called under Section 116 of the Revenue Code, partition is the only remedy that is permitted by law. Until partition takes place by metes and bounds with the passing of a final decree, none of the co-sharers can forbear the other from transferring his/ her undivided or unpartitioned interest in the suit property in favour of a third party.

15. Seen from this vantage, the relief, which the plaintiffs seek, can never be granted even if all the allegations in the plaint at the trial are proved to the hilt.

16. There is another facet of the matter, which the learned Additional District Judge has considered and about which too, he has drawn the correct conclusions. The suit property is revenue paying land and the relief, which the plaintiffs seek, is clearly governed by the provisions of Section 206 read with Item 16 of the Second Schedule. Section 206 of the Revenue Code reads:

"206. Jurisdiction of civil Courts and revenue courts.- (1) Notwithstanding anything contained in any law for the time being in force, but subject to the provisions of this Code, no Civil Court shall entertain any suit, application or proceeding to obtain a decision or order on any matter which the State Government, the Board, any Revenue Court or revenue Officer is, by or under this Code, empowered to determine, decide or dispose of.

(2) Without prejudice to the generality of the provisions of sub-section (1), and save as otherwise expressly provided by or under this Code-

(a) no Civil Court shall exercise jurisdiction over any of the matters specified in the Second Schedule; and

(b) no Court other than the revenue Court or the revenue officer specified in column 3 of the Third Schedule shall entertain any suit, application or proceeding specified in column 2 thereof.

(3) Notwithstanding anything contained in this Code, an objection that a Court or officer mentioned in sub-section (2)(b) had or had no jurisdiction with respect to any suit, application or proceeding, shall not be entertained by any appellate, revisional or executing Court, unless the objection was taken before the Court or officer of the first instance, at the earliest opportunity, and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

17. The Second Schedule to the Revenue Code is extracted below:

**“SECOND SCHEDULE
(See Sections 206 (2) (a))
Matters excluded from the jurisdiction of the Civil
Court**

1	Any question regarding the determination of boundaries or fixing of boundary marks.
2	Any claim to question a decision determining abadi made by the Collector.
3	Any claim to have any entry made in any revenue records or to have any such entry omitted, amended or substituted.
4	Any question regarding the assessment, remission or suspension of land revenue or rent.
5	Any claim connected with or arising out of the collection by the State Government or the enforcement by such Government of any process for the recovery of land revenue or any sum recoverable as an arrear of land revenue under this Code or any other law for the time being in force.
6	Any claim against the vesting of any property in the State Government, Gram Panchayat or other local authority under this Code.
7	Any question relating to the levy or imposition of the fine, cost, expense, charge, penalty or compensation under this Code.
8	Any question regarding reinstatement of a bhumidhar or asami wrongfully ejected or dispossessed from any land.
9	Any claim to compel the performance of any duty imposed by this Code on any revenue officer appointed under this Code.
10	Any question, relating to division, creation, amalgamation, abolition or readjustment of revenue areas and Lekhpal's circles under Chapter II.
11	Any question relating to the allotment of land referred to in section 64 or section 125 or cancellation of such allotment.
12	Any claim to question a direction issued by the Collector under section 71.
13	Any claim to question the delivery of possession over any land and part thereof referred to in section 124, or the eviction of any person under section 134 or section 201.
14	Any claim to question the validity of any order

	made by the State Government under Chapter XI.
15	Any claim regarding possession over any land.
16	<u>Any claim to establish the rights of a co-tenure holder in respect of any land.</u>

18. Item No.16 in the Second Schedule of the Revenue Code clearly speaks of “any claim to establish the rights of a co-tenure holder in respect of any land”. Land is defined under Section 4(14) of the Revenue Code, which reads:

“4. Definition.-In this Code.-.....

(14) ‘land’, except in Chapters VII and VIII and sections 80, 81 and section 136, means land held or occupied for purposes connected with agriculture;”

19. There is no quarrel by the plaintiffs that the suit property is land within the meaning of Section 4(14) of the Revenue Code, which is used for agriculture and recorded as such. It is after all held by the plaintiffs and the defendant for purposes connected with agriculture. If then that is the plaintiffs' case, a suit by them to establish their right as co-tenure holders against the defendant, would clearly be in the teeth of Item No.16 of the Second Schedule to the Revenue Code read with Section 206 (2) (a). The plaintiffs' relief, howsoever quaintly drafted, does not take it out of mischief of Section 206 (2) (a) read with Item No.16 of the Second Schedule to the Revenue Code. The jurisdiction to try a suit of this kind would, therefore, on a bare reading of the plaint, lie exclusively in the Revenue Court. If the plaintiffs were to seek any meaningful relief, they would have to seek a decree for division of their holdings/ the suit property, which again would be exclusively cognizable by the Revenue Court under Section 116 of the Revenue Code. As the relief stands, if at all it can be granted, it is by the Revenue Court and not the Civil Court. Quite apart, the terms, in which the relief has been sought, read together with the cause of action

involved in this suit, the relief can never be granted by any Court, as remarked earlier for the reasons indicated.

20. In the considered opinion of this Court, therefore, the learned Additional District Judge was absolutely right in setting aside the ad interim injunction granted by the Trial Court. No exception can be taken to the impugned order by the plaintiffs, which must in our opinion be unhesitatingly upheld.

21. In the result, this petition fails and is **dismissed with costs of Rs.10,000/-**.

Order Date :- 05.8.2024
Anoop

(J.J. Munir, J.)