

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.54 of 2024**

Bijay Kumar Sarawagi Son of Late Nagar Mal Sara Resident of Village-
Bafaha Bazar P.O. and Police Station-Bagaha District- West Champaran

... .. Petitioner

Versus

1. Sudhir Kumar Sarawagi Late Nagar Mal Sarawagi Resident of Village Bagaha Bazar, P.O. and Police Station- Bagaha Dist West Champaran
2. Samir Kumar Son of Sudhir Kumar Sarawagi Resident of Village Bagaha Bazar, P.O. and Police Station- Bagaha Dist West Champaran

... .. Respondents

Appearance :

For the Petitioner/s : Mr. Ravi Shankar Sahay, Advocae
Mr. Anand Kishore Choudhary, Advocate
For the Respondent/s : Mr.

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

Date : 10-09-2024

Heard the learned counsel for the petitioner.

02. The present petition has been filed by the petitioner under Article 227 of the Constitution of India for setting aside the order dated 02.03.2023 passed by the learned Sub Judge-II, Bagaha, West Champaran in Partition Suit No. 30 of 1999, whereby and whereunder the learned trial court rejected the petition of the petitioner filed for allowing him to sell some particular land of his share.

03. Learned counsel for the petitioner submits that petitioner is defendant in Partition Suit No. 30 of 1999 and the respondents are plaintiffs. The plaintiffs have filed the suit for allocation of 7/36 share in the ancestral property. The claim of



defendant/petitioner is also to the extent of 7/36 share of the suit property. Learned counsel further submits that for marriage of his daughter, the petitioner sought the permission of the court in the year 2003 for selling some land of the suit property and the permission was granted for sale of 02 *Bigha* of land, but the land could not be sold due to nefarious acts of the respondents. The daughter of the petitioner has been suffering from cancer and the petitioner, who is aged about 75 years, has also been suffering from a number of diseases and has to regularly consult the doctors at New Delhi. To meet the expenses for treatment of his daughter as well as for himself, the petitioner needs to sell 02 *Bighas* of land of his share and with this object, an application was filed before the learned trial court seeking its permission. However, permission was denied to the petitioner on the ground that it was not legal to allow the transfer of land during pendency of the suit considering bar of Section 52 of the Transfer of Property Act. Learned counsel further submits that the said reasoning of the learned trial court is flawed. The same court earlier allowed the application of this petitioner and granted him permission to sell 02 *Bighas* land of his share to meet out the expenses of marriage of his daughter. Learned counsel further submits that an objection was taken by the



respondents that the application of the petitioner was hit by *res judicata* as similar application was allowed earlier, but the petitioner did not sell the land. But there could be no application of principle of *res judicata* since situation is different and now the petitioner needs money to meet the expenses for medical treatment of his daughter and also for himself. The petitioner is also required to repay the debts of his relatives and others from whom he has taken money on loan to meet his expenses. Learned counsel further submits that the learned trial court did not take into consideration the fact that the present suit is a partition suit and permission for sale of the land could not be refused. The same court did not allow the injunction considering the fact that it was a partition suit and share of the parties could be adjusted to the extent of sale of their land and refused the prayer for injunction of the plaintiffs. Learned counsel further submits that, moreover, the reasoning adopted by the learned trial court is erroneous that the permission for sale could not be granted considering Section 52 of the Transfer of Property Act. Learned counsel further submits that the share of the petitioner would be to the extent of 04 *Bigha* 06 *Kattha* in total suit property and out of his share, the petitioner wants to sale 02 *Bighas* of land. Hence, the impugned order is not sustainable



and the same needs to be set aside and petitioner be permitted to sale the share of his land.

04. Despite service of notice, none appears on behalf of the respondents.

05. Having regard to the submission made on behalf of the petitioner and on perusal of record, I do not think the impugned order could be sustained. Evidently, the present suit is a partition suit and there is some admitted claim regarding share of the parties. If the petitioner as well as the respondents are having equal share, which is not objected by any of the parties, forbidding the petitioner from executing the sale of a portion of his share for meeting his urgent expenses is certainly not proper considering the age of the petitioner and the facts as brought on record. If the petitioner wants to sale the land which he is likely to get after partition to meet the expenses of treatment of his daughter as well as for himself, his prayer ought to be considered and should not have been rejected merely on the ground that such alienation would be hit by Section 52 of the Transfer of Property Act. Section 52 of the Transfer of Property Act does not bar complete transfer of land during pendency of the suit. The land could be transferred with leave of the court and permission for the same has been sought by the petitioner.



So, the learned trial erred in passing the order and there appears an apparent error of jurisdiction. It is also a fact that earlier the same prayer of the petitioner was allowed though the petitioner did not sell the land but considering the emergent situation, it is required that the application of the petitioner be allowed. Hence, the impugned order dated 02.03.2023 passed by the learned Sub Judge-II, Bagaha, West Champaran in Partition Suit No. 30 of 1999 is set aside. In the result, the application of the petitioner seeking permission to sell a portion of land of his share is allowed. However, such sale would be adjusted against the share of the petitioner at the time of final determination of share.

05. Accordingly, the present petition stands allowed.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	12.09.2024
Transmission Date	NA

