

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1817 of 2011

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Srikant Pandey, s/o- Late Bharat Pandey, r/o- village Jogyar @ Jenerwa, P.O. Areraj, P.S. Govinadganj, Distt. Motihari.

.... Petitioner/s

Versus

1. Ambika Pandey s/o- Sukhaj Pandey r/o- village Jigyar @ Janerwa, P.O. Areraj, P.S. Govindganj, Distt. Motihari
2. Haribansh Pandey s/o- Basdeo Pandey, r/o- village Jigyar @ Janerwa, P.O. Areraj, P.S. Govindganj, Distt. Motihari
3. Vijay Pandey s/o- Basdeo Pandey, r/o- village Jigyar @ Janerwa, P.O. Areraj, P.S. Govindganj, Distt. Motihari
4. Janmejai Pandey s/o- Late Nagina Pandey, r/o- village Jigyar @ Janerwa, P.O. Areraj, P.S. Govindganj, Distt. Motihari
5. Ajay Kumar Pandey s/o- Late Nagina Pandey, r/o- village Jigyar @ Janerwa, P.O. Areraj, P.S. Govindganj, Distt. Motihari
6. Brajesh Kumar Pandey s/o- Late Nagina Pandey, r/o- village Jigyar @ Janerwa, P.O. Areraj, P.S. Govindganj, Distt. Motihari
7. Ramesh Pandey s/o- Late Nagina Pandey, r/o- village Jigyar @ Janerwa, P.O. Areraj, P.S. Govindganj, Distt. Motihari
8. Kamlawati Devi W/O Shambhunath Dubey, r/o- village Shrirajpur, P.O. Nautan, P.S. Nautan, Distt. West Champaran
9. Kishori Kuer wife of Late Vidhya Nand Tiwary r/o- village Mamarkha, P.O. Malahi, P.S. Malahi, Distt. Motihari
10. Savitry Kuer W/O Paras Tiwary, r/o- village Mamarkha, P.O. Malahi, P.S. Malahi, Distt. Motihari
11. Gopnath Pandey s/o- Yamuna Pandey, r/o- village Jogyar @ Jenerwa, P.O. Areraj, P.S. Govinadganj, Distt. Motihari
12. Suraj Bhusan Mishra s/o- Jagdish Mishra, r/o- village Sangrampur, P.S. Sangrampur, Distt. Motihari.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Binod Kumar Singh
Mr. Pramod Kumar Pandey
For the Respondent/s : Mr. Kumar Uday Singh

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

ORAL JUDGMENT

Date: 03-09-2015

This application under Article 227 of the Constitution of India
is directed against the order dated 21.1.2010 passed by Sub-Judge-I,
Motihari in Partition Suit F.D 36/1943 wherein the petition dated

21.5.2009 filed by the petitioner to recall the order dated 31.10.2006 and to delete the name of the defendant nos. 16(ka) and 16(kha) (Singari Devi and Gopi Nath Pandey respectively) has been rejected. Singari Devi is now dead.

A brief background of the case merits to be noticed.

Ambika Pandey filed Partition Suit No. 36/43 in which the writ petitioner was also impleaded as one of the defendants. The suit was compromised between the parties. Properties acquired by different co-sharers after Revisional Survey operations were allowed to remain as their separate properties. Out of the remaining properties, plaintiffs were given 5 bighas 2 kathas 17 dhurs and in the rest of the properties, they got interest to the extent of 4 *aanas*. One Shri Mangal Mishra was appointed as the Arbitrator for effecting partition in respect thereof whereafter the final decree was to be prepared. It thus appears that the partition in respect of the part of the property was allowed and effected by compromise whereas some property left for the decision by the Arbitrator under the agreement. The Arbitrator's award/report was, however, not accepted by the Court. The suit thus remained pending. Another suit for partition bearing Title Suit No. 287 of 1969 was instituted by Ambika Pandey in which the same parties were made defendant(s) besides one Gopi Nath Pandey as the legal heir of deceased defendant Yamuna Pandey. This suit proceeded ex-parte and



a decree was passed on 4.6.1976. One of the defendants of Title Suit No. 287 of 1969 filed Title Suit No. 237 of 1976 for setting aside the ex-parte decree. The suit was allowed on 11.9.1986 and the ex-parte decree was set aside which, on challenge, remained undisturbed by this Court. On 23.1.1974, on an application filed in the pending Title Suit No. 36 of 1943, the widow and son of deceased defendant no. 16 (Yamuna Pandey) was substituted. Gopi Nath Pandey filed an application therein on 12.10.2004 for appointment of Survey Knowing Pleader Commissioner for carving out his 02 annas share which was allowed on 31.10.2006. In the above background, a petition dated 21.5.2009 (Annexure-1) was filed by the writ petitioner for recall of the order dated 31.10.2006 wherein objection was also raised against substitution of Sringari Devi and Gopi Nath Pandey as defendant nos. 16(ka) and 16(kha). A rejoinder was filed thereto by defendant no. 16(kha) stating that if the defendant is aggrieved by the appointment of the Pleader Commissioner then the same can be challenged before the higher Courts in accordance with law. The Trial Court rejected the said application of the petitioner-defendant. Hence, the present writ petition.

Heard Mr. Binod Kumar Singh in support of the application and Mr. Kumar Uday Singh for the contesting respondents.

It has been argued by the Counsel for the petitioner that during



the pendency of the Title Suit No. 237/1976, an application for substitution was filed in Partition Suit No. 36 of 1943 for substituting the heirs and legal representatives of deceased defendant no. 16 (Yamuna Pandey) without serving the copy on the defendant and also suppressing the fact that a suit was pending for setting aside the ex parte decree. In the original plaint, while setting out the genealogy of the joint family, the names of the heirs and legal representatives of Yamuna Pandey were not disclosed. The order was obtained by the Court on such application seeking substitution with a view to grab the share of Yamuna Pandey (deceased) and/or to deny the share of the deceased defendant, who died issueless, to the other defendants. The widow of the deceased Yamuna Pandey has already died. The objection is now with respect to the impleadment of Gopi Nath Pandey (respondent no. 11 herein) as heir and legal representatives of deceased Yamuna Pandey. In the submission of the counsel, a fraud was committed on the Court in obtaining the order on the substitution petition which was objected by the defendants and rejected under the impugned order.

Conversely, the Counsel for the respondents has supported the impugned order. It has been contended that such objection to the substitution of one of the deceased defendants is being raised more than three decades after the order was passed. The Trial Court



considering the same has rightly rejected the prayer/objection. The Title Suit No. 237 of 1976 was filed for setting aside the ex-parte decree not by the defendants who are the writ petitioners. Such passing of order on substitution is incidental to disposal of the suit having no bearing on the merit of the case. If the petitioner has any grievance against such substitution and grant of share, he may institute a separate suit. The order passed in Title Suit No. 36 of 1943 substituting the heirs and legal representatives of one of the deceased defendant would not operate as *res-judicata*.

I have considered the rival submissions of the parties and perused the materials on record.

In the case of ***Sajjadanashin Sayed vs Musa Dadabhai Ummer (2000) 3 SCC 350***, the Apex Court clarified the legal position with reference to Section 11 of the C.P.C. and held that matters directly and substantially in issue shall only be considered for deciding the bar of *res judicata*. Matters which may arise collaterally and incidentally would not operate as *res judicata*.

In ***2009 (4) PLJR (SC) 199 (Dashrath Rao Kate vs. Brij Mohan Srivastava)***, the Apex Court held that an enquiry under Order XXII Rule 5 of the Code of Civil Procedure (for short 'the Code') is of a summary nature and findings therein would not tantamount to *res judicata*. The purpose of the enquiry and the order is to bring legal

representatives on record for conducting the proceeding in which they are to be brought on record. *Inter se* dispute between rival legal representatives or the defendants *inter se* has to be independently tried and decided in separate suit.

Order XXII Rule 4 of the Code enables the Court to substitute legal representative of the deceased defendant as a party to the suit and thereafter proceed therewith. Legal representative defined under the Code means and denotes a person who, in law, represents the estate of the deceased person and includes any person who intermeddles in the estate of the deceased.

In the light of the legal principles enunciated by the Apex Court and noticed hereinabove, what appears to this Court is that on an application filed by the plaintiff in the pending Partition Suit no. 36 of 1943, the Trial Court allowed substitution of the deceased defendant no. 16 by his heirs and legal representatives. Such order was passed in the year 1974 which remained unchallenged for more than three decades. The defendants-petitioners who were represented in the case had occasions to know about such substitution but did not challenge the same. When a petition was filed by the heir and legal representative of the deceased defendant no. 16 for carving out his/their share, the objection was filed which has been rightly rejected by the Trial Court on amongst the grounds of delay and laches. As

noticed above, grant of share, if any, to the legal representative of deceased defendant no. 16 (Yamuna Pandey) can be challenged by the defendant-petitioner in a separate suit. The contention of the petitioner that in the original plaint, no one was shown as the heir and legal representative of deceased Yamuna Pandey does not impress this Court since the suit was filed in the year 1943 whereas prayer for substitution was made in the year 1974. This time lag speaks for themselves.

Viewing the case with this angle, this Court does not find any patent perversity in the order of the Trial Court impugned in the writ petition and that too by invocation of supervisory jurisdiction under Article 227 of the Constitution of India.

The writ application is dismissed.

(Kishore Kumar Mandal, J)

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