

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5385 of 2014

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Satish Kumar @ Satish Kumar Jaiswal S/O Jagdish Chaudhary Resident Of
Mohalla - Gandhi Asharam, Town And P.O. Hajipur, P.S. Hajipur, District –
Vaishali.

.... Petitioner/s

Versus

1. Pramila Devi W/O Jagdish Chaudhary resident Of Mohalla - Gandhi Asharam,
Town And P.O. Hajipur, P.S. Hajipur, District – Vaishali.
2. Pravin Kumar @ Pravin Kumar Jaiswal S/O Jagdish Chaudhary resident Of
Mohalla - Gandhi Asharam, Town And P.O. Hajipur, P.S. Hajipur, District –
Vaishali.
3. Priti Rani Jaiswal D/O Jagdish Chaudhary and W/O Shiv Shankar Prasad
Jaiswal resident Of Village and P.O. And P.S. Sahpur Patori, District –
Samastipur.
4. Sarita Kumari D/O Jagdish Chaudhary and W/O Jagarnath Chaudhary Esident
of Village and P.O. And P.S. Devaria Kothi, District – Muzaffarpur.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. LAKMESH MARVIND

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 23-01-2015

Heard Mr. Lakmesh Marvind, the learned counsel appearing
on behalf the petitioner.

Grieved by the order of the learned court below rejecting
the prayer of the defendants-petitioner under Order VII Rule 11
C.P.C. for rejecting the plaint, the present application under Article



227 of the Constitution of India has been filed. The suit has been filed by the plaintiff claiming herself to be the widow of one Jagdish Choudhary with regard to whom the plaintiff has claimed that he became traceless from March 1995. The suit has been filed in the month of July 2002. The plaintiff has claimed partition of the suit property against her sons and daughters who are defendants in the suit.

The defendants filed the petition under Order VII Rule 11 C.P.C. praying to reject the plaint on the ground that the plaintiff has wrongly averred that Jagdish Choudhary became traceless seven years ago. It was the case of the defendants that Jagdish Choudhary did not become traceless seven years ago but only in the year 1998.

Mr. Marvind, the learned counsel for the petitioner, after some argument, has sought to raise the question of maintainability of the suit in view of the provision of Section 23 of the Hindu Succession Act as it stood before amendment in the year 2005 and has submitted that although this issue was not raised by the petitioner in the petition questioning the maintainability of the suit but it can be raised as a question of law on the basis of undisputed facts.

After considering the submissions and the records including the plaint of the suit, it is transparent that the plaintiff has averred that her husband Jagdish Choudhary became traceless in the month of



March 1995. The suit has been admittedly filed in the month of July 2002. The contention of the defendants that the said averment by the plaintiff is wrong as Jagdish Choudhary became traceless from 1998 and not from March 1995 is a question of fact which cannot be decided without the evidence to be led by the parties, and the plaint on that score therefore cannot be rejected under Order VII Rule 11 C.P.C. The learned court below has committed no illegality in passing the impugned order.

So far as the submissions by the learned counsel for the petitioner with regard to the bar to the plaintiffs to seek partition of the suit property in view of the provision of Section 23 of the Hindu Succession Act as it stood before amendment, the law in this regard has stood settled by the Apex Court in the case of **Prema Vs. Nanje Gowda A.I.R. 2011 S.C. 2077** and in the case of **Ganduri Koteshwaramma Vs. Chakiri Yanadic A.I.R. 2012 S.C. 169**. Even otherwise also the provision as it stood before amendment only contingently deferred the right of a female heirs to claim partition of a dwelling house but their entitlement to a share therein had remained unaffected. By deletion of Section 23 in the Hindu Succession Act through amendment, the bar has now been removed but no new right has been created and the subsequent charge by law can be taken into notice by the Court even in a pending proceeding This Court,

therefore, does not find substance in the submission on behalf of the petitioner in this regard.

Ex consequenti, this writ application is dismissed.

Devendra/-

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(V. Nath, J)

