

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12431 of 2010

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Laxmi, Narain Shahi S/O Late Darbeshwar Narain Shahi R/O Vill. And P.O.-
Chaumukh, P.S. Bochahan, Sub Division Muzaffarpur East, Distt.- Muzaffarpur

.... Petitioner/s

Versus

1. Smt. Usha Kiran D/O Shri Laxmi Narain Shahi And W/O Shri Vikrama Singh
Presently Residing At Vill. And P.O.- Madhopur, P.S.- Majhauria, Distt.- West
Champaran

2. The State Of Bihar Through Law Secretary, Govt. Of Bihar, Patna

.... Respondent/s

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Appearance :

For the Petitioner : Mr. Yugal Kishore, Sr. Advocate.
Mr. BIRENDRA PRASAD, Advocate
Mr. Nutan Sahay, Advocate
Mr. Ugranath Mallik, Advocate.
For the Respondent : Mr. Kumar Dharendra Pratap Singh.

Dated/ the 18th day of February, 2015

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

JUDGMENT

1. This petition under Article-226 of the Constitution of India has been filed by the petitioner (who was defendant in Partition Suit No. 182 of 2006) for quashing the order dated 09-04-2010 passed by Sri Om Prakash Singh, learned Sub Judge-VIII, Muzaffarpur in Partition Suit No. 182 of 2006 by which and whereunder, he rejected the petition dated 15-03-2008 filed on behalf of the petitioner and refused to reject the plaint of Partition Suit No. 182 of 2006 under the provision of Order 7 Rule 11 of the Civil Procedure Code.

2. The brief fact is that the respondent No. 1 namely,



Smt. Usha Kiran filed Partition Suit No. 182 of 2006 in the court of Sub Judge, Muzaffarpur against the petitioner for partition of the suit property. The petitioner appeared in the aforesaid suit and filed a petition on 05-03-2008, praying therein to reject the plaint of the aforesaid suit as the aforesaid suit does not disclose any cause of action and Hindu Succession (Amendment) Act, 2005 has no retrospective effect. The learned Sub Judge rejected the aforesaid petition, passing the impugned order dated 09-04-2010 against which, this petition has been filed.

3. The case of the respondent No. 1 before the learned Sub Judge was that one, Darveshwar Narayan Shahi died in 1966, leaving behind his four sons namely, Sri Narayan Shahi, Laxmi Narayan Shahi, Satya Narayan Shahi and Deo Narayan Shahi. The petitioner, who happens to be one of the sons of Darveshwar Narayan Shahi, filed the Partition Suit bearing Partition Suit No. 82 of 1975 against his brothers for partition of ancestral properties but during pendency of the aforesaid partition suit, the petitioner and his other three brothers, mutually, partitioned the ancestral properties and accordingly, decree was prepared in the above said Partition Suit No. 82 of 1975. Furthermore, the case of the respondent



No. 1 is that she is daughter of Laxmi Narayan Shahi, whose first marriage was solemnized with Chandrakala Devi, who happens to be mother of the respondent No. 1 but after death of his first wife, Laxmi Narayan Shahi solemnized his second marriage with one Sushila Devi and got children out of the wedlock with Sushila Devi. Further case of the respondent No. 1 is that her father, namely, Laxmi Narayan Shahi (petitioner) again filed Partition Suit No. 172 of 2003 for partition of remaining 24 decimals of ancestral lands but respondent No. 1 was not made party to the Partition Suit No. 172 of 2003 nor to the Partition Suit No. 82 of 1975. The respondent No. 1 came to know about the institution of Partition Suit No. 172 of 2003 and, thereafter, she filed a petition before the concerned court for adding her as party to the aforesaid partition suit. During pendency of the aforesaid partition suit, Hindu Succession (Amendment) Act, 2005 came into force and Section-6 of the Hindu Succession Act, 1956 was amended. After the aforesaid amendment, the respondent No. 1 filed Partition Suit No. 182 of 2006, claiming her share in the properties, which had been allotted to the petitioner in Partition Suit No. 82 of 1975. However, after filing of Partition Suit No. 182 of 2006, the petition filed by respondent No. 1 in Partition Suit No. 172 of

2003 was rejected by the concerned court vide order dated 09-02-2007. The claim of the respondent No. 1 is that after amendment of Section-6 of Hindu Succession Act, 1956, she became co-parcener of ancestral property and being co-parcener, she is also entitled to get share in the property of her father.

4. The case of the petitioner before learned Sub Judge was that the Hindu Succession (Amendment) Act, 2005 has been made effective w.e.f. 09-09-2005 and prior to coming into force of the aforesaid amendment, the suit property was allotted to the petitioner and, therefore, the aforesaid property became the self-acquired property of the petitioner and, therefore, the respondent No. 1 has got no share in the self-acquired property of the petitioner. Since the plaint of Partition Suit No. 182 of 2006 does not disclose any cause of action, therefore, the plaint of Partition Suit No. 182 of 2006 was liable to be rejected under the provision of Order VII Rule 11 of the CPC. Furthermore, the case of the petitioner was that the present Partition Suit No. 182 of 2006 was hit by the principle of res judicata as the claim of the respondent No. 1 had already been rejected by learned Sub Judge in Partition Suit No. 172 of 2003 and the order passed in Partition Suit No. 172 of 2003 has

already attended its finality.

5. Learned counsel, appearing for the petitioner submits that admittedly, the suit property was allotted to the petitioner in Partition Suit No. 82 of 1975 and the Hindu Succession (Amendment) Act, 2005 was made effective from 09-09-2005. He further submits that after partition, when the suit property fell in the share of the petitioner, the petitioner became absolute owner of the aforesaid property but learned court below failed to take note of the aforesaid fact and committed error in passing the impugned order. He further submits that when the respondent No. 1 had no right to claim her share in the self-acquired property of the petitioner, she had no right to file partition suit in respect of the aforesaid self-acquired property.

6. Learned counsel for the petitioner relied upon the following decisions:

(I) ***Nathmal Goenka Vs Ajay Kumar Goswami & Others reported in 1999 (2) PLJR 191*** in which, a coordinate bench of this court has held that if, a person got some property in partition, the said property is his self-acquired property.

(ii) ***Brij Narayan Agrawal Vs Anup Kumar***



Goyal & Ors. reported in AIR 2007, 254 in which it has been held by Hon'ble Delhi High Court that if, no Hindu united family is in existence on the day when Hindu Succession (Amendment) Act, 2005 came into force, the question of daughter being co-parcener does not arise.

(iii) ***The Commissioner of Income Tax Vs P.L. Karuppan Chettiar reported in 1993 Supp. (1) SC 580.*** This case relates to assessment of dispute of income tax and it is obvious from perusal of the aforesaid decision that in the above-stated cases, a partition took place between the father, the son and the wife and thereafter, the son, his wife and their children formed Hindu united family and after death of the father intestate, his separate property was inherited and divided between his widow and son and in that circumstance, the Hon'ble Apex Court held that the properties, so inherited by the son, has to be treated as his individual and separate properties.

(iv) ***Additional Commissioner of Income Tax***

Vs M. Karthikeyan reported in ***1994 Supp.(2)***

SCC 112: This case also relates to dispute of income tax and it has been held by Apex Court of this country that after partition and after death of his father, if, a son inherits his father's separate property, the said property shall be treated the separate property of the son.

(v) ***The Commissioner of Wealth Tax, Kanpur etc Vs Chander Sen etc reported in AIR 1986 Supreme Court 1753***. In the above-said case, there was a partition of joint family business between father and his only son and even after partition, they continued the business in the name of partnership firm, the son formed a joint family with his own sons. The father died and amount outstanding to the credit to the deceased father in the account of the firm devolved on his son. The Wealth Tax Authorities while assessing the wealth tax in respect of the family of the son i.e. assessee included the amount in computing wealth. In the aforesaid circumstances, the Hon'ble Supreme Court held that the son inherited the property as an

individual and not as a Karta of his own family.

7. On the strength of aforesaid decisions as well as submissions, learned counsel, appearing for the petitioner submits that the learned court below committed an error, not treating the suit property as self-acquired property of the petitioner and failed to exercise the power, vested in the court under Order 7 Rule 11 of the CPC.

8. the other hand, learned counsel, appearing for the respondent No. 1 refuted the above-said submissions arguing that admittedly, the suit property was allotted to the petitioner in Partition Suit No. 82 of 1975 as well as Partition Suit No. 172 of 2003 and the suit property was an ancestral property. He further submits that Section-6 of Hindu Succession Act, 1956 was amended by Hindu Succession (Amendment) Act, 2005, which came into force w.e.f. 09-09-2005 and according to the aforesaid amendment, in a joint Hindu family, governed by Mitakshara Law, the daughter of a co-parcener also became a co-parcener in her own right in the same manner as the son and have the same rights in the co-parcenary property as she would have had, if she had been a son and, therefore, after the aforesaid amendment, the respondent No. 1 became co-parcener of the suit property and,



therefore, learned court below rightly passed the impugned order. His next contention is that this writ petition is not maintainable because the impugned order is revisable order and only revision petition can lie against the impugned order. He further submits that it is well settled principle of law that if an alternative remedy is available, the writ petition cannot be entertained.

9. In support of his contention, he referred decision of ***Rohit Chauhan Vs Surinder Singh & Ors. reported in 2014(1) PLJR 64 (SC)*** and at paragraph-11 of the aforesaid judgment, the Hon'ble Supreme Court has observed as follows:

Paragraph- 11- "We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with other in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the joint Hindu family and before commencement of Hindu Succession (Amendment), Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in



the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener”.

He also relied upon the decision of **Most. Quraisha Khatoon Vs Sri S.P.N. Singh reported in 2014 (1) PLJR 12** in which, a coordinate bench of this court held that if, an order passed under Order 7 Rule 11 of the CPC finally disposing off the suit, then in that event, against that order, only revision can lie.

10. Learned counsel, appearing for respondent No. 1 also submits that the principle of res judicata is not applicable in the present case because admittedly, petition filed in Title Suit No. 172 of 2003 was rejected on 09-02-2007 and much prior of passing the aforesaid rejection order, the respondent No. 1 had already filed Partition Suit No. 182 of 2006 and moreover, in the present case, the petitioner has denied his relationship with the respondent No. 1 and claimed that respondent No. 1 is not his

daughter and the aforesaid point was not in issue in Partition Suit No. 172 of 2003 and therefore, the principle of res judicata is not applicable in this case.

11. Having heard the contentions of both the parties, I have gone through the materials, available on the record as well as decisions cited on behalf of the parties.

12. It is an admitted position that suit property of present Partition Suit No. 182 of 2006 was allotted to the share of petitioner No. 1 in a partition which has taken place between him and his brothers and, therefore, it is not in dispute that prior to the above-said partition, the nature of suit property was co-parcenary property and the petitioner inherited the aforesaid property as co-parcener of Joint Hindu family. The claim of the respondent No. 1 is that the petitioner had two wives and she is daughter of the petitioner from his first wife and, furthermore, she was born much prior to coming into force of Hindu Succession (Amendment) Act, 2005. It is also an admitted position that after coming into force of Hindu Succession (Amendment) Act, 2005, a daughter also became co-parcener in her own right by birth, in the manner as the son, and have the same right in the co-parcenary property as she would have had, if, she had been a son. Therefore, it is clear from perusal of aforesaid amendment that a daughter becomes

co-parcener by birth in a joint Hindu Family, governed by the Mitakshara law and she will have the same rights in the co-parcenary property as the son has.

13. Now, the only dispute in the present matter is that as to whether if, a person got co-parcenary property in a partition, then, that property shall be treated as his self-acquired property or co-parcenary property. The aforesaid issue was discussed by Hon'ble Supreme Court in the case of Rohit Chauhan (supra) and it has clearly been held that if, a person gets ancestral property in partition and the said property remains in the hand of a single person, in that circumstance, the said property shall be treated as his self-acquired property but if a son is consequently born, the property becomes a co-parcenary property and the son would acquire interest in that and becomes a co-parcener. It is not in dispute that after coming into force of Hindu Succession (Amendment) Act, 2005, the status of the son and the daughter has become equal and the daughter also becomes co-parcener like a son by birth and she will have same right as the son has in co-parcenary. Therefore, it is obvious that after coming into force of Hindu Succession (Amendment) Act, 2005, the respondent No. 1 became co-parcener of the property, which were allotted to her father in Partition Suit No. 182 of 1975

and 172 of 2003 and she may raise her claim for partition of her share in the aforesaid properties, if, the same has not been alienated by the petitioner, prior to coming into force of Hindu Succession (Amendment) Act, 2005.

14. Order 7 Rule 11 of the CPC stipulates several grounds on which, a plaint can be rejected. Of the several grounds; one of the grounds is non-disclosure of cause of action. In the instant case, the claim of the petitioner is that the plaint of the respondent No. 1 does not disclose any cause of action but I am unable to accept the aforesaid contention because the copy of the plaint has been annexed as Annexure-C to the counter affidavit of respondent No. 1 and it has, specifically, been pleaded at paragraph-26 of the plaint that respondent No. 1 demanded amicable partition of suit property from the petitioner but the petitioner refused to concede the demand of the respondent No. 1. Therefore, in my view the learned court below rightly negated the claim of the petitioner.

15. Furthermore, it has also been argued that the above-said Partition Suit No. 182 of 2006 was barred by law of res judicata but again, I am unable to accept the aforesaid contention because the respondent No. 1 had filed Partition Suit No. 182 of 2006 and much after filing of the aforesaid Title Suit,

the order was passed in Title Suit No. 172 of 2003 and, therefore, in my view, the learned Sub Judge rightly refused the petition, filed on behalf of the petitioner for rejection of plaint of the respondent No. 1 filed under Order 7 Rule 11 of the CPC. Apart from the aforesaid facts, it is also obvious from perusal of proviso of Section-115 of the Code of Civil Procedure that the order impugned is revisable order and it is well settled principle of law that when the alternative remedy is available, the writ petition cannot be entertained. Moreover, I have already discussed that the learned court below has not committed any error in passing the impugned order. Therefore, it is needless to permit the petitioner to file/convert this petition into revision application.

16. On the basis of aforesaid discussions, this writ petition does not have any merit and, accordingly, this writ petition stands dismissed on admission stage itself.

(Hemant Kumar Srivastava, J)

A.K.V./-

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