

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9390 of 2012

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1. **Most. Sangita Devi**, W/O Late Udai Shankar Yadav, resident of Mohalla- Majhauria Near Race Court At Chakkar Maidan, One of The Quarters of Muzaffarpur Town, P.O.- Khabra, P.S.- Kazimohammadpur, Town And District- Muzaffarpur
 2. **Bharat Samrat**, S/O Late Udai Shankar Yadav, resident of Mohalla- Majhauria Near Race Court At Chakkar Maidan, One of The Quarter of Muzaffarpur Town, P.O.- Khabra, P.S.- Kazimohammadpur, Town And District- Muzaffarpur
 3. **Bharat Ratna**, S/O Late Udai Shankar Yadav, resident of Mohalla- Majhauria Near Race Court At Chakkar Maidan, One of The Quarter of Muzaffarpur Town, P.O.- Khabra, P.S.- Kazimohammadpur, Town And District- Muzaffarpur
 4. **Ashwarya Rai**, Minor D/O Late Udai Shankar Yadav, under the Guardianship of Her Mother Most. Sangita Devi Resident of Mohalla- Majhauria Near Race Court At Chakkar Maidan, one of The Quarter of Muzaffarpur Town, P.O.- Khabra, P.S.- Kazimohammadpur, Town And District- Muzaffarpur

.... Petitioner/s

Versus

1. **Most. Manjula Devi**, W/O Late Chitaharan Prasad Singh, resident of Village- Sukki, P.S.- Pateypur Sub Registry, Sub Division Mahua Sub Division Munsifi Hajipur, District- Vaishali
2. **Niraj Kumar**, S/O Late Chitaharan Prasad Singh, resident of Village- Sukki, P.S.- Pateypur Sub Registry, Sub Division Mahua Sub Division Munsifi Hajipur, District- Vaishali
3. **Dhiraj Kumar**, S/O Late Chitaharan Prasad Singh, resident of Village- Sukki, P.S.- Pateypur Sub Registry, Sub Division Mahua Sub Division Munsifi Hajipur, District- Vaishali
4. **Hind Kesari Yadav**, S/O Ritlal Rai (Yadav), resident of Mohalla- Majhauria Near Race Course At Chakkar Maidan, One of The Quarter of Muzaffarpur Town, P.O.- Khabra, P.S.- Kazimohammadpur, Town And District- Muzaffarpur
5. **Kiranshankar Yadav**, S/O Ritlal Rai (Yadav), resident of Mohalla- Majhauria Near Race Course At Chakkar Maidan, One of The Quarter of Muzaffarpur Town, P.O.- Khabra, P.S.- Kazimohammadpur, Town And District- Muzaffarpur
6. **Ganga Das**, S/O Late Sundar Das, resident of Village- Gobardhanpur @ Gobarsahi, P.O.- Khabra, P.S.- Sadar Sub Division And Munsifi Muzaffarpur East, District- Muzaffarpur
7. **Sarjug Das**, S/O Late Sundar Das, resident of Village- Gobardhanpur @ Gobarsahi, P.O.- Khabra, P.S.- Sadar Sub Division And Munsifi Muzaffarpur East, District- Muzaffarpur
8. **Rital Surdup Yadav**, Mahavidyalaya Muzaffarpur

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. Ranjan Kumar Dubey-Advocate
 For the Respondent/s : Mr. Dronacharya-Advocate

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 16 -12-2015

Instant petition has been filed on behalf of petitioners/ interveners against an order dated 27.03.2012 passed by Sub-Judge-7th, Muzaffarpur in Title Suit No.368 of 2001 whereby and whereunder petition dated 14.10.2011 filed on behalf of petitioners/ interveners under Order-1, Rule-10 has been rejected.

2. In order to proper appreciation of the lis surviving, brief facts of the case as is visible from the order impugned is incorporated below.

Title Suit No.368 of 2001 was filed by the plaintiff-respondents against the defendants wherein defendants appeared. Defendant No.3, Uday Shankar Yadav died on 08.01.2005 leaving behind his widow, two sons and a daughter for whose substitution, no prayer was made on behalf of plaintiffs whereupon defendant nos.1 and 2 filed petition on 25.11.2005, praying therein that on account of non-substitution of legal heirs of defendant no.3, suit has abated.

3. Rejoinder to that petition was filed on behalf of plaintiffs on 09.04.2009 wherein they have asserted that as he had got no knowledge regarding death of defendant no.3 at an earlier occasion, hence at a cost of Rs.100, abatement was recalled. Subsequently, petition dated 27.04.2009 was filed disclosing therein that as defendant no.3 died without filing of written statement, and

defendant no.5 died after filing of written statement, but failed to respond subsequently. Hence, in terms of Order-22, Rule-4(4) of the C.P.C., plaintiffs are not under obligation to substitute heirs of defendant nos.3 & 5 and the same was allowed vide order dated 09.07.2010.

4. Defendant Nos.1 and 2, being aggrieved thereby, preferred C.W.J.C. No.16597 of 2011 before this Court and the same was rejected on 22.09.2011 (Annexure-2). Subsequently thereof, heirs of defendant no.3, petitioners/ interveners filed petition under Order-1, Rule-10 of the C.P.C. on 14.10.2011 whereupon rejoinder was filed on 03.11.2011 and by the order impugned, the same has been rejected hence, this petition.

5. It has been submitted on behalf of petitioners that the learned lower Court while considering the prayer, became influenced by the order dated 22.04.2011 passed by the High Court, which ought not have. To support such plea, it has been submitted that as, the petitioners were not party, hence the order was not binding upon them, apart from the fact that aforesaid order was passed while adjudging prayer under Order-22, Rule-4(4) of the C.P.C. and not under order 1, Rule-10 of the C.P.C. Apart from this, it has also been submitted that theme of substitution as well as addition of necessary party are based upon two different pedestal, substitution is to be



effected for the purpose of securing presence of legal heirs of deceased party while during consideration of the prayer under Order-1, Rule-10, presence of petitioner is to be seen necessary for just decision of the suit. In the present case, as has been held, no written statement was filed on behalf of deceased-defendants and on account thereof, no pleading was available at his end. However, taking into account, the relief so sought for, the status of these petitioners apart from being legal heirs of defendant no.3, in their individual capacity on account of accrual of right in the suit property, became necessary party to be permitted to defend their rights. Moreover, the just and proper decision would not be possible unless presence of these petitioners are on the record. Hence, the learned lower Court instead of rejecting prayer, should have allowed the same. Furthermore, it has been submitted that an order passed under Order-22, Rule-4(4) of the C.P.C. has got no impact over applicability of Order-1, Rule-10 of the C.P.C. and for that, has referred an interim order dated 01.12.2010 passed in F.A. No.282 of 1996 (Sri Satyanand Kumar & others vrs. Smt. Shyama Devi) as well as A.I.R. 1983 Allahabad Page-368.

6. At the other end, learned counsel for the respondents submitted that the instant petition happens to be misconceived in the eye of law nor has got enforcement there for. In support of such submission, it has been submitted that Order-1, Rule-



10 of the C.P.C. is applicable in a case where a necessary party, has been left out being impleaded in a suit against whom either the relief so claimed for, is found adversely affecting his interest or the Court finds presence of a party necessary for proper adjudication of the lis. So far present status is concerned, on account of failure on the part of defendant no.3 since deceased, who after his appearance failed to file written statement within the stipulated period, found his fate foreclosed duly distinguished and on account thereof, plaintiffs having been released from encumbrment to plead for substitution, which he did and endowed . Then in that circumstance, legal heir of defendant no.3 who acquired interest through the lines of inheritance is found precluded from asking for substitution as, for want of written statement, his right is found extinguished. That being so, his status as necessary party extinguished because of the fact that his ancestor, being a necessary party, had already been impleaded as well as after his death, by a statutory provisions his heirs are engaged due to own lapses.

7. Furthermore, it has been submitted that the claim of heirs to be a necessary party in the background of the fact that his ancestor had already been impleaded, has got no consideration on account of having been distraint in the eye of law due to lapses committed by his ancestor, who failed to file written statement after

appearance. As such, application under Order-1, Rule-10 is neither permissible nor the party could be allowed to frustrate the earlier order having duly confirmed by the Superior Court, and for that relied upon **2003(1) SCC 476, 2000(3) P.L.J.R. Page-675, A.I.R. 1986 (Orissa) Page-191.**

8. In **Zahirul Islam Versus Mohd. Usman and others reported in (2003) 1 SCC 476**, the representative of the deceased-defendant no.2 whose presence was not secured during course of trial whereupon the trial proceeded ex parte and accordingly, petitioners have prayed for substitution, which was rejected by the trial Court as well as by the High Court. While considering the same, the Hon'ble Apex Court had considered Order-22, Rule-4(4) of the C.P.C. and held under Para-6:-

“6. A perusal of sub-rule (4), extracted above, shows that a plaintiff may be exempted from the necessity of substituting the legal representatives of a defendant who has failed to file a written statement or who, having filed it, failed to appear and contest the suit at the hearing and that, in such a case, the judgment may be pronounced against the said defendant notwithstanding the death of such defendant and it shall have the same force and effect as if the judgment has been

pronounced before the death took place”.

Aforesaid petition was allowed as plaintiff had not chosen recourse of Order-22, Rule-4(4) of the C.P.C. However, it is apparent that Order-1, Rule-10 of the C.P.C. was not under consideration nor the impact of Order-22, Rule-4(4) of C.P.C. while considering prayer under Order-1, Rule-10 C.P.C.

9. In **Md. S. Imam vs. Rai Bharat Kumar and others reported in 2000(3) P.L.J.R. Page-675**, defendant no.3 had appeared in a suit, but she had not taken any step including filing of the written statement. Subsequently thereof, plaintiffs had filed petition under Order-22, Rule-4(4) of the C.P.C. after her death, which was rejected by the learned lower court. The matter was decided by the Division Bench over period, whereunder prayer under Order-22, Rule-4(4) C.P.C. was to be considered and holding that it is neither guided by the stage nor with limitation, answered accordingly, allowing the prayer after setting aside the order passed by the learned lower Court. Again, in the aforesaid case, applicability of Order-1, Rule-10 of the C.P.C. was not under consideration.

10. In **Kanhu Gauda vs. D. Kodandi Dora and others reported in A.I.R. 1986 Orissa 191**, the suit was filed by the petitioner/ plaintiff. While sailing with suit, on 02.04.1980 an application under Order-1, Rule-10 was filed on his behalf for

impleation of Dr. Bachchi Babu Dora claiming to be a necessary party and the same was rejected on 10.05.1980. Subsequently thereof, on 12.11.1980 their impleation was sought for by way an amendment under Order-6, Rule-17 of the C.P.C., which was heard and lastly, vide order dated 14.05.1980, the same was rejected.

11. After discussing the same in detail, the High Court had allowed the prayer and set aside the order passed by the learned lower Court and while doing so, the High Court had also considered the effect of rejection of petition at an earlier occasion under Order-1, Rule-10 of the C.P.C. and further, held that both two have got independent identity.

That means to say, none of the decisions so cited on behalf of opposite party is applicable.

12. In **Bhagwan Swaroop and others...appellants vs. Mool Chand and others...respondent reported in A.I.R. 1983 SC 355**, there happens to be consideration of Order-22, Rule-4 in consonance with Order-1, Rule-10 wherein, it has been observed at Para-4 and 5:-

“4. It is true that it was incumbent upon the appellants to implead the heirs and legal representatives of deceased Respondent 1 in time. It is equally true that the appellants were negligent in moving the proper application. We



would not question the finding of the High Court that Appellants 2, 3 and 4 knew about the death of the deceased Respondent 1. This being a suit for partition of joint family property, parties are closely interrelated and it is reasonable to believe that at least some of the appellants must have attended the funeral of deceased Respondent 1, as contended on behalf of the contesting Respondent 2. There is some force in the contention that when a specific provision is made as provided in Order 22 Rule 4, a resort to the general provision like Order 1 Rule 10 may not be appropriate. But the laws of procedure are devised for advancing justice and not impeding the same. In *Sangram Singh v. Election Tribunal, Kotah* (1955) 2 SCR 1: AIR 1955 SC 425: 1955 SCJ 431: 10 ELR 293 this Court observed that a code of procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. This was reaffirmed in *Kalipada Das v. Bimal Krishna Sen Gupta* (1983) 1 SCC 14: 1982 UJ (SC) 866.

5. In a suit for partition, the position of plaintiffs and defendants can be interchangeable. It is that each adopts the same position with the



other parties. Other features which must be noticed are that the appeal was filed somewhere in 1972. It has not come up for hearing and the matter came on Board only upon the application of the 2nd respondent intimating to the Court that the 1st respondent had died wayback and as his heirs and legal representatives having not been substituted, the appeal has abated. Wheels started moving thereafter. Appellants moved an application for substitution. The matter did not end there. Heirs of deceased Respondent 1 then moved an application for being brought on record. If the application had been granted, the appeal could have been disposed of in the presence of all the parties. The difficulty High Court experienced in granting the application disclosed with great respect, a hypertechnical approach which if carried to end may result in miscarriage of justice. Who could have made the most serious grievance about the failure of the appellants to substitute the heirs and legal representatives of deceased Respondent 1? Obviously the heirs of deceased Respondent 1 were the persons vitally interested in the outcome of the appeal. They could have contended that the appeal against them has abated and their share



has become unassailable. That is not their case. They on the contrary, want to be impleaded and substituted as heirs and legal representatives of deceased Respondent 1. They had absolutely no grievance about the delay in bringing them on record. It is the 2nd respondent who is fighting both the appellants and the 1st respondent who wants to derive a technical advantage by this procedural lapse. If the trend is to encourage fairplay in action in administrative law, it must all the more inhere in judicial approach. Such applications have to be approached with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. Undoubtedly, justice according to law; law to be administered to advance justice”.

13. In Ratna Alias Ratnavati (Smt.) vs. Syndicate Bank and others reported in (1995) 1 SCC 407, the question of substitution evolved at the time of passing of final decree and while adjudicating upon the same, the parallel provision of Order-22 as well as Order-1, Rule-10 relating to substitution of deceased party has been considered and explained under Para-6:-

“6. Order 22 Rule 1 says that “the death of plaintiff or defendant shall not cause the suit to



abate if the right to sue survives". Rule 2 says that in case of multiple plaintiffs or defendants, if any of them dies and where the right to sue survives to the surviving plaintiff or plaintiffs/defendants, the court shall cause an entry to that effect made and shall proceed with the suit under Rule 4, if the right does not survive against the surviving defendants alone, on an application made, the court shall cause the legal representative substituted and shall proceed with the suit. A decree passed confers rights and imposes liabilities which are fixed until the decree is reversed or varied in appeal. The preliminary decree declares rights of the plaintiff and liabilities of the respective defendants and they become final. The suit would not abate between the date of preliminary decree and final decree. In this view of the matter, the question which emerges is whether it is not necessary for the decree-holder to make an application within the limitation prescribed under Article 120 of the Schedule to the Limitation Act, 1963 to have the legal representatives brought on record. Section 52 CPC adumbrates that a money decree passed against the legal representative of the deceased defendant, out of the property of the deceased in



his hands, may be executed by attachment or sale of that property. If the legal representatives fail to satisfy the court that he duly applied the property to discharge the debt or the court is not satisfied of his so doing, the court would proceed against the legal representatives personally and to apply the property by sale to satisfy the decree debt. At the time when the application for passing the final decree is filed, it is enough if the legal representatives are impleaded, all or any of the legal representatives or one of the LRs of the deceased defendant judgment-debtor to represent the estate of the deceased. If death of defendant takes place pending passing of final decree they may be brought on record under Section 151 CPC or Order 1 Rule 10 CPC”.

14. In Mahomedally Tyebally and other vs. Safiabai and others reported in A.I.R. 1940 Privy Council Page-215, the Privy Council had an occasion:-

“Still, it would have been very bad practice if in the present case Rukhiaboo had not been joined as a party and this was properly done by Barlee J. on her own application under O.I, R.10. Their Lordships are of opinion that it is open to the Judge in his discretion under O.I, R.10, to



add as a party to the suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of the parties. The contention that the plaintiff's suit had abated as a whole is fundamentally mistaken. It involves that the plaintiff was claiming relief against Sakinaboo, that because Sakinaboo's heirs were entitled to resist the grant of this relief in the present suit by reason of the plaintiff's laches, the plaintiff could not be given relief against the present appellants. No step in this reasoning can be justified".

15. In **Mohammad Mustaqeem and others vs. Aftab Ahmad and others** reported in **A.I.R. 1983 Allahabad 368**, wherein also the ambit and scope of Order-22, Rule-4(4) along with Order-1, Rule-10 has been subject to consideration and it has been held under Para-14:-

"14. In this respect, one aspect of the matter must be further clarified. It is this that if an exemption is granted by a Court to the plaintiff from moving an application for substitution that would not take away the right of the legal representatives to get themselves substituted or brought on record subsequently. In a proper case, the court will consider such an application

on merits judicially and pass appropriate orders thereon. Granting of exemption has nothing to do with the right of the legal representatives of moving an application for being brought on record. The fact that the suit would not abate on account of the deceased having filed a written statement or contested the suit earlier, should not be confused with the right of the legal representatives of moving an application to be substituted or brought on record. On their being brought on record, the suit will proceed on merits, and that will not entitle the impleaded representatives to urge that the suit had abated”.

16. After having close and minute scrutiny of the facts involved in the present petition in consonance with the principle laid down under different judicial pronouncement as discussed herein above, instant petition is allowed. However, in the facts and circumstances of the case, parties will bear their own cost.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated- 16.12.2015
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