

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7573 of 2013

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1. Shobha Devi W/O Sri Sanjay Kumar Pathak R/O Village- Ram Nagar, P.O.- Lahang Karma, P.S.- Tandwa, District- Aurangabad (Bhar), At Present Residing At Village- Akauni, P.O.- Akauni, P.S.- Daud Nagar, District- Aurangabad (Bihar)

.... Petitioner/s

Versus

1. Lilawati Devi wife of Sri Ram Naresh Pandey, R/O village-Deoriya Rampur, PS, Kutumba, Distt-Aurangabad (Bihar) at present Residing at Village-Akauni, P.O. Akauni PS-Daud Nagar, Distt-Aurangabad. Bihar.

2. Sushila Devi W/O Uday Tiwary R/O Village- Awadh Puri Godiha, P.S.- Sansha, District- Aurangabad (Bihar), At Present Residng At Village- Akauni, P.O.- Akauni, P.S.- Daud Nagar, District- Aurangabad At Present Residing At Village- Akauni, P.O.- Akauni, P.S.- Daudnagar, Dist- Aurangabad (Bihar)

3. Srimati Sundari Devi W/O Sri Dhanajay Kumar Pathak R/O Village- Ram Nagar, P.O.- Lahang Karma, P.S.- Tandwa, District- Aurangabad (Bihar), At Present Residing At Village- Akauni, P.O.- Akauni, P.S.- Daud Nagar, District- Aurangabad (Bihar)

4. Mukesh Kumar Pandey S/O Sri Ram Naresh Pandey R/O Village- Deoriya Rampur, P.S.- Kutumba, District- Aurangabad (Bihar), At Present Residing At Village- Akauni, P.O.- Akauni, P.S.- Daud Nagar, District- Aurangabad (Bihar)

5. Bimlesh Kumar Pandey S/O Sri Ram Naresh Pandey R/O Villge- Deoriya Rampur, P.S.- Kutumba, District- Aurangabad (Bihar), At Present Residing At Village- Akauni, P.O.- Akauni, P.S.- Daud Nagar, District- Aurangabad (Bihar)

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Dhruv Narayan, Sr. Advocate.

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

10 17-03-2016

Heard learned counsel for the petitioner.

2. In spite of appearance at an earlier occasion, none appeared on behalf of respondents.

3. Petitioner/plaintiff is aggrieved by an order dated 06.02.2013 passed by Subordinate Judge-3rd , Aurangabad in



Partition Suit No. 104 of 2006/20 of 2009 (final decree proceeding) whereby and whereunder allowed prayer made on behalf of Mukesh Kumar Pandey, Respondent No.5 and Bimlesh Kumar Pandey Respondent No.6 under Order 1 Rule 10 of the CPC.

4. It has been submitted on behalf of the petitioner that she happens to be daughter of Chandramani Pandey (since deceased) who died leaving behind four daughters and a wife. In due course of time, petitioner had filed Partition Suit for distribution of the property left by deceased, Chandramani Pandey which has been decided and in token thereof, preliminary decree had already been prepared, unchallenged at the end of any of the parties got finality. During course thereof, identification of 1/5th share in the suit property left by the deceased Chandramani Pandey has been identified. Accordingly, steps for final decree preparation has been taken up by way of initiating a proceeding wherein Survey Knowing Pleader Commissioner was appointed who had already submitted his report and the same is pending for consideration.

5. It has also been submitted that Most. Brij Kumari @ Mala Kuer, mother of plaintiff as well as other defendants, who herself was one of the defendants died and on account thereof,



substitution had also been effected. It has further been submitted that then thereafter, Mukesh Kumar Pandey and Bimlesh Kumar Pandey who happen to be sons of Leelawati Devi, one of the defendants appeared and filed petition praying therein to admit them as defendants on the basis of unprobated registered 'Will' allegedly executed by Most. Brij Kumari @ Mala Kuer on 08.09.1998 whereupon petitioner/plaintiff put objection, however, overruling the same, the learned lower court allowed by the order impugned, which is the subject matter of challenge under present petition.

6. It has further been submitted on behalf of the petitioner that order impugned is untenable in the eye of law on various reasons. The first and foremost ground argued on behalf of petitioner is, while filing WS, during course of evidence, Most. Brij Kumari @ Mala Kuer had not spoken with regard to execution of 'Will' in favour of these two persons and in likewise manner, Leelawati Devi, mother of these two persons also failed to make any kind of discloser. That means to say, presence of aforesaid document became suspicious one as well as creates doubt over its genuineness being forged one. It has also been submitted that by way of 'unprobated will' propounder has go no right till the same is probated and, in the aforesaid background, it

has been pleaded that neither they are necessary party nor proper party. To substantiate such plea, learned counsel for the petitioner also relied upon *(2010)7 SCC 417* and *(2012) 8 SCC 384* to explain clarification of necessary party as well as proper party.

7. It has also been submitted that even considering and identifying that a 'Will' has been executed in favour of these two persons and further, having been allowed to be impleaded as parties, at the present stage their interest is found conjoint with the interest of Most. Brij Kumari @ Mala Kuer, but, the order impugned whereby they have been directed to file WS is found not at all legally permissible in the eye of law. Therefore, mere having interest of Most. Brij Kumari @ Mala Kuer kept in abeyance till the final adjudication of Probate Case No. 18/2012, interest of others should have properly been taken into account by the learned lower court while passing the order impugned and at least, to that extent the order impugned needs modification.

8. Section 211 of the Indian Succession Act 1925 reads as follows:-

211. Character and property of executor or administrator as such.— (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, [Sikh, Jaina or Parsi] or an exempted person, nothing herein contained shall vest in

an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

9. From plaint reading of Section 211 of the Indian Succession Act, it is apparent that status of propounder is found duly recognized as legal representative for all practical purpose, though, under Sub-Clause-2, the privilege so allowed under Sub-section-1 is found duly barricaded over vesting of property in case the testator happens to be Hindu, Mohammedan, Buddhist, Sikh, Jaina or Parsi. That means to say, the status of the propounder is found duly recognized as legal representative and that being so, presence of Mukesh Kumar Pandey and Bimlesh Kumar Pandey against Most. Brij Kumari @ Mala Kuer is found duly acknowledgeable in the eye of law. That means to say, these two are to be viewed as legal representatives of Most. Brij Kumari @ Mala Kuer.

10. In the aforesaid background, their presence to represent estate of Most. Brij Kumari @ Mala Kuer is found out of hitch and hindrance and to that extent the order impugned is found justified. In the aforesaid background, though after death of Most. Brij Kumari @ Mala Kuer, as has been stated by the petitioner that substitution had already taken place identifying all the four

daughters to be successor, though legally permissible but in the facts and circumstances of the present case, could not be allowed to remain.

11. Furthermore, in the aforesaid facts and circumstances of the case, the share of Most. Brij Kumari @ Mala Kuer as identified under preliminary decree and further, as has been demarcated by the Survey Knowing Pleader Commissioner during course of *Takhte-Bandi* is to be kept immuned till adjudication of Probate Case No. 18/2012.

12. With the aforesaid observation, the instant petition is disposed of.

13. The stay granted vide order dated 30.07.2013 is, hereby, vacated.

(Aditya Kumar Trivedi, J)

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