

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.495 of 2013

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1. VIJAY KUMAR, SON OF LATE SITARAM RAI RESIDENT OF VILLAGE - KESHAVPUR DIGHA JAMAKHARIJ POST OFFICE - DIGHA GHAT, POLICE STATION - DIGHA, DISTRICT - PATNA

.... PETITIONER/S

VERSUS

1. SEEMA DEVI, WIFE OF LATE AJAY KUMAR RESIDENT OF MOHALLA / VILLAGE - KESHAWPUR DIGHA JAMAKHARIJ, POST OFFICE - DIGHA GHAT, POLICE STATION - DIGHA, DISTRICT - PATNA

2. ANKIT KUMAR, MINOR SON OF LATE AJAY KUMAR, THE MINOR UNDER GUARDIANSHIP OF HIS NEXT FRIEND AND WELL-WISHER, SMT. SEEMA DEVI RESIDENT OF MOHALLA / VILLAGE - KESHAWPUR DIGHA JAMAKHARIJ, POST OFFICE - DIGHA GHAT, POLICE STATION - DIGHA, DISTRICT - PATNA

.... RESPONDENT/S

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Appearance :

For the Petitioner/s : Mr. Kamlesh Kumar Sharma--Advocate

For the Respondent/s : Mr. Mritunjay Kumar--Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

04 01-03-2016

Heard learned counsel for the petitioner as well as

learned counsel for the respondents.

Petitioner, who happens to be defendant no.3 relating to Title Suit No.321 of 2010 pending before the Subordinate Judge-IV, Patna is aggrieved by an order dated 25.09.2012, the order impugned whereby and whereunder the Court had directed to consign the record.

On cursory look as well as hearing rival parties, it is evident that Sitaram Rai, the father of petitioner as well as father in-law of respondent no.1 and grand father of respondent no.2, who are wife and son of Late Ajay Kumar, predeceased son of Sitaram Rai had launched Title Suit No.321 of 2010 asking for a declaration that the schedule properties having detailed in the



plaint be declared to be the self-acquisitioned of Sitaram Rai which, as has been submitted, been controverted by respondent nos.1 and 2, Seema Devi and Ankit Kumar while been supported by the petitioner Vijay Kumar, defendant no.3. It has also been pleaded that taking into account the pitiable condition of the Sitaram Rai, he was examined out of turn, cross-examined and discharged. It is also apparent that in due course of time, Sitaram Rai had died and now, the dispute arose, who will command the suit. During midst thereof, an interesting feature is found exposed whereunder, petitioner has submitted that deceased Sitaram Rai had executed a Will in favour of his minor children on 08.09.2009 as well as on 16.05.2011. Simultaneously, the respondents have also pleaded that last Will has been executed by Late Sitaram Rai in their favour. It has also been disclosed by both the parties that both the Wills have been brought up for probate/ letters of administration.

It has been submitted on behalf of petitioner that as he had supported plea of his father and on account thereof, his interest is found tagged with the interest of his father whereupon he is the fit person to be impleaded by way of transposition as plaintiff which, the learned lower Court failed to conceive and directed to consign the record recording a the finding which, will adversely affect upon his interest while sailing with the probate, so

submitted that the order impugned happens to be bad, illegal and contrary to spirit of law.

It has further been pleaded that deceased, apart from presence of these two sons/ wife, son of a predeceased son also left two daughters, who have had also filed petition for substitution, but the learned lower Court did not take cognizance thereof.

It has further been pleaded that lis still survives even after death of Sitaram Rai, because of the fact that the matter of adjudication was with regard to nature of acquisition, whether it happens to be self-acquired property of Sitaram Rai or it was purchased through the nucleus of the joint family. Furthermore, it has also been submitted that aforesaid theme have got bearing in the background of the fact that in case, it is held that the property happens to be self-acquired property, then in that event, petitioner will be entitled, in case Will is probated to possess the whole area in terms of Will and if not, then in that event, to the extent of share of Sitaram Rai. Therefore, there should be declaration and for that, the suit should have been allowed to continue. To substantiate such plea, the learned counsel for the petitioner has referred ***Kiran Tandon v. Allahabad Development Authority and Another reported in A.I.R. 2004 SC 2006***, more particularly ***Para-4*** thereof.



On the other hand, the learned counsel for the respondents submitted that petitioner has got no cause to challenge the order impugned in the background of the fact that whatever status he has, that happens to be by the subsequent action on account of deed of Will executed in favour of his minor son by the deceased which did not happen to be the last Will in the background of the last Will has been executed by the deceased in their favour whereunder there happens to be mode of devolution of the property and being the aforesaid Will under process of probate, therefore, the petitioner has got no right to controvert or challenge the finding recorded by the learned lower Court. It has also been submitted that property being self-acquired property was claimed by the Sitaram Rai. Petitioner being one of the sons and further, recipient at that very moment on account of so alleged Will in favour of his two minor sons, only to justify such prayer had supported and in likewise manner, has asked for transposition which, on account of subsequent Will whereunder the interest of the petitioner has been duly barricaded has challenged the status of the petitioner and that being so, the matter under controversy is to be adjudged under the probate proceeding whereunder it will be decided whether the Will having executed in favour of petitioner happens to be the last Will or the Will executed in favour of respondents happen to be last. Furthermore, by having last Will in



favour of respondents executed by Sitaram Rai is indicative of the fact that the property in question happens to be self-acquired and on account thereof, there happens to be no controversy, which should be decided in the present lis. Therefore, there happens to be no necessity for revival of the present Title Suit, which has been directed to be consign.

Heard the parties.

Gone through the order impugned along with judicial pronouncement relied upon by the learned counsel for the petitioner.

Each fact has got some sort of peculiarity and the application of particular principle is to be taken in the aforesaid background. So far general principle is concerned, there is no controversy with regard to acknowledging the right of the defendant to be transposed as a plaintiff in case, such situation warrants. But, so far present scenario is concerned, that principle is found completely unwarranted. Deceased, Sitaram Rai had executed Will in favour of son of the petitioner and in likewise manner, in favour of respondents. As the Will executed in favour of respondent happens to be last Will, whereunder devolution of property has been prescribed, hence the controversy with regard to nature of property possessed by Late Sitaram Rai, gone out of controversy, as by such testament, having in favour of respondent,

the nature of property has been admitted to be self-acquisitioned of Late Sitaram Rai and that being so, no adjudication is warranted furthermore. In the aforesaid background, the earlier objection raised by the respondent through written statement in Title Suit No.321 of 2010, lost its identity. As such, prayer for revival of Title Suit No.321 of 2010 is found not appreciable. Though, the petitioner has tried to challenge the order in the background of Annexure-4, a petition filed on behalf of daughters Manju Devi and Saanjhari Devi, surreptitiously failed to implead them as a party and that shows another circumstance to see the instant petition non-maintainable. However, the finding whatever been recorded at the present moment will not adversely influence upon the interest of either of the party in future.

Accordingly, instant petition is rejected. The Stay so granted at an earlier occasion is hereby vacated.

(Aditya Kumar Trivedi, J)

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