

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.165 of 2013

1. Arun Kumar.

2. Dhiraj Kumar.

Both sons of Late Laxman Tahkur.

3. Pappu Kumar @ Pappu Thakur.

4. Dinesh Thakur @ Pintu Thakur.

Both sons of Late Dashrath Thakur.

5. Rajesh Thakur, Son of Late Kishun Thakur.

All residents of Mohalla- Chitkohara Basti Post Office Anisabad, Police Station Gardanibagh, District-Patna.

.... Petitioners

Versus

1. Nand Kishore Rai, Son of Late Bipat Rai.

2. Nageshwar Rai.

3. Bindeshwar Prasad.

4. Shiv Jee Rai.

5. Ram Pravesh Kumar Singh.

All sons of Nand Kishore Rai.

All residents of village-Saristabad, Police Station Gardanibagh, Post Office Anisabad, District-Patna.

6. Ramautar Thakur.

7. Nageshwar Thakur.

8. Bihari Thakur.

6 to 8 all are sons of Late Chand Lal Thakur.

9. Mostt. Somari Devi Wife of Late Chariter Thakur.

10. Nageshwar Thakur.

11. Kameshwar Thakur.

Both sons of Late Charitar Thakur.

12. Dr. Jamal Ashraf Son of Late Syed Azizuddin Ashraf, resident of S.P.Verma Road Patna-1, P.O.-G.P.O., P.S.-Kotwali, District-Patna.

13. Dr. Kamal Ashraf Son of Late Syed Azizuddin Ashraf, resident of Jamal Road Patna-1, P.O.-G.P.O., P.S.-Kotwali, District-Patna.

14. S. Ziyauddin Ashraf Son of Late Syed Azizuddin Ashraf, Resident of Mohalla-

Chitkohra, P.O.-Anishabad, P.S.-Gardanibagh, District-Patna.

15. Norruddin Ashraf Son of Late Azizuddin Ashraf resident of Mohalla-Chitkohra, P.O.-Anishabad, P.S.-Gardanibagh, District-Patna.

16. Mano Asharaf Son of Late Syed Azizuddin Ashraf resident of Mohalla-Chitkohra P.O.-Anishabad, P.S.-Gardanibagh, District-Patna.

17. Mostt. Shanti Devi, W/o Late Deokinandan Rai, resident of village Bainon Tola, P.O.-Anishabad, P.S.-Gardanibagh, District-Patna.

18. Bihari Pandit.

19. Bandhu Pandit.

20. Sudhai Pandit.

21. Hari Kishun Pandit.

22. Gopal Pandit.

All Sons of Late Mahavir Pandit.

All resident of Mohalla-Chitkohra, P.O.-Anishabad, P.S.-Gardanibagh, District-Patna.

23. Inder Rai Son of Late Bulkan Rai, Resident of village-Uran Tola, P.S.-Gardanibagh, P.O.-Anisabad, District-Patna.

24. Murari Singh Son of Late Sant Lal Singh, resident of village/Mohalla-Chitkohra, P.O.-Anisabad, P.S.-Gardanibagh, District-Patna.

25. Dwarika Thakur.

26. Chandradip Thakur.

Both sons of Late Jagdish Thakur.

Both residents of village-Dhira Chak, P.O.-Anisabad, P.S.-Gardanibagh, District-Patna.

27. Gulab Choudhari Son of Tiku Chaudhari r/o village-Bainan Tola, P.S.-Gardanibagh, P.O.-Anisabad, District-Patna.

28. That State of Bihar.

29. Smt. Nirmala Jha, Wife of Bishuti Narayan Jha, resident of Mohalla-Shastri Nagar, P.S.-Shastri Nagar, P.O.-Shastri Nagar, District-Patna.

30. Hari Nandan Chaudhary Son of Sri Govind Chaudhari r/o village-Rampur, P.S.-Kankarbagh, District-Nalanda, at present Mohalla-Punaichak, P.S.-Shastri Nagar, District-Patna.

31. Smt. Poonam Kumari wife of Sri Birendra Jha, resident of Mohalla-Patliputra Colony, P.O.and P.S.-Patliputra, District-Patna.

32. Sanjeev Kumar Son of Sri Shaligram Jha, resident of Mohalla-Anisabad, P.S.-

Gardanibagh, District-Patna.

33. Uma Nath Sinha, Son of Late Bhuneshwar Nath Sinha, resident of village-Bihar Sharif Nai Sarai, P.S.-Biharsharif, District-Nalanda at present Mohalla-Tamichak P.S.-Phulwarisharif, District-Patna.

34. Pramod Thakur.

35. Gopal Thakur.

36. Ashok Thakur.

37. Sagar Thakur.

All are sons of Late Kishun Thakur.

38. Mostt. Nageshwari Devi Wife of Radhey Thakur.

39. Binod Thakur.

40. Akhilesh Thakur.

41. Sukhdeo Thakur Son of Late Bakhori Thakur.

All residents of Mohalla-Chitkohra, Basti, Post Office-Anisabad, Police Station-Gardanibagh, District-Patna.

.... Opposite Parties.

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Appearance :

For the Petitioner/s : Mr. Sanjay Kumar Sharma, Adv.

For the Opp.Party Nos.2 to 5:Mr. Bishwanath Choudhary, Adv.

For the Opp.Party No.23: Mr. Radha Mohan Pandey, Adv.

Mr. Chandrashekhar Verma, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 27-07-2016

V.Nath, J.

Heard the learned counsel for the petitioner and the learned counsel appearing for some of the opposite parties.

The plaintiffs are the petitioners in this revision application and are aggrieved by the order passed by the learned court below setting aside the ex parte decree passed in T.S.No.306/1983.

From the materials on the record as well as the submissions on behalf of the parties, it is manifest that a suit for



partition was filed by the present petitioners as plaintiffs. In the said suit besides other defendants, the defendant no.10 Deonandan Rai was also impleaded as a party. The suit was ultimately decreed ex parte against defendant nos. 1,2,10,12 to 15 and 21 and on contest against the remaining defendants. Later on the petition was filed by the present opposite parties under Order 9 Rule 13 C.P.C praying for setting aside the ex parte decree asserting that they were the heirs and legal representatives of the defendant no.10 Deonandan Rai who was dead prior to the filing of the suit and the decree had been passed ex parte against him. The present petitioners contested the claim of the applicants-opposite party nos. 1 to 5. The learned court below by the impugned order has come to the finding that the defendant no.10 Deonandan Rai was dead on the date when the suit was filed and consequently set aside the ex parte decree passed in the suit restoring the same to its original file.

This revision application has been filed on 17.05.2013 and the office has pointed out that there has been delay of 8 months 7 days in filing this revision application. A separate petition for condonation of delay bearing I.A.No. 9221/2013 has been filed. A counter affidavit in the said petition has also been filed on behalf of the contesting opposite parties.

After considering the submissions and averments

made in the limitation petition and counter affidavit, the delay in filing this revision application is condoned.

On merits, it has been submitted by the learned counsel for the petitioners that the petition filed by the opposite party nos. 1 to 5 under Order 9 Rule 13 C.P.C. was not maintainable in view of the provision of Order 9 Rule 13 C.P.C. restricting it to only the defendants in the suit. Elaborating his submissions the learned counsel has contended that the opposite party nos. 1 to 5 were strangers to suit and therefore the learned court below has committed error in entertaining the petition filed by them initiating the Miscellaneous Case No. 10/2001 on that basis. The reliance has been placed on a judgment in the case of *Subahu Kumar Jain Vs. Jagdish Prasad Choudhary*, AIR 1990 Guwahati 66 in support of the contention that the stranger to a suit cannot maintain a petition under Order 9 Rule 13 C.P.C. It has been next submitted that the court was bound to consider whether when the prayer was made for setting aside the decree only by one of the defendants, the entire decree could not have been set aside. It has been propounded thus that the learned court below has committed material irregularity in allowing the prayer of the opposite party nos.1 to 5 and setting aside the entire decree restoring the suit to its original file.

Mr. R.N.Pandey, learned counsel who has



appeared for the opposite party no.23 and Mr.B.N.Choudhary, learned counsel who has appeared for opposite party nos.2 to 5 have supported the impugned order. It has been contended on behalf of the opposite parties that the fact of death of defendant no.10 prior to the filing of the suit which has also been substantiated by his death certificate has not been controverted by the petitioners. It has also been submitted that the opposite party nos. 2 to 5 are not strangers to the decree inasmuch as they are the heirs and legal representatives of the deceased defendant no.10 and therefore they are entitled to protect the property inherited by them in accordance with law.

After considering the submissions and perusal of the impugned order, it is manifest that the suit has been filed by the petitioners for partition in which besides other defendants the defendant no.10 Deonandan Rai was also a party. It is also manifest from the judgment and decree of the said T.S.No. 306/1983 that the suit was decreed ex parte against some of the defendants including the defendant no.10 and on contest against the remaining defendants. The opposite party nos. 1 to 5 filed the petition claiming themselves to be the heirs of the deceased Deonandan Rai. The submission on behalf of the petitioners that the opposite party nos. 1 to 5 could not have maintained the petition even if they are heirs of the deceased defendant no.10 but not parties to the suit cannot be sustained in view

of the provision of Section 146 C.P.C which reads as follows:

146. Proceedings by or against representatives.-*Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.*

There is no pleading on behalf of the petitioners either before this Court or in the court below that the opposite party nos. 1 to 5 are not the heirs and legal representatives of the deceased defendant. The decision in the case of **Subahu Kumar Jain (Supra)** has been rendered in an entirely different setting of facts and the relevancy of the concept of the stranger to the decree will differ in the context and facts and circumstances of a case. As such, this Court does not find substance in the submission on behalf of the petitioners that the opposite party nos. 1 to 5 being the heirs and legal representatives of the deceased defendant no.10 would stand precluded from maintaining the petition under Order 9 Rule 13 C.P.C. for setting aside the ex parte decree against their predecessor-in-interest in view of the enabling provision of Section 146 C.P.C.



The next submission on behalf of the petitioners that the learned court below has committed material irregularity in not considering the fact that the prayer has been made only on behalf of the deceased defendant no.10 by his heirs for setting aside the ex parte decree and therefore the entire decree could not be set aside. It cannot be lost sight of that the suit was filed for partition and according to the well settled principles, in such a suit every party is plaintiff and defendant and if the decree against one of the parties is vitiated for any reason the entire decree would stand vitiated.

From the perusal of the impugned order, it is demonstrably clear that the learned court below has recorded a finding of fact on the basis of scrutiny of evidence that the defendant no.10 Deonandan Rai was dead before the filing of the suit. This Court in revisional jurisdiction cannot interfere with the finding of fact as recorded by the trial court and further finds that the learned court below has not committed error of jurisdiction and material irregularity in setting aside the ex parte decree for partition in entirety.

The learned counsel for the petitioners has further submitted that the petitioner-decree holders are ready not to claim or execute the decree against the opposite party nos. 1 to 5. This submission is again misconceived at this stage as in revisional jurisdiction such a contention cannot be raised for the first time. In

any view of the matter, the civil litigations are to be decided as far as possible on merits after contest and the ex parte decree in such matters cannot be sustained except for strong reasons. This Court therefore is not inclined to accept this submission for setting aside the impugned order.

This revision application is, accordingly, dismissed.

(V. Nath, J)

Nitesh/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	09.09.2016
Transmission Date	