

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No. 1269 of 2016

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Krishna Chandra Prasad Singh @ Anil Kumar Singh S/o Late R.P.N. Singh R/o Chandrapura House, Cinema Road, P.O. & P.S. Hajipur, District Vaishali, at present residing at Bank Road, P.S. Gandhi Maidan, Town & District Patna.

.... Petitioner

Versus

1. Syed Askari Hadi Ali Augustine Imam @ Tootoo Imam, S/o Late Syed Hasan Imam.

2. Syed Hasan Francis Imam S/o Syed Askari Hadi Ali Augustine Imam @ Tootoo Imam

Both residents of KEHILAN, Village- Kesura, P.O. Rola, P.S. Hazaribagh Mufassil, Town & District- Hazaribagh.

3. Jitendra Kumar Sinha, Advocate S/o (not known) through Syed Askari Hadi Ali Augustine Imam @ Tootoo Imam, r/o Venar Avenue, P.S. Hazaribagh, Town & District Hazaribagh.

4. Harish Reddy, S/o Vijender Reddy, R/o 1406 Babukhan Estate, Bashirbagh, P.S. Narayanaguda, District- Hyderabad (Andhra Pradesh)

5. Syed Akabir Hussain S/o Late Syed Shakir Hussain R/o Hussain Khan Sarai, P.O. Sambhal, P.S. Muradabad, Town & District Muradabad (U.P.).

6. Dr. Shahida Hasan D/o Late Syed Hasan Ahmad Sami, W/o Azfar Hasan, R/o Ramna Road, Naya Tola, Near Sapna Apartment, P.S. Pirbahore, Town & District Patna.

.... Respondents

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Appearance :

For the Appellant/s : Mr. Harsh Singh, Adv.
Mr. Ravi Shankar Choudhary, Adv.

For the Respondent/s :

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

CAV JUDGMENT

Date: 07-12-2017.

1. Petitioner by filing this writ petition under Article 227 of the Constitution of India has assailed the part of order dated 29.09.2016 passed by learned Sub Judge-XI, Patna in Title Suit No. 71 of 2000 by which and whereunder learned Sub Judge-XI disposed of several petitions including petition filed on behalf of the petitioner



under Order 1 Rule 10(2) read with Section 151 of the C.P.C.

2. One Syeda Mehndi Imam filed Title Suit No. 71 of 2000 for declaration that purported Will dated 03.05.1998, said to be executed by her spinster daughter, namely, Shamim Amena Imam in favour of original defendants no. 1 and 2 of the suit, was forged, fabricated and manufactured document and on the basis of aforesaid Will dated 03.05.1998, the original defendants no. 1 and 2 did not acquire any right and title over the property of Shamim Amena Imam.

3. During pendency of the aforesaid Title Suit No. 71 of 2000, the sole plaintiff, namely, Syeda Mehndi Imam died and several persons claimed themselves to be her legal representatives and several petitions were filed to that effect on behalf of several persons. However, the court below vide order dated 09.01.2007 allowed one Faiz Murtaza Ali to represent the sole plaintiff-deceased, Syeda Mehndi Imam and accordingly, the aforesaid Faiz Murtaza Ali was substituted in place of original plaintiff, Syeda Mehndi Imam. It is pertinent to note here that by the same order dated 09.01.2007, the court below also added respondent no. 5, namely, Syed Akabir Hussain as defendant to the aforesaid suit giving liberty to him that in case the substituted plaintiff, Faiz Murtaza Ali found to be not conducting the suit properly, in that case the aforesaid Syed Akabir Hussain would be entitled to take steps for his transposition in place



of the substituted plaintiff.

4. In view of the order dated 09.01.2007 passed by the court below, Faiz Murtaza Ali was substituted as plaintiff in place of Syeda Mehndi Imam and similarly, respondent no. 5, namely, Syed Akabir Hussain was added as defendant to the aforesaid suit. However, after substitution of Faiz Murtaza Ali as plaintiff in the aforesaid suit, the said Faiz Murtaza Ali also died and again dispute arose and several petitions were filed by different persons claiming their substitution (impleadment) as plaintiff in the suit. The petitioner, too, filed a petition under Order 1 Rule 10(2) read with Section 151 of the C.P.C. praying therein to implead him as plaintiff in the aforesaid Title Suit No. 71 of 2000 on the ground that Syeda Mehndi Imam had executed registered Will in his favour on 24.11.1999 but the petitioner came to know about the execution of aforesaid registered Will dated 24.11.1999 when the aforesaid registered Will dated 24.11.1999 was handed over to him by the Faiz Murtaza Ali on 19.06.2013.

5. The learned court below having perused the materials and examined the claims of petitioner and others passed the impugned order dated 29.09.2016 by which not only claim of the petitioner but also claims of Princeton Niketan Pvt. Ltd. and Saiyad Abid Imam were rejected.

6. The petitioner is aggrieved only to that part of the order



by which the claim of the petitioner was rejected by the court below.

7. It is also pertinent to note here that dispute of substitution of Faiz Murtaza Ali was brought before this court in C.W.J.C. No. 19030 of 2011 and this court vide order dated 07.02.2014 directed the trial court to make an enquiry in the matter of substitution of deceased, Faiz Murtaza Ali under Order 22 Rule 5 of the C.P.C. In compliance of direction of this court, the court below instituted Misc. Case No. 07 of 2014 for the purpose of making enquiry and having completed the enquiry the court below came to conclusion that respondent no. 5, namely, Syed Akabir Hussain was entitled to be substituted and to get transposed as plaintiff in the suit and accordingly, passing impugned order dated 29.09.2016 the learned court below ordered that respondent no. 5, namely, Syed Akabir Hussain be transposed as plaintiff in place of substituted deceased-plaintiff Faiz Murtaza Ali. However, the impugned order was challenged before this court in Civil Misc. Jurisdiction No. 1480 of 2016 in which a co-ordinate Bench of this court vide order dated 19.05.2017 quashed part of impugned order dated 29.09.2016 which relates to Shahnaz Ali and Seher Ali Saini, who were petitioners in aforesaid Civil Misc. Jurisdiction No. 1480 of 2016 and furthermore, the co-ordinate Bench of this court remitted the matter back to the learned court below to consider the claim of above stated Shahnaz



Ali, Seher Ali Saini as well as respondent no. 5, namely, Syed Akabir Hussain afresh and pass appropriate order after granting opportunity of hearing to them. This court also stayed the further proceeding of Title Suit No. 71 of 2000 till disposal of above stated dispute.

8. It is emerged out from the aforesaid facts that after death of Faiz Murtaza Ali, still the substitution matter is pending before the court below and furthermore, it is emerged out that earlier enquiry conducted by the court below under Order 22 Rule 5 of the C.P.C. was not accepted/approved by this court rather this Court directed the court below to pass afresh order on the point of substitution.

9. Learned counsel appearing for the petitioner submits that the learned court below failed to take note of this fact that petitioner is a necessary party of Title Suit No. 71 of 2000 because admittedly, the aforesaid Title Suit No. 71 of 2000 was brought by Syeda Mehndi Imam for declaration of Will dated 03.05.1998 as forged, fabricated, manufactured and fraudulent and furthermore, for declaration that on the basis of above stated alleged Will dated 03.05.1998, the defendants of that suit did not get any right and title over the property of deceased Shamim Amena Imam. He further submits that admittedly, Syeda Mehndi Imam was mother of late Shamim Amena Imam who was an unmarried lady and she pre-



deceased of Syeda Mehndi Imam and, therefore, after death of Shamim Amena Imam, it was Syeda Mehndi Imam who inherited her entire property being her legal heir but to put cloud over the right and title of late Syeda Mehndi Imam, the defendants of the aforesaid suit got prepared forged and fabricated Will dated 03.05.1998 and that was the reason Syeda Mehndi Imam filed Title Suit No. 71 of 2000. He further submits that Syeda Mehndi Imam executed registered Will in favour of the petitioner on 24.11.1999 but the aforesaid registered Will was not in the knowledge of the petitioner and for the first time, the aforesaid registered Will was brought into the notice of petitioner by Faiz Murtaza Ali in the month of June, 2013 and thereafter, the petitioner filed petition under Order 1 Rule 10(2) read with Section 151 of the C.P.C. and in the aforesaid circumstance, petitioner happens to be necessary party of Title Suit No. 71 of 2000.

10. Learned counsel for the petitioner further submits that it is well known proposition of law that in Mahomedan Law, there is no necessity to probate a Will. He further submits that after death of sole original plaintiff, Syeda Mehndi Imam, petitioner being legal heir of sole original plaintiff, namely, Syeda Mehndi Imam became entitled to inherit the property of Shamim Amena Imam but the alleged Will dated 03.05.1998 has put a cloud over the right and title of the petitioner and, therefore, petitioner is a necessary party to the



suit. He relied upon decision of **Braj Kishore Singh vs. Sri Raja Ram Prasad Yadav & Ors.** reported in 2002(4) PLJR 313 wherein a co-ordinate Bench of this court held that *“A legatee or executor of Will can be substituted in place of the testator or added as a party if he makes a claim on the basis of an unprobated Will.* He also referred the decision reported in 2007(1) PLJR 179 which follows the decision of **Suresh Singh and Anr. vs. Dr. Raja Ram Singh** reported in 1992(2) PLJR 129. He also referred the decision reported in (2010) 7 SCC 417 wherein the expressions **“necessary party”** and **“proper party”** was explained. Similarly, he relied upon decision reported in (2005) 6 SCC 733 wherein the term necessary party has been defined. He also cited decision of **Suresh Singh and another vs. Dr. Raja Ram Singh and others** reported in 1992 (2) PLJR 129. He also relied upon decision reported in (2015) 13 SCC 579 wherein it has been held that *“A beneficiary of a trust is necessary party if a dispute regarding the sale of property of the trust is sub judice in a suit.”*

11. On the other hand, learned counsel appearing for the respondents refutes the above stated submissions arguing that admittedly, Title Suit No. 71 of 2000 was filed by original plaintiff Syeda Mehndi Imam in the year 2000 and during pendency of aforesaid title suit, she died. However, Faiz Murtaza Ali was



substituted in his place by the order of the court below in the year 2007 and since then he continued as substituted plaintiff of aforesaid title suit till his death in the year 2013 and after death of Faiz Murtaza Ali, the petitioner came before the court below with forged and fabricated Will in the year 2013 i.e. after 17 years of filing the Title Suit No. 71 of 2000. He further submits that moreover, in Title Suit No. 71 of 2000, the genuineness of Will dated 03.05.1998 is sub judice and admittedly, petitioner has no concern with the Will dated 03.05.1998 and, therefore, the court below rightly rejected the petition filed by the petitioner under Order 1 Rule 10(2) read with Section 151 of the C.P.C. because the petitioner was neither necessary nor proper party of the aforesaid Title Suit No. 71 of 2000. He further submits that the learned court below had given liberty to petitioner to participate in the enquiry initiated under Order 22 Rule 5 of the C.P.C. but being aggrieved by the aforesaid direction of the court below petitioner preferred writ petition before this court though the said writ petition was subsequently withdrawn by the petitioner. He further submits that as a matter of fact, after death of Faiz Murtaza Ali the suit was abated as up till now, no person has been substituted in place of Faiz Murtaza Ali and, therefore, the petition filed under Order 1 Rule 10(2) of the C.P.C. could not have entertained by the court below because there is no suit in the eye of law. He further submits



that petitioner has no right and title in respect of property of Shamim Amena Imam unless the Will dated 03.05.1998 is declared void and illegal and, therefore, only on the basis of future expectation petitioner could not have been impleaded as party of the Title Suit No. 71 of 2000. He relied upon para-11 of decision reported in (2010) 7 SCC 417 wherein it has been held by the Apex Court of this country that *“Future expectation based on spes successionis cannot be entertained and on the aforesaid basis the party cannot be treated either necessary or proper party.* He further submits that petitioner was admittedly, given power of Attorney by Faiz Murtaza Ali and he was in constant touch with the Faiz Murtaza Ali since long but it is surprising enough that Faiz Murtaza Ali disclosed about the existence of the Will dated 24.11.1999 to the petitioner in the year 2013. He also submits that petitioner being Attorney of Tehmina Imam Punvani filed Civil Suit No. 155 of 1999 in the court of Sr. Civil Judge, Delhi against Syeda Mehndi Imam and others and, therefore, the aforesaid fact goes to show that the term of the petitioner was not cordial with original plaintiff Syeda Mehndi Imam and, therefore, the so-called Will said to be executed by Syeda Mehndi Imam in favour of the petitioner is forged and fabricated one and, therefore, the learned court below rightly rejected the claim of the petitioner.

12. Having heard the contentions of both the parties, I



have gone through the record. It is an admitted position that sole original plaintiff Syeda Mehndi Imam filed Title Suit No. 71 of 2000 for declaration of Will dated 03.05.1998 as forged and fabricated and during pendency of aforesaid Title Suit No. 71 of 2000, she died. It is also an admitted position that after her death a controversy regarding her legal representative arose as several persons claimed themselves to be her legal representatives. However, in the year 2007, the learned trial court ordered to substitute Faiz Murtaza Ali as legal representative of the original plaintiff, Syeda Mehndi Imam and also permitted the respondent no. 5, namely, Syed Akabir Hussain to be added as defendant of the aforesaid suit and a liberty was granted to respondent no. 5, namely, Syed Akabir Hussain to get himself transposed as plaintiff of the aforesaid suit, if the substituted legal representative, namely, Faiz Murtaza Ali fails to represent the suit properly on behalf of the deceased-plaintiff. It is also an admitted position that aforesaid Faiz Murtaza Ali, too, died and after his death, his wife and son, namely, Shahnaz Ali and Seher Ali Saini respectively filed substitution petition under Order 23 Rule 3 of the C.P.C. The respondent no. 5, namely, Syed Akabir Hussain, too, filed petition for transposition as plaintiff of the aforesaid suit. The dispute came before this court and this court directed the court below to conduct an enquiry under Order 22 Rule 5 of the C.P.C. The court



below conducted enquiry and ordered to transpose respondent no. 5, namely, Syed Akabir Hussain as plaintiff to the aforesaid suit but the above stated enquiry report and order of the court below was set aside by a Bench of this court vide order dated 19.05.2017 passed in Civil Misc. Jurisdiction No. 1480 of 2016 and the matter was again sent for afresh enquiry.

13. Order 22 Rule 5 of the C.P.C. says that “Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the court. Therefore, it is obvious from the aforesaid provision that disputed question of legal representative shall be decided by the court in an enquiry.

14. In the present case, this court vide order dated 19.05.2017 passed in Civil Misc. Jurisdiction No. 1480 of 2016 has already directed to reconsider the prayer of wife and son of Faiz Murtaza Ali as well as respondent no. 5, namely, Syed Akabir Hussain after giving opportunity of hearing to them.

15. Admittedly, the petitioner filed petition before the court below under Order 1 Rule 10 (2) of the C.P.C. which says that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party



improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

16. The bare perusal of aforesaid provision goes to show that it is discretion of the court to add or struck off a party but the aforesaid discretionary power should be exercised judicially. It is also obvious from the aforesaid provision that a person can be added as plaintiff or defendant of the suit, if his presence in the suit is necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In the present case, when the Title Suit No. 71 of 2000 was filed, the petitioner had not acquired any interest in the property of Shamim Amena Imam because admittedly, the petitioner has based his claim on the basis of alleged Will said to be executed by original plaintiff of Title Suit No. 71 of 2000. Therefore, if the claim of the petitioner is accepted, then in that event also, the petitioner got cause of action after death of original plaintiff Syeda Mehndi Imam. Therefore, in my view, petitioner ought to have filed substitution petition under Order 22 Rule 3 of the C.P.C. for substitution of his name in place of original



plaintiff but it is the case of the petitioner that he got knowledge about the registered Will dated 24.11.1999 in the month of June, 2013 and admittedly, prior to that Faiz Murtaza Ali had already substituted in place of original plaintiff, Syeda Mehndi Imam. However, it is apparent from the aforesaid facts that Faiz Murtaza Ali has not been added as plaintiff in the aforesaid suit in his individual capacity rather he was substituted in place of original plaintiff with a purpose that interest of sole plaintiff-deceased could be protected. Therefore, it cannot be said that presently, the question of substitution of deceased Faiz Murtaza Ali is pending before the court below rather the question before the court below is who will represent the interest of original plaintiff Syeda Mehndi Imam in Title Suit No. 71 of 2000. Therefore, the petitioner has still opportunity to file a petition under Order 23 Rule 3 of the C.P.C. before the court below seeking his substitution in place of deceased-plaintiff.

17. It is also an admitted position that after the order passed in Civil Misc. Jurisdiction No. 1480 of 2016, the enquiry under Order 22 Rule 5 of the C.P.C. is still pending before the court below and, therefore, in my view, this petition should be disposed of directing the court below to treat the petition dated 27.09.2013 filed on behalf of petitioner under Order 22 Rule 3 of the C.P.C. and take the aforesaid petition along with the claim of the Shahnaz Ali, Seher



Ali Saini and respondent no. 5, namely, Syed Akabir Hussain under the enquiry initiated under Order 22 Rule 5 of the C.P.C. and pass appropriate order in accordance with law on the above stated petition dated 27.09.2013 along with other petitions within a period of two months from the date of receipt/production of copy of this order.

18. In the aforesaid manner, the impugned order dated 29.09.2016 stands set aside to the extent which relates to the petitioner and accordingly, this writ petition stands disposed of with the above stated observations/directions.

(Hemant Kumar Srivastava, J)

SHAHZAD/-

AFR/NAFR	A.F.R.
CAV DATE	30.11.2017
Uploading Date	08.12.2017
Transmission Date	N.A.

