

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.125 of 2015

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1. Md. Mokimuddin @ Md. Moquim son of Late Malik Mian resident of Village Makhdampur, Police Station Katihar, District Katihar.

.... Petitioner/s

Versus

1. Md. Shaheed son of Late Malik Mian resident of Village Makhdampur, Police Station Katihar, District Katihar.
2. Md. Rustam Ali son of Late Malik Mian
3. Md. Sharif son of Late Malik Mian Both resident of Village Makhdampur, Police Station Katihar, District Katihar.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Khatim Reza

For opposite party no.1 Mr. Ratnakar Ambastha

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
ORAL JUDGMENT

Date: 23-11-2017

1. Counter affidavit is filed on behalf of the opposite party no.1. Let it be kept on record.

2. Heard learned counsel for the petitioner and learned counsel for opposite party no.1.

3. This revision petition has been preferred against the order dated 10.9.2015 passed by Addl. District Judge III, Katihar in Probate Case no. 01/2012 by which and whereunder he rejected petition dated 16.6.2015 filed on behalf of the petitioner under Order 14 rule 2 of the CPC.

4. Opposite party no.1 filed Probate Case no.



01/2012 on the basis that his father, namely, Malik Mian executed registered Will in his favour as well as in favour of remaining heirs. Petitioner appeared in the aforesaid probate case and filed petition under Order 14 rule 2 of the CPC praying therein to decide the aforesaid case framing preliminary issue about legality of the Will as his consent was not taken after death of late Malik Mian which is clear violation of Article 117 of the Mohammedan Law.

5. The court below, having considered the above stated objection, passed the impugned order holding that the aforesaid issue shall be decided along with other issues.

6. Learned counsel for the petitioner assailed the impugned order submitting that Article 117 of the Mohammedan Law clearly states that if a Will is executed in favour of a heir, the consent of other heirs is required after death of the testator but learned court below failed to take note of the aforesaid legal proposition, particularly, in the circumstances, when in rejoinder dated 10.7.2015, it has been admitted by opposite party no.1 that consent had not been taken after



death of the testator. He, further, submitted that moreover, as soon as objection is filed in probate case, it would be deemed that consent was not given and, therefore, the above stated probate case was not maintainable but even then learned court below decided to proceed with the aforesaid case.

7. On the other hand, learned counsel for opposite party no.1 refuted the above stated submissions arguing that the above stated question is a mixed question of fact and law and, therefore, that can not be decided as a preliminary issue. He, further, submitted that, as a matter of fact, late Malik Mian, who happened to be father of the petitioner and opposite party no.1, had executed registered Will in favour of his four sons in their presence as well as in presence of the witnesses but the petitioner got executed sale deed in respect of some property and that is the reason, he filed objection in Probate Case no. 01/2012 though after death of the testator, earlier he had given his consent regarding the Will in question.

8. Having heard the submissions of the parties, I went through the record. Here, I would like to refer order 14 rule 2 of the CPC which says that (1) notwithstanding



that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to –

(a) the jurisdiction of the court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

9. From perusal of the above stated provision, it is obvious that the court can dispose of the suit on an issue of law only in two circumstances. First, where the issue relates to the jurisdiction of the court and second, where a bar to the suit created by any law for the time being in force but in the present case, it has not specifically been admitted by opposite party no.1 that the petitioner had not given his consent after death of testator rather it has been pleaded in rejoinder that with an intent



to grab some land, the petitioner retreated back from his consent. Moreover, it is obvious that the above stated question is a mixed question of law and fact and, therefore, in my view, learned court below has rightly held that the aforesaid question shall be decided along with other issues and only on that ground, probate case can not be dismissed. Therefore, I do not find any illegality, irregularity or impropriety into the impugned order and hence, this revision petition stands dismissed. The impugned order dated 10.9.2015 passed by Addl. District Judge III, Katihar in Probate Case no. 01/2012 is, hereby, confirmed.

Shahid

(Hemant Kumar Srivastava, J)

AFR	
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