IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.371 of 2013

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Dharmesh Kumar

.... Petitioner/s

Versus

Vijaywant Kumar Choudhary & Ors

.... Respondent/s

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Appearance :
For the Petitioner/s : Mr. Raj Kishore Prasad Singh
For the Respondent/s : Mr. Null

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL ORDER

4 12-09-2017 **1.** Heard the learned counsel, Mr. R. K.P. Singh, for the petitioner and the learned counsel, Mr. Gopal Shankar, for the respondent.

2. This writ application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 24.7.2012 passed by learned Sub Judge II, Dalsinghsarai in Money Suit No.7 of 1995 whereby the learned Sub Judge has rejected the substitution application on the ground that the brother of the sole plaintiff is there, therefore, he should be substituted in place of the sole plaintiff.

3. From perusal of the impugned order, it appears that the respondent filed application for being substituted on the ground that sole plaintiff has executed a Will in favour of the petitioner. The money suit was filed by the sole plaintiff against Yashwant

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Kumar Chaudhary and his three sons. The Court below by the impugned order allowed the substitution application filed by respondent in view of provision as contained in section 211(2) of the Indian Succession Act without considering the fact that the money suit was filed by Srimant Chaudhary against his brother Yashwant Kumar Chaudhary and his sons and if now Yashwant Kumar Chaudhary is substituted in place of the sole plaintiff then the suit will become infructuous. The Court below also did not consider the fact that the sole plaintiff, Srimant Chaudahry, prayed for 2,70,000/- and odd from Yashwant Kumar Chaudhary and his sons, therefore, the case of the sole plaintiff and the case of the defendant is entirely different as such in place of the plaintiff, Yashwant Kumar Chaudahry could not have been substituted. The other question is the petitioner is claiming that sole plaintiff has executed a Will and for that he has filed a probate case which is still pending. It is settled principle of law that on the basis of unprobated Will also for that purpose of Order 22 Rule 3 a legatee can be substituted in place of the testator.

4. In view of my above discussion, I find that if the order impugned is allowed to stand, it will occasion failure of justice. Therefore, this writ application is allowed. The impugned order is set aside and the present petitioner is substituted in place of the

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deceased sole plaintiff only for the purpose of Order 22 Rule 3of the Code of Civil Procedure. The right, title, and interest or whatever the case may be, it will be the subject matter of final decision.

(Mungeshwar Sahoo, J)

Sanjeev/-

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