

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4150 of 2013

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Shambhu Nath Sikaria S/o Sri Radhakishun Sikaria, resident of mohalla- Nakchhed Tola, P.O. and P.S.- Motihari Town, District- East Champaran. Petitioner/s

Versus

1. Pradeep Son of Late Radheshyam Pd., Mohalla Sevari, PO- Sevari, Ward No. 7, House No. 27, Dist. Deoria, Kushinagar (U.P.)
 2. Ramesh Son of Late Radheshyam Pd., Mohalla Sevari, PO- Sevari, Ward No. 7, House No. 27, Dist. Deoria, Kushinagar (U.P.)
 3. Santosh Son of Late Radheshyam Pd., Mohalla Sevari, PO- Sevari, Ward No. 7, House No. 27, Dist. Deoria, Kushinagar (U.P.)
 4. Mala Devi Daughter of Late Radheshyam Pd., Mohalla Sevari, PO- Sevari, Ward No. 7, House No. 27, Dist. Deoria, Kushinagar (U.P.). Respondent/s
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Appearance :

For the Petitioner/s : Mr. Shashi Shekhar Dvivedi, Sr. Adv.
Mr. Parth Gaurav, Adv.
Mr. Mtithilesh Kr. Upadhyay, Adv.

For the Respondent/s : Mr. Md. Anis Akhtar, Adv.
Mr. Sanjeet Devkuliari, Adv.

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

Date: 06-03-2018

This application has been filed by the plaintiff of Title Suit No. 255 of 1984 pending in the court of Sub-Judge-I, Motihari to quash the order dated 07.02.2013 whereby and whereunder the prayer of the petitioner made in the petitions dated 15.12.2011, 15.03.2012 and 11.10.2012 was rejected.

2. The petitioner has prayed to hold enquiry as regards legal heir/representative of deceased and for staying the further proceeding till enquiry.

3. Heard learned counsels for the petitioner as well as the respondents.



4. The petitioner had filed Title Suit No. 255 of 1984 against the original defendant, Smt. Kishori Devi for specific performance of contract. The said suit ended in compromise and defendant Kishori Devi agreed to execute the sale deed in favour of the petitioner. The defendant did not execute the sale deed and so the petitioner filed Execution Case No. 1 of 1986. The defendant filed Miscellaneous Case No. 21 of 1986 for setting aside the compromise judgment and decree dated 07.12.1985. The said miscellaneous case was dismissed and the sale deed was executed in favour of the petitioner on 20.03.1989 through the process of the court. After execution of sale deed, a proceeding under section 144 Cr.PC was initiated between the parties which converted into proceeding 145 Cr.PC and it was decided in favour of the petitioner. The said miscellaneous case was dismissed as per order dated 13.03.1989 against which, the defendant filed Miscellaneous Appeal No. 132 of 1989 before this Court which was allowed on 22.11.1996. This Court while disposing of the miscellaneous appeal, directed the court below to dispose of the suit as early as possible preferably within six months from the date of receipt and/or production of the order. The defendant did not take any step for about 15 months and in course of pendency of suit, Kishori Devi died on 17.03.2007. In the year 2011, an application dated 02.02.2011 was filed before the District Judge,



Motihari purported to be filed on behalf of Kishori Devi praying therein to rehear the title suit and on that application the suit was reopened. The defendant did not turn up and so the case proceeded *ex parte*. During the pendency of the suit, one Pradeep Kumar claiming to be son of original defendant Kishori Devi, filed an application on 28.04.2011 praying therein to dismiss the suit as abated for non-substitution of sole defendant. A rejoinder to the said petition was filed by the plaintiff-petitioner. This petitioner further filed a substitution petition under Order 22 Rule 4 of Code of Civil Procedure on 07.06.2011 for expunging the name of original defendant and for substitution of her heir which was allowed vide order dated 07.06.2011. After summons, one Pradeep Kumar appeared in the said suit by filing vakalatnama. After appearance of Pradeep Kumar, dispute arose about the real legal heir/representative of deceased Kishori Devi. Both Pradeep Kumar claimed to be legal heir of Kishori Devi. Out of aforesaid two Pradeep Kumar, one filed written statement supporting the case of plaintiff and another Pradeep Kumar filed written statement on 24.06.2011 denying the case of the plaintiff. Both of them claimed to be legal heir of Kishori Devi. The court below rejected the petition of Pradeep Kumar, who was being represented through his counsel, Shri Bam Shankar Prasad. The said Pradeep Kumar filed C.W.J.C. No. 15759 of 2001, which was



dismissed. Thereafter, the petitioner filed a petition for declaring the contesting defendant as fake person. The court below as per impugned order rejected the prayer of the petitioner and the written statement filed by the contesting defendant on 24.06.2011 was accepted and the case was fixed for evidence.

5. Learned counsel for the petitioner cited the provision of Order 22 Rule 5 of Code of Civil Procedure which runs as follows:-

“Order 22 Rule 5 –Determination of question as to legal representative.-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.”

6. Referring to the above provision, it has been submitted that the court below ought to have enquired into the matter as to which of Pradeep Kumar is a legal heir of deceased Kishori Devi. The court below without examining into the matter, accepted the written statement of the contesting defendant, which is beyond the scope of Order 22 Rule 5 of Code of Civil Procedure.

7. The learned counsel for the petitioner cited ruling reported in (2008) 8 SCC 521 (Jaladi Saguna v. Satya Sai Central Trust and others) wherein the Hon’ble Apex Court at para 17 has held as follows:-

“.....When Saguna, the first respondent in the appeal before the High Court died, the proper course for the High Court, was first to decide as to



who were her legal representatives. For this purpose the High Court could, as in fact it did, refer the question to a subordinate court under the proviso to Rule of Order 22 CPC to secure findings. After getting the findings, it ought to have decided that question, and permitted the person(s) who are held to be the legal representative(s) to come on record. Only then there would be representation of the estate of the deceased respondent in the appeal.”

8. Thus from the provision of Order 22 Rule 5 of Code of Civil Procedure and the observation of the Hon’ble Apex Court it is apparent that the provision of making enquiry as regards legal heir/representative of deceased is mandatory. In the case, in hand, the court below without making enquiry accepted the written statement filed by the contesting defendant of one Pradeep Kumar purported to be son of original defendant. The court below is required to determine as to who out of two Pradeep Kumar is real legal heir/representative of the deceased before the suit is proceeded.

9. In view of above facts, the impugned order dated 07.02.2013 passed in T.S. No. 255 of 1984 is not sustainable and is accordingly set aside. The court below is directed to enquire into the matter and pass order as per provision of law preferably within 3 months from the date of this order.

10. This application is accordingly disposed of.

Mahesh/-

(Sanjay Kumar, J)

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	17.03.2018
Transmission Date	

