

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10044 of 2014

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Surendra Goshwami son of Late Mohan Gosain, resident of Mohalla-Goving-pur,
P.O. and P.S. Fatuha, District Patna.

.... Petitioner/s

Versus

1. Bijendra Goswami son of Late Mohan Gosain
 2. Smt. Anita Devi wife of Bijendra Goswami
 3. Babloo Goswami @ Babloo son of Bijendra Goswami
- All residents of Mohalla- Govindpur, P.O. and P.S. Fatuha, District- Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : M/s Ravindra Kr Sinha No.2 and Achintya Anand, Adv.
For the Respondent/s : Mr. Manoj Madhav, Adv.

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

Date: 06-03-2018

The defendant no. 4 of Title Partition Suit No.154 of 2013 has filed this application for setting aside the order dated 13.05.2014 passed by the Sub-Judge-I, Patna City whereby and whereunder the prayer of petitioner to transpose him in the category of plaintiff was rejected and the suit of the deceased plaintiff was ordered to be withdrawn on the application filed on 06.06.2013.

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

3. The original plaintiff Mosmat Kewla Devi filed the aforesaid suit for partition of land mentioned in schedule-A of the plaint and also for declaration that the sale deed dated 15.03.2013 executed by her in favour of defendant no. 2 be declared as illegal,



void, sham and not binding on the plaintiff and defendant 2nd set. The suit was filed on 10.04.2013 and the defendants were summoned. The plaintiff filed requisites for notices on defendants and on the same day, a fresh vakalatnama of plaintiff along with a petition to withdraw the suit was filed. The present petitioner, who was defendant no. 4 in the said suit, appeared on 16.12.2013 and filed a written statement. He supported the case of plaintiff Kewla Devi. The sole plaintiff Kewla Devi died on 31.12.2013 and thereafter, this petitioner filed a petition on 17.01.2014 for transposing him as plaintiff. The said petition was rejected as per order dated 13.05.2014.

4. Learned counsel for the petitioner submits that the court below had no jurisdiction to pass order on withdrawal petition purported to be filed by the plaintiff on 23.05.2013. The petition for withdrawal of suit was not filed by the lawyer, who had filed the plaint for partition of the suit property. The withdrawal petition along with fresh vakalatnama of a different lawyer was filed fraudulently in order to deprive the petitioner from his valuable right. In this regard, learned counsel for the petitioner referred the provision of Order 3 Rule 4 of Code of Civil Procedure which relates to appointment of Pleader engaged for conducting the case.

5. Learned counsel for the respondents on the other hand submits that the plaintiff had voluntarily filed the petition to withdraw



the suit by engaging another lawyer. The said petition is supported with an affidavit. The court below, after hearing both sides and on being convinced with the submission of the learned counsel for the plaintiff, has rightly ordered to withdraw the suit.

6. The provision of Order 3 Rule 4 of Code of Civil Procedure relates to appointment of Pleader. Sub-rule (2) of Rule 4 of Order 3 reads as under:

“Every such appointment shall be [filed in Court and shall, for the purposes of sub-rule (1), be] deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.”

7. In the case, in hand, the sole plaintiff Mosmat Kewla Devi died on 31.12.2013 and so after her death, the relationship of client and conducting lawyer ended. The concerned advocate had no authority to move the application for the deceased plaintiff and so the order directing withdrawal of suit is not legally sustainable. It further appears that the petitioner is one of the son of plaintiff Kewla Devi and she had filed a suit impleading her two sons, one daughter-in-law and one grandson as party to the suit. The plaintiff had claimed half share against the defendants including the present petitioner. She further sought relief for declaration with respect to document which



was allegedly brought into existence by committing fraud on her. This petitioner being son of original plaintiff supported the entire case of the plaintiff. The suit is between co-sharers and each co-sharer has right to proceed with the case and so in case of death of plaintiff or abandoning the claim by the plaintiff, the other defendants/co-sharers have right to proceed with the case. The learned counsel for the petitioner has cited ruling reported in AIR 1987 Rajasthan 177 (Mahonar Singh v. Mst. Sardar Bai and others) wherein at para 4 it has been held as follows:-

“The position in a suit for partition of immovable property filed by a joint coparcener stands on a different footing altogether. In such suit for partition of immovable property even the defendants have the same right to claim partition and it is not material as to in what manner the parties are arrayed as plaintiffs or defendants in the suit. Even the defendants can be transposed as plaintiffs and can continue the suit if they feel that the plaintiff is not continuing the suit in their interest. Thus in such kind of suit no absolute right can be held in favour of the plaintiff of withdrawing a suit under Order 23 Rule 1 of Code of Civil Procedure.”

8. In the present suit, the plaintiff had challenged the genuineness of a registered sale deed purported to be executed in favour of the defendant 1st set. This petitioner supported the case of plaintiff as regards committing fraud and forgery in execution of sale deed and also the claim of partition. This petitioner has also share in



the said property and so he has right to protect his interest. The court below has erred in allowing the withdrawal of suit in favour of a person who was already dead.

9. In view of above facts, the impugned order dated 13.05.2014 passed in Title Partition Suit No. 154 of 2013 is not sustainable and is accordingly set aside.

10. This application is accordingly allowed.

(Sanjay Kumar, J)

Mahesh/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	12.03.2018
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