

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.747 of 2016

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1. Tarique Iqubal Bari @ Tarique Bari S/O late Shahbuddin Bari;
 2. Ishrat Jahan Bari wife of late Shahbuddin Bari;
 3. Shaista Bari, D/O late Shahabuddin Bari;
 4. Zahid Iqubal Bari @ Zahid Bari S/O late Shahbuddin Bari; Nos. 1 to 4 are resident of Narkatiaganj, P.S. Shikarpur, District West Champaran - at present residing at Pipra Kauwaha, P.S. Subhadra, District West Champaran.
 5. Mahe Anjum Seema Bari, D/O late Shahbuddin Bari and W/o Imtiaj Ahmad;
 6. Fahimun Nisha Bari D/O late Shahbuddin Bari and Wife of Israr Ahmad. Nos. 5 to 6 are resident of Narkatiaganj, P.S. Shikarpur, District West Champaran- at present resident at Ikra, P.S. Jahanabad, District Jahanabad.

.... Petitioner/s

Versus

1. Om Prakash S/O late Paspas Prasad, resident of Narkatiaganj, Ward No. 16, P.S. Shikarpur, District- West Champaran.

.... Respondent/s

with

Civil Writ Jurisdiction Case No.25675 of 2013

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1. Tarique Iqubal Bari S/O Late Shahbuddin Bari Resident Of Narkatiaganj, P.S. Shikarpur, District West Champaran At Present Resident Of Pipra Kauwaha, P.S. Subhadra, District West Champaran.
 2. Ishrat Jahan Bari W/O Late Shahbuddin Bari Resident Of Narkatiaganj, P.S. Shikarpur, District West Champaran At Present Resident Of Pipra Kauwaha, P.S. Subhadra, District West Champaran.
 3. Shaista Bari D/O Late Shahbuddin Bari Resident Of Narkatiaganj, P.S. Shikarpur, District West Champaran At Present Resident Of Pipra Kauwaha, P.S. Subhadra, District West Champaran.
 4. Zahid Iqubal Bari @ Zahid Bari S/O Late Shahbuddin Bari Resident Of Narkatiaganj, P.S. Shikarpur, District West Champaran At Present Resident Of Pipra Kauwaha, P.S. Subhadra, District West Champaran.
 5. Maha Anjum @ Seema D/O Late Shahbuddin Bari And W/O Imtiaj Ahmad Resident Of Narkatiaganj, P.S. Shikarpur, District West Champaran At Present Residing At Ekra, P.S. Jahanabad, District Jahanabad.
 6. Fahim Munnisa Bari D/O Late Shahbuddin Bari And W/O Israr Ahmad Resident Of Narkatiaganj, P.S. Shikarpur, District West Champaran At Present Residing At Ekra, P.S. Jahanabad, District Jahanabad.

.... Petitioner/s

Versus

1. Om Prakash S/O Late Paspas Prasad Resident Of Narkatiaganj, Ward No. 16, P.S. Shikarpur, District West Champaran.

.... Respondent/s



Appearance :

(In C.Misc. No.747 of 2016)

For the Appellant/s : Mr. Jagdish Prasad Bhagat

For the Respondent/s : Mr.

(In CWJC No.25675 of 2013)

For the Petitioner/s : Mr. Jagdish Prasad Bhagat

For the Respondent/s : Mr. Jagdish Prasad Bhagat

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR

JHA

ORAL ORDER

8 12-02-2018 Heard Mr. J.S.Arora, learned senior counsel for the petitioners and Mr. Syed Firoz Reza, learned counsel for the respondent.

The petitioners filed CWJC No.25675 of 2013 against the order dated 17.07.2013 passed in Partition Suit No.261 of 2002 by which the learned Sub Judge allowed the petition of respondent No.2, Om Prakash filed under Order I Rule 10 C.P.C. and impleaded him as defendant No.2.

The petitioners also filed civil miscellaneous No.747 of 2016 against the order dated 24.05.2016 passed by the learned Sub Judge, Narkatiaganj whereby the petition of the petitioner filed under Order 23 Rule 1 has been dismissed and the newly added respondent, Om Prakash, was transposed as plaintiff. Therefore, both these petitions are heard together and disposed of by this common order.

The facts giving rise to the filing of both these petitions are that petitioners are plaintiffs in Partition Suit No.261



of 2002. One Prof. Abdul Bari died leaving behind two sons namely Salauddin Bari, Shahbuddin Bari and three daughters namely Tahira Khatoon, Miss Hamida Bari and Ms. Sayeeda Bari. Tahira Khatoon migrated to Pakistan and she died later on. Shahbuddin got two sons and three daughters. The plaintiffs are the widow, sons and daughters of Shahbuddin, one of the sons of Abdul Bari. Salauddin another son of Abdul Bari died issueless. Two daughters of Prof. Abdul Bari Miss Hamida Bari and Miss Sayeeda Bari, were unmarried. During the pendency of this partition suit, Miss Hamida Bari died on 20.10.2011. The petitioner filed petition on 03.01.2012 to delete the name of Hamida Bari as her legal heirs are already on record. The sole defendant, Sayeeda Bari filed rejoinder on 08.02.2012 and she disclosed that Hamida Bari on 10.10.2011 orally gifted her share to a trust and she was appointed as trustee of her share. She nowhere disclosed that Om Prakash newly added defendant No.2 respondent was also appointed as one of the trustees of the share of Hamida Bari but Sayeeda Bari got a trust deed in existence on 23.01.2012 admittedly before filing of rejoinder. In the present suit, before filing of rejoinder on behalf of Sayeeda Bari on 08.02.2012, Sayeeda did not disclose this fact in her rejoinder. Thereafter Om Prakash filed a petition under Order I Rule 10 that



he be added as respondent to protect the share of Hamida Bari and the learned Sub Judge vide his order dated 17.07.2013 allowed the petition of Om Prakash to be added as defendant for deciding the genuineness of the trust deed. The petitioner filed writ petition being CWJC No.25675 of 2013 against the aforesaid order. Sayeeda Bari also died on 02.08.2014. Thereafter, the petitioner filed petition under Order 23 Rule 1 C.P.C. to withdraw the partition suit as none remained to contest the partition suit and the plaintiff inherited the entire property but the petition of the petitioner was rejected and Om Prakash, who was added as defendant No.2, has been ordered to be transposed as plaintiff.

Mr. J.S.Arora, learned senior counsel for the petitioner submits that Om Prakash is not a necessary party in the partition suit pending between the legal heirs of Prof. Abdul Bari. Ms. Hamida Bari one of the daughters of Abdul Bari died on 20.10.2011. She never executed any trust deed under Section 5 of the Indian Trust Act. It mandates that no trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the Will of the author of the trust or of the trustee. It is submitted that admittedly on the date of death of Hamida Bari on 20.10.2011, no trust was in existence nor



the same was registered. The trust was registered only on 23.01.2012. Sayeeda Bari got the trust executed on 23.01.2013. When she filed rejoinder of the petition of the plaintiff for deletion of the name of Hamida Bari dated 08.02.2012 Sayeeda Bari did not disclose this fact in her entire rejoinder that Om Prakash was also appointed as a trustee by her deceased sister, Hamida Bari. Therefore, it is submitted that there is an interpolation and the name of Om Prakash who is a stranger only inserted to grab the land. He is not at all interested in disposal of partition suit as he is not in any way legal heirs of Prof. Abdul Bari. It is further submitted that learned Sub Judge has allowed the petition on erroneous consideration that the genuineness of the trust is to be decided in the partition suit. In the partition suit, the genuineness of the trust cannot be decided and, therefore, the order is not legal and sustainable. Mr. Arora further submitted that in the second order, the Sub Judge has again committed jurisdictional error by transposing Om Prakash, stranger to the family as plaintiff. Once the order dated 17.07.2013 is bad, the order transposing Om Prakash as plaintiff shall also go as the same is not in accordance with law.

Mr. Syed Firoz Reza, learned counsel for the respondent submitted that in view of last line of Section 5 of



Indian Trust Act, 1882, the unregistered trust can be created. It further submitted that if Om Prakash is appointed as trustee, he has got right to protect the share and interest of Hamida Bari who donated her property by oral Hiba in favour of the trust.

Having considered the submission of both sides and on perusal of the records, I find that it is admitted fact that the plaintiffs are the sons and daughters of Shahbuddin Bari, one of the sons of Abdul Bari. Abdul Bari died leaving behind two sons and three daughters. One son and one daughter died before institution of the partition suit leaving behind no legal heir. Miss Hamida Bari and Miss Sayeeda Bari were made defendant Nos.1 and 2. During the pendency of the partition suit, Hamida Bari died on 20.10.2011. Thereafter, the plaintiff filed petition for deleting her name as her legal heirs are already on record. Sayeeda Bari filed petition stating that Hamida Bari created a trust and donated her share to the trust. She was made one of the trustees in pursuance of many of the witness but admittedly on the death of Hamida Bari, the trust was not registered. From perusal of Section 5 of the Indian Trust Act, 1882, it appears that no trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered. Admittedly, on the date of death of



Hamida Bari, there was no document duly signed either by Hamida Bari or the trustee and the same document was registered.

Mr. Syed Firoz Reza, learned counsel for the respondent has submitted that the second part of the aforesaid provision shows that even if the trust deed is not registered it cannot be said that the same is illegal stating that or by the Will of the trust or the trustee. It is submitted that Hamida Bari expressed her will to donate her share by creating a trust and, therefore, the same is not required to be registered but I find no force and the same cannot be accepted as Sayeeda Bari, the surviving daughter of Prof. Abdul Bari did not disclose either in rejoinder or in the trust deed said to be registered on 23.01.2012 that Hamida Bari created or desired to create a Will for the purpose of creation of trust of her property. Therefore, the creation of trust itself is illegal. On the aforesaid facts, learned Sub Judge has committed jurisdictional error in allowing the petition of defendant No.2, Om Prakash to be added as respondent on the ground that genuineness of the trust can be decided to the party of the suit. In the partition suit the only fact to be decided about the entitlement of share and the genuineness of the trust deed cannot be decided in the partition suit.

Therefore, the order dated 17.07.2013 is not



sustainable. The order dated 24.05.2016 transposing Om Prakash as plaintiff is also illegal. Accordingly, both the orders dated 17.07.2013 and 24.05.2016 are hereby set aside.

Thus, Civil Miscellaneous No.747 of 2016 and CWJC No.25675 of 2013 are allowed.

(Prabhat Kumar Jha, J)

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