IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1275 of 2018
In
Civil Writ Jurisdiction Case No.5489 of 2009

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Ramchandra Khan, Son of Late Bahadur Khan Sharma, Resident of House No. 1, East of Park, Adarsh Colony, S.K. Nagar, Police Station Budha Colony, District Patna.

... ... Appellant/s

Versus

1. Sri Rajiv Kumar Sinha, Son of Late Arbind Kumar Sinha, Resident of Ground Floor, C/o T.S. Jamuar, C.P. Thakur Patha, Shivpuri attached to Professor Colony, Police Station A.N. College, District Patna.
2. The Union of India through the Secretary, Ministry of Finance, Government of India, New Delhi.
3. Debt Recovery Appellate Tribunal through Registrar, Debt Recovery Appellate Tribunal, 7 Old Post Office Street, 7th Floor, Kolkata.
4. Debt Recovery Tribunal, Patna through its Registrar, 396, Boring Canal Road, Patna.
5. The Recovery Officer, Debt Recovery Tribunal, 396, Boring Canal Road, Patna.
6. Punjab National Bank through the Senior Manager, Exhibition Road Branch, Police Station Gandhi Maidan, District-Patna.

... ... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Kamal Nayan Chaubey, Sr. Advocate
		Mr. Ambuj Nayan Chaubey, Advocate
		Mr. Prashant Kumar, Advocate
		Ms. Ritu Priyadarshani, Advocate
		Mr. Dineshwar Pandey, Advocate
		Mr. Animesh Kumar, Advocate
		Mr. Ashok Kr. Garg, Advocate
For the Respondent-Bank	:	Mr. Raj Nandan Prasad, Advocate
For the Respondent petitioner	:	Mr. Arbind Kumar Jha, Advocate
For the Respondent No. 2 to 5	:	None

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL ORDER

(Per: HONOURABLE THE CHIEF JUSTICE)

2 26-11-2018 Heard Shri Kamal Nayan Chaubey, learned Senior Counsel for the appellant and Shri Arbind Kumar Jha, learned counsel for the respondent No. 1 and Shri Raj Nandan Prasad,

learned counsel for the respondent No. 6-Punjab National Bank. None appears on behalf of the respondents No. 2 to 5.

This is a peculiar case where in the discharge of the liabilities of a loan, the proceedings went up to the Debts Recovery Tribunal and in respect of which the following facts are undisputed, namely, that the respondent No. 1, Rajiv Kumar Sinha, is the sole proprietor of M/s Thriller Enterprises, who is the borrower from the respondent No. 6-Bank. His father Late Arbind Kumar Sinha was the guarantor. The residential house of his father was under mortgage that was subjected to an auction in the proceedings under the D.R.T. Act, 1993. The appellant before us is the auction purchaser. The guarantor, namely, the father of the appellant, filed writ petition bearing C.W.J.C. No. 5489 of 2009, that has given rise to this appeal, challenging the proceedings of the Debts Recovery Tribunal. In the writ petition, the appellant was arrayed as respondent No. 7. The writ petitioner namely, Arbind Kumar Sinha, the father of the respondent No. 7 in the writ petition, died on 20th of November, 2014. On his death, he was substituted by his widow Smt. Kamla Devi. Unfortunately, Smt. Kamla Devi also died on 13th of July, 2016, leaving behind the respondent No. 1, Rajiv Kumar Sinha, as their heir, who admittedly is the only son of his parents.

On the death of the original petitioner and Smt. Kamla Devi, their daughter-in-law, Smt. Priya Sinha, filed an application for substitution on the ground that a Will has been executed in her favour, but the said application for substitution was rejected on 3rd of April, 2017 on the ground that the Will was unprobated.

Another application was filed jointly by the respondent No. 1 Rajiv Kumar Sinha, and his wife Smt. Priya Sinha praying for substitution, that was dismissed as withdrawn on 4th of September, 2017, with liberty to file an appropriate application for substitution.

It is in this background that the appellant, who is the auction purchaser, has come up contending that Rajiv Kumar Sinha, the respondent No. 1, has succeeded in getting himself deleted from the capacity of a borrower under the impugned order dated 25th of August, 2018, which was impermissible and it is urged by Shri Chaubey, learned Senior Counsel, that at best it can be a case of transposition and consequently, the impugned order virtually allows the respondent No. 1 to escape from his liability as a borrower. The contention, therefore, is that the impugned order is not in conformity with the principles laid down for substitution and transposition, as contained under Order XXIII of the Civil Procedure Code and consequently, the impugned order is unsustainable in law. He also contends that had it been a case of an individual, the transposition could have been permitted, but in the instant case, the writ petition was filed by the guarantor whereas the respondent No. 1, Rajiv Kumar Sinha, was represented in the capacity of the borrower firm, namely, M/s Thriller Enterprises and, therefore, in such a situation, no such right could have been exercised that has resulted in miscarriage of justice.

Learned counsel for the respondent No. 1 submits that the said respondent being the only son of his parents and in the wake of the fact that the substitution application had been rejected on 3rd April, 2017, that was moved by the wife, the answering respondent cannot be non-suited that would cause serious prejudice to him keeping in view his status and capacity as the sole legal heir of his parents after their death as he happens to be the only surviving class-I heir under the relevant provisions.

Learned counsel for the Bank has also submitted that no such order would cause prejudice to the interest of the Bank and consequently, the impugned order deserves to be modified.

Having considered the submissions raised, we find that for the purpose of substitution, the High Court has framed its Rules contained in Chapter VI of the Rules of the High Court at Patna relating to appointment of guardians and substitution of the legal representatives. Apart from this, the principles of Order I Rule 10 of the C.P.C., in our opinion, would also be attracted inasmuch as a litigation in the shape of a writ petition has to proceed with the arraignment of proper and necessary parties.

As to who would be a proper and necessary party is not far to decipher. Reference be had to the judgments in the case of ***Mumbai International Airport (P) Ltd. vs. Regency Convention Centre & Hotels (P) Ltd. [(2010)7 SCC 417]*** and in the case of ***State of Assam vs. Union of India & Ors. [(2010)10 SCC 408]***

The respondent No.1-Rajiv Kumar Sinha was rightly impleaded as respondent No. 7 in the capacity of a borrower.

The substitution is only to allow a person to sue or be sued in a particular capacity in place of the deceased suitor which does not involve adjudication of a title. This is necessary as a *lis* has to be resolved with the existence of proper and necessary parties. As involved in the present case, the dispute of the auction of the house was raised by the owner of the house who had mortgaged it. The interests of the deceased owner can be represented by a person who can step into his shoes after his death. This, therefore, is more of matter of procedure which has always been dealt with and held to be a handmaid of justice. It allows the litigant to exercise his right to avail of a judicial remedy. To enliven a right, there is a remedy in law which cannot be eclipsed or else it would result in miscarriage of justice. A person who has a right to assert cannot be left remediless and the life of the law cannot be doused by putting to an end to it on a mere doubt posed on account of any procedure.

We have come across the judgment in the case of ***Nirendra Kumar Bose vs. District Magistrate (AIR 1978 Patna 241)***, where it was held that in a matter arising out of the Revenue Recovery Act (1 of 1890), the Collector could not have altered the particulars of the recovery certificate by adding or substracting the name of any person as that would affect the identity of the defaulter. The said case, therefore, does not answer the proposition involved here, inasmuch as the subject-matter of controversy is the mortgaged house which has been auctioned in the present case. The identity of the house is therefore referable to the owner and the ownership whereof can be claimed by Rajiv Kumar Sinha, being the only son of his

Late father, subject to any other claim in this regard.

We have also come across the judgment in the case of ***Dukh Haran Tewary vs. Dulhin Bihasa Kuer (AIR 1963 Patna 390)***, that finds reference in the Apex Court's judgment in the case of ***Ambalika Padhi vs. Radhakrishna Padhi [(1992)1 SCC 667]***, where it has been held that impleadment of certain persons as legal representatives of a deceased party does not confer upon any title as such. The Apex Court further went on to hold that a legal representative of a deceased cannot assert his own individual or hostile title in the suit and he must abide by and continue the defence taken by the deceased defendant. Other authorities were also discussed by the Apex Court in the said judgment, where the right to sue in respect of a property by the legal representatives can be permitted if they are the natural heirs or if they claim on the basis of a deed, settlement or a Will. The conflict of interest in a dual capacity would be a matter of adjudication at the appropriate moment, but the same cannot be an impediment in the representation of the proper parties, as discussed above.

In the present case, Rajiv Kumar Sinha is a litigant in a dual capacity. He was impleaded as a sole proprietor of the firm. His father, who was the guarantor, was the petitioner who was questioning the auction proceedings of his mortgaged house and he died. Rajiv Kumar Sinha, being the only son of his Late father, was therefore entitled to be substituted. However, this substitution does not dissolve the capacity of the respondent to be represented as a sole proprietor of the firm, who coincidentally happens to be Rajiv Kumar Sinha himself. In these circumstances, it is for him to elect his own plea either as a petitioner or his defence as the proprietor of the firm, that would be subject to any adjudication in the pending *lis*. The issue of his capacity and his claim of any right or any apprehension about probating or approbating would be a matter of adjudication in the pending petition itself. The substitution of Rajiv Kumar Sinha in place of the petitioner therefore is necessary and, at the same time, his capacity as the sole proprietor of the respondent-firm does not get dissolved.

In such a situation, we do not find any reason for deleting the respondent No. 7 as the sole proprietor of the firm from the array of parties, for which the request had been made in I.A. No. 6987 of 2017, as the borrower was a proper and necessary party. To this extent, the impugned order dated 25th of August, 2018 cannot be sustained.

We, accordingly, partly set aside the order dated 25th of August, 2018, whereby permission was granted to delete the respondent No. 7 and allow the appeal to the aforesaid extent, leaving it open to the learned Single Judge to proceed in the matter, treating Rajiv Kumar Sinha to be the substituted heir in place of the original petitioner and allow him to take his stand also in relation to his separate capacity as a proprietor of the borrower-firm.

By allowing the aforesaid restoration of the parties aforesaid, this Court does not intend to cause any prejudice to the rights either of the Bank or the purchaser or their rights to take any objection in the event they apprehend any approbation and reprobation on the part of respondent No. 1, during the disposal of the writ petition.

The appeal stands partly allowed.

(Amreshwar Pratap Sahi, CJ)

(Anjana Mishra, J)

PNM/Saif/-

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