

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1188 of 2018

1. Harshan Rai @ Harasan Ray and Ors Son of Late Sarju Rai @ Saraju Ray
2. Lallu Rai, Son of Late Kantu Rai.
3. Vijaibahadur Rai, Son of Arjun Rai, All Resident of Village-Salempur, P.S.-Chainpur, Distirt-Kaimur Bhabua.

... .. Petitioner/s

Versus

Abhishek Kumar Agarwal Son of Late Kanti Prasad Agarwal, All Resident of Village-Salempur, P.S.-Chainpur, Distirt-Kaimur Bhabua.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Manoj Kumar Singh, Adv.
For the Respondent/s : Mr. Abhash, Adv.

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
ORAL ORDER

4 22-11-2022 Heard Mr. Om Prakash Upadhyay, learned counsel for the petitioners and learned counsel for the respondents.

2. The petitioners are aggrieved by an order dated 26.02.2018 passed in filed by Title Suit No. 97/2007 by which the learned trial court has rejected the petition filed by petitioners/plaintiff for substitution of Defendant No. 1 in the plaint who died on 25.12.2013.

3. Learned counsel for the petitioners submits that the petitioners are the plaintiff in the Title Suit No. 97 of 2007 which was filed for declaration of title upon the suit land.

4. Defendant No. 1 died on 25.12.2013. The case of the petitioner is that the petitioners were not knowing about the death of Defendant No. 1 and as soon as they got the knowledge



about the death, they filed a petition under Order 22 Rule 4 of the C.P.C. for deletion of his name and for substitution of his legal heirs on 03.08.2015. A petition for condonation of delay was also filed by the petitioners stating therein that the petitioners had no knowledge about the death of Defendant No. 1 and the moment they got the knowledge, they filed the substitution petition on 03.08.2015.

5. Learned counsel for the petitioner relied upon the judgment of Hon'ble Supreme Court reported in ***Mithailal Dalsangar Singh and Ors. vs. Annabai Devram Kini and Ors.*** 2003 (10) SCC 691.

6. On the other hand, learned counsel for the respondents submits that under Order 22 Rule 4 CPC, the petitioner was required to file a petition for setting aside abatement also and or a prayer could have been made by the petitioner in the substitution petition in this regard. No such petition or prayer has been made in the petition filed by the petitioner. As such, the learned trial court has rightly rejected the petition for substitution of Defendant No. 1. He further submits that provision of Order 22 Rule 4 CPC is mandatory in nature.

7. I have heard learned counsel for the parties, gone



through the impugned order and material on records. From Annexure- 2, it appears that the petitioner has filed a petition for substitution stating therein that after coming to know about the death of the Defendant No. 1/ Kanti Prasad Agarwal, the present petition for substitution of his legal heir has been filed with a prayer that in the place of Defendant No. 1, his legal heir Abhishek Kumar Agarwal be substituted as defendant. A petition for condonation of delay has also been filed along with the aforesaid petition for substitution.

8. Hon'ble Supreme Court, in the case of ***Mithailal Dalsangar Singh*** (supra) has held that prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement.

9. In view of the judgment of the Supreme Court and the fact that the petitioner filed a petition for substitution of the legal heir of Defendant No. 1 along with a petition for condonation of delay, as such, in my opinion the absence of specific prayer for setting aside abatement, cannot be construed that he did not make prayer for setting aside the abatement and the petitioner cannot be denied to substitute the legal heirs of defendant mainly on the basis of technical ground.



10. Accordingly, in order to advance the cause of substantial justice, the order dated 26.02.2018 passed by Sub Judge- 5th, Kaimur in Title Suit No. 97/2007 is set aside and the legal heir of Defendant No. 1 is directed to be substituted as defendant. Abatement, if any, is hereby set aside. Delay is condoned.

(Anil Kumar Sinha, J)

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