

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1228 of 2018**

Saroj Kumar, Son of Late Sri Krit Narayan Singh, Resident of Village- Chinia
Bela, P.S.- Punpun, P.O.- Punpun, District- Patna.

... .. Petitioner/s

Versus

1. Manish Kumar, Son of Late Shyam Narayan Singh.
2. Miss. Bibha Kumari, Daughter of Late Syam Narayan Singh.
3. Miss Prity Kumari, Daughter of Late Shyam Narayan Singh.
4. Ranish Kumar, Son of Late Shyam Narayan Singh.
5. Smt. Shakuntala, Devi W/o Late Shyam Narayan Singh.
6. Smt. Meena Devi, W/o Sri Krit Narayan Singh.
7. Sri Arbind Kumar, Son of Sri Krit Narayan Singh.
8. Sri Krit Narayan Singh, Son of Late Sheonandan Singh.
9. Sri Jai Narayan Singh, Son of Sri Sheonandan Singh. All are resident of
Village- Chinia Bela, P.O.- Punpun, P.S.- Punpun, District- Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Saroj Kumar Upadhyay, Advocate
For the Respondent/s	:	Mr.

**CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT**

Date : 24-03-2023

Heard learned counsel for the petitioner.

2. No one is present on behalf of respondents despite service of notice and given sufficient opportunities thus, I am proceeding to dispose of this case.

3. The instant Civil Miscellaneous Application under Article 227 of the Constitution of India is directed against the order dated 16.05.2018 passed by learned Sub-Judge 13, Patna in Title Suit No. 301 of 2005, whereby and whereunder the



petition filed by the petitioner under Section 10 read with Section 151 of Code of Civil Procedure seeking stay of a suit for partition bearing Title Suit No. 301 of 2005 was dismissed.

4. Respondents No. 1 to 5 / plaintiffs filed suit for partition being Title Suit No. 301 of 2005 which is pending in the Court of learned Sub-Judge -13, Patna in which the defendants appeared and filed their written statement denying the assertions made in the plaint. The issues have been framed in the suit and the trial commenced and some of the witnesses have also been examined.

5. On 11.09.2015 the petitioner filed a petition for stay of the proceeding of the said suit under Section 10 of the Code of Civil Procedure read with Section 151 of Code of Civil Procedure to stay the hearing of the suit till disposal of the L.A. Case No. 73 of 2010 on the ground that in both proceedings subject matter is same properties. The petitioner claimed that suit property involved in Title Suit No. 301 of 2005 is also subject matter of a Will dated 01.04.2005 executed by Sheo Nandan Singh, in his favour and on the basis of the said Will, petitioner filed letter of Administration Case No. 73 of 2010 which is pending in the Court of learned Additional District Judge- IX, Patna. The said petition has been rejected by the



learned trial Court vide the impugned order dated 16.05.2018.

6. Learned counsel for the petitioner submits that the learned trial Court failed to appreciate that decree in probate / Letter of Administration case is binding on the parties and accordingly to avoid multiplicity of the suit, the proceeding of title partition suit has to be stayed. Further it is stated that the learned Court below wrongly held that probate case and partition suit are filed for different purposes ignoring that properties involved in both the proceedings are the same and the decision in the testamentary proceeding on the question of validity of Will shall have direct impact on the partition suit. He has further submitted that the probate Court has exclusive jurisdiction in the matters relating to legality of a Will. If the partition suit proceeds independently and the plaintiff therein succeed, there would be possibility of inconsistent findings by two Courts, provided the petitioner succeed in the L.A. proceeding.

7. Learned counsel for the petitioner has submitted that in view of the well settled principles the suit for partition can be clubbed together with a testamentary proceeding as the decision in the testamentary proceeding on the question of validity of the Will shall have direct impact on the partition suit.



He has referred and relied on the decision of the Hon'ble Supreme Court in **Shamita Singha and Another Versus Rashmi Ahluwalia and Another (2020) 7 Supreme Court Cases 152** wherein the Supreme Court transferred the suit filed in Delhi High Court to Bombay High Court with direction that the suit and testamentary petition be heard by the same Judge and both the proceedings shall be heard simultaneously clubbing them together, if necessary. After referring many judgments the Hon'ble Apex Court in paragraph 10 observed that the testamentary proceeding would have a direct bearing or impact on the pending suit for partition.

8. At the time of argument, learned counsel for the petitioner then confined his prayer that both the Partition Suit and L. A. Case may be heard together, as the adjudication of the issues involved in the probate case will have a direct impact upon the suit. Learned counsel for the petitioner referred and relied upon judgment of the Hon'ble Supreme Court in **Nirmala Devi Vs. Arun Kumar Gupta & Ors.** reported in **(2005) 12 SCC 505**, **Balbir Singh Wasu Vs. Lakhbir Singh & Ors.** reported in **(2005) 12 SCC, 503** and the judgment dated 06.07.2009 of this Court in the case of **Krishnapal Singh Raghuvanshi & Ors. Vs. Ravindra Pratap Singh @ Ravind**



(C.R. No. 1628 of 2005) to demonstrate that in similar nature of cases the probate case were directed to be clubbed alongwith the title suit to be heard together.

9. Learned counsel for the petitioner further submits that this Court in **Smt. Pratibha Singh Vs. Sri Amit Kumar Singh (Civil Writ Jurisdiction Case No. 9294 of 2015)** vide Judgment dated 06.12.2018 consolidated the eviction suit and partition suit pending before the Court below for trial and disposal.

10. The judgment in the Case of **Kanwarjit Singh Dhillon Vs. Hardayal Singh Dhillon (2007) 11 SCC 357** is an authority on the point that probate Court is not competent to determine the question of title of the properties forming subject matter of a Will. The Hon'ble Supreme Court has laid down in **Chiranjilal Shrilal Goneka Vs. Jagjit Singh (1993) 2 SCC 507** the primacy of the probate Court on the question of validity of a Will.

11. The scope of proceedings in a partition suit are broader than that in a probate petition. The nature of probate proceedings is the judgment in rem. The nature of the proceedings i.e. the probate proceedings and partition suit are completely different. Probate proceedings are expected to be



summary in nature whereas in a partition suit detailed evidence is led by the parties concerned. A probate petition, strictly speaking, cannot be considered to be a suit under Section 10 CPC and both the probate petition and the suit for partition can proceed. Section 213 (1) of the Succession Act provides that no right as executor or legatee can be established in any Court unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed or has granted letter of administration with the Will.

12. In **Amrita Vs. Rakesh Kumar** (Civil Writ Jurisdiction Case No. 6832 of 2013) decided on 11th February, 2016 this Court observed that nature of both the matters is quite different. In the probate case the genuineness of the Will is to be examined whereas in partition suit the unity of Title and possession of both the parties are to be gone into. The proceedings in a partition suit and the probate proceeding are distinct. Proceeding in title suit cannot be stayed which are plenary in nature whereas the probate proceeding are summary in nature to be granted by a Court of limited jurisdiction.

13. This Court in the Judgment of **Smt. Pratibha Singh Vs. Sri Amit Kumar Singh** (supra) relied upon and quoted the observation of the Hon'ble Apex Court in the case of



M/s Chitivalasa Jute Mills Vs. M/s Jaypee Rewa Cement

reported in **AIR 2004 SC 1687** which are as follows:

“ The two suits ought not to be tried separately. Once the suit at Rewa has reached the Court at Vishakhapatnam, the two suits shall be consolidated for the purpose of trial and decision. The trial Court may frame consolidated issues. The Code of Civil Procedure does not specifically speaks of consolidation of suits but the same can be done under the inherent powers of the Court flowing from Section 151 of the C.P.C. Unless specifically prohibited, the Civil Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. The parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials.”

14. In Matia Devi Vs. Smt. Masani Devi & Ors.

reported in **1991 (2) PLJR, 403** this Court held that in a probate proceeding, the question of title of the parties cannot be gone into. Thus, the scope of two cases are different and the further proceeding of title Suit cannot be stayed.

15. If the letters of administration are granted to the petitioner in the testamentary proceeding, then the asset of deceased may not remain available as partible estate of the deceased. If the partition suit proceeds independently and the



plaintiffs therein succeed, then there would be possibility of inconsistent finding by two Courts provided the petitioner succeed in the testamentary proceeding. In situation of this nature the Hon'ble Supreme Court in **Balbir Singh Wasu Versus Lakhbir Singh and Others (2005) 12 SCC 503, Nirmala Devi Versus Arun Kumar Gupta and Others (2005) 12 SCC 505 and Chitivalasa Jute Mills Versus Jaypee Rewa Cement (2004) 3 SCC 85** has directed clubbing together of both proceedings for hearing.

16. In **Krishna Pal Singh & Ors. Vs. Ravindra Pratap Singh @ Rabindra Pd. Singh** reported in **(2010) 1 BBCJ 278** this Court held that proceeding of the partition suit cannot be stayed under Section 10 of the Code of Civil Procedure during the pendency of the probate case.

17. In decision reported in **AIR 2005 Supreme Court 242, National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara**, it was held that the object of Section 10 of CPC is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is whether on final decision being reached in the previous suit, such decision would



operate as *res judicata* in the subsequent suit. Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject matter in both the proceedings is identical.

18. In view of the above, I am of the view that there is no jurisdictional error committed by the Court below in holding that the proceeding of the title suit cannot be stayed under Section 10 of the CPC till the disposal of probate / Letter of Administration case.

19. However, considering the facts and circumstances of the Case and in view of the aforesaid principles as set by Hon'ble Supreme Court and this Court, and in the interest of justice the Partition Title No. 301 of 2005 and L.A. Case No. 73 of 2010 between the parties ought to be heard and adjudicated together in order to avoid multiplicity of proceedings and conflicting findings / decisions.

20. Accordingly, the Title Suit No. 301 of 2005 pending on the file of the learned Sub-Judge 13th, Patna shall stand transferred to the Court of learned Additional District Judge – IX, Patna and clubbed alongwith the L.A. Case No. 73 of 2010 and taken up together for disposal. Considering that the title suit is of year 2005 and L.A. Case is of year 2010 the



learned Court below shall take steps for its early disposal.

21. This Civil Miscellaneous application is, accordingly, disposed of with the aforesaid observation and direction.

(Sunil Dutta Mishra, J)

saaurabhkr/-

AFR/NAFR	AFR
CAV DATE	16.03.2023
Uploading Date	24.03.2023
Transmission Date	

