

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1235 of 2018**

1. Rajesh Kumar Gupta
2. Mukesh Roshan Kumar
3. Rakesh Roshan All sons of Late Jwala Prasad Gupta, residents of Khuskibagh, P.O. Khuskibagh, P.S. Sadar Purnea, District- Purnea.

... .. Petitioners

Versus

1. Sapna Kumari alleged widow of Late Jwala Prasad Gupta, resident of Ward No. 17, Khuskibagh Station Road Commonly Known as Nageshwarbagh, P.S. Sadar, District Purnea.
2. Rahfat Jahan wife of Late Bulan Akhtar
3. Nishant Jamial daughter of Late Buland Akhtar
4. Iqbal Akhtar son of Late Buland Akhtar null
5. Jamal Akhtar son of Late Buland Akhtar
6. Sabana Kausar daughter of Late Buland Akhtar
7. Kamal Akhtar son of Late Buland Akhtar
8. Farhad Jahan daughter of Late Buland Akhtar
9. Nihal Akhtar son of Late Buland Akhtar Respondent nos. 2 to 9 residents of Khuskibagh, P.S. Sadar, P.S. Khuskibagh Nageshwarbag, District Purnia.
10. Beni Chandra Sarkar son of Surendra Chandra Sarkar, resident of Belauri, P.S. Sadar, P.O. Belauri, Via Gulabbagh, District Purnia.

... .. Respondents

Appearance :

For the Petitioner/s : Mr. Abhishek, Advocate
For the Respondent/s : Mr. Diwakar Prasad Singh

**CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT**

Date : 11-09-2023

1. This is an application for setting aside the order dated 05.02.2018 passed in Title Suit No. 77 of 2005 by learned Sub-Judge -2nd , *Purnia* whereby and whereunder the Court below has allowed the substitution petition under Order 22, Rule 3 C.P.C. filed by Respondent 1st set and *Sapna Kumari* has been

allowed to be substituted as co-plaintiff additionally in this suit.

2. It has been submitted by the learned counsel for the petitioners that the matter arises out of Title Suit no. 77 of 2005 filed by sole deceased plaintiff namely *Jwala Prasad Gupta* against respondents 2nd set and 3rd set herein for reliefs that suit property be declared to be belonging to the plaintiff and defendant 1st set has no concern and further it be declared that the decree passed in Eviction Suit No. 24 of 1996 by the court of Additional Munsif, Purnia and the decree passed in the Title Suit No. 134 of 1997 by the Court of Sub Judge 4th, Purnia are wrong, illegal, fraudulent, collusive, void and not binding on the plaintiff and he further submits that defendant 2nd set are tenants and are liable to be evicted from the suit house and to deliver Khas possession of the suit house to the plaintiff.

3. Learned counsel for the petitioners further submits that defendant 1st set appeared in the suit and filed joint written statement on 09.11.2005 and are contesting the suit and prayed for dismissal of the suit. The aforesaid defendants raised various pleas including the plea of non-maintainability of the suit apart from the technical pleas on merit. Defendant 1st set *inter-alia* amongst other defences, categorically pleaded that the suit property was never constructed either by plaintiff or by his

father rather the same along with two other shop rooms, which are under the same roof were constructed by *Late Buland Akhtar* the husband of defendant no. 1 and father of other defendants.

4. Learned counsel for the petitioners further submits that the defendant 1st set also filed additional written statement against the statement made by the plaintiff in his plaint and *inter-alia* stated that it is wrong on the part of the plaintiff to say that the decree passed in Eviction Suit No. 24 of 1996 and Title Suit No. 134 of 1997 are quite wrong, illegal, fraudulent, collusive and without any foundation and it was further pleaded that the plaintiff is not entitled to get any relief or reliefs. He further submits that the original sole plaintiff namely *Jwala Prasad Gupta* died on 27.02.2015 and in his place his sons (petitioners herein) from his wife *Sushila Devi* have been substituted pursuant to petition dated 25.05.2015 as plaintiffs in the suit vide order dated 19.04.2016 in presence of respondent no. 1 without any objection.

5. It has further been submitted by the learned counsel for the petitioners that on 20.07.2015, the petitioner *Sapna Kumari* filed a petition under Order 22, Rule 3 C.P.C. and *inter-alia* stated therein that after the death of his first wife the original

plaintiff *Jwala Prasad Gupta* again got married with the respondent 1st set namely *Sapna Kumari* on 06.02.2013 and this marriage is duly registered under Bihar Marriage Registration Rules and prayed that *Sapna Kumari* be substituted as a co-plaintiff in the suit in the capacity of a legal representative of her husband Late *Jwala Prasad Gupta* who was the sole plaintiff of this suit. However, no prayer for recall of order dated 19.4.2016 was made subsequently. On 10.05.2016 the defendant 1st set/respondent 2nd set filed a rejoinder to the petition dated 20.07.2015 and *inter-alia* stated that the substitution petition of *Sapna Kumari* is much belated and the same is fit to be rejected as being time barred. The petitioners-substituted plaintiffs filed rejoinder on 01.06.2016 objecting to the prayer of *Sapna Kumari* respondent no. 1 herein and prayed for rejection of such prayer.

6. Learned counsel for the petitioners further submits that on 27.06.2016, respondent 1st set *Sapna Kumari* filed a petition under Section 5 of the Limitation Act and stating therein that she had no knowledge about institution of the present suit and as such she could not file her substitution petition in time and prayed to condone the delay and allow her substitution as co-plaintiff in view of her petition dated 20.07.2015 and the claim

of respondent no. 1 as alleged widow of the original plaintiff claiming to be married with original plaintiff on 06.02.2013 is entirely false and concocted in view of her own conduct and documents *inter-alia* a residential certificate obtained by her prior to her divorce from her first husband with mala-fide and oblique motive disclosing/declaring original plaintiff i.e. father of these petitioners as her husband and she is maintaining one Bank Account at *Kishanganj* of a much prior period with the help of fraudulently obtained residential certificate as aforesaid disclosing the father of the present petitioners as her husband. The copy of order dated 20.06.2017 passed in Matrimonial Case No. 48 of 2016 has been filed by *Sapna Kumari* and from perusal of this order, it is clear that the Learned Principal Judge, Family Court, Purnia has been pleased to dismiss the Matrimonial Case No. 48 of 2016 as being not maintainable. However, no finding on marriage or its validity was given.

7. Learned counsel for the petitioners further submits that the Court below has illegally and by a perverse order allowed the substitution/ addition of party application without appreciating the facts and without proper determination of the questions as to the legal status of *Sapna Kumari*, the alleged legal heir/ legal representative in view of Order 22 Rule 5 of the

C.P.C. which is mandatory in nature.

8. It has further been submitted by the learned counsel for the petitioners that the impugned order and the reasons assigned therein for allowing the substitution petition of *Sapna Kumari* is clearly arbitrary and shows complete non-application of mind and is liable to be set aside.

9. Learned counsel for the petitioners has relied upon a judgment of Hon'ble Supreme Court in the case of *Jaladi Saguna (deceased) through Lrs. Vs. Satya Sai Central Trust and Others* (2008) 8 SCC 521 and has also relied upon a judgment of this Court in the case of *Anil Kumar Singh vs Bihar State Board of Hindu Religious Trust* (2015) SCC OnLine Pat 4903.

10. Learned counsel for the respondents *Sapna Kumari* has submitted that the impugned order has rightly been passed and *Sapna Kumari* has been directed to be substituted as co-plaintiff and her substitution does not change the nature of the suit and there is no need of conducting any enquiry under Order 22, Rule 5 of the C.P.C.

11. Learned counsel for the respondents has relied upon the judgment of the Hon'ble Supreme Court in the case of *Dashrath Rao Kate Vs Brij Mohan Srivastava* (2010) 1 SCC

277 and he has also relied upon a judgment of this Court in the case of *Sheo Dharma Nand @ Deo Shankar Tewary & Ors Vs Shyam Lal Chauhan & Ors 2009 SCC OnLine Pat 1152*.

12. I have heard and considered the submission of the parties.

13. Order 22, Rule 5 of the Code of Civil Procedure reads as follows:-

“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant such question shall be determined by the Court.”

14. In the present case, the dispute is with regard to the fact as to whether *Sapna Kumari* is the legal heir/legal representative of the deceased *Jwala Prasad Gupta* or not. From the case which has been made out by *Sapna Kumari*, it appears that she claims to be the widow of deceased *Jwala Prasad Gupta* and she has produced some documents but there is no unimpeccable document to prove that she is the widow of deceased *Jwala Prasad Gupta* and the moment there is a dispute with regard to the substitution of *Sapna Kumari* which has been objected by the petitioners, the provisions of Order 22, Rule 5 come into play.

15. Once the petitioners had objected for substitution of *Sapna Kumari* by saying that she was not the widow of deceased *Jwala Prasad Gupta* as the deceased *Jwala Prasad*

Gupta had never remarried after the death of his wife then the duty of the Court was to decide the question under Order 22, Rule 5 by taking evidence for the purpose as to whether *Sapna Kumari* could be substituted or not as a legal heir of late *Jwala Prasad Gupta*.

16. The Hon'ble Supreme Court in the case of ***Jaladi Saguna (deceased) through Lrs. Vs. Satya Sai Central Trust and Others (Supra)*** in paragraph nos. 9 to 14 has held as follows:-

9. *When a respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the court can proceed further in the appeal. Where the respondent-plaintiff who has succeeded in a suit, dies during the pendency of the appeal, any judgment rendered on hearing the appeal filed by the defendant, without bringing the legal representatives of the deceased respondent - plaintiff on record, will be a nullity. In the appeal before the High Court, the first respondent therein (Suguna) was the contesting respondent and the second respondent (tenant) was only a proforma respondent. When first respondent in the appeal died, the right to prosecute the appeal survived against her estate. Therefore it was necessary to bring the legal representative/s of the deceased Suguna on record to proceed with the appeal.*

10. *Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for*

adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-...-vis other rival claimants to the estate of the deceased.

11. The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 make it clear that the appeal can be heard only after the legal representatives are brought on record.

12. The third respondent, who is the husband of the deceased, wants to come on record in his capacity as a sole legal heir of the deceased, and support the case of the Trust that there was a valid gift by the deceased in its favour. On the other hand, the appellants want to come on record as testamentary legatees in whose favour the suit property was bequeathed by will, and represent the estate of the deceased Suguna as intermeddlers. They want to continue the contest to the appeal. When Suguna - the first respondent in the appeal before the High Court died, the proper course for the High Court, was first to decide as to who were her legal representatives. For this purpose the High Court could, as in fact it did, refer the question to a Subordinate Court under the proviso to Rule 5 of Order 22 CPC, to secure findings. After getting the findings, it ought to have decided that question, and permitted the person/s who are held to be the legal representative/s to come on record. Only then there would be representation of the estate of the deceased respondent in the appeal. The appeal could be heard on merits only after the legal representatives of the deceased first respondent were brought on record. But in this case, on the dates when the appeal was heard and disposed of, the first respondent therein was dead, and though rival

claimants to her estate had put forth their claim to represent her estate, the dispute as to who should be the legal representative was left undecided, and as a result the estate of the deceased had remained unrepresented. The third respondent was added as the legal representative of the deceased first respondent only after the final judgment was rendered allowing the appeal. That amounts to the appeal being heard against a dead person. That is clearly impermissible in law. We, therefore, hold that the entire judgment is a nullity and inoperative.

13. We may look at it from yet another angle. The relief sought by Suguna in the suit was one in regard to which the right to sue would have survived to her legal representatives if she had died during the pendency of the suit. She successfully prosecuted the suit and obtained the decree declaring the deed to be void. The said decree would continue to be in

force unless it is set aside in a manner known to law. It could be set aside in an appeal filed by the aggrieved party, but only after hearing the plaintiff who had secured the decree. Pronouncement of judgment in a case, can be only after the case has been heard. (Vide section 33, Order 20 Rule 1 and Order 41 Rule 30 of CPC). When the respondent - plaintiff died and his/her estate remains unrepresented, it cannot be said that the appeal was 'heard'. When the respondent-plaintiff died, the legal representatives who succeeded to her estate will have to be brought on record and they should be heard in their capacity as persons representing the estate of deceased plaintiff. If they are not heard, there is no 'hearing' of the appeal in the eye of law. Consequently the judgment of the trial court could not be disturbed or set aside by the appellate court. Be that as it may.

14. We, accordingly, allow this appeal and set aside the judgment dated 19.9.2006, restore the appeal to the file of the High Court, with the following directions :

(i) The High Court shall first decide the dispute between the husband of the deceased on the one hand, and her nieces and nephews on the other, after considering the evidence and findings dated 28.11.2005 recorded by the Trial Court and hearing the rival claimants.

(ii) After such determination, the person/s determined to be the person/s entitled to represent the estate of the deceased shall be brought on record as the legal representatives of the deceased.

(iii) Thereafter, the appeal shall be heard on merits and disposed of in accordance with law.

17. A Co-ordinate Bench of this Court in the case of *Anil*

Kumar Singh v Bihar State Board of Hindu Religious Trust

(Supra) in paragraph nos. 17 to 24 has held as follows:-

“17. From bare perusal of the aforesaid provision, it is abundantly clear that when dispute arises as to whether any person is or is not legal representative of a deceased-plaintiff or a deceased defendant, the court is duty bound to determine the aforesaid question before bringing the aforesaid person on record as legal representative of the deceased.

18. In the instant case, the petitioner has challenged that Ram Chandra Prasad Shahi, who claimed before the competent authority to be Secretary of Ayodhya Prasad Singh Trust, is not duly appointed Secretary of above stated trust and he is not competent to represent the aforesaid trust nor he is legal representative of the above stated trust. It is an admitted position that the competent authority did not make any enquiry as provided under Order 22 Rule 5 of the Civil Procedure Code, before passing the impugned order dated 19.05.2009 rather passed the impugned order on the basis of materials available on the record.

19. It has been argued on behalf of the respondents that perusal of documents available on the record amounts to an enquiry as prescribed under Order 22 Rule 5 of the Civil Procedure Code but in my view, mere perusal of documents available on the record is not amount to proper enquiry because in enquiry both parties of the said enquiry have right to adduce their evidence but admittedly, in the present case, the competent authority did not give any opportunity to the parties to adduce evidence on the point of status of aforesaid Ram Chandra Prasad Shahi before passing impugned order dated 19.05.2009.

20. It would appear from perusal of the impugned order that the competent authority relied upon the photostat copy of resolutions of the Committee and did not take any pain to call for the original documents of resolutions of the aforesaid Committee, particularly, in the circumstance, when the petitioner vehemently pleaded before the competent authority that photostat copies of resolutions of the Committee were forged and fabricated documents and, therefore, in my view, the impugned order of competent authority cannot

sustain in the eye of law.

21. It would further appear from perusal of the impugned order that the competent authority has completely ignored the provision of Order 22 Rule 5 of the Civil Procedure Code, particularly, in the circumstance, when the petitioner specifically pleaded before the competent authority that Ram Chandra Prasad Shahi was not duly appointed Secretary of the aforesaid trust and the concerned trust had already lost its existence in the year 1976 when the entire properties of concerned trust were vested in the State.

22. It is an admitted position that purpose of substitution as provided in the law is only to represent the estate of deceased before the court of law in a litigation and mere substitution of a person is not amount to declaration of his right and title in respect of the disputed properties. The substituted person can only pursue and protect the interest of a deceased in a litigation before the court of law but before substituting to any person in place of a deceased in a litigation, the court is duty bound to see as to whether proper person has been substituted in place of deceased or not and no person, who has adverse interest against the deceased can be substituted in place of deceased and that is why Order 22 Rule 5 of C.P.C. casts a duty upon the court to determine as to whether any person is or is not the legal representative of a deceased, if a dispute arises in respect of the aforesaid fact.

23. It is apparent from the impugned order that the competent authority did not follow the provision as provided under Order 22 Rule 5 of the Civil Procedure Code and, therefore, in my view, the impugned order cannot sustain as the same is in utter violation of law and this Court under Article 226 of the Constitution of India has every right to interfere into the impugned order.

24. Accordingly, on the basis of aforesaid discussions, this writ petition is allowed and the impugned order dated 19.05.2009 is, hereby, quashed and the matter is remitted to the competent authority with direction to pass afresh order in accordance with law after making proper enquiry as provided under Order 22 Rule 5 of the Civil Procedure Code.”

18. The Hon’ble Supreme Court in the case of *Dashrath Rao*

Kate vs Brij Mohan Srivastava (Supra) has held as follows:-

“The question involved was whether the finding in a summary proceeding under Order 22, Rule 5 still act as res-judicata in the suit or not and the question as to whether the legal representative can be decided under Order 22, Rule 5 was not the question involved in the case.”

19. This Court in the case of ***Sheo Dharma Nand @ Deo Shankar Tewary & Ors Vs Shyam Lal Chauhan & Ors (Supra)*** in paragraph 13 has held as follows:-

“13. Substitution of a person in a suit or appeal or in any such proceeding in place of a deceased party does not by itself create any right of heirship in favour of the person substituted; hence efforts have to be made to bring on record all necessary or proper parties for effective adjudication of the issues involved in the suit between the parties thereto. Reference in this regard may be made to a decision of this Court in case of Jag Narain Singh v Mathura Prasad Singh, reported in 1999 (3) PLJR 650. Furthermore, Punjab & Haryana High Court had also held in case of S. Charanjit Singh v Bharatinder Singh, reported in AIR 1988 Punjab & Haryana 123 that in such intensely contested cases proper course would be to implead both the claimants under Order XXII Rule 5 of the Code.”

20. In view of the discussions made above, I find that the law is well settled and in the case of a dispute with regard to substitution of legal heir/ legal representative of a deceased party, the Courts must make an enquiry under Order 22 Rule 5 of the C.P.C. The judgments cited above are also consistent in their view about holding an enquiry under Order 22 Rule 5 of C.P.C., once when there is a dispute regarding substitution of the deceased party by someone who claims to be the legal heir/ legal representative of the deceased. I am of the view that once

the petitioner objected to the substitution of *Sapna Kumari* as legal heir/ legal representative of the deceased *Jwala Prasad Gupta*, the Court below should have proceeded to hold an enquiry under Order 22, Rule 5 of the C.P.C. and after the enquiry, the Court below should have acted as per the result of the enquiry and *Sapna Kumari* could not be substituted as the legal heir/ legal representative of deceased *Jwala Prasad Gupta* without any enquiry.

21. In view of the above, this application is allowed and the order dated 05.02.2018 passed in Title Suit No. 77 of 2005 by learned Sub-Judge -2nd, Purnia is hereby set aside and the petition dated 20.07.2015 is restored.

22. The petition dated 20.07.2015 is restored in the Court below with direction that the Court below will first decide the dispute between *Sapna Kumari* and the petitioners and will decide as to whether *Sapna Kumari* is the legal heir/ legal representative of the deceased *Jwala Prasad Gupta*. The same shall be decided as per the provision under Order 22, Rule 5 of the C.P.C. by holding an enquiry. After the enquiry, the Court below will pass an order on the petition dated 20.07.2015 filed by the petitioners.

23. The Court below must decide the petition dated

20.07.2015 filed by *Sapna Kumari* for substitution within three months of communication of this order thereafter the suit will be decided within year i.e. entire proceeding must be concluded within 15 months of communication of this order.

24. The Court below will proceed ex-parte against non-cooperating party and will not give unnecessary adjournment to either of the parties. The Court below will not stay its hands by mere pendency of any Civil Misc or any application in the High Court.

(Sandeep Kumar, J)

Shishir/-

AFR/NAFR	A.F.R.
Uploading Date	14 .09.2023
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