

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.121 of 2023

1. Yasoda Devi Wife of Late Ram Chandra Purbey Resident of Mohalla- Bari Durga Asthan, P.O.- Rosera, P.S.- Rosera, District- Samastipur.
2. Sunita Kumari, Daughter of Late Ramchandra Purbey Resident of Mohalla- Bari Durga Asthan, P.O.- Rosera, P.S.- Rosera, District- Samastipur.
3. Sanjay Kumar Purbey, Son of Late Ramchandra Purbey Resident of Mohalla- Bari Durga Asthan, P.O.- Rosera, P.S.- Rosera, District- Samastipur.
4. Sunil Kumar Purbey, Son of Late Ramchandra Purbey Resident of Mohalla- Bari Durga Asthan, P.O.- Rosera, P.S.- Rosera, District- Samastipur.

... .. Petitioner/s

Versus

1. Dilip Kharga Son of Late Shiv Lakhan Kharga Resident of Mohalla- Bakarganj, P.S.- Lakhisarai, District- Darbhanga.
2. Usha Devi, Daughter of Late Shiv Lakhan Kharga, Wife of Bharat Raut Resident of Laxmi Sagar, P.S. and District- Darbhanga.
3. Rani Devi, Daughter of Late Shiv Lakhan Kharga, Wife of Kedar Mahto Resident of Village and P.O. and P.S.- Pandaul, District- Madhubani.
4. Deepak Kumar Mandal, Son of Raj Kumar Mandal Resident of Mohalla- Akbarpur, Pitaunjhia, P.S.- Waris Nagar, District- Samastipur.
5. Pradeep Mandal @ Surya Shekhar Prasad Mandal, Son of Raj Kumar Mandal Resident of Mohalla- Akbarpur, Pitaunjhia, P.S.- Waris Nagar, District- Samastipur.
6. Sweeta Choudhary, Daughter of Raj Kumar Mandal Resident of Mohalla- Akbarpur, Pitaunjhia, P.S.- Waris Nagar, District- Samastipur.
7. Vinita Kumari, Daughter of Raj Kumar Mandal Resident of Mohalla- Akbarpur, Pitaunjhia, P.S.- Waris Nagar, District- Samastipur.
8. Rekha Seth, Daughter of Raj Kumar Mandal Resident of Mohalla- Akbarpur, Pitaunjhia, P.S.- Waris Nagar, District- Samastipur.
9. Reeta Nayak, Daughter of Raj Kumar Mandal Resident of Mohalla- Akbarpur, Pitaunjhia, P.S.- Waris Nagar, District- Samastipur.
10. Meera Mahto, Daughter of Raj Kumar Mandal Resident of Mohalla- Akbarpur, Pitaunjhia, P.S.- Waris Nagar, District- Samastipur.
11. Sunil Mandal, Son of Late Jagdish Mandal Resident of Mohalla- Akbarpur,



Pitaunjhia, P.S.- Waris Nagar, District- Samastipur.

12. Shashi Manda, Son of Satish Mandal Resident of Village and P.O. and P.S.- Rosera, District- Samastipur.
13. Shiv Kumar Mandal, Son of Satish Kumar Mandal Resident of Village and P.O. and P.S.- Rosera, District- Samastipur.
14. Asharfi Purbey Son of Late Khubi Purbey Resident of Village and P.O. and P.S.- Rosera, District- Samastipur.
15. Rajendra Purbey Son of Late Khubi Purbey Resident of Village and P.O. and P.S.- Rosera, District- Samastipur.
16. Surendra Kumar Purbey, Son of Asharfi Purbey Resident of Village and P.O. and P.S.- Rosera, District- Samastipur.
17. Narendra Kumar Purbey, Son of Asharfi Purbey Resident of Village and P.O. and P.S.- Rosera, District- Samastipur.
18. Mishit Kumar Purbey, Son of Rajendra Prasad Purbey Resident of Village and P.O. and P.S.- Rosera, District- Samastipur.
19. Anit Kumar Purbey Son of Rajendra Prasad Purbey Resident of Village and P.O. and P.S.- Rosera, District- Samastipur.
20. Rajendra Mandal, Son of Jageshwar Mandal Resident of Village- Gamharia, Kankarghat, P.S.- Rosera, District- Samastipur.
21. Ram Bilash Mandal, Son of Jageshwar Mandal Resident of Village- Gamharia, Kankarghat, P.S.- Rosera, District- Samastipur.
22. Bharat Mistri, Son of Mangal Mistri Resident of Mohalla- Panchupur, Town- Rosera, Ward No.- 5, P.S.- Rosera, District- Samastipur.
23. Sri Devchandrar Jha, Son of Not known Resident of Village- Hirni, P.S.- Kusheshwar Asthan, at present Practice as Advocate at Samastipur.
24. Most. Dulari Devi, Wife of Late Jagdish Mandal Resident of Mohalla- Karak Bara, P.O.- Madhubani, District- Madhubani.
25. Munakia Devi, Wife of Late Rameshwar Mandal Resident of Mohalla- Karak Bara, P.O.- Madhubani, District- Madhubani.
26. Urmila Devi, Wife of Hari Karak Resident of Mohalla- Karak Bara, P.O.- Madhubani, District- Madhubani.
27. Shakuntala Devi, Wife of Raj Kumar Mandal Resident of Bachhauli, P.O.Bhore Shahpur, Via- Angarghat, District- Samastipur.
28. Mahendra Mandal, Son of Rameshwar Mandal Resident of Mohalla- Parbhu Thakur, Town- Rosera, District- Samastipur.
29. Shambhu Mandal, Son of Rameshwar Mandal Resident of Mohalla- Parbhu



Thakur, Town- Rosera, District- Samastipur.

30. Dilip Mandal, Son of Rameshwar Mandal Resident of Mohalla- Parbhu
Thakur, Town- Rosera, District- Samastipur.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. J.S. Arora, Sr. Advocate Mr. Manoj Kumar, Advocate Mr. Rakesh Kumar, Advocate Mr. Himanshu Shekhar, Advocate
For the Respondent/s	:	Mr. Uma Shankar Singh, Advocate Mr. Shishir Kumar Shishir, Advocate Mr. Binod Kumar Sinha, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 30-10-2024

The instant petition has been filed by the petitioners under Article 227 of the Constitution of India for quashing the order dated 18.05.2022 passed by learned 1st Additional District Judge, Samastipur in Title Appeal No. 34 of 1989 whereby and whereunder, the learned first appellate court allowed the respondents 1st set to be added as party in the appeal by allowing their application dated 05.04.2019.

2. The conspectus of the case, as it emerges from the record, is that the petitioners were plaintiffs before the learned trial court and along with respondents 3rd set, they filed Title Suit No. 157 of 1976/71 of 1988 in the court of learned Sub Judge, Samastipur. Title suit was filed for declaration of title, recovery of possession and entitlement to receive compensation from State of Bihar, *mesne profits* along with a number of other



reliefs. Only defendant no.1, Most. Dulari Devi appeared and contested the suit by filing her written statement. Thereafter, the suit was decreed on contest on 26.07.1989 by the court of learned Subordinate Judge-IV, Samastipur in favour of the plaintiffs/petitioners. Subsequently, defendant 1st party preferred appeal before the learned District Judge, Samastipur vide Title Appeal No. 34 of 1989 which is still pending before the court of learned 1st Additional District Judge, Samastipur. It also appears that one Ram Sagar Devi was arrayed as defendant no.16 in the suit as one of the members of defendant 4th party. It also transpires that she did not file her written statement and did not contest the suit and title suit was decreed *ex-parte* against her. When the defendant 1st party, who are respondents 2nd set herein, preferred appeal against the said judgment and decree, the said Ram Sagar Devi was arrayed as respondent no.13 in the memo of appeal. In the appeal, Ram Sagar Devi appeared on 13.05.2005 but did not take any further steps and she is reported to have died in the year 2014 and no substitution took place and even her heirs did not come forward to be substituted in her place. In this backdrop of facts, a petition was filed in the Title Appeal No. 34 of 1989 by respondent 1st set on 05.04.2019 by submitting that the respondent 1st set were not aware about the



pendency of the appeal and as they came to know that their mother was one of the defendants and subsequently one of the respondents in the title appeal, the respondent 1st set be impleaded as party respondents in the said appeal. It has also been mentioned that the name of Ram Sagar Devi was ordered to be struck off vide order dated 23.09.1978 in the title suit, however, she was again made party vide order dated 17.07.1982. During pendency of the appeal, a petition was filed under Order 22 Rule 4(4) of the Code of Civil Procedure (in short 'the Code') by the appellants/respondents 2nd set on 22.11.2018 stating therein that as respondent no.13, Ram Sagar Devi, did not file written statement in the suit, they may be exempted from substituting her heirs and an order was passed on 07.02.2019 granting exemption from substituting heirs of the deceased respondent no.13 Ram Sagar Devi. The learned 1st appellate court, vide order dated 18.05.2022, allowed the petition of respondents 1st set and further allowed the respondents 1st set to put forward their cross-objection. This order is under challenge before this Court.

3. Mr. J.S. Arora, learned senior counsel appearing on behalf of the petitioners, at the outset submitted that the learned 1st appellate court has committed jurisdictional error in allowing



the petition of impleadment and without any prayer or petition, further allowed filing of the cross-objection by the respondent 1st set. Learned 1st appellate court completely failed to appreciate that once Ram Sagar Devi did not file any written statement and did not contest the suit, no right remained with her heirs to file cross objection in absence of any defence before the learned trial court. The learned 1st appellate court further did not appreciate the scope of Order 22 Rule 4(4) and Order 1 Rule 10(2) of the Code and further failed to appreciate that once an order under Order 22 Rule 4(4) of the Code has been passed, unless the said order has been recalled, there is no occasion for anybody to put forward any claim as the legal representative of the said deceased or as successor in interest. The learned 1st appellate court also overlooked the fact that the respondent 1st set did not come forward to the court to be substituted in place of deceased defendant/respondent, Ram Sagar Devi. But they had come to the court for being added as a party. The basic distinction between substitution and addition of parties has been blurred by the orders of the learned 1st appellate court as in case of substitution one gets only right to defend as being the original party of the suit but in addition one could assert his independent claim. Mr. Arora further submitted that respondent 1st set, on



one hand were making claim as heirs of late Ram Sagar Devi, and on the other hand they made a cross objection whereas there has been no defence or objection on part of said Ram Sagar Devi either at the stage of suit or appeal. Mr. Arora further submitted that the learned 1st appellate court was not at all justified in allowing the respondent 1st set to be added as a party and also to file cross objection/appeal without any basis, reasoning and without any provision of law and without any such prayer being made by them. It was also not considered that cross appeal was time barred.

4. Mr. Arora further submitted that the application for impleadment is completely *mala fide*. Contradictory pleas have been taken and though the respondent 1st set have been claiming their right through Ram Sagar Devi, they sought their substitution under Order 1 Rule 10(2) of the Code in order to frustrate the decree of the plaintiffs/petitioners as allowing the impleadment of the respondent 1st set and further allowing them to file cross objection would put the clock back and virtually a *de novo* trial has been allowed and this is completely beyond the purview, scope and entitlement of the respondent 1st set under Order 1 Rule 10(2) of the Code. Mr. Arora further submitted that cross-objection/appeal was admitted even prior to the



impleadment of respondents 1st set which is not permissible under the law. Cross objection/appeal has been allowed beyond the period of limitation. If the impugned order is not set aside, it would nullify the whole proceeding of a court of law having taken place between the year 1976 to 2022. Thus, the order impugned is not sustainable at all and the present miscellaneous petition be allowed and the impugned order be set aside.

5. Learned counsel appearing on behalf of the respondent 1st set vehemently opposed the contention made on behalf of the petitioners. Learned counsel submitted, at the outset, that the plaintiffs/petitioners, who are respondent no.1, 2 and 3 in the title appeal, are hand in glove with the appellants and in collusion with each other want to get decree with respect to the properties which belong to the intervenors/respondents 1st set. The respondents 1st set are the children of Ram Sagar Devi and she was daughter of Chulhai Purvey. From the plaint, it is clear as crystal that suit property has been purchased in the name of Chulhai Purvey. Learned counsel further submitted that Ram Sagar Devi was initially made party in the suit but her name was subsequently struck off vide order dated 23.09.1978 as the plaintiff did not file requisites for issuance of summons upon her. However, she was again made party vide order dated



17.07.1982 and without service of notice and without receipt of service of notice, the Title Suit No. 57 of 1976/71 of 1988 was fixed for settlement of issues and the same were settled vide order dated 28.11.1984. Against the judgment and decree of the title suit, an appeal was filed. In appeal too, substituted service of notice under Order 5 Rule 17 of the Code was treated as service upon the respondent Ram Sagar Devi. Thereafter, the appellants filed an application for exemption from substituting heirs of respondent no.13 Ram Sagar Devi on the ground that she did not file written statement and the appellants be exempted from substituting her heirs. But Ram Sagar Devi was never given an opportunity for filing the written statement. Thus, the learned counsel submitted that the whole proceeding took place behind the back of the mother of the respondents 1st set. Learned counsel further submitted that the chronology of events shows connivance on part of the petitioners and respondents 2nd set in frustrating the claim of the intervenors/respondents 1st set. Learned counsel further submitted that when the respondents 1st set filed their application for impleadment, they also filed their cross-objection/appeal with the prayer that as they could not be heard before the learned trial court and their defence could not be



placed before the learned trial court, their cross-objection/appeal be taken on record. Hence, it could not be said that there was no prayer for taking the cross-objection/appeal on record.

6. Learned counsel further submitted that the endeavour of the court should be towards the determination of real controversy between the parties and further endeavour of the court should be towards complete adjudication settling all the questions involved in the suit and for this purpose, the impleadment of respondents 1st set has been rightly ordered and the impugned orders does not suffer from any infirmity and, hence, the same needs to be sustained.

7. I have given my thoughtful consideration to the rival submission and in the light of facts and circumstances of the case. The mother of respondents 1st set was party in Title Suit No. 157 of 1976/71 of 1988 as one of the defendants. Her name was ordered to be struck off as it appears from the application filed for impleadment by respondents 1st set that requisites of notice upon her were not filed. Subsequently, she was again arrayed as party but it has been claimed that without service of notice, the suit was decreed *ex-parte* against her. Admittedly, there was no defence of Ram Sagar Devi in the title suit. It also transpires that Ram Sagar Devi was made one of the



respondents when appeal was filed against the judgment and decree of Title Suit No. 157 of 1976/71 of 1988. Subsequently, the appellant sought exemption from substituting Ram Sagar Devi who was respondent no.13 and the prayer of the appellant was allowed. Thereafter, the heirs of Ram Sagar Devi filed the application for impleadment along with cross-objection/appeal and impleadment was ordered and cross-objection/appeal was admitted. The issue before this Court is whether the learned first appellant court was justified in allowing the impleadment of the respondent 1st set under Order 1 Rule 10(2) of the Code and in further admitting the cross objection/appeal?

8. Order 1 Rule 10(2) of the Code reads as under:-

“Order 1 Rule 10 (2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

9. By this provision, courts have been vested with a



discretion to add or delete party in a proceeding before it if the same is required or effectually and completely adjudicate upon the questions involved in the suit or proceeding. It is a discretion with the courts and it goes without saying the jurisdiction is to be exercised judiciously. Under this provision only those persons could be added as party who are either necessary or proper party and not a busy body or a stranger to the suit. In the present case, the intervenors/respondents 1st set have put forward a case that they have direct interest in the suit property and for this reason they are the necessary parties. The learned first appellate court perhaps went on this premise and allowed their impleadment. All along the respondents 1st set has been claiming that there has been no service upon their mother. The respondents 1st set had two options, either to get themselves substituted in place of their deceased mother or to get themselves impleaded on their own. The respondents 1st set have chosen the second option. It is also pertinent to note here that the appellant sought exemption from substituting heirs/legal representatives of the deceased respondent Ram Sagar Devi on the ground that no written statement was filed and the same was allowed. In the aforesaid circumstances, when the respondents 1st set claimed that no service of notice upon their mother, in this



background, the exercise of option for impleadment invoking provisions of Order 1 Rule 10(2) of the Code instead of filing a petition for substitution under Order 22 Rule 4(4) of the Code appears to be with the intention of circumventing the procedure provided under the law. At the same time, only making the respondents 1st set parties could not have much bearing on the appeal for the reason that the respondents 1st set would be starting with a big handicap for the reason that they have no defence before the learned trial court. If the respondents 1st set have chosen their course of action and proceeded by seeking their impleadment, their status would be akin to proforma respondents only.

10. The aforesaid observation is also true for any cross objection filed under Order 41 Rule 22. Cross objections have been provided under Order 41 Rule 22 which reads as under:-

“22. Upon hearing respondent may object to decree as if he had preferred separate appeal.-(1)
Any respondent, though he may not have appealed from any part of the decree, may not only support the decree 2[but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decreewhich he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him



or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.”

11. Now an appellant is allowed to file cross objection within the 30 days of the receipt of notice of the appeal. It has been submitted that Ram Sagar Devi appeared in the appeal on 13.05.2005 but no steps were taken by her. If the same is the case, the heirs/legal representatives of Ram Sagar Devi would not get any opportunity to file cross-objection subsequently as the same would be barred by limitation. It appears that in order to circumvent this provision, the heirs/legal representatives of Ram Sagar Devi did not pray for getting them substituted in place of Ram Sagar Devi. If that is the case, the impleadment becomes bad. If the respondents 1st set want to put forward their case, they are supposed to take recourse to the appropriate provision of law beginning from the preliminary stage of the title suit and they could not short-circuit the process. In these circumstances, the options available before the intervenors/respondents 1st set were that they could have moved for setting aside the *ex-parte* decree of the learned Sub Judge against their mother if the service on her was not proper or they could have prayed to the learned first appellate court to allow them to be substituted in place of their deceased mother but



under no circumstances they could have asked for their impleadment under Order 1 Rule 10(2) of the Code. Instead they could have sought their substitution before the appellate court under Order 22 Rule 4(1) of the Code which reads as under:-

“Order 22 Rule 4(1)- Procedure in case of death of one of several defendants or of sole defendant.- (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit.”

12. When the respondents 1st set are claiming through their deceased mother and deceased mother was already party in the appeal, there is no scope for respondents 1st set to claim their independent addition as a party since all their claims flow from their deceased mother and they have no other independent claim. Furthermore, allowing impleadment application in the aforesaid circumstances without recalling the order passed on application filed under Order 22 Rule 4(4) of the Code is bad both in law as well as on facts.

13. Therefore, in the light of facts and circumstances, I am of the opinion that the learned trial court committed an error



of jurisdiction in allowing the petition dated 05.04.2019 filed on behalf of the intervenors/respondents 1st set for their impleadment and admitting their cross-objection. Hence, the impugned order dated 18.05.2022 passed by learned 1st Additional District Judge, Samastipur in Title Appeal No. 34 of 1989 is set aside.

14. Accordingly, the instant civil miscellaneous petition stands allowed.

15. However, it is made clear that the intervenors/respondents 1st set are at liberty to take recourse of law under appropriate proceeding for asserting their rights and claims, if so advised.

(Arun Kumar Jha, J)

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AFR/NAFR	NAFR
CAV DATE	24.09.2024
Uploading Date	30.10.2024
Transmission Date	NA

