

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.313 of 2022**

Sanjay Tribedi @ Munna Tribedi, Son of Late Sharda Nand Trivedi, Resident of Goh, P.S. - Goh, District - Aurangabad.

... .. Petitioner

Versus

1. Kanti Devi, Wife of Ramjee Mishra, Resident of Goh, P.S. - Goh, District - Aurangabad.
2. Ram Uday Mishra, Son of Late Ramjee Mishra, Resident of Goh, P.S. - Goh, District - Aurangabad.
3. Suraj Kumar, Son of Late Ramjee Mishra, Resident of Goh, P.S. - Goh, District - Aurangabad.
4. Bipul Kumar, Son of Late Ramjee Mishra, Resident of Goh, P.S. - Goh, District - Aurangabad.
5. Abhay Kumar, Son of Late Ramjee Mishra, Resident of Goh, P.S. - Goh, District - Aurangabad.
6. Kundan Pandey, Son of Late Shrikant Pandey, Resident of Goh, P.S. - Goh, District - Aurangabad.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Dineshwar Mishra, Advocate Ms. Ruchi Arya, Advocate
For the Respondent/s	:	Mr. Damodar Prasad Tiwary, Advocate Mr. Braj Bhushan Mishra, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date : 27-11-2024

The instant petition has been filed under Article 227 of the Constitution of India for quashing the order dated 25.01.2022 passed by the learned Additional District Judge-X, Aurangabad in Probate Case No. 8/2012 / 15/2021, whereby and whereunder the learned trial court allowed the application dated 29.01.2021 filed by the respondents for substitution in place of probate petitioner, Ramji Mishra, and transposed the name of one of the opposite parties/respondents as plaintiff/petitioner.



02. Briefly stated, the facts of the case, as it appears from the record, are that one Ramji Mishra filed a Letters of Administration/Probate Case No. 08 of 2012 for probate of an unregistered Will making his son Bipul Kumar as one of the opposite parties/respondents. The petitioner, coming to know about the said probate case, filed his objection and also sought his impleadment on 18.12.2012, claiming that the land in question was under his possession. The petition of the objector was allowed and he was made one of the defendants. During pendency of the aforesaid probate case, the plaintiff/petitioner, Ramji Mishra, died and an application under Section 151 of the Code of Civil Procedure, 1908 (for short 'the Code') for substitution of the plaintiff has been filed on 29.01.2021. A reply to the said application was filed on 19.03.2021. The learned trial court vide order dated 25.01.2022 allowed the said application thereby bringing on record the heirs/legal representatives of the plaintiff on record which included one of the defendants, namely Bipul Kumar, respondent no. 4 herein. The said order is under challenge before this Court.

03. Learned counsel for the petitioner submitted that while passing the impugned order, the learned trial court overlooked a number of facts and committed patent illegality.



The learned trial court did not consider the fact that the petition filed for substitution was neither affidavited nor verified. No provision has been mentioned for substitution of heirs/legal representatives of the plaintiff. The learned trial court further failed to consider the anomaly that whether defendant no. 4 could be made one of the plaintiffs without filing any application by him under appropriate provision of law. The learned trial court committed error of jurisdiction as it has no power of transposition of defendant to the category of the plaintiff without taking recourse of appropriate statutory provision. The learned counsel further submitted that substituting the name of defendant no. 4 in place of plaintiff is contrary to the law as he was already impleaded as the defendant and in capacity of opposite party, he has filed rejoinder on 30.04.2012 itself. Learned counsel further submitted that where a power is given to do certain thing in certain way, it must be done in that way and not at all. The transposition of a person from defendant to plaintiff has been made without any application being filed under Order 1 Rule 10(2) of the Code and the same is not permissible. Learned counsel further submitted that Section 222 of the Indian Succession Act provides that Will is to be probated only in



favour of the executor and there is no provision for substitution of the heirs/legal representatives of the executor. If a probate petitioner is dead, probate petition would simply lapse. Learned counsel next submitted that even moving application under Section 151 of the Code was not permissible when the application should have been filed under Order 22 Rule 3 of the Code for substitution. All the aforesaid facts and circumstances go on to show that the impugned order could not be sustained.

Learned counsel referred to the decision of Hon'ble Supreme Court in the case of *Manilal Mohanlal Shah & Ors. Vs. Sardar Sayed Ahmed Sayed Mahmad & Anr*, reported in *AIR 1954 SC 349*, wherein the Hon'ble Supreme Court held that the inherent powers of the Court cannot be invoked to circumvent the mandatory provisions of the Code. Learned counsel next referred to decision of Hon'ble Supreme Court in the case of *Mahendra Manilal Nanavati vs Sushila Mahendra Nanavati*, reported in *AIR 1965 SC 364*, wherein the Hon'ble Supreme Court has held that in view of the express provisions of the rule, the High Court could not have had recourse to inherent powers, because it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. Learned counsel next referred to



the decision of Hon'ble Supreme Court in the case of ***Ramkarandas Radhavallabh vs Bhagwandas Dwarkadas***, reported in ***AIR 1965 SC 1144***, wherein it has been held that inherent powers are to be exercised by the Court in very exceptional circumstances for which the Code lays down no special procedure. Lastly, learned counsel referred to a Division Bench judgment of this Court in the case of ***Rakesh Bihari Sharan vs. Alka Sharan***, reported in ***2017 (3) PLJR 951*** wherein the issue before the Court was whether after the death of the executor and before the Will could be proved can a beneficiary or claimant be permitted to get substituted in place of the executor? The Court answered the question in negative and held that an application with prayer for substitution in the testamentary suit after the death of the executor is not maintainable and the probate proceeding comes to an end with the death of the executor. Thus, the learned counsel submitted that the impugned order may be set aside and the present petition be allowed.

04. Learned counsel appearing on behalf of the respondents vehemently contended that there is no infirmity in the impugned order and the same needs to be affirmed. Learned counsel further submitted that the petition for substitution filed



on behalf of the heirs/legal representatives of Ramji Mishra was in order and the learned trial court rightly allowed the same and there is no illegality in the impugned order. It was within the knowledge of the court that Bipul Kumar was already on record as one of the opposite parties and he has been rightly allowed to be substituted in place of the plaintiff/petitioner, Ramji Mishra by transposing his place. Learned counsel reiterated that son of original plaintiff/petitioner-Ramji Mishra, namely Bipul Kumar also made prayer before the learned trial court that his name may be expunged from the category of defendant and be transposed as one of the plaintiffs. Furthermore, wrong mentioning of provision could not defeat the substantial right of the parties.

Learned counsel placed reliance on the decision of Hon'ble Supreme Court in the case of ***Ratna Alias Ratnavati (Smt) vs Syndicate Bank & Ors.***, reported in ***(1995) 1 SCC 407*** to stress the point that the Court should be liberal in allowing impleadment and held that LR's of the deceased defendant could be impleaded even at the time of filing of the application for passing the final decree in a suit for recovery of the money due under an hypotheca. Learned counsel next referred to the decision of learned Single Judge of this Court in the case



Chanda Devi & Ors. vs Shrinath Sharma & Anr., reported in *AIR 1993 PATNA 105* wherein the learned Single Judge held the second appeal filed by the wife and children of the respondent of the first appeal, who were not party before the lower court, to be maintainable in the peculiar facts of the case that during pendency of the first appeal against decree in title suit, plaintiff/respondent was abducted. Learned counsel next submitted that it was in the interest of justice and to shorten the litigation that, as the heirs/legal representatives are beneficiary of the Will through deceased Ramji Mishra, they should be allowed to be substituted and the proceedings be converted for grant of letters of administration instead of probate of the Will. Thus, learned counsel submitted that there is no merit in the present petition and the same be dismissed.

05. I have given my thoughtful consideration to the rival submission of the parties and perused the record. Admittedly, the opposite party no.1, Bipul Kumar, has been allowed to be substituted along with other heirs/legal representatives of the deceased-plaintiff/petitioner, Ramji Mishra, on an application filed under Section 151 of the Code. In a proceeding filed for probate of an unregistered Will, before this Court enters into the legality of such transposition, the



position after death of the executor of the Will seeking probate is to be first considered. For this, it would be advantageous to refer to the relevant provisions of Indian Succession Act, 1925 (for short 'the Act'), Sections 222, 276 and 278 of which read as under:

“222. Probate only to appointed executor.—*(1) Probate shall be granted only to an executor appointed by the will.*

(2) The appointment may be expressed or by necessary implication.

276. Petition for probate.—*(1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—*

- (a) the time of the testator's death,*
- (b) that the writing annexed is his last will and testament,*
- (c) that it was duly executed,*
- (d) the amount of assets which are likely to come to the petitioner's hands, and*
- (e) when the application is for probate, that the petitioner is the executor named*



in the will.

(2) In addition to these particulars, the petition shall further state—

- (a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and*
- (b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.*

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate.

278. Petition for letters of administration.—*(1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating—*

- (a) the time and place of the deceased's death;*
- (b) the family or other relatives of the deceased, and their respective residences;*
- (c) the right in which the petitioner claims;*



(d) the amount of assets which are likely to come to the petitioner's hands;

(e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(f) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate.”

06. Reading of Section 222 of the Act makes it amply clear that probate shall be granted only to an executor appointed by the will. Thus, the right to obtain a probate is confined to the executor and it can by no means devolve upon the heir of the executor appointed by the will as held by the Division Bench of this Court in the case of ***Musammat Phekni v. Musammat Manki***, reported in ***1929 SCC OnLine Pat 113 : AIR 1930 Pat 618***. On the same proposition, reliance could be placed on



another decision of Division Bench of this Court in the case of ***Bihari Lal Mahton Tetak Gayawal vs. Ganga Dai Tatkain & Ors.***, reported in ***AIR 1917 Patna 209***. Thus, after the death of the executor and before the will could be proved no beneficiary or claimant can be permitted to get himself or herself substituted in place of the executor. In other words, the probate proceedings come to an end with the death of the executor. Furthermore, the substitution of heirs/legal representatives of an executor is not permissible in a probate proceeding though such heirs/legal representatives could maintain a petition under Section 276 of the Act for grant of letters of administration.

07. Moreover, the impugned order also suffers from further infirmity. Though mere wrong mentioning of provision is not fatal to the cause of the respondents but when there is express provision in the Code for substitution or transposition of the parties, the learned trial court could not have exercised its inherent powers under Section 151 of the Code. In the case of ***Manilal Mohanlal Shah & Ors.*** (supra), the Hon'ble Supreme Court has held in Para-12 as under:

“12. It was urged before us that the Court could allow a set-off in execution proceedings under its inherent powers apart from the provisions of Order 21, rule 19, of the Civil Procedure Code. We do not think that the inherent powers of the Court could be



invoked to circumvent the mandatory provisions of the Code and relieve the purchasers of their obligation to make the deposit. The appellants by misleading the Court want to benefit by the mistake to which they themselves contributed. They cannot be allowed to take advantage of their own wrong.”

Further, the Hon’ble Supreme Court in the case of ***Mahendra Manilal Nanavati*** (supra) in Para-202 has observed as follows:

“(202) Rule 25 circumscribes the powers of the appellate Court to frame an issue and refer the same for trial to the Court below, if need be by taking additional evidence, and permits it to adopt this course only if (a) the trial Court had omitted to frame an issue, (b) try an issue or (c) to determine any question of fact which appears to the appellate Court essential to the right decision of the suit upon the merits. In this case, the High Court has purported to exercise its powers upon the ground that proper issues were not framed by the trial Court. I have already indicated above that the content of the two additional issues framed by the High Court is to be found in three of the issues raised by the City Civil Court. Therefore, there was no scope for the exercise of the High Court of its power under R. 25. No doubt, the High Court has made no reference to R. 25 when it framed the additional issues and sent them down for a finding; but its action must be referable to R. 25, because that is the provision of law which deals with the question of remitting issues for trial to the trial Court. I may add that in view



of the express provisions of this rule the High Court could not have had recourse to inherent powers, because it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code.”

Similar to the effect is the observation of Hon’ble Supreme Court in the case of **Ramkarandas Radhavallabh** (supra), Paragraph-6 of which reads as under:

“Learned advocate for the tenant contended that the High Court was wrong in its view that S. 151 had no application to the present case. We are unable to accept this contention. It has been observed by this Court in Manohar Lal v. Hiralal, AIR 1962 SC 527 at p. 534 : "The inherent powers are to be exercised by the Court in very exceptional circumstances, for which the Code lays down no procedure." This is a well recognised principle. Rule 4 of O. 37 expressly gives power to a Court to set aside a decree passed under the provisions of that Order. Express provision is thus made for setting aside a decree passed under O. 37 and hence if a case does not come within the provisions of that rule, there is no scope to resort to S. 151 for setting aside such a decree. We, therefore, agree with the High Court that the appellate bench of the Court of Small Causes was in error in setting aside the ex parte decree in exercise of powers under S. 151. Again all the Courts have taken the view, and we think rightly, that no circumstances justifying the setting aside of the decree under R. 4 of O. 37 existed in the present case. We did not also understand learned advocate for the tenant to



*rely on any such circumstances in this Court.
No question of setting aside the decree under
that order, therefore, arises.”*

08. Taking into consideration the position of law and applying the same to the facts of the case, I find no merit in the submission of the learned counsel for the respondents. Even the authorities cited by the learned counsel for the respondents are not relevant for the purposes of the present case as the facts of those cases are quite dissimilar to the present case. Lastly, the fact is also to be taken note of that without deleting the name of Bipul Kumar from the array of defendants/opposite parties, making him one of the plaintiffs was certainly wrong. For the aforesaid reasons, the impugned order could not be sustained.

09. In the light of discussion made here-in-before, I am of the considered opinion that the learned trial court exceeded its jurisdiction and passed the impugned order against the settled principles of law and hence, the same cannot be sustained. Therefore, the impugned order dated 15.01.2022 passed by the learned Additional District Judge-X, Aurangabad in Probate Case No. 8/2012 / 15/2021 is set aside. In the result, the application dated 29.01.2021 filed by the respondents in Probate Case No. 08/2012 / 15/2021 for substitution in place of probate petitioner is dismissed. However, the dismissal of such



application will not come in the way of the respondents to take
recourse of Section 276 of the Indian Succession Act, 1925.

10. As a result, the present petition stands allowed.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	AFR
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