

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.104 of 2016**

=====

Rajniti Yadav son of late Dhanuki Yadav resident of village Bretha, P.S.
Gogari, District - Khagaria.

... .. Petitioner/s

Versus

1. Rambaran Yadav @ Satyanarayan Prasad Yadav Vimal and Ors son of late Anandi Mahto alias Anandi Yadav resident of village Basantpur Thatha, P.S. Mansi, District Khagaria.
2. Janardan Yadav son of late Bouku Mahto alias Mukti Mahto
3. Kishore Yadav
- 4.1. Ranjana Devi wife of Late Rabindra Yadav, resident of Village-Basantpur Thata, P.S.-Mansi, District-Khagaria.
- 4.2. Rinkesh Kumar, son of Late Rabindra Yadav, resident of Village-Basantpur Thata, P.S.-Mansi, District-Khagaria.
5. Arbind Yadav Respondents no. 2 to 5 are sons of late Bouku Mahto alias Mukti Mahto Respondents no. 2 to 5 are residents of village Basantpur Thatha, P.S. Mansi, District Khagaria.
6. Smt. Baijantimala Devi wife of Sri Sudhir Yadav resident of village Thatha, P.S. Mansi, District Khagaria.

... .. Respondent/s

=====

Appearance :

For the Petitioner/s	:	Mr. Dronacharya, Advocate Mr. Ram Shankar Kumar, Advocate
For the Respondent/s	:	Mr.

=====

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

Date : 27-08-2024

Present learned counsel for the petitioner.

02. However, no one appears for the respondents.

Perusal of record shows even on the last date of hearing none appeared for the respondents.

03. Heard learned counsel for the petitioner.

04. The present petition has been filed under Article 227 of the Constitution of India to quash the order dated

17.04.2015 passed by the learned Sub-Judge-III, Khagaria in Title Suit No. 47 of 2003 whereby and whereunder the learned trial court rejected the application dated 07.03.2014 to add the petitioner as party defendant in place of deceased defendant 2nd party, namely Maina Devi.

05. Learned counsel for the petitioner submits that the respondent nos. 1 to 5 have instituted Title Suit No. 47 of 2003 against defendant 1st party/respondent no. 6 Baijantimala Devi and deceased defendant Mosomat Maina Devi seeking relief to declare the sale deed executed by defendant 2nd party namely Mosomat Maina Devi in favour of defendant 1st party as void *ab-initio* and not binding on the plaintiff. The dispute is with regard to 18 katha land appertaining to Tauji No. 9337, Khata No. 40, Khesra Nos. 3558 and 3598, Khata No. 249 Khesra No. 3559 of Mauja Thatha Basantpur, P.S. Mansi, District Khagaria. Learned counsel further submits that during pendency of the suit defendant Maina Devi died and the petitioner filed a petition for substitution in place of the deceased defendant on the ground that the deceased defendant executed a registered deed of Will in the favour of the petitioner on 28.06.2002 with regard to her share in the suit property. The said petition has been filed under provisions of Order 1, Rule 10 of the Code of Civil Procedure

after the name of the deceased defendant was expunged and substitution was sought for deceased defendant. A rejoinder to the said application was filed on behalf of the plaintiffs and the learned trial court after hearing the parties dismissed the petition filed by the petitioner.

06. Learned counsel for the petitioner further submits that the learned trial court committed an error when it refused to take into account the execution of Will in favour of the petitioner by the deceased defendant. In paragraph 13 of the written statement filed by the deceased defendant Maina Devi she has specifically stated that she has executed a registered Will on 28.06.2002 in favour of the petitioner Rajniti Yadav. The learned trial court refused to substitute the petitioner in place of the deceased defendant only on the ground that the petitioner has not got a probate of the Will in his favour and for this reason the petition was not maintainable but the said decision is against the law as laid down by a Division Bench of this Court in the case of ***Suresh Singh and Anr. Vs. Dr. Raja Ram Singh and Ors.*** reported in ***1992(2) PLJR 129*** wherein it has been held that a legatee or executor can institute a suit or set up a claim by way of defence and he can be allowed to be substituted in place of the testator or added as a party if he

makes a claim on the basis of an unprobated Will. Learned counsel further submits that similar to the effect of a decision of learned Single Judge of this Court who relied on the decision of ***Suresh Singh (Supra)*** and allowed the claimants of unprobated Will to continue the litigation on behalf of deceased testator. Learned counsel thus submits that the impugned order is erroneous and the same needs to be set aside.

07. Having regard to the submission and especially the authority cited on behalf of the petitioner in the case of ***Suresh Singh (Supra)***, I am of the view that the learned trial court committed an error when it refused to make the petitioner party in place of deceased defendant no. 2 Maina Devi. In ***Suresh Singh (Supra)*** while referring to the case of ***Ramcharan Singh Vs. Mst. Dharohar Kuer*** reported in ***AIR 1984 Patna, 175*** it has been observed that a legatee derives his title and authority from the Will of its testator and not from the grant of probate. It has further been laid down that a legatee is creature of the Will and like the executor, legatee comes into existence as soon as the Will becomes an operative document, that is to say, when the testator dies. On similar lines the decision in the case of ***Bhudeb Chandra Roy Vs. Bhikshakar Pattanaik and Ors.*** reported in ***AIR 1942 Patna, 120*** wherein it

has been held that the estate of the deceased testator vests in the executor immediately upon the death of the testator. On these lines the Division Bench held that a legatee or executor of an unprobated Will making a claim on the basis of the same can institute a suit or take a defence in a suit on the basis of such a Will, but his claim cannot be established in a Court of law unless and until a probate or letter of administration is granted meaning thereby that neither any decree can be passed in favour of a plaintiff nor defence can be accepted in such a suit unless probate or letters of administration is obtained before its disposal. It has also been held that if such a legatee or executor can institute a suit or set up a claim by way of defence, he can be allowed to be substituted in place of the testator or added as a party if he makes a claim on the basis of an unprobated Will.

08. In the present case, the whole claim of the petitioner is based on an unprobated registered Will executed by the deceased defendant no. 2. Having regard to the law laid down by the Division Bench of this Court in the case of ***Suresh Singh (Supra)***, the petitioner is required to be substituted in place of deceased defendant no. 2 Maina Devi so as to represent her estate and continue the proceeding. Hence, the impugned order suffers from error of jurisdiction and has been passed

without consideration of the settled proposition of law and hence, the same is set aside and the application dated 07.03.2014 filed by the petitioner is allowed.

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

(Arun Kumar Jha, J)

anuradha/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	29.08.2024
Transmission Date	N/A