

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.39 of 2018

1. Bihar State Sunni Wakf Board Haz Bhawan, Harding Road, Patna, through its Chief Executive Officer of Bihar State Sunni Wakf Board, Haz Bhawan, Harding Road, Patna.
2. Immamuddin Hussain @ Imammuddin Khan, S/o Late Sadique Hussain, R/o Village-POPS- Kopo, District- Saran, Mutauali of Wak Estate No. 1891, Bari Masjid, Kopa, District- Chhapra.

... .. Petitioner/s

Versus

1. Manju Singh W/o Late Jagarnath Singh, resident of Village-Kopa, P.S.- Kopa, and District-Saran at Chapra.
2. Manoj Kumar Singh, S/o Late Jagarnath Singh,
3. Samresh Singh, S/o Late Sambhunath Singh,
4. Manoj Singh @ Mantu, S/o Late Sambhunath Singh,
5. Sita Devi, W/o Late Sambhunath Singh,
- 6.1. Rajiv Kumar Singh son of Late Jogindra Singh, Resident of Village-Kopa, Police Station-Kopa, District-Saran.
- 6.2. Ranjan Kumar Singh, son of Late Jogindra Singh, Resident of Village-Kopa, Police Station-Kopa, District-Saran.
7. Nathji Rai @ Natha Rai, S/o Late Buddhu Rai,
8. Krishna Singh, S/o Late Rajgiri Singh,
9. Tarkeshwar Dubey, Son of Baijnath Dubey, Respondent no.1 to 9 is resident of Village- Kopa, P.s.- Kopa and District- Saran at Chapra.
10. Lalo Begum @ Samshul Nisha, W/o Late Warish Khan.
11. Auranzeb, S/o Late Warish Khan, Both respondent 10 and 11 are residents of Village- Banpura, P.S.P.O.- Khaira, District- Saran at Chapra.
12. Ziyaul Haque, S/o Late Ramzan Khan,
13. Rabiya Khatoon W/o Mumtaz Khan, Resident of Gudri Bazar, Post Office- Chapra, Police Station-Bhagwan Bazar, District-Saran.
13. Tabassum Khatoon, Wife of Ansar Khan, Resident of Gudri Bazar, Post Office-Chapra, Police Station-Bhagwan Bazar, District-Saran.
13. Sabra Begum, D/o Ziyaul Haque, resident of Village-Kopa, Police Station- Kopa, District-Saran.
13. Sivnani Khan, son of Ziaul Haque, resident of Village-Kopa, Police Station- Kopa, District-Saran.
13. Aasif Zilani Khan, Son of Ziaul Haque, resident of Village-Kopa, Police Station-Kopa, District-Saran.
14. Samada Khatoon, W/o Jumrati Miyan, Daughter of Late Md Ramzan,
15. Taharan Khatoon, Daughter of Late Md Ramzan,



16. Wajir Khan, S/o Mohammad ASraf, Respondent 12 to 16 R/o Village-Garhitee, P.S.P.O.- Bhagwan Bazar, District- Saran at Chapra.
17. Wakila Khatoon, W/o Late Md Imran,
18. Sakil Hasan, S/o Late Md Imran,
19. Md Ikram, S/o Late Noor Mohammad,
21. Human Hussain, S/o Late Hanif Hussain,
22. Kallu Hussain, S/o Late Hanif Hussain,
23. Noor Alam Hussain, S/o Late Hanif Hussain,
24. Aftab Hussain, S/o Late Hanif Hussain, Respondent 17 to 24 are R/o Village- Kopa, P.S.- Kopa, District- Saran, Chapra.
25. Zaiben Begum, W/o Late Munshi Hussain,
26. Fullmohammad Hussain, S/o Late Mushi Hussain,
27. Meraj Hussain, S/o Late Munshi Hussain,
28. Afsari Khatoon, Daughter of Late Munshi Hussain,
29. Tejan Hussain, S/o Late Sadique Hussain,
30. Rustam Hussain, S/o Late Aziz Hussain,
31. Sajra Begum, W/o Late Qayamuddin Hussain,
32. Jamshed Hussain, S/o Late Qayamuddin Hussain,
33. Gudiya Khatoon W/o Roshan Hussain, resident of Village-Kopa, Police Station-Kopa, District-Saran.
33. Sahjad Khan S/o Roshan Hussain resident of Village-Kopa, Police Station-2. Kopa, District-Saran.
33. Shabnam Khatoon resident of Village-Kopa, Police Station-Kopa, District-3. Saran.
33. Neha Khatoon daughter of Late Roshan Hussain resident of Village-Kopa, 4. Police Station-Kopa, District-Saran.
33. Jugnu Khatoon daughter of Late Roshan Hussain, resident of Village-Kopa, 5. Police Station-Kopa, District-Saran.
33. Gulshan Khatoon Daughter of Late Roshan Hussain, resident of Village-6. Kopa, Police Station-Kopa, District-Saran.
33. Sonam Khatoon, daughter of Late Roshan Hussain, resident of Village-7. Kopa, Police Station-Kopa, District-Saran.
34. Parwez Hussain, S/o Late Qayamuddin Hussain, Respondent no.25 to 34 is R/o Village- Kopa, PS- Kopa, Dist- Saran, Chapra.
35. Sudup Hussain, S/o Late Rajjab Hussain,
36. Roshan Hussain, S/o Late Rajjab Hussain,
37. Bibi Saidu Nisha, D/o Late Saheb Hussain,
38. Sheikh Dahari Hussain, S/o Late Asgar Hussain,
39. Bibi Chanda, W/o Doyamat Hussain, Daughter of Late Rajab Hussain,
40. Niyamat Hussain, S/o Late Rajab Hussain, Respondent no.35 to 40 are



resident of VillagePOPS- Kopa, District- Saran at Chapra.

41. Majda Begum, W/o Late Ashraf Ali,
42. Sajaullah Siddique, S/o Late Ashraf Ali,
43. Prince Raja, S/o Late Ashraf Ali,
44. Ajaullah, S/o Late Ashraf Ali,
45. Noor Jahan, D/o Late Ashraf Ali,
46. Sadique Siddique, S/o Late Ashraf Ali, Respondent no. 41 to 48 are R/o P.O.- Kopa, P.S.- Kopa, District- Saran. Presently residing at VillageP.O.- Nagra, P.S.- Nagra, District- Chhapra, Saran.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Md. Helal Ahmad, Advocate
For the Respondent/s	:	Mr. Mahesh Narayan Parbat, Sr. Advocate Mr. Ved Prakash Srivastava, Advocate Mr. Praveen Prabhakar, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 30-09-2024

The present petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 02.07.2015 passed in Misc. Case No. 02 of 2013 by learned 9th Additional District Judge, Saran at Chapra, whereby and whereunder the petition filed by the petitioner no. 2 on 29.05.2015, for transposing himself as appellant no. 2 after death of original appellant no. 2 Ashraf Ali, was rejected. The petition has also been filed for setting aside the order dated 16.11.2017 passed in Misc. Case No. 04 of 2015 by learned 9th Additional District Judge, Saran at Chapra, whereby and whereunder the petition to recall the order dated 02.07.2015 passed in Misc. Case No. 02 of 2013 has been rejected.



2. Shorn of unnecessary details, the facts of the case, as it appears from the record are that one Sheikh Afzal Hussain had executed registered deed of Waqf dated 09.11.1943 and 26.08.1967 in respect of certain lands. After execution of registered Waqf deeds, Sheikh Afzal Hussain appointed himself as Mutawalli and in the deeds it has also been incorporated who would be Mutawalli after Sheikh Afzal Hussain. The recitals of the deeds was to the effect that author of the Waqf or his descendants would not have right to transfer the properties comprising in the deed of Waqf. However, Sheikh Afzal Hussain transferred various Waqf properties having area 5 bigha 6 katha and 2 dhur in favour of one Sheikh Md. Ramzan on 10.05.1969, by way of gift deed. Subsequently, Ashraf Ali was appointed as Mutawalli who, in order to protect the interest of the public and to preserve the properties of the Waqf so created by Sheikh Afzal Hussain, informed the Bihar State Sunni Waqf Board that the respondents were occupying the schedule properties unauthorizedly. Show cause notice was issued to the respondents who appeared and filed objection controverting the claim of the Board, their contention was disallowed by the Board and steps under Section 36(B) of Waqf Act, 1954 were taken against the respondents. The matter was forwarded to the



District Magistrate, Saran at Chapra for removal of unauthorized possession of respondents from the trust property. The District Magistrate, Saran at Chapra issued notices against the respondents who filed objection and objections were rejected by the District Magistrate vide order dated 31.10.1988 passed in Misc. Petition Case No. 03 of 1988. Against the said order, the respondents preferred Misc. Appeal Nos. 61 and 62 of 1988 before the learned District Judge, Saran at Chapra which was subsequently transferred to the court of 3rd Additional District Judge, Saran, who after hearing the parties remanded the matter to Bihar State Sunni Waqf Board with a direction vide its order dated 30.05.1990. On 14.12.1991, petitioner no. 1, Secretary, Bihar State Sunni Waqf Board and the then Mutawalli of Waqf Estate namely, Ali Imam had filed title suit before 1st Sub Judge, Chapra which was numbered as Title Suit No. 18 of 1992. The declaration was sought that Schedule I property under Wakf-ul-aulad dated 26.08.1967 is a public property. Recovery of possession in respect of 9 bighas 7 dhurs of the property described in Schedule II excluding the property of Schedule III was also sought. Title Suit No. 18 of 1992 was ultimately dismissed by learned Sub Judge-I, Saran at Chapra vide judgment and decree 13.11.1998. Aggrieved by the said



judgment and decree, petitioner no. 1 and the then Mutawali filed first appeal bearing F.A. No. 40 of 1999 before the High Court. However, vide order dated 29.07.2005 passed in F.A. No. 40 of 1999, the High Court directed for transfer of the memo of appeal to the court of learned District Judge, who became competent to hear the appeal in view of valuation being less than Rs. Two lakhs. Thus, the first appeal came to be transferred to the learned District Judge and thereafter to the court of Fast Trac Court No. 1, Saran at Chapra and the first appeal was renumbered as Title Appeal No. 62 of 2006. The record was transferred to learned Fast Trac Court No. IV on 27.01.2010 and the appeal was dismissed for default on 25.02.2011. Coming to know about the dismissal of the appeal, the then Mutawalli Ashraf Ali, who was appellant no. 2 in the appeal filed a petition on 11.04.2013 under Order 41 Rule 19 of the Code of Civil Procedure (hereinafter 'the Code') vide Misc. Case No. 02 of 2013 before the learned first appellate court for restoration of the appeal. Ashraf Ali, who had been looking after the pairvi of the case, died on 28.12.2014 and thereafter, the Waqf Board vide order dated 28.05.2015 issued under Memo No. 706 constituted Managing Committee vide Waqf State No. 1891 and Imamuddin Khan @ Immamuddin Hussain was appointed as



President of the Managing Committee. Imamuddin Khan, petitioner no. 2 herein. Thereafter, petitioner no. 2 filed a petition on 29.05.2015 to substitute his name in place of deceased Ashraf Ali in Misc. Case No. 02 of 2013. It further appears that the learned Additional District Judge- 9th, Saran at Chapra vide order dated 02.07.2015 dismissed the petition filed by the petitioner no. 2 on 29.05.2015. Thereafter, the petitioners filed Misc. Case No. 04 of 2015 along with limitation petition on 18.08.2015 before learned Additional District Judge- 9th for setting aside the order dated 02.07.2015 passed in Misc. Case No. 02 of 2013. Even the said Misc. Case No. 04 of 2015 was rejected. Thus, the orders are 02.07.2015 and 11.11.2017 are under challenge before this Court.

3. Learned counsel for the petitioners at the outset submitted that the Misc. Case No. 02 of 23013 is still pending and therefore, he does not press his prayer against the order dated 16.11.2017 passed in Misc. Case No. 04 of 2015 as the said miscellaneous case was instituted under wrong impression that Misc. Case No. 02 of 2013 has been disposed of having been abated. Learned counsel further submitted that the order dated 02.07.2015 has been passed under wrong interpretation of law as well as facts. Petitioner no. 2 sought his transposition in



Misc. Case No. 02 of 2013 in place of original petitioner no. 2 Ashraf Ali, who was the Mutawalli of the Waqf Estate. The learned Additional District Judge- 9th, has held that the abatement has taken place in the matter as petitioner no. 2 of the said case died on 28.12.2014 and no application was filed for his substitution. However, the learned Subordinate court did not consider the fact that the miscellaneous case as a whole would not abate because petitioner no. 1 of the present petition was also a party as the petitioner no. 1 in Misc. Case No. 02 of 2013 and even the person who sought transposition has been a party as defendant/respondent in the same case. Learned counsel further submitted that the learned Subordinate court dismissed the application of transposition on the ground that petitioner no. 2 was not appointed as Mutawalli by the Bihar State Sunni Waqf Board. The said observation is not correct as the petitioner no. 2 was appointed head of the Managing Committee constituted after the Waqf property and that is the job of Mutawalli. Mere nomenclature is immaterial. Learned counsel has placed reliance on the decision in the case of ***Pankajbhai Rameshbhai Zalavadia Vs. Jethabhai Kalabhai Zalavadiya (Deceased) through L.Rs. & Ors.*** reported in ***2017(4) PLJR 181*** wherein in paragraph 9 and 14 the Hon'ble Supreme Court has held that



the Court can add any person as a party at any stage of the proceedings, if the person whose presence in Court is necessary to effectively and completely adjudicate upon and settle all the questions involved in the suit to avoid multiplicity of proceedings. Learned counsel has also placed reliance on the decision in the case of ***Guljar Rai Vs. Laldeo Singh & Ors.*** reported in ***2013(4) PLJR 434***. Wherein this Court even allowed impleadment of a transferee *pendente lite*. On these two grounds, the learned submitted that the impugned order is not sustainable and the same needs to be set aside.

4. Mr. Mahesh Narayan Parbat, learned senior counsel appearing on behalf of the respondents vehemently contended that the impugned orders do not suffer from any infirmity and the same do not require any interference by this Court. Learned senior counsel submitted that after the death of Ashraf Ali, Misc. Case No. 02 of 2013 abated as the Ashraf Ali was not substituted within the period of limitation. Thereafter, petitioner no. 2 filed an application for his transposition. But he could not transposed in place of Ashraf Ali, Mutawalli for the simple reason that the application has abated and when the abatement has taken place, transposition could not be done under Order 1 Rule 10 of the Code. Learned senior counsel



referred to the decision of this High Court in the case of ***Ram Das Chaurasia Vs. Jagdish Chaurasia and others*** reported in 1998(1) BLJ 802. Learned counsel further referred to a decision of ***Karnataka High Court*** reported in ***AIR 2003 Karnataka 73 and AIR 2002 Karnataka 470***, wherein the learned trial court held that the application for transposition under Order 1 Rule 10 of the Code is maintainable only in a case when the proceeding is pending and after dismissal of the suit or in the case of abatement, the application for transposition could not be accepted.

5. Learned senior counsel further submitted that the claim of the petitioners is that Misc. Case No. 02 of 2013 is still pending is not sustainable in view of the fact that the petitioners themselves filed Misc. Case No. 04 of 2015 for restoration of Misc. Case No. 02 of 2013. This fact has also been taken note of by the learned Additional District Judge – 9th, Saran at Chapra in its order dated 16.11.2017. The court has mentioned the submission that the petitioners made prayer for setting aside the order dated 02.07.2015 and to restore Misc. Case No. 02 of 2013. Learned senior counsel further submitted that if Misc. Case No. 02 of 2013 has been disposed of, the said order could not be challenged before this Court as the same is an appellable



order. Thus, learned senior counsel submitted that the impugned orders are proper and valid and should be affirmed.

6. I have considered the rival submission of the parties and perused the record. The short issue involved in this case is whether Misc. Case No. 02 of 2013 instituted for restoration of F.A. No. 40 of 1999/62 of 2006, stands abated after death of Mutawalli Ashraf Ali. Admittedly, no appropriate petition has been filed for setting aside the abatement of petitioner no. 2 of Misc. Case No. 02 of 2013. Thereafter, an application has been filed on behalf of petitioner no. 2 Imamuddin Khan for his transposition in place of deceased petitioner no. 2 Ashraf Ali of Misc. Case No. 02 of 2013. But law on this point is very much clear. If petitioner no. 2 was dead and no substitution petition has been filed within time and no steps have been taken for setting aside the abatement, no transposition under Order 1 Rule 10 of the Code can be allowed. Reference would made to ***Ram Das Chaurasia Vs. Jagdish Chaurasia and others*** (supra). Whether Misc. Case No. 02 of 2013 has abated as a whole or abatement has taken place quo petitioner no. 2, petitioner no. 2 of this case cannot seek transposition since petitioner no. 2 Ashraf Ali has not been substituted and the suit has abated against him. So far claim of



petitioner no. 2 on this account is not sustainable. Therefore, the decisions cited by learned counsel for the petitioners is not of any help to the case of the petitioners. The claim of the petitioners that the order dated 16.11.2017 has been passed on wrong impression that the application was filed for setting aside the order dated 02.07.2015 passed in Misc. Case No. 02 of 2013 whereas in fact, petition dated 18.08.2015 was filed under Order 22 Rule 9 of the Code for setting aside the abatement since Misc. No. 02 of 2013 filed under Order 41 Rule 19 of the Code is still pending. Perusal of petition dated 18.08.2015 does not show any application to the effect that abatement should be set aside rather the prayer has been made for restoration of Misc. Case No. 02 of 2013. So the petitioners could not claim otherwise. It appears the petitioners are under the impression that Misc. Case No. 02 of 2013 has been dismissed or disposed of or abated and if they filed application for its restoration, such order being appealable under Order 43 Rule 1(k) of the Code cannot be assailed by filing recall petition or before this Court. For this reason, even the order dated 16.11.2017 passed in Misc. Case No. 04 of 2015 is quite correct and valid order. However, it is made clear that as there were two petitioners in Misc. Case No. 2 of 2013 and if right to sue survives to petitioner no.1 and



the petition does not became incompetent, the petitioner could raise this issue before the court concerned which would be required to pass a reasoned order clarifying the position. Similarly, for setting aside the abatement caused due to death of petitioner no.2 of Misc. Case No. 4 of 2015, the petitioners exercise their remedy available under law.

7. In the light of these facts and circumstances, I am of the opinion that there is no infirmity in the impugned order dated 02.07.2015 and the same is affirmed.

8. In the light of discussion made so far, I do not find any merit in the present petition and hence, the same is dismissed.

(Arun Kumar Jha, J)

DKS/-

AFR/NAFR	NAFR
CAV DATE	12.09.2024
Uploading Date	01.10.2024
Transmission Date	NA

