

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1064 of 2017**

=====

Gurudeo Sharan Tiwari, Son of Shri Narbadeshwar Tiwari @ Narbadeshwar Nath Tiwari, resident of Village- Amhi Mishra, P.O.- Dube Jigina, P.S. Bhore, District- Gopalganj Bihar.

... .. Petitioner/s

Versus

1. The State of Bihar through the Collector, Gopalganj, District-Gopalganj (Bihar)
2. Narbadeshwar Nath Tiwari, Son of Late Mukti Nath Tiwari, Resident of Village- Amhi Mishra, P.O.- Dube Jigina, P.S.- Bhore, District- Gopalganj.

... .. Respondent/s

=====

Appearance :

For the Petitioner/s	:	Mr. Sanjay Kumar Pandey No-5, Advocate
For the State	:	Mr. R.P.N. Tiwari, AC to SC 25
For the O.P. No.2	:	Mr. Udar Pratap Singh, Advocate

=====

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

Date : 06-05-2024

Heard learned counsel for the petitioner as well as learned counsel for the respondents on the point of admission and I intend to dispose of the present petition at the stage of admission itself.

2. The petitioner has filed the instant petition under Article 227 of the Constitution of India for setting aside the order dated 16.05.2017 passed by the learned Additional District Judge-VIII, Gopalganj in Probate Case No. 9 of 2016 whereby and whereunder the learned Additional District Judge-VIII, Gopalganj rejected the petition dated 17.09.2016 filed on behalf of the petitioner for amendment in the schedule of the plaint of the probate case.

3. Learned counsel for the petitioner submits that



petitioner is the legatee of a Will executed by Payahari Sharan Tiwari which is a registered Will. The said Will is an open deed and does not contain any schedule of the properties. After death of the testator, the petitioner filed Probate Case No. 9 of 2016 for grant of probate of the Will dated 09.05.2013 with the details of property in schedule of the petition and opposite party no.2 Narbadeshwar Nath Tiwari appeared and filed his written statement on 17.09.2016. After appearance of opposite party no.2, the probate case has been converted into a testamentary suit. The issues have not been framed in the said suit. At the stage, the petitioner filed a petition under Order VI Rule 17 of the Code of Civil Procedure (hereinafter referred to as 'the Code') for amendment in the schedule of the plaint of Probate Case No. 9 of 2016. These amendments which have been proposed in the schedule of the probate case are addition of one property having Khata No. 51, Plot No. 153 having an area of 2 *katha* 14 *dhur* and to change in the area of Plot No. 374 from 5 *dhur* 10 *dhurki* to the 8 *dhur*. Learned counsel further submits that as the petitioner came to know about these facts subsequent to filing of the probate case, at the first instance, he brought these facts to the notice of the court seeking amendment in the schedule of the plaint. Rejoinder to the amendment application



was filed by opposite party no.2 and the learned trial court rejected the prayer of the petitioner for amendment in the schedule of the plaint.

4. Learned counsel further submits that the order of the learned trial court is bad in the eyes of law. Learned trial court did not consider the petition of the petitioner seeking amendment and has passed the order with regard to only one of the amendments. Further, the learned trial court has failed to appreciate the fact that the trial is at the stage of framing of issues after filing of written statement by opposite party no.2. The learned trial court went on the premises that the Will did not contain details of the property and did not consider the fact that once the Will was contested, the provisions of Section 295 of the Succession Act would come in play. Amendment was rejected considering the merit of the amendment which is not permissible at this stage. Thus, the learned counsel submits that the impugned order is not sustainable and same be dismissed.

5. Learned counsel appearing on behalf of respondent no.2 vehemently contests the submission made on behalf of the petitioner. Learned counsel submits that the Will is forged and fabricated as the same person earlier executed a Will in favour of other brothers of the petitioner as well and thereafter just 16



days prior to the death of the testator, this Will has come into existence. Learned counsel submits that nowhere in the amendment petition there is anything mentioned about the amendment in the original pleadings and it is also vague as it does not disclose where the property as mentioned in the amendment petition should be added in the portion of the pleadings. Learned counsel further submits that there is no infirmity in the impugned order and the same needs to be sustained. Learned counsel appearing on behalf of the State supports the contention of the learned counsel for respondent no.2.

6. I have given my thoughtful consideration to the rival submission of the parties. Order VI Rule 17 of the Code provides as under:-

“17. Amendment of pleadings.-The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the



conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

7. The Court has been empowered to allow the parties to alter or amend the pleadings for the purpose of determining the real question in controversy between the parties. In the present case, the issue of genuineness of Will is the subject matter. The jurisdiction of the probate court is limited only to consider that the Will is genuine, it was executed by the testator in a sound state of mind, whether the Will was duly attested and the Will was duly executed. The law is well settled that it is not competent for the probate court to determine the question of title of the suit properties or the existence of the properties. Reliance could be placed on the decisions of the Hon'ble Supreme Court in the cases of ***Krishna Kumar Birla vs. Rajendra Singh Lodha & Ors.***, reported in ***(2008) 4 SCC 300*** and ***Ishwardeo Narain Singh vs. Kamta Devi & Ors.***, reported in ***(1953) 1 SCC 295***. Now, in the present case what is sought by the petitioner to bring by way of amendment in the probate petition is insertion of certain properties in the schedule annexed with the probate petition. This amendment has nothing to do with the subject matter of probate which is the Will wherein no details of properties have been mentioned. It is the claim of the petitioner



that the schedule properties are the property of the testator and certain properties left to be mentioned. The claim is contested by the respondent. However, as already discussed, it is not within the domain of the probate court to decide the title and for this reason adding of subtracting the properties in schedule annexed with the probate petition is not of much significance. Moreover, it is also the settled law that a testator can bequeath property only to the extent of share held by the testator and if the property is in excess of such share, to that extent the legatee would inherit only to the extent of the share of the testator.

8. Hence, in the light of the aforesaid discussion, I do not find any infirmity in the impugned order dated 16.05.2017 passed by the learned Additional District Judge VIII, Gopalganj in Probate Case No. 9 of 2016 and the same is affirmed.

9. Accordingly, the instant civil miscellaneous petition stands dismissed.

(Arun Kumar Jha, J)

balmukund/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	13.05.2024
Transmission Date	NA

