

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1512 of 2019

Om Prakash Singh @ Prince son of Sri Kumar Dayanand Prasad Singh @ Kanhayajee Resident of Village- Shampur, P.O. and P.S.- Haveli Kharagpur, District- Munger and at present Maa Gayatri Opposite Patna College, Ashok Rajpath, P.O. Mehandru, Patna- 800006.

... .. Petitioner/s

Versus

1. Kumar Dayanand Prasad Singh @ Kanhayajee son of Late Damodar Prasad Singh resident of Village- Shampur, P.O. and P.S.- Haveli Kharagpur, District- Munger.
2. Daya Devi W/o Late Damodar Prasad Singh resident of Village- Shampur, P.O. and P.S.- Haveli Kharagpur, District- Munger.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Dilip Kumar, Advocate
For the Respondent/s	:	Mrs. Kiran Kumari, Advocate
For the O.P. No.2	:	Mr. Vikash Anand, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL ORDER

- 7 08-10-2024 1. Heard learned counsel for the petitioner as well as learned counsel for the respondent no.2.
2. Despite service of notice, none appeared to represent the respondent no.1.
3. The present petition has been filed under Article 227 of the Constitution of India by the petitioner for setting aside the order dated 09.07.2019 passed by learned Sub-Judge-1, Munger whereby and whereunder the application filed by the petitioner for the impleadment has been rejected.
4. Learned counsel for the petitioner submits that the plaintiff, Daya Devi and her husband Damodar Prasad Singh,



the grandparents of the petitioner, filed Title Suit No. 115 of 2011 in the court of learned Sub-Judge-1, Munger for declaration of their title and confirmation of possession along with other reliefs over the suit property. The defendant who is respondent no.1 (father of the present petitioner) in the present petition appeared in file his written statement. During pendency of the Title Suit No. 115 of 2011, the original plaintiff no.2, Damodar Prasad Singh died on 07.02.2019. Prior to that, the original plaintiff no.2 executed the deed of Will dated 12.12.2018 in favour of the petitioner and Probate Case No. 56 of 2019 has been pending in the court of learned Additional District Judge-XIII, Patna for probate of the Will and the citations were issued on near relatives. On the basis of said Will, the petitioner filed a petition dated 10.04.2019 seeking impleadment in the title suit in place of deceased original plaintiff no.2. Learned counsel further submits that the petitioner acquired sufficient interest after transfer of most of the suit property of the title suit in his favour and the petitioner was required to be impleaded as co-plaintiff along with his grand-mother. Learned counsel further submits that mother of the petitioner died when the petitioner was only three years old and thereafter, his grandparents got him educated and pleased



with his services, the original plaintiff no.2 executed the deed of Will dated 12.12.2018. In another case, S.T.A. No. 35 of 2013, filed by the deceased grand-father of the petitioner, the petitioner was allowed to be impleaded as appellant in place of his deceased grand-father, Damodar Prasad Singh. Learned counsel further submits that the impugned order rejecting the impleadment is bad in the eye of law as well as in fact. The said order has been passed without considering the deed of Will dated 12.12.2018 executed by grand father of the petitioner in his favour. The petitioner acquired a vested right in the suit property on the basis of the said Will and therefore, the petitioner is a necessary party and should have been allowed to be impleaded as such in Title Suit No. 115 of 2011. Learned counsel further submits that even the other plaintiff, namely, Daya Devi, the grand mother of the petitioner, has no objection to such impleadment. Learned counsel further submits that subsequent event has taken place and by a registered gift deed dated 29.09.2023, the grand mother of the plaintiff has gifted all her properties to the petitioner and the subsequent development should also be taken into consideration by this Court. Learned counsel next submits that the learned trial court merely went on the consideration that the intervenor petitioner is not the legal



heir of the plaintiff no.2, Damodar Prasad Singh. But this is an erroneous finding as relationship of the parties is quite clear and moreover, the petitioner has not been making claim as a legal heir rather he claims as legatee of the plaintiff no.2 Damodar Prasad Singh. Learned counsel further submits that though the Will is yet to be probated, still on the basis of unprobated Will, the petitioner could be made party and relied in this regard on a decision of Hon'ble Supreme Court in the case of ***Suresh Kumar Bansal vs. Krishna Bansal & Anr. (Civil Appeal No. 8271 of 2009)*** where in the Hon'ble Supreme Court allowed the impleadment of the appellant along with natural heirs of the deceased plaintiff on the basis of a Will alleged to have been executed by the deceased plaintiff.

5. Learned counsel submits that the impugned order is not sustainable and the same be set aside and the impleadment of the petitioner be allowed.

6. Learned counsel for the petitioner appearing on behalf of the respondent submits that respondent no.2 has no objection on petitioner being made co-plaintiff with her and also concurs with the fact about transfer of property by way of gift deed in favour of the petitioner by respondent no.2.

7. I have given my thoughtful consideration to the



submission made on behalf of the petitioner. Legatee of a Will can seek substitution in place of deceased plaintiff or defendant if suit property has been bequeathed in his favour. In the present case the property has been bequeathed in favour of the petitioner but the Will is unprobated. Similar issue arose before this Court in the case of ***Rajniti Yadav vs. Rambaran Yadav & Ors.***, Civil Misc. No. 104 of 2016. This Court took note of a Division Bench decision of this Court in the case of ***Suresh Singh and Anr. vs. Dr. Raja Ram Singh and Ors.*** reported in ***1992(2) PLJR 129*** and another decision in the case of ***Ramcharan Singh vs. Mst. Dharohar Kuer*** reported in ***AIR 1984 Patna, 175*** to hold that a legatee derives his title and authority from the Will of its testator and not from the grant of probate. Reference was also made to 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. The decision referred by the learned counsel for the petitioner in ***Suresh Kumar Bansal*** (supra) is on



similar lines and clinches the issue wherein the Hon'ble Supreme Court allowed the appellant to be substituted in place of the deceased plaintiff along with others natural heirs on the basis of a Will in favour of the appellant executed by the deceased plaintiff. Therefore, the issue is no more *res integra* and the legatee or executor of an unprobated Will can institute a suit or take a defence in a suit on the basis of such Will and in like manner can be substituted in a place of a plaintiff or defendant. However, in the decisions quoted hereinabove, it was also made clear that in the event the probate of the Will of the deceased plaintiff is not granted, no decree can be passed in favour of the substituted plaintiff unless probate or letter of administration is obtained before disposal of the suit. Therefore, I am of the considered opinion that the petitioner can be allowed to be substituted in place of the testator, the deceased original plaintiff no.2, even though his claim is based on an unprobated Will. Further, the learned trial court went on completely irrelevant consideration in searching for relationship of the petitioner with the deceased plaintiff and hence, the order suffers from error of jurisdiction.

8. In the light of the discussion made so far, I am of the view that the impugned order dated 09.07.2019 is not



sustainable and the same is set aside. Accordingly, the petition dated 09.07.2019 filed by the petitioner for impleadment is allowed.

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

(Arun Kumar Jha, J)

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