

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1722 of 2018

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Bishwanath Prasad, Son of Late Ram Chandra Ram, resident of Mohalla-Salimpur Ahra, Dwarika Nath Lane, Police Station- Gandhi Maidan, Town and District- Patna, at present C/o Sri B.K. Singh, 1st Floor, Sundari Sadan, Jagat Narain Road, Kadam Kuan, P.S.- Kadamkuan, Town and District- Patna.

... .. Petitioner/s

Versus

Kamla Devi Daughter of Sri Ram Chandra Ram and Wife of Dr. Binay Prasad, resident of Bhoot Nath Road, Police Station- Agamkuan, District- Patna, presently resident of Mohalla- Salimpur Ahra, Dwarika Nath Lane, Police Station- Gandhi Maidan, District- Patna.

... .. Respondent/s

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*Constitution of India, 1950—Article 227—petitioner being a member of a joint family, filed a Title Suit for his share in the entire joint family properties—a probate case was pending for adjudication before learned Additional District Judge—learned Sub-Judge refused his petition for amendment in plaint for inclusion of the properties left after death of his father under Order VI Rule 17 of Code of Civil Procedure, 1908 till the final adjudication of probate case; and also stayed the proceeding in the partition suit—learned trial Court has committed error in not considering the amendment petition filed under Order VI Rule 17—impugned order set aside with direction to District Judge—petition allowed.***(Paras 6 to 9)**

*(2005) 12 SCC 503; (2005) 12 SCC 505; 2009 (4) PLJR 918—***Relied upon.**

*Words and Phrases—Probate of a Will means the genuineness of a Will is to be tested by the probate court; and any decision on this point would not be taken as a decision on the disputed question of title and ownership of the properties.***(Para 6)**

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Appearance :

For the Petitioner/s	:	Mr. J.S. Arora, Sr. Advocate Mr. Manoj Kumar, Advocate Mr. Himanshu Shekhar, Advocate
For the Respondent/s	:	Mrs. Archana Sinha @ Archana Shahi, Advocate Mr. Alok Kumar, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT
Date : 29-04-2024**

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

2. The instant petition has been filed by the petitioner under Article 227 of the Constitution of India for setting aside the order dated 05.07.2018 passed by the learned Sub Judge XI, Patna in Title Suit No. 340 of 2009 by which the petition dated 22.08.2017 filed by the plaintiff/petitioner under Order VI Rule 17 of the Code of Civil Procedure (hereinafter the Code) for



amendment in the plaint has been disposed of with certain observations.

3. Learned senior counsel submits that plaintiff/petitioner is a member of joint family and filed Title Suit No. 340 of 2009 before the court of learned Sub Judge-1, Patna for his 1/3 share in the entire joint family properties. As the plaintiff/petitioner was not aware about the entire joint family properties at the time of filing of the suit, upon getting knowledge of the other properties, subsequently the plaintiff/petitioner filed a petition on 22.08.2017 under Order VI Rule 17 of the Code for amendment in the plaint for inclusion of the properties left to be mentioned in the plaint which was also for the amendment in the quantum of share claimed by the plaintiff/petitioner after death of his father. On 06.11.2017, a rejoinder was filed to the said petition by the defendant/respondent-sister of the plaintiff/petitioner contending that the father of the petitioner has already executed a Will dated 21.03.2014 in favour of the defendant/respondent and Probate Case No. 62 of 2017 has also been filed which was pending adjudication before the court of learned Additional District Judge-XI, Patna. The learned Sub Judge vide order dated 05.07.2018 refused to allow the petition filed by the petitioner



till the final adjudication of the probate case. Learned senior counsel further submits that in fact a peculiar order was passed without considering the law in regard to ambit and scope of Order VI Rule 17 of the Code.

4. Learned senior counsel further submits that the learned trial court has failed to appreciate the principles laid down by the Hon'ble Apex Court wherein it has been observed that where with regard to the same property, a suit for partition and also a probate case is pending, in such a situation there cannot be stay of the proceeding of partition suit and it was decided by the Hon'ble Supreme Court in the case of ***Balbir Singh Wasu vs. Lakhbir Singh & Ors.***, reported in ***(2005) 12 SCC 503*** and in the case of ***Nirmala Devi Vs. Arun Kumar Gupta & Ors.***, reported in ***(2005) 12 SCC 505***. The said principle has been followed by this Court in the case of ***Krishnapal Singh Raghuvanshi vs. Ravindra Pratap Singh*** reported in ***2009 (4) PLJR 918***. Learned senior counsel further submits that in the light of settled principles of law there was no occasion for the learned trial court not to consider the petition for amendment and observations made by it to proceed with the suit after disposal of the probate case by *suo moto* staying the further proceeding in the partition suit is completely against the



law. Further, the observation made by the court that further proceeding in the case shall be continued after final adjudication of Probate Case No. 62 of 2017 was simply uncalled for and was not warranted. Learned senior counsel further submits that the learned trial court did not consider the merits of the proposed amendment that the entitlement of the petitioner became $\frac{1}{2}$ share in the suit property after death of his father instead of $\frac{1}{3}$ share as earlier claimed. Learned senior counsel further submits that even after grant of probate, the title and ownership of the property could be always the subject matter of the title suit and probate of Will would not have any effect on the title and ownership on a property though it might be a part of the Will. Thus, the learned senior counsel submits that the impugned order is not only against the law and without jurisdiction but the same is also perverse in the eye of law.

5. Learned counsel appearing on behalf of the defendant/respondent has vehemently contended that there is no infirmity in the impugned order. The defendant/respondent is the daughter of the deceased Ram Chandra Ram and is the sister of the plaintiff/petitioner. The properties which are subject matter of the Will are self-acquired properties of Ram Chandra Ram and the petitioner has no claim over it as the properties have



been bequeathed to the defendant/respondent. Learned counsel further submits that whatever might be the decision of this Court, the probate case may not be stayed and it should be allowed to proceed.

6. Having regard to the rival submissions, the Hon'ble Supreme Court in the cases of **Balbir Singh Wasu** (supra) and **Nirmala Devi** (supra) ordered for clubbing of probate proceedings and the civil suit and to be heard and disposed of by the competent court. Moreover, in the present case, I find that the learned trial court has refused to consider the amendment petition of the plaintiff/petitioner only on the ground that the properties are also subject matter of Will and it was not the proper stage to pass any order on the amendment petition before final adjudication of the probate case. Evidently, the learned trial court has erred on this point and the order is against the settled provisions of law. If the amendment application was moved, the learned trial court was required to dispose of the same on its merits. Even if the decision in the probate proceedings on the question of proof of the 'Will' could have a direct impact on the partition suit, there cannot be an adjudication of the title and ownership of the property in a probate case. Probate of a Will means the genuineness of a Will is to be tested by the probate



court and any decision on this point would not be taken as a decision on the disputed question of title and ownership of the properties. So the learned trial court has committed error in not considering the amendment petition filed under Order VI Rule 17 of the Code citing pendency of proceedings before the probate court.

7. Hence, the observations made by the learned trial court regarding present stage not being a proper stage for passing any order on amendment petition before the final adjudication of the probate case is not sustainable and therefore, the stay of further proceedings of the partition suit till final adjudication of the Probate Case No. 62 of 2017 was simply unwarranted.

8. In the light of aforesaid facts and circumstances, I find and hold that while passing the impugned order dated 05.07.2018 in Title Suit No. 340 of 2009, the learned Sub Judge-XI, Patna committed an error of jurisdiction and erroneously refused to exercise the jurisdiction vested in him, hence the impugned order is set aside.

9. Considering the fact that a large number of issues would overlap, probate proceedings and civil suit should be clubbed and heard together by the competent court in terms of



the decisions of the Hon’ble Supreme Court in the cases of *Balbir Singh Wasu* (supra) and *Nirmala Devi* (supra). Therefore, the learned District Judge, Patna is requested to transfer the Title Suit No. 340 of 2009 to the court which is already seized of the matter in Probate Case No. 62 of 2017 and the concerned court, while considering all issues, would proceed to dispose of both the cases within a period of nine months from the date of receipt/production of a copy of this order.

10. Accordingly, the instant petition stands allowed.

(Arun Kumar Jha, J)

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AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	02.05.2024
Transmission Date	NA

