

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**CIVIL MISCELLANEOUS JURISDICTION No.979 of 2017**

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1. Ashutosh Kumar Singh son of Late Purushottam Kumar Singh, resident of Village -Kalyanpur Bambaia, Police Station-Bibhutipur, District- Samastipur.
2. Amitosh Kumar Singh Son of Late Purushottam Kumar Singh, resident of Village -Kalyanpur Bambaia, Police Station-Bibhutipur, District- Samastipur.

... ... Petitioner/s

Versus

- 1.1. Kaushalya Devi Wife of Late Laxmi Prasad Sah, resident of Village -Kalyanpur Bambaia, Police Station-Bibhutipur, District-Samastipur.
- 1.2. Pankaj Kumar Sah, son of Late Laxmi Prasad Sah, resident of Village -Kalyanpur Bambaia, Police Station-Bibhutipur, District-Samastipur.
- 1.3. Jivachh Devi, Daughter of Late Laxmi Prasad Sah, resident of Village -Kalyanpur Bambaia, Police Station-Bibhutipur, District-Samastipur.
- 1.4. Sandhya Devi, daughter of Late Laxmi Prasad Sah, resident of Village-Kalyanpur Bambaia, Police Station-Bibhutipur, District-Samastipur.
- 1.5. Pramila Devi, daughter of Late Laxmi Prasad Sah, resident of Village-Kalyanpur Bambaia, Police Station-Bibhutipur, District-Samastipur.
- 1.6. Punita Devi, Daughter of Late Laxmi Prasad Sah, resident of Village-Kalyanpur Bambaia, Police Station-Bibhutipur, District-Samastipur.
3. Ranjit Kumar, Son of Late Ramakant Sah
4. Rajesh
5. Raja Babu
6. Gautam All three Sons of Late Ramakant Sah under the guardianship of Sushila Devi All resident of Village-Kalyanpur Bambaia, Police Station-Bibhutipur, District-Samastipur

... ... Respondent/s

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*Acts/Sections/Rules:*

- *Order 1 Rule 10 of the Code of Civil Procedure*

*Cases referred:*

- *Ajit Kumar Hazra and Ors. vs. Rathindra Nath Roy reported in AIR 1980 Cal 117*
- *Suresh Kumar Bansal Vs. Krishna Bansal and Anr. passed in Supreme Court Civil Appeal No. 8271 of 2009*
- *Rajniti Yadav vs. Ramabaran Yadav & Ors. passed in Patna High Court Civil Miscellaneous Jurisdiction No. 104 of 2016*
- *Suresh Singh and Anr. Vs. Dr. Raja Ram Singh and Ors. reported in 1992(2) PLJR 129*
- *Bhudeb Chandra Roy Vs. Bhikshakar Pattanaik and Ors. reported in AIR 1942 Patna, 120*
- *Ramcharan Singh Vs. Mst. Dharohar Kuer reported in AIR 1984 Patna, 175*

*Petition - filed to quash the order wherein the District court rejected the petition filed by the petitioners under Order 1 Rule 10 of the Code of Civil Procedure.*

*Appellants preferred an appeal bearing Title Appeal before the Additional District Judge. During the pendency of the said Title Appeal, the defendant in the title suit executed a registered deed of Will in favour of petitioners in respect of the aforementioned part of the suit land and only that part was subject matter of appeal. Defendant died issueless and thereafter the petitioners on the basis of the registered Will came in peaceful possession of the land in question. The petitioners after coming to know about pendency of the appeal obtained the relevant documents and filed a petition under Order 1 Rule 10 read with Section 151 of the Code praying therein that petitioners might be impleaded as parties in title appeal as they are necessary parties and their interest would be affected with the outcome of the said appeal. This petition was rejected.*

*Held - The estate of the deceased testator vests in the executor immediately upon the death of the testator conferring certain rights to him. (Para 7)*

*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. - 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. (Para 7)*

*Appellate Court committed error of jurisdiction when it refused to allow impleadment of the petitioners on the ground that it was based on an unprobated Will. (Para 8)*

*Petition is allowed. (Para 9)*

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... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Arun Kumar, Adv.  
Mr. Raghubir Chaudhary, Adv.  
For the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA  
ORAL JUDGMENT

Date : 23-01-2025

Present learned counsel for the petitioners however,  
no one appears on behalf of the respondents despite service of



notice upon the respondents.

2. Heard learned counsel for the petitioners and I intend to dispose of the present petition at the stage of admission itself.

3. The instant petition has been filed on behalf of the petitioners for quashing the order dated 04.03.2017 passed in Title Appeal No. 26 of 2009 by learned Additional District Judge-II, Samastipur whereby and wherein the learned Additional District Judge rejected the petition filed by the petitioners under Order 1 Rule 10 of the Code of Civil Procedure (in short “the Code”).

4. Learned counsel for the petitioner submits that the appellants are respondents before this Court and they filed Title Suit No. 59 of 1996 for declaration of their Title over the suit property which include part of lands bearing Tauzi No. 3968, Khata No. 334(old)/1179(new), Khesra No. 5497 part old/new 8748 measuring 12 kathas 2 dhurs 15 dhurki and also part of land bearing khata no. 1, khesra no. 5379(old)/8803(new) measuring 9 katha 3 dhurs, both situated in Village Kalyanpur Bambaiya, P.S. - Bibhutipur, District Samastipur. After hearing the parties, the Title Suit No. 59 of 1996 was dismissed against the appellants vide order dated 29.11.2008 passed by learned



Civil Judge, Senior Division No. II, Rosera, Samastipur. Accordingly, a decree was prepared on 06.12.2008. Thereafter, the appellants/respondents preferred an appeal bearing Title Appeal No. 26 of 2009 before the learned Additional District Judge, Samastipur. During the pendency of the said Title Appeal, the defendant in the title suit, Ram Nandan Poddar executed a registered deed of Will in favour of petitioners on 18.08.2009 in respect of the aforementioned part of the suit land and only that part was subject matter of appeal. Ram Nandan Poddar died issueless on 05.07.2010 and thereafter the petitioners on the basis of the registered Will came in peaceful possession of the land in question. The petitioners after coming to know about pendency of the appeal on 21.09.2016, obtained the relevant documents and filed a petition dated 23.09.2016 under Order 1 Rule 10 read with Section 151 of the Code praying therein that petitioners might be impleaded as parties in title appeal as they are necessary parties and their interest would be affected with the outcome of the said appeal. Thereafter, the appellants/respondents filed a rejoinder on 22.10.2016 to the petition dated 23.09.2016 opposing the same on the ground that late Ram Nandan Poddar has not been contesting the appeal and the Will dated 18.08.2009 has not been probated and the



petitioners have no right to be substituted in his place. The learned Additional District Judge-II, Samastipur after hearing the parties, vide order dated 04.03.2017 rejected the petition filed by the petitioners and the said order is under challenge in this Court.

5. Learned counsel for the petitioners submits that the impugned order is illegal, improper and arbitrary. The learned 1<sup>st</sup> Appellate Court failed to appreciate that petitioners have got interest in the part of the suit property which is also subject matter of the appeal by way of registered Will executed by late Rama Nandan Poddar. The learned trial court did not consider this fact as well that petitioners are in possession of the part of the suit property without any hindrance. Learned counsel further submits that the petition of impleadment was rejected mainly on the ground that petitioners have sought impleadment on the basis of Will which is an unprobated Will and such document has no legal value. Learned trial court also did not take into consideration the fact that petitioners are still in possession of the part of the suit property. On these grounds, the impugned order is arbitrary and shows non-application of judicial mind. Learned counsel referred to the decision of the Calcutta High Court in the case of *Ajit Kumar Hazra and Ors. vs. Rathindra*



*Nath Roy* reported in *AIR 1980 Cal 117*, wherein the learned Single Judge observed that it is settled law that executor can bring or prosecute an action before obtaining probate provided that no decree can be passed in such action before probate is obtained. Learned counsel further referred to another decision of the Supreme Court in the Case of *Suresh Kumar Bansal Vs. Krishna Bansal and Anr.* passed in *Civil Appeal No. 8271 of 2009* wherein the Hon'ble Supreme Court held that appellant claiming on the basis of an unprobated Will must be impleaded in the suit along with the natural heirs and legal representatives of the deceased plaintiff, subject to grant of probate by a competent court of law. Learned Supreme Court further held that best course open to the Court is to allow impleadment of the appellant in the eviction proceeding, thereby permitting him to proceed with the eviction suit along with natural heirs and legal representatives of the deceased plaintiff. It further held that in case the decree is to be passed for eviction of the tenant from the suit premises such eviction decree shall be subject to the grant of probate of the Will alleged to have been executed by the deceased plaintiff. Thus, learned counsel submits that on the basis of unprobated Will the substitution in title appeal could be allowed.



6. I have given my thoughtful consideration to the submission made on behalf of the petitioner and also perused the record.

7. The issue involved in the present matter is whether the petitioners would claim impleadment in title appeal on the basis of an unprobated Will executed in their favour. This Court in the case of *Rajniti Yadav vs. Ramabaran Yadav & Ors.* passed in *Civil Miscellaneous Jurisdiction No. 104 of 2016* relying on the decisions of Hon'ble Division Benches 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 *Bhudeb Chandra Roy Vs. Bhikshakar Pattanaik and Ors.* reported in *AIR 1942 Patna, 120* has earlier dealt with the matter and came to a finding that substitution could be allowed if the claim of the intervenor is based on a unprobated Will. The proposition which emerged from the two decisions of this Court is that the estate of the deceased testator vests in the executor immediately upon the death of the testator conferring certain rights to him. 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. 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 these lines the Hon'ble 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. The Hon'ble Supreme Court, in the case of **Suresh Kumar Bansal** (Supra), took a similar view wherein it held that a legatee under a Will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased testator, will be a legal representative and it has further been held that in an eviction proceeding, when a legatee under a Will intends to represent the interest of the estate of the



deceased testator, he will be a legal representative within the meaning of Section 2(11) of Code of Civil Procedure.

8. Therefore, in the light of discussion made hereinabove, I am of the opinion that the learned Appellate Court committed error of jurisdiction when it refused to allow impleadment of the petitioners on the ground that it was based on an unprobated Will. Therefore, application dated 23.09.2016 filed by the petitioners for impleadment is allowed and the impugned order dated 04.03.2017 is set aside but the claim of the petitioners would be established only when a probate or letter of administration of Will in his favour is granted.

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

**(Arun Kumar Jha, J)**

Anuradha/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	28.01.2025
Transmission Date	N/A

