

**IN THE HIGH COURT OF JHARKHAND AT RANCHI
C.M.P. No. 228 of 2023**

Diwakar Chandra Pandey, aged about 50 years, son of Late Muneshwar Pandey,
resident of Thana Road, Daltonganj, P.O. and P.S.- Daltonganj, District-
Palamau Petitioner

Versus

Dhruo Shankar Dubey @ Dhruv Shankar Dubey, son of Late Rajeshwar
Prasad Dubey, resident of Nawatoli, Tripathy Colony, K.G. School Road,
Town-Daltonganj, P.O. and P.S.- Daltonganj, District-Palamau
..... Opp. Party

CORAM : HON'BLE MR. JUSTICE SUBHASH CHAND

For the Petitioner : Mr. Amar Kr. Sinha, Advocate
: Mr. Sandeep Verma, Advocate
: Mr. Sumit Kumar, Advocate
For the Opp. Party : Mr. Bhaiya Viswajeet Kumar, Advocate
: Mr. Sheo Kumar Singh, Advocate

Order No. 10 /Dated: 5th December, 2024

1. This C.M.P. has been preferred on behalf of the petitioner against the order dated 16.01.2023 passed by the learned Civil Judge, Senior Division-VII, Palamau in Title Suit No. 102 of 2008, whereby learned Court below has allowed the petition filed by the intervenor/opposite parties under Order XXII Rule 10 read with Section 151 of C.P.C.
2. Learned counsel for the petitioner has submitted that the title suit was filed by Ram Dulari Devi against Diwakar Chandra Pandey which was registered at Title Suit No. 102 of 2008 in the Court of Sub Judge II, Palamau at Daltonganj. The copy of that plaint is Annexure No. 1 of this petition. In that Title Suit No. 102 of 2008, the written statement was also filed by the sole defendant which is Annexure No. 2. During pendency of Title Suit No. 102 of 2008, an application was given on behalf of Dhruo Shankar Dubey to be substituted as legal heir of plaintiff in that suit after the death of original sole plaintiff, Ram Dulari Devi, on the basis of the will, alleged to have been executed by Ram Dulari Devi in favour of Dhruo Shankar Dubey. The copy of that application is Annexure No. 3 in this petition. Against this petition, objection/rejoinder was filed on behalf of the defendant, the copy of the same is Annexure No. 4 of this petition.

- 2.1. Learned Court below has allowed the petition ignoring the very material fact that the will was not annexed with the application for the affidavit given in support thereof. Further the petitioner Dhruo Shankar Dubey had also concealed this material fact that deceased Ram Dulari had also left four daughters as natural legal heirs. This very plea was also taken by the defendant/petitioner herein in the objection against that application. Learned Court below having ignored both these material fact has allowed the application of Dhruo Shankar Dubey who is sole Opposite Party in this petition.
3. Per contra the learned counsel for the Opposite Party has vehemently opposed the contentions made by learned counsel for the petitioner and contended that in the objection given on behalf of the defendant, this plea was also raised that the probate was required; which there is no legal requirement of the same to substitute the legal heirs in a suit on the basis of the will. Further it has been opposed on this ground that even if the will was not filed along with this application, same was also adduced before the Trial Court with the list of documents and the execution of will has not been denied by the defendant. Therefore the impugned order passed by the Court below bears no illegality and needs no interference.
4. The Title Suit which was filed on behalf of Ram Dulari Devi against Diwakar Chandra Pandey, the copy of the plaint is Annexure No. 1 of this petition. In this Suit, the plaintiff has sought to cancel the sale deed dated 29.10.2005, alleged to have been executed by the plaintiff in favour of the defendant and also sought the declaration of right, title and interest of the plaintiff in the property in suit and also in possession thereof.
 - 4.1 In this very suit, the written statement was filed on behalf of the defendant which is Annexure No. 2.
 - 4.2 During pendency of the suit, admittedly Ram Dulari Devi died and one Dhruo Shankar Dubey who is opposite party in this petition came forward before the learned Trial Court to be substituted as legal heir of Ram Dulari Devi on the basis of will that application is Annexure no. 3 in this petition. From the very perusal of this petition, it is found

that petitioner Dhruo Shankar Dubey has stated that the sole plaintiff has died on 30th July, 2017 and before her death in her lifetime, the plaintiff had executed a will on 13th February, 2013 in favour of the petitioner bequeathing the property in suit. On this basis of the will, sought to be substituted as legal heirs of sole plaintiff.

- 4.3 In this very application, Dhruo Shankar Dubey has nowhere mentioned that after death, Ram Dulari Devi had also left her natural legal heir, i.e. her daughters. From the very contents of this petition and the affidavit annexed thereof, the copy of the will is also not annexed.
- 4.4. In the objection itself which is Annexure No. 4 in this petition in paragraph no. 2, it has been pleaded that plaintiff after his death on 30th July, 2017 also left the four daughters namely Champa Devi, Indu Devi, Gita Tiwari, Renu Tiwari and also the legal heirs of the deceased daughter Kamla Devi. Moreover in paragraph no. 5, it is stated that the copy of the will has not been annexed.
5. From the very perusal of the impugned order, it is found that the learned Court below has not taken into consideration while allowing the application of Dhruo Shankar Dubey, this very material fact that deceased had also left the natural legal heirs, four daughters and the legal heirs of fifth daughter as well and also ignored this fact that the will was not filed along with the application.
6. It is the settled law that **if any legal heirs of a party in suit comes to be substituted on the basis of will as plaintiff/appellant in a suit, for the same, there is no requirement of probate.** But claiming to be the legal heir on the basis of the will Dhruo Shankar Dubey has not filed the will along with the petition for substitution as plaintiff.
- 6.1 The very application of Dhruo Shankar Dubey is under Order 22 Rule 10 of C.P.C. and same is under the wrong provision, still it is not fatal because the caption of the application is not material, rather it is the subject matter of the application. From the basis of the same, the intention of the applicant and relief sought is to be gathered.
- 6.2 As submitted by learned counsel for the Opposite Party, the said will had been filed by the list of the documents and the same should have

been taken into consideration by the learned Court below while passing the impugned order but the learned Court below has ignored this material fact.

6.3 It is pertinent to mention here that after the death of sole plaintiff, if the natural legal heirs left by the deceased plaintiff also come forward to be substituted as plaintiff in the suit and Dhruo Shankar Dubey who is Opposite Party herein, who had already moved the application to be substituted as a plaintiff on the basis of the will. It is incumbent upon the Court below in view of the settled legal proposition of law that both the natural legal heirs and Dhruo Shankar Dubey who is claiming on the basis of the will should be impleaded as party in the suit.

6.4 The Hon'ble Apex Court in the case of *Custodian of Branches of Banco National Ultramarino v. Nalini Bai Naique*, reported in *1989 Supp (2) SCC 275*: at paragraph no. 4 held as under:

4. After hearing learned Counsel for the parties, we are of opinion that the learned Judicial Commissioner committed serious error of law in setting aside the order of the trial Judge. "Legal representative" as defined in Civil Procedure Code which was admittedly applicable to the proceedings in the suit, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide, it is not confined to legal heirs only instead it stipulates a person who may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression "legal representative".

6.5 Where there is dispute in regards to legal heirs of deceased plaintiff or defendant the trial court should adopt summary inquiry under Order 22 Rule 5 of the Civil Procedure Code as to who is the legal heir from the rival claimants. It is mandatory for the court to determine the legal heir taking into consideration the right to sue or be sued is surviving.

6.6 Hon'ble Apex Court in the case of *Nawal Kishore Patel vs. Indrapati Devi (Smt.) reported in (2003) 9 SCC 220* at paragraph no. 3 held as

under.

3. Order 22 Rule 5 CPC provides the procedure for determination of the question as to who is or is not the legal representative of a deceased plaintiff or defendant. Legal representative as defined in Section 2(11) CPC means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. It is thus clear that the scope of proceeding under Order 22 Rule 5 is limited to the question of finding as to who represents the estate of a deceased plaintiff or defendant. Obviously, the question unless put to issue as to who was the heir to the estate of the deceased cannot be enlarged. Similarly, in proceeding under Order 22 Rule 10 when a person claims himself to be an assignee or one on whom any interest during the pendency of a suit has been created or devolved seeks leave of the court to become party and look after his interests therein. Here as well no question of title is settled. In this light of the matter we are of the considered view, having heard learned counsel for the parties, that no res judicata was involved just because at an earlier stage in the appeal sufficient evidence had been introduced to establish that Veena Devi was the widow of the deceased Pramod Kumar. That finding arose out of a question posed about representation and not decided by regular issue and did not finally determine her heirship to the estate of the deceased

- 6.7 Further, though Dhruo Shankar Dubey in his application has not mentioned that deceased plaintiff Ram Dulari had also left the legal heirs of four daughters of the legal heirs of fifth daughter as well. But this fact was brought in knowledge of the Court by defendant narrating in paragraph no. 2 of the objection. Still the learned court below ignored this material fact while disposing the substitution application filed by Dhruo Shankar Dubey. As such the impugned order passed by the learned Court below is based on perverse finding and needs interference.
7. In view of the submissions made, impugned order passed by the learned court below is based on perverse finding and needs interference. Accordingly, this petition is hereby allowed and the impugned order dated 16.01.2023 passed by Learned Civil Judge (Senior Division) VII is set aside.
- 7.1 The learned trial court is directed to dispose of this application of Dhruo Shankar Dubey afresh after giving him an opportunity to file the will, if the same has not been filed on record and also to take into consideration whether the natural legal heirs of deceased sole plaintiff

come forward to be substituted as plaintiff and if they do not come to be substituted as plaintiff, also to mention the same fact while disposing substitution application of Dhruo Shankar Dubey.

(Subhash Chand, J.)

Rashmi/- **A.F.R.**