

Most Tunna Devi and ors. Vs. Smt. Sona Devi and ors.

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Court : Patna

Decided On : Oct-06-2005

Judge : M.L. Visa, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(11)

Appeal No. : F.A. No. 546 of 1997

Appellant : Most Tunna Devi and ors.

Respondent : Smt. Sona Devi and ors.

Prior history : M.L. Visa, J. 1. Respondents No. 1 to 6, 8 to 11 and 13 have filed IA No. 4229 of 2005 stating therein that they had filed Title Partition Suit No. 121 of 1988 claiming one-third share in suit property and suit has been decreed by learned Subordinate Judge II, Patna city and a preliminary decree has been prepared against which this appeal has been filed by the appellants who were defendants before the Court below. A survey knowing Advocate Commissioner was appointed for carving out separate ta

Judgement :

M.L. Visa, J.

1. Respondents No. 1 to 6, 8 to 11 and 13 have filed IA No. 4229 of 2005 stating therein that they had filed Title Partition Suit No. 121 of 1988 claiming one-third

share in suit property and suit has been decreed by learned Subordinate Judge II, Patna city and a preliminary decree has been prepared against which this appeal has been filed by the appellants who were defendants before the Court below. A survey knowing Advocate Commissioner was appointed for carving out separate takhta who submitted his report and appellants filed objection against the report and the Court below, after considering the report and objection of appellants, confirmed the report of Advocate Commissioner with certain recommendation and final decree was prepared against which appellants filed Title Appeal No. 373 of 2000 before the Court below. According to respondents, respondent No. 7 Mithilesh Gope was a minor who died on 10.02.2000 leaving behind him his mother Smt Shila Devi who is class-1 heir of. deceased but who has not been substituted in place of respondent No. 7 and, therefore, the appeal has automatically abated. Further, case of respondents is that before preparation of final decree, respondents got the name of Shila Devi substituted in place of respondent No. 7 and this order of substitution was passed in presence of appellants and besides this appellants had full knowledge of heirs of respondent No. 1 and in the final decree, name of Shila Devi has been mentioned and against that final decree, appellants had filed Title Appeal No. 373 of 2000 showing that appellants had full knowledge that respondent No. 7 died leaving behind his mother Shila Devi. In the petition under consideration, respondents have further stated that respondent No. 12 Deopati Devi died on 07.07.2000 leaving behind two sons and one daughter but appellants have not substituted their names in place of Deopati Devi. Further, appellant No. 1 died on 21.10.1997 and in his place, name of his wife Tunna Devi has only been substituted but his two daughters Chinta Devi and Kanti Devi have not been substituted. According to respondents, this appeal has abated as a whole. Prayer has been made for dismissing the appeal as abated.

2. Appellants have filed supplementary affidavit in reply to petition filed by respondents stating therein that father and two brothers of respondent No. 7 Mithilesh Gope, who was the minor, are already on record and, therefore, there is no question of abatement of appeal but they have prayed that name of Shila Devi may be added in the category of heirs of respondent No. 7. About respondent No. 12, the case of appellants is that they have filed I A No. 959 of 2005 for

substituting the names of legal heirs of respondent No. 12 but since respondents have suggested different names of heirs of respondent No. 12, therefore, appellants have got no objection in correcting the names, as suggested by the respondents.

3. The learned counsel appearing on behalf of respondents, during argument, did not press the issue of non-substituting the heirs of respondent No. 12 Deopati Devi and has concentrated his arguments on the issue of not substituting the name of Shila Devi, mother of respondent No. 7 Mithilesh Gope who is said to have died on 10.02.2000. He has argued that because respondent No. 7 died leaving behind his mother who is class-I heir and whose name has not been substituted in place of respondent No. 7, therefore, the whole appeal has abated. He has relied upon a number of decisions reported in 2002 (2) PLJR 9, AIR 1962 Supreme Court 89, AIR 1965 Supreme Court 1794 and, 2000 (2) BLJ 632. On the other hand, the learned counsel appearing on behalf of the appellants has argued that father of respondent No. 7 was a party and his name is on record and, therefore, there was no need of substituting the name of any heir of respondent No. 7 after his death. According to him, the suit was for partition and in a partition suit, names of heads of branches of the family are required. I am unable to accept, this argument because in the suit, which was admittedly, a suit for partition, respondent No. 7 was a party and in a partition suit, a party is interested in every part of suit property but then I find that there is no dispute that father of respondent No. 7 was also a party in the suit and his name is on record. The issue under consideration is fully covered by a Full Bench judgment of this Court reported in AIR 1987 Patna 239 where it was held that 'The legal guardian of a minor in possession of his property, who is himself a party to the suit alongwith the said minor, would, on the latter's death become his representative as intermeddler with the estate of the minor under Section 2(11) of the Code of Civil Procedure.' However, in that case also, mother of minor was allowed to be brought on record. As stated above, learned counsel of respondents has cited a decision of Supreme Court reported in 2000 (2) BLJ 632 which was a case in which a minor's property was sold through his guardian and the father, acting as a guardian, filed a suit on behalf of minor against the vendee for return of property and the suit was dismissed and an appeal was preferred but the during the pendency of appeal minor died. In that case, it was held that since

the minor's estate devolved in the hands of his mother who did not pursue the appeal so the appeal became incompetent. Facts of the present case are quite different because in the case relied upon by learned counsel of respondents, issue of intermeddler was not there and, therefore, it was not considered. However, the learned counsel of appellants has conceded that he has got no objection if mother of respondent No. 7 is brought on record as the heir of respondent No. 7. He further submitted that if permitted, he would be filing a petition for substituting her name in place of respondent No. 7. He further submitted that for appellant No. 1 who died on 21.10.1997, he will file petition for substituting the names of his two daughters Chinta Devi and Kanti Devi as his heirs.

4. In view of aforesaid facts, the appellants are directed to file petitions for substituting the name of mother of respondent No. 7 and names of daughters of appellant No. 1 as legal heirs of respondent No. 7 and appellant No 1 respectively. Appellants are also directed to make correction in IA No. 959 of 2005 in respect of proposed heirs of respondent No. 12 so that fresh notices to them be issued as per order dated 18.07.2005 earlier passed in this case.

IA No. 4229 of 2005 stands disposed of.

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