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**Court** : Patna

**Decided On :** Jan-23-1998

**Judge** : M.Y. Eqbal, J.

**Appeal No.** : Civil Revision No. 532 of 1997

**Appellant** : Sone Lal Singh and anr.

**Respondent** : Smt. Laro Devi and anr.

**Disposition** : Application Allowed

**Judgement** :

**M.Y. Eqbal, J.**

1. This Civil Revision application, at the instance of Defendants 1 and 5, is directed against the order dated 5.3.1997 passed by the Subordinate Judge I, Samastipur, in partition suit No. 37 of 1992, by which prayer made by Opp. party No. 1 (Smt. Laro Devi) to be added and substituted as plaintiff in the suit has been allowed.

2. The sole original plaintiff Smt. Dayabanti Devi filed the aforesaid suit for partition of her share to the extent of 5/- annas in the suit properties left behind by her husband Jeetan Mahto, in the said suit prayer was also made to a declaration that the order of Assistant Consolidation Officer dated 1.7.1988 was not binding on it.

The case of the deceased plaintiff was that one Nirdhan Mahto common ancestor died having behind his two sons, namely, Jeetan Mahto and Chhatri Mahto. Chatri Mahto died issueless Jeetan Mahto died on 10.1.1958 leaving behind his widow, the plaintiff and two sons, namely defendant Nos. 1 and 2 and one daughter (defendant No. 4). The plaintiff, therefore, claimed-5/- annas share in the suit property left by her husband and further claimed that her two sons, defendant Nos. 1 and 2 have-5/- annas share in the property. The plaintiff's further case was that her two sons, in order to deprive her from the property got their names recorded in respect of the property. Defendants-petitioners contested the suit by filing written statement stating, inter, alia, that Jeetan Mahto died in the year 1953 before coming into force of the Hindu Succession Act and as such the plaintiff had no claim or share in the property left by her husband it was further stated that Jeetan Mahto during his life time partitioned the suit property and gave the property to his two sons. During the pendency of the suit, the sole plaintiff Dayabanti Devi died on 4.12.1996.After hearing the death, Smt. Laro Devi, wife of defendant No. 2 filed an application under Order 22, Rule 3, C.P.C. for her substitution in place of the deceased plaintiff on the ground that Smt. Dayabanti Devi had executed a deed of gift on 3.12.1994 in respect of her share in the property in her favour and after the said gift she came in possession of the same. She, therefore, prayed to be substituted as the plaintiff and to prosecute the suit. The said application was opposed by the defendant petitioners on the group, inter alia, that she is not the legal representative of the original plaintiff and therefore, she could not be allowed to be substituted in her place. The leaned Court below after hearing the parties allowed the prayer of opp. Party No. 1 for being substituted as plaintiff in place of the original sole plaintiff.

3. I have heard learned Counsel appearing on behalf of the parties. The learned Counsel for the petitioners as sailed the impugned order as being illegal and wholly without jurisdiction for the reason that the application, so allowed, was not maintainable under the provisions of Order XXII, Rule 3, C.P.C. learned Counsel further submitted that originally the suit was filed by the deceased plaintiff for partition and possession, but by substituting Opp. Party No. 1 the suit will become one for title and possession. Learned Counsel then submitted that Opposite party No. 1 who is a stranger to the family cannot be substituted as plaintiff in place of

the deceased-plaintiff. Learned Counsel then submitted that the transferee during the life time of deceased plaintiff cannot be a legal representative and is not entitled to submission.

4. On the other hand learned Counsel appearing on behalf of Opposite party No. 1 submitted that by reason of deed of gift executed by the deceased plaintiff in favour of assigment and, therefore, the Court below has rightly held that she being the legal representative is entitled for substitution.

5. Before appreciating the rival contention of the parties. It would be useful to look at the relevant provisions of the Civil Procedure Code. Order XII, Rule 1 of the Code of Civil Procedure provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Rule 2 of Order XXII provides that 'Where there are more plaintiffs of defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff of plaintiffs alone, or against the surviving defendant of defendants alone the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs against the surviving defendant or defendants'. Rule 3 of Order XXII is relevant provision for the present case which reads as under:

Rule 3' (1) Where one or two or more plaintiffs dies an the right to sue does not survive to the surviving plaintiff of plaintiffs alone, or a sole plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.'

(2) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and on the application of the defendant, the Court may award to him the costs which he may have incurred in defending in the suit, to be recovered from the estate of the deceased plaintiff.

From bare reading of the aforesaid provision, it is manifest that in case of death of or a of several plaintiffs or of sole plaintiff, the legal representative of the deceased plaintiff may make an application for substitution in place of deceased plaintiff. The term legal representative has been defined in Section 2(11) of the Code of Civil Procedure which rads as follows:

Legal Representative 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 of is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.

6. Before discussing further, it would be appropriate to look one important provision of Rule 10 of Order XXII of the Code of Civil Procedure which reads as under:

10 (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

2. The attachment of a decree pending an appeal there from shall be deemed to be an interest entitling the person who procured such attachment to the benefit of Sub-rule (1).

7. As noticed above, the word 'legal representative' as defined in Section 2(11) 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 capacity the person on whom, the estate devolves on the death of the party so suing or sued,' It is, therefore, mainfest from the plain reading of definition that person in possession of the estate of the deceased or a person who intermeddled with the estate of the deceased are legal representatives and it is not necessary that they should necessarily be legal heirs. It is sufficient it they represent the estate of the deceased or is in possession of the estate of deceased. While interpreting the term 'legal representative', the Apex Court in the case of Custodian of Branches of BANCO National Ultramarino v. Nalinl Bal : [1989]2SCR810 , held that 'it means a person who represents the

estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. The definition is inclusive in character and its scope is wide. It is not comfit to legal heirs only, but includes a person who is competent to inherit the property. It further includes person who represents the estate without title either as executor or administrator.'

8. Applying the principle discussed above, in the instant case, question falls for consideration is whether the applicant Smt. Laro Devi comes within the definition of legal representative and whether the application under Order XXII, Rule 3, C.P.C. is maintainable. Admittedly the original plaintiff Dayawanti Devi died on 4 12,996 and till her death the applicant did not file any application to prosecute the suit. It was only after her death the applicant filed application under Order XXII, Rule 3, C.P.C. for her substitution in place of the deceased plaintiff on the ground that the deceased plaintiff executed a deed of gift much. before her death i.e. 3.12.1994 in her favour and pursuant to that gift she came in possession of the share of the deceased in the property. It is, therefore, clear that the applicant is claiming her substitution on the basis of deed of gift alleged to have been executed by the deceased plaintiff in her favour.

9. As noticed above Rule 10 of Order XXII is enabling provision which is based on the principle that the trial of the suit cannot be arrested merely by reason of devolution of the interest of the party in the subject matter of the suit and a person who acquired interest may continue the suit with the leave of the Court. It is, therefore, clear that in cases where during the pendency of the suit there is assignment, creation or devolution of any interest then a person in whose favour such interest has come by such assignment. Creation or devolution may with the leave of the Court continue to proceed. The assignment of interest can be created by transfer intervivos and such assignee may file an application under Order XII, Rule 10 of the C.P.C. in my opinion, therefore, if during the pendency of the suit the plaintiff or defendant transfers suit property then during the lifetime of the deceased, such transferee cannot be called legal representative or an intermeddler so as to represent his estate after his death. By reason of the alleged gift made by the deceased plaintiff in favour of the applicant, she later may claim ownership in her own right or independently of the other members of the family of

the deceased. By reason of such gift the applicant may take leave of the Court to continue the suit by filling an application under Order XXII, Rule 10 of the C.P.C. but she cannot claim to be substituted as legal representative of the deceased plaintiff under the provision of Order XXII, Rule 3 of the Code of Civil Procedure. The learned Court below has completely misconstrued the ratio of the case reported in the case of Gobardhan Mukherjee v. Saligram Marwari AIR 1936 Patna 123. The Court below further erred in law by holding that by reason of the gift, the applicant became the legal reprsentative and her application under Order XXII, Rule 3, CPC is maintainable and she is entitled to be substituted in place of the deceased.

10. Having regard to the facts and circumstances of the case and the discussions made herein above. I am of the opinion that the impugned order passed by the Court below cannot be sustained in law. In the result, this civil revision application is allowed and the impugned order passed by the Court below is set-aside. However, it is observed that the applicant as a transferee will not be debared from making any application under Order XXII, Rule 10 of the Code of Civil Procedure and if such application is filed, the Court below may consider the application on its own merit in accordance with law.

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