

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH  
AT JAIPUR.**

**ORDER**

S.B. CIVIL WRIT PETITION NO. 12634/2013  
WITH  
S.B. CIVL MISC. STAY APPLICATION NO. 10421/2013  
AJAYPAL & ANOTHER  
VS.  
ADDITIONAL DISTRICT JUDGE NO. 1, DEEG(BHARATPUR) & OTHERS.

DATE OF ORDER : 30.04.2015

**HON'BLE MR. JUSTICE MOHAMMAD RAFIQ**

Mr. L.L. Gupta, for the petitioners.  
Mr. Rahul Sharma on behalf of Mr. Rajneesh Gupta, for the respondents.

**BY THE COURT:**

This writ petition has been filed by the petitioners-applicants challenging order dated 07.05.2013 passed by Additional District Judge No. 1, Deeg(for short 'the Trial Court') whereby application filed by the petitioners under Order 1 Rule 10 CPC read with Section 151 CPC seeking their impleadment as defendants in the suit has been rejected.

Plaintiff-Respondent No. 2 filed a suit for partition of the properties situated in Deeg and mentioned in the suit alleging the same to be of Pyarelal grand father and Smt. Kesar, grand mother of the petitioners. Defendant No.1, Shri Gopal Prasad filed a written statement on or about 30<sup>th</sup> July, 2011 and pleaded that Shri Pyarelal and Smt. Kesar Devi died on 09.08.2013 and 12.04.2008 respectively having executed a joint will dated 15.06.1991

bequeathing the properties in dispute in favor of Ajaypal and Vijaypal, petitioners and therefore, the said properties are not liable to be partitioned. On the basis of the pleadings of the parties, the Trial Court framed issues on 13.02.2012 wherein Issue No. 4 was with regard to execution of Will dated 15.06.1991 in favour of the present petitioners. In those circumstances, the petitioners filed an application under Order 1 Rule 10 CPC seeking their impleadment. The plaintiff-respondent filed reply to the application on 06.04.2012 and opposed the impleadment sought by the petitioners. The Trial Court vide order dated 07.05.2013 rejected the application for impleadment. Hence, this writ petition has been filed by the petitioners.

Learned counsel for the petitioners has submitted that the Trial Court failed to consider that the properties subject matter of the suit have been bequeathed in favour of the petitioners by Smt. Kesar Devi and Shri Pyarelal, as mentioned above, therefore, no question of partition of the said properties arises. The Trial Court has wrongly rejected the application of the petitioners on the ground that original defendant Gopal Prasad too has taken such plea and even issue has also been framed. The properties actually vested in the applicants-petitioners and even issue regarding execution and effect of the Will dated 15.06.1991 executed in favour of the petitioners has been framed and therefore, the petitioners are necessary party to the suit. It is submitted that the Trial Court has erred in dismissing the application of the petitioners on the ground that the defendant Gopal Prasad can summon the present applicant as witness and Gopal Prasad can represent the petitioners. Once

the Trial Court has framed issue with regard to execution of the Will dated 15.06.1991 and suit relates solely with regard to the property subject matter of the Will, the presence of applicants become necessary. The suit is at preliminary stage as evidence of parties has not been commenced, therefore, the petitioners ought to have been impleaded as party defendants to the suit. The plaintiff has sought a relief of partition in relation to the properties actually given to the petitioners by deceased Shri Pyarelal and Smt. Kesar Devi vide Will dated 15.06.1991 and therefore, can not be partitioned amongst any one else. As such the petitioners are not only necessary but also proper parties.

Learned counsel for the respondents has opposed the writ petition and submitted that Shri Pyarelal and Smt. Kesar Devi had not bequeathed any property in the name of the petitioners and the Will in question is forged one. The suit is for partition which was filed in November, 2000 and affidavit has been filed by the plaintiff in evidence and father of the petitioners, Gopal Prasad has been arrayed as defendant in the suit, therefore, he can represent the petitioners and they are not necessary party. The order passed by the Trial Court is absolutely legal and proper and liable to be affirmed.

Learned Trial Court has rejected the application of the petitioners for impleaded in a suit for partition on the ground that plaintiff Sunny son of late Sunil Dutt had filed suit for partition claiming 1/2 share in the properties in question. Issues in the suit have been framed on 13.02.2012 and two affidavits have been filed by the plaintiff on 08.08.2012, but so far their cross-examination

could not have taken place because of the present application filed by the petitioners. The Trial Court has taken note of the fact that defendant Gopal Prasad in his written statement has stated that late Shri Pyarelal died on 09.08.1993 and his widow Smt. Kesar Devi died on 12.04.2008 and both of them had executed a will in favour of his sons Ajaypal and Vijaypal, present petitioners and that defendant Gopal Prasad himself was receiving rent of the shops on their behalf. It is further observed that the plaintiff has not recognised adoption of the petitioners and has not mentioned any fact about the same in the plaint. Trial Court has further held that the plaintiff is the master of the suit and by virtue of application principle of Dominus Litus, the plaintiff cannot be compelled to implead the petitioners as party defendants in the suit. Even though, Issue No. 4 has been framed, it is for the defendants to prove their case and if possible by summoning the petitioners as witnesses.

The Trial Court, in considered view of this Court, has erred in law. Even though the plaintiff has not recognised petitioners right, but the defendant has set up a specific plea about execution of Will in favour of the petitioners by late Shri Pyarelal and Smt. Kesar Devi. This issue was incorporated in the main issue which fact is fortified from specifically framed issue thereabout being Issue No. 4. Issue No. 4 is to the effect that whether late Pyarelal and Kesar Devi had jointly executed a joint will dated 15.06.1991 in respect of the disputed property in favour of Ajaypal and Vijaypal, petitioners and that the plaintiff has no right to get this property partitioned and that the suit was not liable to be dismissed with cost

of Rs. 25,000/- . When specific issue has been framed with respect to alleged Will and the petitioners have to be named in the issue as one in whose favour Will is said to have been executed, they would be necessary and proper party because in the event of that issue being decided against them, they would be adversely affected thereby.

In view of above, this writ petition deserves to succeed and the same is accordingly allowed. Order dated 07.05.2013 passed by the Trial Court is quashed and set aside and application filed by the petitioners for their impleadment is allowed and they are impleaded as defendants in the suit.

Stay application stands disposed of.

**(MOHAMMAD RAFIQ),J.**

Manoj

*"All corrections made in the judgment/order have been incorporated in the judgment/order being emailed."* MANOJ NARWANI Personal Assistant.