



GAHC010116622023

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/164/2023

SUSHIL KUMAR HARLALKA
S/O- LATE TANSUKHRAI HARLALKA,
R/O- NEHA APARTMENT,
SATI JOYMATI ROAD, ATHGAON,
GUWAHATI- 781001,
DISTRICT- KAMRUP(M), ASSAM.

VERSUS

A) SONESWARI BEY AND 3 ORS
W/O- LATE HIREN CHANDRA BEY,
RESIDENT OF HOUSE NO. 10,
2ND NO. KARBI PATH,
JYOTIKUCHI DHAPALIA,
PS- FATASIL AMBARI, GUWAHATI.

1.1:B). JULI DEY TAROH
D/O- LATE HIREN CHANDRA BEY

RESIDENT OF HOUSE NO. 10

2ND NO. KARBI PATH

JYOTIKUCHI DHAPALIA

PS- FATASIL AMBARI
GUWAHATI.

2:BHUMIDHAR BEY
S/O- LATE HIREN CHANDRA BEY

RESIDENT OF HOUSE NO. 10



2ND NO. KARBI PATH

JYOTIKUCHI DHAPALIA

PS- FATASIL AMBARI
GUWAHATI.

3:PANKAJ BEY
S/O- LATE HIREN CHANDRA BEY

RESIDENT OF HOUSE NO. 10

2ND NO. KARBI PATH

JYOTIKUCHI DHAPALIA

PS- FATASIL AMBARI
GUWAHATI.

4:KULDIP BEY
S/O- LATE HIREN CHANDRA BEY

RESIDENT OF HOUSE NO. 10

2ND NO. KARBI PATH

JYOTIKUCHI DHAPALIA

PS- FATASIL AMBARI
GUWAHATI

For the Petitioner(s) : Mr. A. K. Purkayastha, Advocate

: Mr. J. Chopra, Advocate

For the Respondent(s) : Mr. P. P. Das, Advocate

Date of Hearing : **13.03.2024**

Date of Judgment : **13.03.2024**



**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 13-03-2024

1. This is an application filed under Article 227 of the Constitution challenging the order dated 03.10.2019 passed in Title Suit No.157/2014 by the learned Civil Judge No.1 whereby the petition filed bearing Petition No.5455/2018 for rejection/dismissal of the written statement-cum-counter claim filed by the Defendant No.1(A) was rejected.

2. The record reveals that the Plaintiffs herein have filed the suit being Title Suit No.157/2014 seeking declaration of their right, title and interest over the schedule plots of land as described in the plaint; for confirmation of possession of the Plaintiffs over the schedule land; for permanent injunction and in the alternative, if the Plaintiffs are dispossessed during the pendency of the suit, for recovery of possession. The said suit upon being filed, the Defendants entered appearance on 29.05.2014. On 18.09.2014, taking into account that the written statement was not filed by the defendants even after the expiry of 90 days, the issue of filing of written statement by the defendants was closed. Thereupon, the suit proceeded.

3. The Defendant No.1 expired on 02.07.2016. Pursuant thereto, three applications were filed by the Plaintiffs. The first application pertains to condonation of delay of 54 days, the second application pertains to setting aside the abatement and the third application pertains to substitution of the legal representatives. The learned Trial Court vide order dated 05.08.2017 condoned the delay, set aside the abatement and substituted the legal

representatives of the Defendant No.1. Thereupon, summons were issued vide an order dated 18.09.2017.

4. The substituted defendants more particularly the Defendant No.1(A) filed a written statement-cum-counter claim on 13.06.2018. Thereupon, after a passage of 6 (six) months, on 17.12.2018, an application was filed by the Plaintiffs for dismissal of the written statement-cum-counter claim filed by the Defendant No.1(A). The said petition was numbered as Petition No.5455/2018. To the said application, the Defendant No.1(A) had filed a written objection. Subsequent thereto, after hearing, the order dated 03.10.2019, which has been impugned in the instant proceedings, was passed. Being aggrieved, the present proceedings have been initiated.

5. This Court finds it very pertinent at this stage to observe that pursuant to the order passed for substitution of the legal representatives of the Defendant No.1, on 11.05.2018, the Defendant No.1(A) appeared and filed the petition bearing Petition No.2366/2018 seeking time to file written statement. On that very day, the learned counsel for the Plaintiffs opposed the prayer of the written statement by the Defendant No.1(A) but the learned Trial Court upon considering the same directed the Defendant No.1(A) to file the written statement/objection.

6. The record further reveals that on 13.06.2018, the Defendant No.1(A) had filed the written statement-cum-counter claim. The further orders passed by the learned Trial Court on 24.07.2018 and 27.09.2018 shows that the service upon the Defendant No. 1(ii) was not completed. It was only on 17.12.2018, i.e. the Petition bearing Petition No.5455/2018 was filed by the Plaintiffs. Pursuant thereto, on 03.10.2019, the impugned order was passed.

7. This Court had duly taken note of the provisions of Order XXII Rule 4 which stipulates the procedure in case of death of one of the several defendants or the sole defendant. In Sub-Rule (2) of Rule 4 of Order XXII, it is mentioned that any person so made a party may make any defence appropriate to his character as a legal representative of the deceased defendant. In terms with Sub-Rule (4) of Rule 4 of Order XXII, the Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who had failed to file written statement or who having filed it, have failed to appear and contest the suit at the hearing and the judgment may in such a case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place. Therefore, if the provisions of Sub-Rule (4) of Rule 4 of Order XXII is applied, the learned Trial Court could have proceeded with suit against the Defendant No.1 without carrying out any substitution. However, it was the plaintiff who had filed the applications seeking condonation of delay, setting aside the abatement as well as for substitution of the legal representatives and after a detailed hearing, the learned Trial Court vide order dated 05.08.2017 permitted the three applications thereby substituting the legal representatives of the Defendant No.1. Under such circumstances, in the opinion of this Court, the learned Trial Court by operation of Sub-Rule (2) of Rule 4 of Order XXII having substituted the Defendant No.1 with his legal representatives has to permit the legal representatives including the Defendant No.1(A) to take any defence appropriate to his character as legal representatives of the deceased Defendant No.1. The learned Trial Court vide its order dated 11.05.2018

therefore rightly did so and the same would be apparent from the reasons and analysis herein under.

8. Mr. A. K. Purkayastha, the learned counsel appearing on behalf of the Petitioner submitted a decision of the Delhi High Court in the case of ***Manju Parthi and Others Vs. Rohit Parthi*** reported in ***(2007) SCC OnLine Del 1491***. The learned counsel submitted that the Delhi High Court held that merely because the substituted defendant is a legal representative of the deceased defendant, he does not get a new right to put the clock back and file the written statement as if the case started afresh. The learned counsel for the Petitioner therefore submitted that the learned Trial Court erred in passing the impugned order.

9. This Court having taken note of the said judgment finds it relevant to opine that the said judgment was rendered in the case where the learned Trial Court refused to grant the permission to the substituted defendants to file the written statement and against which, a proceedings under Article 227 of the Constitution was initiated unlike the present facts of the instant case. This Court also finds it relevant to take note of that in the said judgment, the learned Single Judge of the Delhi High Court with due respect did not take into consideration Order XXII Rule 4(4) of the Code and its co-relation with Order XXII Rule 4(2) of the Code. The reasons to respectfully defer to the proposition laid down therein would be seen in the analysis made hereinafter.

10. This Court finds it relevant to take into account why there is a requirement for substitution of the legal representatives of the deceased defendant in terms with Order XXII Rule 4 of the Code. It would be seen

from a perusal of Order XXII Rule 4(1) of the Code that the necessity of substitution of the legal representatives arise only in the circumstance when the right to sue does not survive against the surviving defendant or defendants alone or when the sole defendant or sole surviving defendant dies, the right to sue survives. Now, coming to the provision of Sub-Clause (3) of Order XXII Rule 4 of the Code, it would be seen that if the application is not filed in a case requiring substitution of the legal representatives and that too within time, the suit shall abate. Therefore, a conjoint reading of both the Sub-Clauses (1) and (3) would show that if the right to sue survives even after the death of the sole defendant or right to sue does not survive against the remaining defendant(s) and no substitution is carried out, the suit shall abate, meaning thereby that the Court seized with the suit or appeal is no longer required to proceed with the suit or appeal as the case may be as the cause of action for which the suit was filed is no longer required to be adjudicated upon. Therefore, statutorily the suit or appeal has to be closed as abated. The recourse therefore available is to first set aside the abatement of the suit/appeal by filing an application under Order XXII Rule 9 of the Code. Another important aspect is that in view of the bar contained in Order XXII Rule 9(1) of the Code, no fresh suit can be brought on the same cause of action, if the suit had abated or in other words, in a case falling under Order XXII Rule 4 of the Code, the plaintiff(s) cannot proceed against the legal representatives of the deceased defendant, on the same cause of action, if the right to sue survived pursuant to the death of the defendant, unless substitution is carried out within the time stipulated.

11. Before proceeding further, this Court finds it relevant to take note of the term “right to sue” which is of great significance for the purpose of the

present analysis. The Privy Council had in the case of ***Mst. Bolo Vs. Mst. Koklan and Others*** reported in ***AIR 1930 PC 270*** observed that a right to sue is a right accrued to be asserted in the suit as regards its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. The Supreme Court had in the judgment rendered in the case of ***Smti Phool Rani and Others VS. Shri Naubat Rai Ahluwalia*** reported in ***(1973) 1 SCC 688*** observed that the term “right to sue” means the right to bring a suit asserting the right to the same relief which the deceased plaintiff asserted at the time of his death. In the judgment of the Supreme Court in the case of ***State of Punjab and Others Vs. Gurdev Singh*** reported in ***(1991) 4 SCC 1***, it was observed that the words “right to sue” ordinarily mean the right to seek relief by means of a legal proceedings. The Supreme Court further observed in the said judgment that generally, the right to sue accrues only when the cause of action arises i.e. the right to prosecute to obtain relief by legal means.

12. In the above context, if this Court again relates back to Sub-Clause (1) of the Order XXII Rule 4 of the Code, it would be seen that the requirement to substitute the legal representatives would arise when the right to sue survives in the case of sole defendant or right to sue does not survive against the remaining defendant(s) in the case of the death of a defendant. Therefore, the logical conclusion one can arrive at is the right to sue of the plaintiff has to survive against the legal representatives of the deceased in order to proceed with the suit against the legal representatives and sans that, there would be no cause of action. At this stage, this Court further finds it relevant to take note of a very pertinent aspect i.e. in the circumstance, the cause of action was personal to the deceased defendant,

then the right to sue does not survive upon the death of the deceased defendant in view of the principle "Actio personalis moritur cum persona".

13. Moving forward, this Court now finds it relevant to take note of Sub-Clause (4) of Order XXII Rule 4 of the Code. This Sub-Clause (4) was inserted vide the Act of 104 of 1976. In the judgment of the Supreme Court in the case of ***Mata Prasad Mathur Vs. Jwala Prasad Mathur reported in (2013) 14 SCC 722***, the Supreme Court traced the history of the said provision and opined that the legislature incorporated the said provision with the specific view to expedite the process of substitution of the legal representatives of the non-contesting defendant. It was observed that in absence of compelling reasons, the Court ought to exercise the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representatives. Another very important aspect in respect to the said Sub-Clause (4) of Order XXII Rule 4 is that the Court specifically has to exercise the power to exempt in the case of non-contesting defendants during the proceedings of the suit and prior to delivery of the judgment else the provisions of Order XXII Rule 4(3) of the Code shall come into play. [see ***T. Gnanavel Vs. T. S. Kanagraj and Othes reported in (2009) 14 SCC 294*** para 26.]

14. Now, in the above backdrop, let this Court take note of the provisions of Order XXII Rule 4(2) of the Code. The said provision shows that any person so substituted and made a party may make any defence appropriate to his character as legal representative of the deceased defendant. It is important to note that a suit can neither be filed against a dead person nor a suit can be proceeded against a dead person. However, in the latter case,

the suit can be proceeded against the dead person provided the conditions stipulated in Sub-Clause (4) of Order XXII Rule 4 of the Code is satisfied and the Court passes appropriate orders exempting the plaintiff. Now, coming back to the term "right to sue survives", it has to mean that the plaintiff's right continues to be infringed or there is still a threat to the infringement of the plaintiff's right even after the death of the defendant. In other words, the legal representatives of the Defendant continues to infringe the rights of the plaintiff or for that matter, still continues to cause a threat to the rights of the plaintiff. It is in this context that one has to understood the purport of Sub-Clause (2) of the Order XXII Rule 4 of the Code and as such, the legal representative had/have been permitted to make a defence appropriate to the character as the legal representative(s) and state his/her defence against the cause of the plaintiff. This Court further finds it relevant at this stage to take note of a judgment of the Supreme Court in the case of **Jagdish Chander Chatterjee and Others Vs. Shri Sri Kishan and Another** reported in **(1972) 2 SCC 461**. Paragraph No.9 and 10 of the said judgment are quoted herein below:

"9. It is obvious that the appellant landlord's right to proceed with the appeal with a view to obtain possession of his premises did survive under Order 22 Rule 4, read with Rule 11 of the Civil Procedure Code. Where the right to sue and prosecute the appeal survives, the appellant is bound to cause the legal representatives of the deceased respondent to be made a party and proceed with the appeal. Therefore, the heirs and legal representatives of the aforesaid B.N. Chatterji were rightly brought on record and the appeal had to proceed.

10. Under sub-clause (ii) of Rule 4 of Order 22 of the Civil Procedure Code any person so made a party as a legal representative of the deceased, respondent

was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title."

15. The above judgment would show that the legal representatives who were brought on record were entitled to make any defence appropriate to his/her character as legal representative of the deceased defendant. It was categorically observed that the legal representatives could urge all contentions which the deceased defendant could have urged except only those which were personal to the deceased. It was further observed that the legal representatives could even urge their independent title and in such case, the Court should implead them not merely as legal representative but also in the personal capacity avoiding thereby a separate suit for a decision on independent title.

16. In the backdrop of the above analysis, if this Court reverts back to the facts of the instant case, it would be seen that the learned Trial Court did not exercise the powers under Order XXII Rule 4(4) of the Code. In fact the learned Trial Court in view of the applications filed by the plaintiff, condoned the delay, set aside the abatement and further substituted the Respondents herein as defendants. In view of the above analysis, it is the opinion of this Court that the legal representatives have a right to state their defence for



which this Court finds no illegality or jurisdictional error in the impugned order dated 03.10.2019. Accordingly, the present proceedings are meritless for which the same is dismissed.

17. This Court further finds it relevant to take note of that vide order dated 05.06.2023, the further proceedings of Title Suit No.157/2014 was stayed. The said stay order is vacated and the parties herein are directed to appear before the learned Trial Court on 08.04.2024 so the learned Trial Court can further proceed with the suit in accordance with law.

JUDGE

Comparing Assistant