

(2022) 05 SIK CK 0017

In the Sikkim High Court

Case No : Regular Second Appeal No. 07 Of 2020

Dachima Tamang

APPELLANT

Vs

Ran Maya Sherpa & Anr

RESPONDENT

Date of Decision : 12-05-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 22, Rule 3, Order 22, Rule 5

Citation : (2022) 05 SIK CK 0017

Hon'ble Judges : Meenakshi Madan Rai, J

Bench : Single Bench

Advocate : N. Rai, Yozan Rai, Tara Devi Chettri, Zangpo Sherpa, Dewen Sharma Luitel, Sudesh Joshi, Yadev Sharma, Thinlay Dorjee Bhutia, Sujan Sunwar

Judgement

Meenakshi Madan Rai, J

1. I.A. No.04 of 2021, dated 19.11.2021, is an application filed by the Appellant under Order XXII Rule 3 of the Code of Civil Procedure, 1908 (CPC), stating that the right to sue does not survive, as the contest in the Suit was between the Appellant and the Late Respondent No.1, who has since passed away on 26.08.2021, issueless.

2. Instead of a Response to I.A. No.04 of 2021, Learned Counsel for the Respondent No.1 filed I.A. No.05 of 2021, dated 03.12.2021, submitting inter alia that during a meeting conducted with the family members of the Late Respondent No.1, it was decided that "Nima Sherpa," resident of Lal Bazaar, being the brother of Respondent No.1's husband and her kin, was her heir and hence he be arrayed as the new Respondent No.1.

3. After I.A. No.05 of 2021 (supra), was filed by Learned Counsel for the Respondent No.1, the Response to I.A. No.04 of 2021 (supra) came to be filed by Learned Counsel for the Respondent No. 1 on 11.03.2022, stating therein that the Suit Property has been mutated in the name of one "Kesang Sherpa." It was submitted by Learned Counsel for the Respondent No.1 that after the Judgment,

dated 10.06.2020, in Title Appeal No.01 of 2018 (Mrs. Dachima Tamang vs. Mrs. Ran Maya Sherpa and Another) of the Learned District Judge, Special Division-I, East Sikkim at Gangtok, in favour of the Respondent No.1, the Late Respondent No.1 after completion of the limitation period, wanted to transfer the Suit Property to Kesang Sherpa, whom she and her Late husband treated as their nephew. That, the Suit Property has now been duly transferred in the name of Kesang Sherpa on 21.10.2020 and recorded in his name. Hence, he is the legal heir and successor of the deceased Respondent No.1.

4. On 29.04.2022, Rejoinder to the Response of Respondent No.1 in I.A.04 of 2021 was filed by the Appellant denying that Nima Sherpa was the legal heir of the Late Respondent No.1, as stated in I.A. No.05 of 2021 (of the Respondent No.1).

5. It is worth noticing that the Response to I.A. No.04 of 2021 is dated 11.03.2022 where it is submitted that the Suit Property was recorded in the name of Kesang Sherpa on 21.10.2020. At the same time, vide I.A. No.05 of 2021, dated 03.12.2021, the Counsel for Respondent No.1 had submitted that Nima Sherpa ought to be arrayed as the new Respondent No.1, when evidently he was aware that the Suit Property of deceased Respondent No.1 was allegedly mutated in the name of Kesang Sherpa. The Counsel for the Late Respondent No.1 appears to be approbating and reprobating in his submissions with regard to the legal heir of the Late Respondent No.1, as apparent from the aforementioned circumstances.

6. In such a situation, it is relevant to refer to the provision and more specifically the proviso to Order XXII Rule 5 of the CPC, referred to by Learned Senior Counsel for the Appellant which, provides as follows;

“ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

.....

5. Determination of question as to legal representative.— Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.”

7. In view of the vacillating claims regarding the legal heir of the Late Respondent No.1 and in view of the settled position of law that the Court must determine that question before the matter is proceeded further with, including at

the Appellate stage, if the question so arises, let the matter be remitted to the Court of the Learned Civil Judge, Junior Division, East Sikkim at Gangtok, to determine within two months from today, the question raised hereinabove viz. "Who is the legal heir of Late Ran Maya Sherpa and her Late husband Passang Sherpa, in terms of the provisions of Order XXII Rule 5 of the CPC?"

8. I.A.04 of 2021 and I.A. No.05 of 2021 disposed of accordingly.

9. Records of the Learned Trial Court be returned forthwith.

10. Copy of this Order be forwarded to the Learned Trial Court, for information and strict compliance.