

(2013) 08 OHC CK 0005

In the Orissa High Court

Case No : Writ Petition (C) No. 6435 of 2012

Pradeep Kumar Sahani and Others

APPELLANT

Vs

Sanjukta Hota and Others

RESPONDENT

Date of Decision : 21-08-2013

Acts Referred:

Citation : (2013) 116 CLT 916 : (2013) 2 OLR 882

Hon'ble Judges : S.K. Mishra, J

Bench : Single Bench

Advocate : Sisir Kumar Purohit, R.C. Patnaik and A.K. Das, for the Appellant; Sanjeev Udgata, S.B. Udgata and Ashutosh Mishra for Opp. Party No. 1, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Mishra, J.—The order dated 02.03.2012 passed by the learned Addl. District Judge, Sambalpur in F.A.O. No. 11 of 2011 is called in question in this writ petition. The plaintiff in Civil Suit No. 7 of 2011 has preferred an appeal under Order XLIII, Rule 1 of the Code of Civil Procedure, 1908, hereinafter referred as the "Code" for brevity. During pendency of the appeal, respondent No. 3 Kulamani Biswal expired on 20.04.2011 leaving behind his legal heirs. On 05.07.2011, the plaintiff filed an application for substitution of the said deceased-respondent. Copies of the said petition were served on the contesting respondents, but none has filed any written objection to the same. Hence, on 17.08.2011, the learned Addl. District Judge, Sambalpur allowed the substitution petition and directed the appellants to file consolidated appeal memo.

2. On 22.02.2012, after a lapse of about six months, the respondent Nos. 6, 7 and 11 have filed an application to direct that the appeal has abated. It was contended by the respondents that the petition filed by the plaintiff on 13.12.2011 is not maintainable. The legal obligation of the plaintiff is to effect substitution of the deceased-respondents. The respondents further plead that the claim of the plaintiff is based on landlord and tenant relationship among the

defendant Nos. 1, 2 and with Kulamani Biswal. Hence, it is presumed that the plaintiff is aware about the L.Rs. of the defendant late Kulamani Biswal and for that awareness, the plaintiff has filed the substitution petition in support of an affidavit. The petitioner further pleaded that the substitution petition supported by an affidavit has been filed stating falsehood. Hence, it is not maintainable. Similarly, the petition has been filed by the respondent No. 1, 2, 3(a) to 3(e). The basic objection to the substitution already made as per the direction of the Court is that all the L.Rs. of the deceased-respondents No. 3 have not been brought into record. Hence, the appeal should abate.

3. The Supreme Court in *Dolai Molliko and Others Vs. Krushna Chandra Patnaik and Others*, has held that if any legal heir proposed to be substituted in the petition, but the petitioner excludes the names of other legal heirs in absence of fraud or collusion, the proceeding should not abate. The Supreme Court has further held that unless there is fraud or collusion or there are other circumstances, which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceeding, there is no reason why the heirs, who have applied for being brought on record, should not be held to represent the entire estate including the interests of the heirs not brought on record. The Supreme Court further held that this is not to say that where heirs of an appellant are to be brought on record, all of them should not be brought on record or all of them should be deliberately left out. But if by oversight or on account of some doubt as to who are the heirs, any heir of a deceased appellant is left out that in itself would be no reason for holding that the entire estate of the deceased is not represented unless circumstances like fraud or collusion to which have been referred above exists.

4. Admittedly, opposite party No. 1 filed an application for substitution on 05.07.2011. It was asserted that Kulamani Biswal died on 20.04.2011. So the petition for substitution is within time. Learned Addl. District Judge has also recorded on 17.08.2011 that the respondents have not filed any objection to the petition for substitution. On that basis, the petition was allowed. There is no reason to hold that the present petitioners i.e. the contesting respondents before the Court below were not given adequate opportunity of showing cause in the hearing by the learned Addl. District Judge.

5. In that view of the matter, this Court comes to the conclusion that when the appellant files an application for substitution proposing to add all the legal heirs as per her knowledge, but because of lack of knowledge regarding other legal heirs, inadvertently excludes to implead certain legal heirs in the petition, in that case, the suit or appeal shall not abate as the remaining legal heirs have substantially represented the estate of the deceased-respondent. Therefore, this Court comes to the conclusion that the writ petition is devoid of merit and the same is dismissed. Pending Misc. Case No. 5671 of 2012 is also disposed of as infructuous.