

(2011) 01 JH CK 0080

In the Jharkhand High Court

Case No : Writ Petition (C) No. 3908 of 2010

Uday Lal Sahu @ Uday Kumar Sahu

APPELLANT

Vs

Kailash Chand Jain and Others

RESPONDENT

Date of Decision : 20-01-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 1 JLJR 510 : AIR 2011 Jhar 92 : (2011) 2 JCR 162 : (2011) 6 RCR(Civil) 2215

Hon'ble Judges : Poonam Srivastav, J

Bench : Single Bench

Judgement

Poonam Srivastav, J.—Heard counsel appearing on behalf of the Petitioner as well as counsel for the Respondents.

2. Pleadings have been exchanged. The writ petition has been listed for "admission" and as agreed between the parties, I proceed to decide the matter finally at the stage of "Admission" itself. Respective counsels have also agreed to argue the case to resolve the controversy finally.

3. The grievance of the Petitioner-Defendant is that in the original Title Suit No. 70-A of 1982, an order was passed on 26th March, 2010 by the Subordinate Judge-VI, Hazaribagh substituting the heirs of the deceased/Appellant.

4. The facts are an injunction suit was instituted against two Defendants namely Asharfi Lal Sahu and Chandrakanta Devi. The Defendant No. 2 Chandrakanta Devi died and by means of the impugned order, her heirs have been allowed to be substituted. The substitution application preferred before the Court below was allowed and the same is the subject matter of dispute in the instant writ petition. The original suit was decreed and the first appeal against the said order was dismissed. The matter has been remanded to the trial Judge by the High Court in a second appeal.

5. This is a case where the Defendant No. 1 Asharphi Lal Sahu is also reported to

be dead. The objection of the learned Counsel is two fold:

1. First, that in the substitution application it was not declared that the "right" to sue" exists; since and the injunction was granted against the two contesting Defendants and also in favour of the two Plaintiffs in persona and therefore, in absence of a specific assertion that "right to sue survives", the substitution could not be allowed. Therefore, the suit should stand abated.

2. The second objection is that the Petitioner's were not noticed on the substitution application.

6. The counsel for the Petitioner has cited decision in the case of Kosarichand Motichand Shah Vs. Fakirbhai Kariabhai Koli and others, in support his contention. In this case, there were several Defendants and an interim injunction was granted but after death of one of the Defendants, the other surviving Defendants' right continued to exist and therefore, the Court dispelled the objection raised in the said substitution application Assertion of the learned Counsel is that in the instant case, both the Plaintiffs were dead and therefore it was necessary to mention whether the "right to sue" continues to exist or not.

7. The counsel for the Petitioner has further cited decision of the Punjab and Haryana High Court in the case of Murti Hanuman Brajman Hanuman Mandir, Hissar and Others Vs. Punjab Walkaf Board and Others, In this case also, the question of right to sue survived and the Punjab and Haryana High Court stated that there were several Defendants and therefore, the objection was refused.

8. The counsel for the Petitioner has further relied upon another decision Koodalmanickam In Koodalmanickam in Devaswom Managing Committee Vs. Thachudaya Kaimal alias Manickan Keralan (Dead) by Lrs., This decision is on the question of abatement where the right granted to the claimant was in personam and the effect of death of the said claimant in the appeal was liable to abate The Supreme Court observed that the suit filed by sole Respondent against Appellant Committee claiming that the properties were given to him in personam for her personal benefit under a decree of British resident for the State of Travancore and Cochin and as such, he was entitled to enjoy its income or usufruct during his tenure. The claim was allowed but during the pendency of the second appeal, the Respondent died and the property was taken over by the Appellant The Apex Court held that the right of the Respondent ceased to exist as it was in personam and therefore, the appeal should abate.

9. I have gone through the aforesaid judgments. It is apparent that this is not the case at hand. In the present case, suit for injunction was instituted by two Plaintiffs against the Defendants was preferred and both are dead. But from perusal of the plaint, it is apparent that in the relief clause, the word "agent, his men or any other person claiming through the Defendant" has been used and therefore, the heirs of the Defendants who are sought to be substituted by means of substitution applicant, can very well be treated to be the agent or any other man of the Defendant against whom the injunction was granted. The Suit

was admittedly decreed and therefore, if the substitution is refused and the matter being again at the trial stage, it is evident that it is only the Petitioner who will stand benefited if the substitution is refused. The objection to the substitution of the heirs of the Defendant is only on account of this reason.

10. In my view, since I am sitting in a discretionary Jurisdiction under Article 226 of the Constitution of India, I have also to adjudge and balance "the equities" between the two parties and therefore, I am of the considered view that it does not call for any interference. Let the matter be contested on merit. The heirs of the deceased Defendant Chandrakanta Devi be substituted as Defendants.

11. With the aforesaid observations, the writ petition stands disposed of.