

GAHC010160322022



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

Case No. : CRP(IO)/188/2022

AFTAB UDDIN BARBHUIYA
S/O. LT. JAMIR UDDIN BARBHUIYA, R/O. KAZIDAHAR PART-I, P.S. SONAI,
PORGANA BONRAJ, DIST. CACHAR, ASSAM.

VERSUS

FAZIL UDDIN LASKAR AND 6 ORS
S/O. LT. BASARAT ALI LASKAR,

2:AMURUN NESSA LASKAR
W/O. NURUL ISLAM

3:OJIB UDDIN LASKAR
S/O. LT. BASARAT ALI

4:NOOR UDDIN
S/O. LT. TABARAK ALI

5:BABUR UDDIN
S/O. LT. HARIS ALI

6:MONAI MIA
S/O. LT. HARIS ALI

7:ABDUL SALAM @ PUTUL UDDIN
S/O. LT. HARIS ALI

ALL ARE R/O. KAZIDAHAR PART-I
P.S. SONAI
PORGANA BONRAJ
DIST. CACHAR
ASSAM

Advocate for the Petitioner : MS. R CHOUDHURY

Advocate for the Respondent : MS. S PHUKAN (R1 TO R7)

**BEFORE
HONOURABLE MR. JUSTICE AJIT BORTHAKUR**

ORDER

08.02.2023

Heard Ms. R. Choudhury, learned counsel for the petitioner/defendant as well as Mr. S.D. Purkayastha, learned counsel appearing for the respondents/plaintiff.

2. This petition under Article 227 of the Constitution of India read with Section 151 of the Code of Civil Procedure (for short 'CPC') has been filed for setting aside the impugned order, dated 07.06.2022, passed by the learned Munsiff No. 2. Cachar, Silchar in T.S. No.150/2015 instituted for declaration that the pathway mentioned in the Schedule-I of the plaint is the only pathway of the respondents/plaintiff for ingress and egress.

3. The petitioner/defendant's case precisely is that the plaintiff/respondents have filed the aforesaid declaratory suit, *inter-alia*, for removal of blockade/obstruction, fencing etc. from the disputed pathway described in Schedule-II of the plaint which is part of the entire pathway described in Schedule-I to ensure their free passage and further, permanent injunction restraining the petitioner/defendant etc. from recurring such blockade or obstructions over it.

4. In course of the aforesaid proceeding, the plaintiff No. 3, namely Kewarun

Nessa, wife of Siraj Uddin Laskar died. Therefore, the plaintiffs by a petition under Order 6 Rule 17 of the CPC sought for amendment of the plaint in view of death of plaintiff No. 3 and as her legal heirs expressed unwillingness to get themselves impleaded in the suit in her place, prayed to delete the name of plaintiff No. 3 from the plaint by way of amendment of the plaint. However, learned Munsiff No. 2, Cachar at Silchar by order, dated 01.04.2019 rejected the aforesaid petition on the grounds that there was no document in support of the claim of death of the plaintiff No. 3 and such amendment in the suit might change the nature and feature of the suit.

5. Thereafter, the defendant petitioner herein, referring to the aforesaid order of rejection of the petition for amendment, took the plea that the suit abated as a whole as cause of action of the suit was in severable and evidently, a dead person was impleaded with forgery and by practicing fraud. After hearing the learned counsel of both the sides and consideration of the materials on record rejected the aforesaid petition and fixed the suit for cross-examination of P.W. 1/further P.Ws.

6. The aforesaid order of rejection of the petition reads as hereunder extracted (relevant portion)-

“Perusal of C/R reveals that in the present case there are 8 nos. of plaintiff out of which plaintiff no. 3, Kewarun Nessa expired. There are other 7 nos. of plaintiffs. Right to sue survives on the said plaintiff, as it is a declaratory suit regarding plaintiffs right over a pathway. Hence, considering the overall circumstances of the case and considering the matter in its entirety this court comes to the reasonable finding that as right to sue survives upon the other plaintiffs, hence no question arises regarding the abatement of the suit as a whole. Accordingly, petition no. 148/2 is rejected.

Fix 30/07/22 for cross of PW 1/further PWs.”

7. Ms. R. Choudhury, learned counsel for the petitioner, submits that there are 8 number of plaintiffs in the suit and the plaintiffs after 8 months from filing of the written statement, dated 21.03.2016 specifically pointing out that the plaintiff No. 3 died before the institution of the suit, filed the aforesaid petition under Order 6 Rule

17 of the CPC on 07.11.2016 contending that the legal heirs are not necessary to be impleaded in the suit in her place and as such, by virtue of rejection of the petition itself rendered the whole proceeding of the suit against dead person is a nullity and failure to substitute her legal heirs abated the suit. In this context, Ms. Choudhury has relied on the ratio of the judgment rendered by the Hon'ble Supreme Court in *Gurnam Singh (Dead) through legal representatives and ors. Vs. Gurbachan Kaur (Dead) by legal representatives*, reported in (2017) 13 SCC 414.

8. *Per contra*, Mr. S.D. Purkayastha, learned counsel appearing for the respondents/plaintiff, submits that the suit would not abate in view of the death of the plaintiff No. 3 as the right to sue survived on the other plaintiffs in the said suit where declaration has been sought on the disputed pathway described in Schedule-II of the plaint and when the rights of either of the parties are not prejudiced. Mr. Purkayastha relied on the judgment of the Apex Court rendered in *Sardar Amarjit Singh Kalra (Dead) by LRs. And Others Vs. Pramod Gupta (Smt) (Dead) by LRs. and Others*, reported in (2003) 3 SCC 272.

9. It may be pointed out that generally, a necessary party is one in the absence of whom relief claimed in the suit cannot be granted. In other words, it means that for the grant of relief claimed in a suit, a person who ought to have joined must be added. The plaintiff respondents herein pleaded that they and their predecessors-in-interest were/are using the disputed pathway for ingress and egress leading to the PWD road and as such, by instituting the suit they are seeking a mere declaration of their and other persons' right in common to continue to use the pathway as such. It may be mentioned that a declaratory decree is one which only declares some existing rights in favour of the plaintiff(s) and as such, not executable in nature per se devoid of any declaration as to the right, title and interest over the suit pathway. Therefore, in the aforesaid backdrop of facts stated in pleadings and circumstances, the right to sue survived on the other plaintiffs in the suit and as such, for failure to bring on record

the legal heirs of the deceased plaintiff No. 3 out of the total 8 plaintiffs would not certainly abate the whole suit. However, in such circumstances, **striking off her name as plaintiff No. 3** is necessary as prayed for by the plaintiff respondents.

10. For the reasons, set forth above and after due consideration of the above citations, this Court is of the opinion that the learned trial Court has not committed any illegality or irregularity while passing the impugned order and accordingly, the petition stands **dismissed**. No cost.

This disposes of the petition.

JUDGE

Comparing Assistant