

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Review No.62 of 2012

In
Civil Writ Jurisdiction Case No. 13055 of 2011

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Bimal Prasad Singh & Ors

.... Petitioner/s

Versus

Urmila Devi @ Anita Devi & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Harshwardhan Sahay

For the Respondent/s :

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO
ORAL ORDER

15 09-01-2015

Heard the learned senior counsel, Mr. T.N.Maitin on behalf of the petitioners and the learned counsel, Mr. Uma Kant Shukla on behalf of the opposite parties.

This review application has been filed by the petitioners for review of order dated 30.09.2011 passed in C.W.J.C. No.13055 of 2011.

It appears that aforesaid writ application was filed under Article 227 of the Constitution of India by the petitioners against the order dated 17.07.2007 passed in Miscellaneous Appeal No.24 of 2006 whereby the District Judge, Munger allowed the appeal and set aside the order dated 09.11.2006 passed by Sub Judge I, Munger in title suit No.60 of 2002.

From perusal of the record, it further appears that one Vishnu Yadav filed title suit No.60 of 2002. However, he died on



08.05.2004. One Badri Vishal Yadav then filed application under Order 22 Rule 3 C.P.C. for being substituted in place of the sole deceased plaintiff. The defendant objected the application on the ground that he is not the legal representative of the sole deceased plaintiff. Enquiry was held under Rule 5 Order 22 and the trial court rejected the application filed by the said Badri Vishal Yadav and consequently order was passed abating the suit. Against that order, appeal was filed and the appellate court set aside the trial court order. Against the said order, the petitioners filed the aforesaid writ application. This Court by terms of order dated 30.09.2011, dismissed the writ application holding that the order is appealable.

The learned senior counsel, Mr. T.N.Maitin appearing for the petitioners submitted that the application under Order 22 Rule 3 C.P.C. was rejected by the trial court after enquiry under Order 22 Rule 5 C.P.C.. Therefore, there is no question of refusing to set aside abatement arises because the application was never filed under Order 22 Rule 9 C.P.C. by the said Badri Vishal Yadav. Substitution application was within time. However, this Court wrongly held that the suit has abated consequently, therefore, appeal is maintainable. In such circumstances, the learned counsel relying on the decision of the



Supreme Court in the case of **Mangluram Dewangan v. Surendra Singh & Ors., 2011 S.A.R.(Civil) 594** Supreme Court submitted that this Court because of misconception of law held that appeal was maintainable before the lower appellate court. According to the learned counsel, in view of the decision of the Supreme Court in the case of **Board of Control for Cricket, India and another v. Netaji Cricket Club and others, A.I.R. 2005 Supreme Court 592**, paragraph 90, the mistake on the part of the Court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reason' in O. 47, R. 1 of the Code is wide enough to include a misconception of fact or law by a Court or even an Advocate.

As stated above, admittedly, the sole plaintiff, Vishnu Yadav of title suit No.60 of 2002 died on 08.05.2004. The substitution application under Order 22 Rule 3 C.P.C. was filed by Badri Vishal Yadav, the ancestor of the opposite parties under Order 22 Rule 3 C.P.C. within 90 days on 19.07.2004. The defendants who are petitioners herein filed objection to the

substitution application regarding the heir ship, therefore, enquiry under Rule 5 of Order 22 C.P.C. was made. Evidences were adduced and thereafter on the basis of the evidences, the learned court below recorded a finding that Badri Vishal Yadav is not nephew of the deceased sole plaintiff and accordingly, rejected the substitution application. Consequently, the suit was abated.

The Hon'ble Supreme Court in the case of **Mangluram Dewangan v. Surendra Singh & Ors., 2011 S.A.R.(Civil) 594 Supreme Court** at paragraph 9, 10 and 11 has held as follows:

“9. Having found that the order under Order dated 31.08.1996 complied with requirements (i), (ii) and (iv), what remains to be considered is whether it fulfils requirement (iii) also, so that it will answer the definition of decree in section 2(2) of the Code. Requirement(iii) is that the adjudication must determine the rights of the parties with regard to all or any of the matters in controversy in the suit. The applicant in an application under Order 22 Rule 3 is not a party to the suit. An application under Order 22 Rule 3 is by a non-party requesting the court to make him a party as the legal representative of the deceased plaintiff. Necessarily unless the applicant in the application under Order 22 Rule 3 allowed and the applicant is permitted to come on record as the legal representative of the deceased, he will continue to be a non-party to the suit. When such an application by a non-party is dismissed after a determination of the question whether he is a legal representative of the deceased plaintiff, there is no adjudication determining the rights of parties to the suit with regard to all or any

of the matters in controversy in the suit. It is determination of a collateral issue as to whether the applicant, who is not a party, should be permitted to come on record as the legal representative of the deceased. Therefore an order dismissing an application under Order 22 Rule 3 after an enquiry under Rule 5 and consequently dismissing the suit, is not a decree.

10. As the order dated 31.08.1996 is neither a 'decree' appealable under section 96 of the Code nor an order appealable under section 104 and Order 43 Rule 1, the remedy of the applicant under Order 22 Rule 3, is to file a revision. The High Court was therefore, right in its view that the adjudication of the question whether an applicant in an application under Order 22 Rule 3 was a legatee under a valid will executed by the deceased plaintiff in his favour, was not a decree and therefore the remedy of the applicant was to file a revision.

11. The appellant submitted that even if the rejection of an application under Order 22 Rule 3 after an enquiry under Rule 5, may not amount to a decree, the consequential dismissal of the suit on the ground that there is no legal representative, is a denial of the substantive rights claimed by the plaintiff against the defendant in the suit. This contention is clearly flawed. If the court orders that suit has abated or dismissed the suit as having abated, as a consequence of objection of an application under Order 22 Rule 3 of the Code, as noticed above, there is no determination of rights of parties with regard to any of the matters in controversy in the suit and therefore the order is not a decree. But if an order declares that the suit has abated, or dismisses a suit not as a consequence of legal representatives filing any application to come on record, but in view of a finding that right to sue does not survive on the death of sole plaintiff, there is an adjudication determining the rights of parties

in regard to all or any of the matters in controversy in the suit, and such order will be a decree. But that is not the case here. Similar contention raised before various High Courts have repeatedly negated by different High Courts.”

In view of this decision of the Supreme Court, it is now the settled principles of law but in the order dated 30.09.2011 while disposing of the writ application, this Court did not consider this settled principles of law which is the law of land. In my opinion, this is nothing but misconception of law.

The Hon'ble Supreme Court in the case of **Board of Control for Cricket, India and another v. Netaji Cricket Club and others, A.I.R. 2005 Supreme Court 592** at paragraph 90 has held as follows:

“90. Thus, a mistake on the part of the Court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reason' in O. 47, R. 1 of the Code is wide enough to include a misconception of fact or law by a Court or even an Advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit."

In my opinion, therefore, in view of the above facts, there should not be any hesitation to review the order dated 30.09.2011 passed by this Court in C.W.J.C. No.13055 of 2011.

Therefore, I hereby review the order and it is held that the appeal filed by the respondents i.e. Miscellaneous Appeal No.24 of 2006 was not maintainable. Consequently, it is further held that the order dated 17.07.2007 passed by the then District Judge, Munger in the aforesaid miscellaneous appeal is held as without jurisdiction and accordingly, it is set aside.

In view of the above facts, this review application is allowed. The order under review is modified to the extent that the order passed in miscellaneous appeal by the District Judge, Munger dated 17.07.2007 in Miscellaneous Appeal No.24 of 2006 is hereby set aside and the order of the trial court dated 09.11.2006 passed by 1st Subordinate Judge, Munger in title suit No.60 of 2002 is hereby restored. The opposite parties herein may file Civil Revision challenging the said order dated 09.11.2006 of the trial court with limitation application, if so advised, or may file a fresh suit, as the case may be, and in that case, the finding recorded by the trial court under Order 22 Rule 5 will not operate as resjudicata.

Thus, this review application stands allowed and the order passed in the writ application is modified.

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(Mungeshwar Sahoo, J)