

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4402 of 2013

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1. Sudhir Kumar Jain S/O Late Santosh Kumar Jain.
 2. Shishir Kumar Jain S/O Late Santosh Kumar Jain.
 3. Shobha Jain W/O Sharad Kumar Jain all Resident Of Jayant Jyoti, 5, Riding Road, Sheikhpura, P.S- Shashtrinagar, Patna- 14.

.... Petitioners.

Versus

1. M/S Hindustan Liver Ltd., Through Its Managing Director, Hindustan Liver House, No, 165-166 Backbay Reclamation, Mumbai- 20
2. The Managing Director, M/S Hindustan Liver Ltd., Hindustan Liver House, No, 165-166 Backbay Reclamation, Mumbai- 20
3. The Board Of Director, M/S Hindustan Liver Ltd., Hindustan Liver House, No, 165-166 Backbay Reclamation, Mumbai- 20
4. The Company Secretary, M/S Hindustan Liver Ltd., Hindustan Liver House, No, 165-166 Backbay Reclamation, Mumbai- 20
5. Mrs. Meena Wakade, Assistant Manager, Investors Service Department, M/S Hindustan Liver Ltd., Hindustan Liver House, No, 165-166 Backbay Reclamation, Mumbai- 20
6. Magadh Stock Exchange Association, 9th Floor, Ashiana Plaza, Budh Marg, Patna Through Its Chief General Manager.

.... Respondents.

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Appearance :

For the Petitioner/s : Mr. Mahesh Narayan Parbat, Sr. Adv.
For the Respondent nos. 1 to 5 : Mr. N.K. Agrawal, Sr. Adv.
Mr. Jayanta Ray Chaudhury, Adv.
Mr. Binay Kumar, Adv.
For the Respondent no. 6 : Mr. T.N. Maitin, Sr. Adv.
Mr. R.K. Agrawal, Adv.
Mr. Shive Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT

10 09-02-2016

Heard the learned senior counsels for the parties.

Assail in the present application under Article 227 of the Constitution of India is to the order passed in the Misc. Case

No. 04 of 2011 by the learned court below holding the said misc. case to be not maintainable and dismissing the petition dated 31.10.2012 filed by the petitioners.

The Title Suit No. 56 of 1999 was filed by Santosh Kumar Jain (now deceased) who was the father of the present petitioners for declaration that he was owner of the share certificates mentioned in schedule-I of the plaint and the defendants were under obligation to issue duplicate share certificates in his name with relief for direction for issuance of the duplicate share certificates to the plaintiff. Further relief was for injunction restraining the defendants from transferring the share certificates in favour of any other person, and also for ancillary reliefs. The defendants appeared and filed their written statements contesting the claim of the plaintiff. The sole plaintiff Santosh Kumar Jain died on 21.08.2004. His widow namely Mahesh Kumari Jain filed substitution petition on 08.04.2005 in the suit praying for her substitution as plaintiff on the basis of the will executed by her husband in her favour with regard to his property including the share certificates. The separate application for condonation of delay and setting aside the abatement was also filed. The defendants filed their rejoinder opposing the prayer for substitution as made. However, the said Mahesh Kumari Jain died



on 01.08.2005 before disposal of the substitution petition. The present petitioners thereafter filed substitution petition on 05.09.2005 praying for their substitution in place of the sole plaintiff in the suit but before the disposal of this substitution petition, the suit was dismissed for default on 18.09.2010 as no body appeared either on behalf of the plaintiff or the defendants before the court on that date.

The Misc. Case No. 04 of 2011 was initiated on the basis of petition dated 14.01.2011 filed under Order 9 Rule 4 and Section 151 C.P.C. praying for restoration of the title suit. This petition carried the verification and affidavit thereto by one Vidya Bhushan Tiwary as pairvikar of the petitioners. The title page of the petition further carried the name of the original plaintiff Santosh Kumar Jain. The present petitioners subsequently filed a petition on 31.10.2012 in the Misc. Case No. 04 of 2011 stating therein that due to mistake on the part of the petitioners the said miscellaneous case was filed in the name of late Santosh Kumar Jain and the prayer therefore was made for substitution of the name of the petitioners in the said miscellaneous case in place of late Santosh Kumar Jain.

By the impugned order, the learned court below has held that the miscellaneous case has been filed in the name of a

dead person and not by the heirs of the deceased Santosh Kumar Jain and, therefore, the same is not maintainable. Further, as a consequence, the petition dated 31.10.2012 has also been rejected.

Mr. Parbat, the learned senior counsel appearing on behalf of the petitioners has submitted that the learned court below has acted with material irregularity in passing the impugned order without adjudicating the prayer of the petitioners as made in the petition dated 31.10.2012. After elaborating the facts of the case, it has been canvassed that the learned court below has ignored the background facts leading to the filing of the miscellaneous case for restoration of the suit, and after taking a too technical view of the matter, the miscellaneous case as well as the petition dated 31.10.2012 have been rejected on the ground which at the most can be said to be only irregularities not going to the root of the matter. The learned counsel has placed reliance upon the decision in the case of **Rajeshwari Singh Vs. Lakhrajo Kunwar, A.I.R. 1984 Pat. 354** in support of his submissions.

Mr. Maitin, the learned senior counsel appearing on behalf of the respondent no. 6, however, has emphasized that as the miscellaneous case praying for restoration of the suit was filed in the name of a dead person, the learned court below has committed no illegality in holding that the said miscellaneous case

is not maintainable. It has been further submitted that the petition for restoration on the basis of which the miscellaneous case was instituted was not filed by the present petitioners rather the affidavit and the verification were done by one Vidya Bhushan Tiwary as pairvikar and, therefore, explicitly the miscellaneous case was not maintainable.

Mr. Agrawal, the learned senior counsel appearing on behalf of the respondent nos. 1 to 5 has, after accepting the submission made on behalf of the respondent no. 6, prayed for dismissal of this application.

After careful consideration of the matter and the submissions on behalf of the parties, it becomes apparent that after the demise of the sole plaintiff Santosh Kumar Jain on 21.08.2004, a petition for substitution was filed by his widow on 08.04.2005. However, as she died before the disposal of the substitution petition, the present petitioners filed substitution petition on 05.09.2005 praying for their substitution in place of the sole plaintiff in the suit. The suit was dismissed for default as neither the plaintiff nor the defendants appeared on 18.09.2010 and the substitution petition filed by the present petitioners remained pending. It is further apparent that the petition was filed on 14.01.2011 praying for restoration of the suit to its original file



wherein the name of the sole plaintiff Santosh Kumar Jain was mentioned in the title page and the verification as well as affidavit to the said petition was made by Vidya Bhushan Tiwary as Pairvikar of the petitioner. It does not appear from the petition dated 14.01.2011 (Annexure-4) on the basis of which the Miscellaneous Case No.04/2011 was initiated that the said Vidya Bhushan Tiwary had anywhere described himself to be the petitioner of the said case and from the perusal of the verification as well as affidavit thereto it is clear that he described himself as Pairvikar of the petitioner. As the petition carried the name of the deceased plaintiff Santosh Kumar Jain in the title page the present petitioners filed the petition on 31.10.2012 praying for their substitution/ addition of their names in place of the deceased sole plaintiff Santosh Kumar Jain as his heirs. It is not the case of the respondents that the present petitioners are not the heirs of the deceased sole plaintiff and the fact of pendency of the substitution petition filed by the present petitioners in the suit itself which could not be disposed of finally due to dismissal of the suit for default has also not been denied. The inference is thus irresistible that the subsequent petition dated 31.10.2012 was filed for curing the defect in the petition dated 14.01.2011 which carried the name of the deceased sole plaintiff. The learned court below instead of

disposing of this petition dated 31.10.2012 on merits has proceeded otherwise in dismissing the Miscellaneous Case No.04/2011 (initiated on the petition dated 14.01.2011) and thereafter dismissing the petition dated 31.10.2012.

The enabling provision as contained in Section 146 C.P.C. provides as follows:

146. Proceedings by or against representatives.-*Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.*

It is evident, therefore, that the present petitioners whose status as heirs of the deceased sole plaintiff has not been disputed, has the right to maintain the prayer for restoration of the suit. The fact that the petition dated 14.01.2011 was filed in the name of the deceased sole plaintiff (though no substitution was made in the suit till its dismissal for default) and further fact that the verification and affidavit thereto has been made by the Pairvikar of the petitioner are only irregularities, for curing the

same, the petition dated 31.10.2012 was filed by the petitioners. The learned court below ought to have disposed of the petition dated 31.10.2012 in accordance with law and thereafter proceeded to dispose of the Miscellaneous Case No.04/2011 either on its own merits or on the issue of maintainability in accordance with law. By not following the said course the learned court below has committed material irregularity and the impugned order thus is vitiated.

The writ application is accordingly allowed, the impugned order is quashed and the matter is remitted back to the court below for fresh consideration in accordance with law in view of the observations made above.

(V. Nath, J)

Devendra/Nitesh

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