

Nageshwari Devi and ors Vs. State

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Court : Patna

Decided On : Aug-30-2013

Appellant : Nageshwari Devi and ors

Respondent : State

Advocate for Def. : Mr. Ambastha

Judgement :

IN THE HIGH COURT OF JUDICATURE AT PATNA Civil Writ Jurisdiction Case
No.6123 of 1989 With Interlocutory Application No. 2149 of 2013

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1. Nageshwari Devi, wife of Ram Charittar Singh

2. Vidyanand Singh

3. Bhola Singh, both 2 and 3 sons of late Ramchandra Singh

4. Raghunath Singh (expunged and substituted vide order dated 2.11.2012) (i) Satya Narain Singh, son of late Raghunath Singh (ii) Savitri Devi, wife of late Raghunath Singh (iii) Manoj Kumar Singh, son of late Bhup Narain Singh and grand son of late Raghunath Singh (iv) Guddi Kumari, D/O late Bhup Narain Singh and grand daughter of late Raghunath Singh (v) Soni Kumari, D/O late Bhup Narain Singh and grand daughter of late Raghunath Singh

5. Nunu Devi, (expunged and substituted vide order dated 4.4.2013) (i) Jai Prakash Singh (ii) Uma Shankar Singh (iii) Shyam Babu Singh, all 5(i) to 5(iii) sons of late Nunu Devi Village Koari, P.S. Hajipur, District Vaishali All, 1 to 4 residents of Village Paura Jagannath, P.S. Lalganj, District Vaishali Petitioner/s
Versus

1. Joint Director of Consolidation (Muzaffarpur), Patna

2. Deputy Director of Consolidation, Vaishali at Hajipur

3. Consolidation Officer, Lalganj, District Vaishali

4. Sheo Narain Singh, s/o late Durga Prasad Singh

5. Ram Vinay Singh, son of late Vaidehi Sharan Singh, Both 4 and 5 residents of Village Paura Madan singh, P.O. Paura, P.S. Lalganj, District Vaishali

6. Gauri Sharan Singh, s/o late Jamuna Prasad Singh, resident of Village 2 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 2 /11 Paura Jagannath, P.S. lalganj, District Vaishali Respondent/s

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Appearance : For the Petitioner/s : Mr. Yogendra Mishra, Advocate For the Respondents 1 to 3 : Mr. Vishwambhar Prasad, A C to AAG IX For the Respondent No.4 : Mr. Shiv Shankar Sharma, Advocate Mrs. Anuradha Singh, Advocate For the Respondent No.5 : Mr. Arun Prasad Ambastha, Advocate Mr. Jainendra Kumar Sinha, Advocate

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CORAM:
HONOURABLE MR. JUSTICE BIRENDRA PRASAD VERMA C.A.V.

JUDGMENT

Date:

30. -08-2013 The petitioners have filed the present writ petition under Articles 226 and 227 of the Constitution of India assailing the validity and correctness of order dated 17.4.1989 (Anneure-3) passed in Consolidation Revision No. 2075 of 1988 by the respondent Joint Director of Consolidation (Muzaffarpur), Patna, whereby

while setting aside the appellate order dated 29.3.1988 (Annexure-2) passed in Appeal Case No. 621 of 1987-88 by the respondent Deputy Director of Consolidation, Vaishali, he has affirmed the original order dated 9.9.1987 (Annexure-1) passed in Case No. 205 of 1986-87 by the respondent Consolidation Officer, Mahnar, rejecting the claims of the petitioners with respect to the lands under dispute and allowing the said claims of the respondent Nos. 4 to 6.

2. This case has a checkered history. The writ petition was filed as far back as on 10.7.1989 and was admitted by an order dated 21.11.1990. When this case was taken up for hearing on 25.4.2007, learned counsel appearing on behalf of the 3 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 3 /11 respondent No. 5 submitted before this Court that on account of death of respondent Nos.4 and 6 long ago, the writ petition has abated as against them for want of substitution of their heirs ad legal representatives. However, the matter was adjourned for a week, enabling him to file an affidavit in support of his above claims.

3. On 8.5.2007, an affidavit was filed on behalf of the private respondents in support of their claim that respondent Nos. 4 and 6 have died during the pendency of the writ petition, yet steps for substitution have not been taken by the petitioners, hence the writ petition stood abated. A Bench of this Court dismissed the writ petition on account of non-prosecution as also on account of abatement due to non-substitution of the heirs and legal representatives of the deceased respondent No.4 and 6 by the order dated 8.5.2007 itself, which is reproduced herein below:- No one appears for the petitioners. Mr. Ambastha counsel for the respondents files an affidavit in which it is stated that respondent no.4 died in the year 1998 and respondent no.6 died on 27.8.2003. No steps were taken for substitution of their heirs and this writ petition has, therefore, abated as against the heirs of the deceased respondents. No one appears even to give reply to this statement. This writ petition is accordingly dismissed for non-prosecution and for abatement in regard to the heirs of the deceased respondents 4 and 6.

4. It is admitted case of the parties that against the order of dismissal of the present writ petition by aforesaid order dated 8.5.2007, neither any L.P.A. before a Division bench nor any review petition before the same Bench was filed on behalf

of the petitioners and the aforesaid order dated 8.5.2007 became final. 4 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 4 /11 5. However, after about 3 years, the petitioners filed M.J.C. No. 1956 of 2010 on 13.5.2010 with a prayer for restoration of C.W.J.C. No. 6123 of 1989 by recalling the order dated 8.5.2007. Subsequently, Interlocutory Application No. 3765 of 2011 was filed in the aforesaid M.J.C. No. 1956 of 2010 with a prayer for substitution of heirs and legal representatives of deceased respondent Nos. 4 and 6. Admittedly, neither a copy of the aforesaid M.J.C. application No. 1956 of 2010 nor a copy of the aforesaid Interlocutory Application was ever served upon the counsel appearing on behalf of any of the respondents including respondent No.5. Even notice was never issued to the respondents, yet the learned Single Judge of this Court by an order dated 2.2.2012 allowed the prayer for restoration by recording the following order:- For the reasons stated in the restoration application, the application is allowed and C.W.J.C. No. 6123 of 1989 is restored to its original file.

6. It is also not in dispute that before allowing the prayer for restoration of C.W.J.C. No.6123 of 1989 by aforesaid order dated 2.2.2012, no order regarding substitution was passed by the learned Single Judge with respect to the deceased respondent Nos. 4 and 6. Even, no order for setting aside the abatement of the writ petition was passed. However, in view of aforesaid order dated 2.2.2012 passed in aforesaid M.J.C. No. 1956 of 2010, the present writ petition was placed for consideration before the Bench.

7. Now, Interlocutory Application No. 2149 of 2013 has been filed on behalf of the petitioners seeking substitution of heirs and legal representatives of deceased 5 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 5 /11 respondent No.4, who died on 12.12.1997 and deceased respondent No. 6, who died on 27.9.2003 leaving behind them their heirs and legal representatives, fully detailed in paragraph Nos. 4 and 5 respectively of the aforesaid Interlocutory Application.

8. By an order dated 4.4.2013 passed by a Bench of this Court, notices were issued to the proposed heirs and legal representatives of deceased respondent Nos. 4 and 6, in response whereof some of the heirs of deceased respondent No.4 have entered appearance through their lawyers by filing their duly executed

Vakalatnama and they have contested the claim of the petitioners for substitution of the heirs and legal representatives of the deceased respondent No.4 on the ground of delay and in view of law laid down by the Honble Apex Court as also by this Court.

9. Learned counsel appearing on behalf of the petitioners has argued the matter at great length and has submitted that it is true that respondent No.4 died on 12.12.1997 and respondent No. 6 died on 27.9.2003, but according to him, respondent No. 6 had subsequently given up his claim with respect to the lands under dispute and, therefore, the petitioners are exempted from substituting his heirs and legal representatives under the provisions of Order 22 rule 4(4) of the Code of Civil Procedure. He next contended that interest of deceased respondent No.4 was being represented by his nephew, namely, respondent No. 5 Ram Vinay Singh, therefore, even if heirs and legal representatives of deceased respondent No.4 were not substituted, the writ petition shall not abate. He further submitted that even if the writ petition is treated to have been abated, then in that case also this court has power to set aside the order of abatement. In 6 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 6 /11 support of his above contentions, he has placed reliance on the following Judgments:- (a) 1984 BBCJ 16 (FB) [Jagannath Singh Vs. Smt. Singhashan Kuer], (b) AIR 199.SC 119.[Smt. Gema Coutinho Rodrigues Vs. Bricio Francisco Pereira]], and (c) AIR 201.SC 173.[Sushil K. Chakravarty Vs. M/s Tej Properties Pvt. Ltd.] 10. Per contra, learned counsels appearing on behalf of the respondent No.5 and some of the proposed heirs and legal representatives of deceased respondent No. 4 have stoutly opposed the prayer for substitution with respect to the deceased respondent Nos. 4 and 6. According to them the present substitution petition on behalf of the petitioners for substitution of deceased respondentNo.4 has been filed after more than 15 years and with respect to deceased respondent No. 6 has been filed after more than 9 years. It is also pointed out by them that though the present writ petition was restored by an order passed in aforesaid M.J.C. No. 1956 of 2010 without giving them any opportunity of hearing, yet the order of abatement passed by a learned single Judge of this Court by an order dated 8.5.2007 has not be set aside till date. Therefore, it is pleaded by them that the orders passed by the consolidation authorities in favour of the private respondents have become

final. Hence, merit of the case cannot be gone into at this Stage. In support of their above contention they have placed reliance on the judgment of the Honble Apex Court in the case of Puran Singh Vs. State of Punjab[(1996) 2 SCC 205.as also an unreported judgment/order dated 16.7.2013 passed by this Court in C.W.J.C. No. 2864 of 1984 [Sukh Bilas Roy & Ors. Vs. The 7 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 7 /11 State of Bihar & Ors.].

11. The issue raised here in the present proceeding with respect to the abatement of the writ petition on account of non-substitution of the heirs and legal representatives of deceased respondent Nos. 4 and 6 is no longer a res integra. This issue came up for consideration before the Honble Apex Court in the case of Puran Singh Vs. State of Punjab (Supra) and the Honble Apex Court, after considering all the aspects of the matter, laid down the law in paragraph 12 of its judgment which is reproduced herein below:- As such even if it is held that Order 22 of the Code is not applicable to writ proceedings or writ appeals, it does not mean that the petitioner or the appellant in such writ petition or appeal can ignore the death of the respondent if the right to pursue remedy even after death of the respondent survives. After the death of the respondent it is incumbent on the part of the petitioner or the appellant to substitute the heirs of such respondent within a reasonable time. For purpose of holding as to what shall be a reasonable time, the High Court may take note of the period prescribed under Article 120 of the Limitation Act for substituting the heirs of the deceased defendant or the respondent. However, there is no question of automatic abatement of the writ proceedings. Even if an application is filed beyond 90 days of the death of such respondent, the Court can take into consideration the facts and circumstances of a particular case for purpose of condoning the delay in filing the application for substitution of the legal representative. This power has to be exercised on well-known and settled principles in respect of exercise of discretionary power by the High Court. If the High Court is satisfied that delay, if any, in substituting the heirs of the deceased respondent was not intentional, and sufficient cause has been shown for not taking the steps earlier, the High Court can substitute the legal representative and proceed with the hearing of the writ petition or the writ appeal, as the case may be. At the same time the High Court has to be conscious that after lapse of time a valuable right accrues to the legal representative of the

deceased 8 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 8 /11 respondent and he should not be compelled to contest a claim which due to the inaction of the petitioner or the appellant has become final. (Emphasis added by me) 12. Similar matter came up for consideration before me in the case of Sukh Bilas Roy and Ors. Vs. The State of Bihar and Ors.(Supra). In the aforesaid judgment/order, I have noticed that in Puran Singh Vs. State of Punjab (Supra) the writ petition was dismissed by the learned Single Judge of Punjab and Haryana High Court on account of not taking steps for substitution of one of the contesting respondents for a period of 3 years 3 months. Letters Patent Appeal filed against the said order was also dismissed by a Division Bench of Punjab and Haryana High Court. When the matter was taken to the Honble Supreme Court, the orders passed by the Punjab and Haryana High Court were affirmed and the law has been laid down, which has already been reproduced above.

13. After taking into consideration various aspects including the principles enunciated by the Honble Apex Court in the case of Puran Sigh Vs. State of Punjab (Supra), as also a Division Bench judgment of our own High Court in the case of Harakh Nath Singh Vs. Lodha Singh [1978 BBCJ 481 , I have come to a conclusion in aforesaid case of Sukh Bilas Roy &Ors. Vs. The State of Bihar & Ors (Supra) that if steps are not taken within a maximum period of 3 years, then the prayer for substitution cannot be allowed. The legal rights accrued to the successful respondents or the heirs and legal representatives of the deceased respondent cannot be taken away mechanically. In my considered opinion a period of 3 years is a reasonable period of time for taking steps for substitution. I am tempted to reproduce 9 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 9 /11 paragraphs 13 and 14 of the judgment/order in the case of Sukh Bilas Roy & ors. Vs. The State of Bihar & Ors (Supra), which are as follows:

13. A question arises as to what would be the reasonable time for taking steps for substitution. Article 120 of the Limitation Act, 1963 provides a period of 90 days for substitution of the legal representatives under the Code of Civil Procedure. It is true that the provisions of the Code of Civil Procedure cannot be strictly applied in a proceeding under article 226 of the Constitution of India, in view of the provisions contained in Section- 141-Explanation of the C.P.C., but benefits of the principles

can be taken and analogy of the provisions of the C.P.C. can be drawn in a proceeding under article 226 of the Constitution of India.

14. Coming once again to the provisions of the Limitation Act, this Court finds that under Article 137 a period of 3 years has been prescribed for filing any application for which no period of limitation has been provided. The period of 3 years is a long period. If death of a party takes place, then the petitioner/appellant of writ petition/writ Appeal/L.P.A. or the proposed heirs may not be required to file a substitution petition strictly within a period of 90 days, but he/she is required to take steps for substitution within a reasonable period of time. In the considered opinion of this Court, if the steps are not taken within a maximum period of 3 years, then the prayer for substitution cannot be allowed and the legal rights accrued to the successful respondents or the heirs and legal representatives of a deceased respondent cannot be taken away in a mechanical manner and further they cannot be compelled to contest such proceeding, which has abated due to non-substitution of the heirs and legal representatives of the deceased within a reasonable period of time of 3 years.

14. Coming back to the present writ petition, admittedly, death of respondent No.4 took place in the year 1997, and that of the respondent No. 6 on 27.9.2003. The petition for 10 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 10 /11 substitution was filed after 15 years on 4.3.2013, so far deceased respondent No.4 is concerned, and after 9 years, so far deceased respondent No.6 is concerned. Admittedly, the petition for substitution has not been filed within a reasonable period of time of 3 years. The order passed by the revisional authority has become final in favour of the proposed heirs and legal representative of deceased respondent Nos. 4 and 6. As such they cannot be compelled to contest the present writ petition, which has already abated. In above view of the matter, this Court is not inclined to consider the claim of the parties on merit.

15. It may be true that this Court may set aside the order of abatement if sufficient cause is shown, but in the present case, no such prayer has been made on behalf of the petitioner in the instant Interlocutory Application No. 2149 of 2013. Even the learned Single Judge while allowing the prayer for restoration of the present writ

petition by order dated 2.2.2012 passed in M.J.C. No. 1956 of 2010 had not set aside the order of abatement dated 8.5. 2007 reproduced above.

16. All the three judgments cited by the learned counsel appearing on behalf of the petitioners are not at all relevant in the factual background of the present case. All the three judgments, referred to above, are not with respect to the proceedings under Article 226 or 227 of the Constitution of India. All the above judgments are with respect to the proceedings of civil suits or appeals. Admittedly, in a proceeding under Article 226 of the Constitution of India, the procedure provided in the Code of Civil Procedure cannot be strictly applied in view of the provisions contained in Section 141-Explanation of the C.P.C 17. For the reasons recorded above, Interlocutory 11 Patna High Court CWJC No.6123 of 1989 dt.30-08-2013 11 /11 Application No. 2149 of 2013 is rejected. Now, the writ petition has become incompetent. There cannot be two contradictory and inconsistent orders, one against dead person and other against surviving person in one and common lis.

18. Consequently, the writ petition has to fail and is, accordingly dismissed. No costs. (Birendra Prasad Verma, J) Kanth/-

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