

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CR No. 13/2019

Reserved on: 01.08.2023
Pronounced on: 09 .08.2023

Abdul Rashid Dar and others

.....Petitioner(s)/Appellant(s)

Through: Mr. S. N. Ratanpuri, Advocate with
Ms. Saima Ghulam, Adv. Mr. F. A. Lone
& Ms. Peer Fiza, Adv.

V/s

Ghulam Qadir Dar and others

..... Respondent(s)

Through: Mr. M. Sultan, Advocate

CORAM:

HON'BLE MS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

1. This revision petition is directed against the order dated 08.12.2018, passed by Additional District Judge, Srinagar, passed in an application seeking restoration of counter claim in a suit titled *Abdul Rashid Dar and others versus Ghulam Nabi Dar and others*, and suit for declaration of title with relief of injunction was filed by Abdul Rehman Dar against Ghulam Qadir Dar and others in the court of Principal District Judge, Srinagar.
2. The defendants appeared in the suit and along with their written statement counter claim was also filed by them. Proceedings in the suit remained pending. The suit was dismissed in default of appearance vide order dated 30.04.2016. The defendant respondents herein filed an application on 05.03.2018 with a prayer to retrieve and restore the counter claim submitted by the applicant/defendant and the same be proceeded under law.

3. The contention of the respondents was that in the civil suit with the written statement they had filed a counter claim seeking a prayer that Will/Adoption deed shown to have been executed by Mst. Noori on 20.05.1964, be declared as nullity, void and *non est* in the eye of law. The suit of the plaintiff was dismissed in default, however, counter claim was to be treated as counter suit which also stands consigned to records. Therefore, the defendants submitted that though the suit was dismissed, the counter claim would be proceed as a suit and, as such, sought restoration of the suit and to be proceeded in accordance with law.
4. The petitioners, being legal heirs of Abdul Rehman Dar, filed their objections to the application stating that the defendants had sufficient knowledge of dismissal of the suit and belatedly approached the Court for restoration of the counter claim and, as such, the same was without any merit and be dismissed.
5. The Trial Court while considering the application vide order dated 08.12.2018, allowed the application of the respondents and restored the counter claim to its original number and directed that same be proceeded in accordance with law.
6. The petitioners are aggrieved of this order on the ground that application for restoration of counter claim was filed by the respondents two years after the passing of the order, despite having knowledge of the order. It is submitted that the plaintiff had died, therefore, the respondents had to first implead his legal representatives as party respondents. The respondents also had to file an application seeking setting aside of abatement, but no such application was filed. It was also submitted that since the application was filed by the respondents for restoration of the plaint without filing an application to bring on record the legal heirs of deceased defendant and the same was not maintainable in terms of Order 22 Rule 4&3 and Order 22 Rule 9 (2).
7. It is also contended that there is no plausible explanation given for the delay in filing application especially when the suit was dismissed in the presence of defendant.

8. In terms of Order 8 rule 6, a defendant in a suit may, in addition to his right of pleadings a set off under Rule 6, set up by way of a counter claim against the claim of the plaintiff, any claim or right in respect of a cause of action accruing to the defendant against the plaintiff either before or after filing of the suit. Thus, once counter claim has been raised by the defendant in terms of Rule 6 A, its effect of discontinuation of a suit is provided in Order 8 Rule 6 D.

Rule 6 D envisages as under:

“...6D. effect of discontinuance of suit.

If in any case in which the defendant sets up a counter – claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.”

9. Thus, it is clear that even, if the suit was dismissed, the trial court had to proceed with the counter claim raised by the defendant as an independent suit and the same had to be decided in accordance with law. By way of order dated 30.04.2016, the suit was dismissed for non-prosecution and there was no separate order of dismissal with regard to counter claim which was also sent to records. This error has occurred while passing the order dated 30.04.2016.
10. The respondent/defendant thus was well within its right to bring to the notice of the court that the counter claim filed by him has also been consigned to records without any order in terms of order dated 30.04.2016, which is contrary to mandate of Order 8 Rule 6-D. The contention of the petitioners with regard to the fact that the application was filed after a considerable delay even when the order was in the knowledge of the defendants does not hold any merit in view of the fact, that it was incumbent upon the court passing the order to issue separate orders in the counter claim and proceed in the counter claim as an independent suit giving opportunity to the defendant to prove his claim. This, however, has not been done. The error had occurred while dismissing the suit for non-prosecution and same had to be corrected when brought to the notice of the court, so that prejudice is not caused to the party.

11. The principle is well settled that act of Court shall prejudice no one. *The maxim Actus Curiae Neminem Gravabit*. The Apex Court in “**Neeraj Kumar Sainy and Others vs. State of U.P and others**”, **AIR 2017 SC 1524**, which holding that no prejudice should be caused to anyone due to the act of Court has held in Para 29 as under:

“29. In this regard, we may usefully refer to a passage from *Kalabarati Advertising v. Hemant Vimalnath Narichabnia & Ors* (2010) 9 SC437, wherein it has been ruled that the maxim *actus curiae neminem gravabit*, which means that the act of the court shall prejudice no one, becomes applicable when a situation is projected where the court is under an obligation to undo the wrong done to a party by the act of the court. In a case, where any underserved or unfair advantage has been gained by a party invoking the jurisdiction of the court, and the same requires to be neutralized, the said maxim is to be made applicable.”

12. The next contention of the petitioners is that the respondents had filed an application for restoration without impleading legal representatives of Abdul Rehman Dar, who had died during the pendency of the suit as party. The suit as well as counter-claim had abated. Counter claim of the petitioners was consigned to record, therefore, there were no proceedings pending before the court where an application under Order 22 for impleading the LRs of the deceased Abdul Rehman Dar as a party. It is only when the counter-claim was resorted to his original number and place that an application for impleadment of legal representatives could be made. Reliance has been placed on the judgment in **Syed Bilal Ahsan, appellant versus Wastana Rubi and others, AIR 1979, Patna 319**, in which the court while considering the similar contention had held:

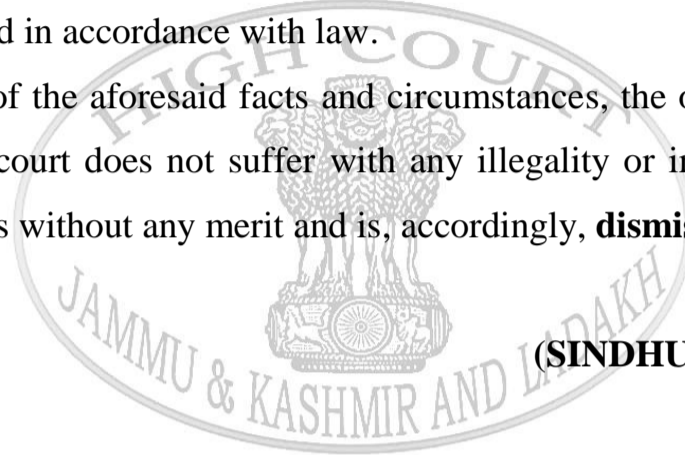
“...4. The Court below has by the impugned order held that the suit has abated. The Court has observed that a proceeding under O. 9, R. 13, Civil P. C., is not in continuation of the suit and is not a stage in the suit. In that, view, the substitution of the heirs made in the miscellaneous case does not amount to substitution in the suit itself. It has further been held that the provisions of O. 22 including the provision of abatement of a suit applied to the present case.

5. The question which arises in this case is as to whether the provisions of O. 22 in regard to the abatement can be applied to the present case. From the very language used in the different rules of O. 22. It is manifest that the question of abatement of a suit arises only if a suit is pending. It is, therefore, futile to suggest that on the death of defendant No.1 on 18.04.1971 when the suit stood disposed of, there could be any question of abatement thereof. No application for substitution of the heirs of the deceased party could have been filed. The provisions of O. 22, being applicable only to pending suits cannot be applied to the present case.

Besides the effect of restoring the suit after setting aside ex parte decree vis-à-vis all the parties concerned including the heirs of defendant No. 1 is to implead them as parties to the suit and by their application dated 24th Mar., 1973, the plaintiffs were merely getting formal and consequential corrections made in the body of the plaint. If that were not so, they would have to be held as a necessary and corollary that the ex parte decree against defendant No. 1 was never set aside.”

13. In view of the aforesaid facts and circumstances, the respondents could not be put to disadvantageous position by the order of the court, which had resulted in consigning their counter claim which was to be proceeded in accordance with law.

14. In view of the aforesaid facts and circumstances, the order passed by the trial court does not suffer with any illegality or irregularity. The petition is without any merit and is, accordingly, **dismissed**.



(SINDHU SHARMA)
JUDGE

SRINAGAR

09.08.2023

“Imtiyaz”

Whether the order is speaking: Yes/No.
Whether the order is reportable: Yes/No