

CR(P) No.40/2010

-Vs-

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Shillong (*Annexure-1B to the present revision petition*) strenuously contended that the said appeal had been filed by 19 (nineteen) persons of whom 8 (eight) persons were dead persons i.e. U Swop Nongspung (since deceased), U Miklin Kharumnuid (since deceased), U Wolet Nongspung (since deceased), U Jrui Nongbri (since deceased), U Khroi Kshiar (since deceased), Ka Riphida Kshiar (since deceased), Ka Riphida Kshiar (since deceased) and Ka Sarian Kharmylliem (since deceased). Over and above, the said appeal had been filed against the dead person i.e. Ka Kwuid Muthoh plaintiff of Civil Suit No.13/1978.

3. Mr. Wahlang, learned counsel for the petitioner also contended that the plaintiff of Civil Suit No.13/1978 had died while the Civil Suit No.13/1978 was pending in the Court of Additional Subordinate District Council Court, Khyrim Syiemship. Because of this controversy, this Court called the record of the Civil Suit No.13/1978 from the Court of Additional District Council Court, Khyrim Syiemship and accordingly, learned court below had sent the record to this Court. On perusal of the record of the Civil Suit No.13/1978, it is crystal clear that there is an order passed by the trial court dated 18.02.1993 for allowing to substitute the plaintiff by her youngest daughter i.e. the present petitioner. The learned first appellate court in the impugned judgment and order dated 23.12.2008 also had mentioned that during pendency of the suit i.e. Civil Suit No.13/1978, the respondent (plaintiff) had expired and in her place, the present petitioner had been allowed to substitute.

4. As stated above, the memo of appeal i.e. Title Civil Appeal No.5/2005 was filed against the dead person i.e. the original plaintiff who had already been substituted by her L.R. i.e. the present petitioner vide the said

order dated 18.02.1993. It is fairly settled law that decree against the dead person is nullity and the appeal cannot be filed against the dead person. The first appellate court i.e. District Council Court, Khasi Hills Shillong should have taken recourse to the *Order XLI Rule 3 of the Code of Civil Procedure (for short 'CPC') 1908* which reads as follows:-

***“3. Rejection or amendment of memorandum – (1) where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.***

***(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.***

***(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.”***

5. Since Title Civil Appeal No.5/2005 had been filed against the dead person, the first appellate court should have exercised one of the two courses provided under Order XLI Rule 3 of the CPC viz either to reject the memo of appeal or to return the memo of appeal to the appellant for the purpose of being amended within a time to be fixed by the court (appellate court) or to amend then and there. The judgment and order i.e. the impugned judgment and order dated 23.12.2008 passed against the dead person in Title Civil Appeal No.5/2005 is nullity. Accordingly, in order to avoid further complicacy, the judgment and order dated 23.12.2008 passed by the District Council Court, Khasi Hills, Shillong in Title Civil Appeal No.5/2005 is hereby set aside.

6. Before parting this appeal, this Court also noted down the submissions of the learned counsel appearing for the parties that “the Code of Civil Procedure, 1908 is followed in spirit” under Rule 47 of “the Khasi Hills

Autonomous District (Administration of Justice) Rules, 1953 in the civil cases before the District Council Courts.”

7. The record of Title Civil Appeal No.5/2005 is remitted back to the District Council Court, Khasi Hills, Shillong so as to take up the procedure prescribed under Order XLI Rule 3 of the CPC. It is made clear that the Judge, District Council Court, Khasi Hills, Shillong may pass appropriate order. The record of Civil Suit No.13/1978 is also returned to the Court of the Additional Subordinate District Council Court, Khyrim Syiemship.

8. It is also made clear that any application for condonation of delay filed by the respondents in the present revision petition in the Court of the District Council Court may be considered liberally.

9. With the above observations and directions, this revision petition is allowed.

**JUDGE**

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