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J&K HIGH COURT ON INDEPENDENT STATUS OF COUNTER CLAIM

A. Introduction

High Court of Jammu & Kashmir and Ladakh (“**HC**”) in *Abdul Rashid Dar* case,¹ on August 9, 2023, held that Counter Claim (“**CC**”) has independent status, and they can continue despite dismissal of the primary suit.

B. Facts

1. Suit for declaration of title with relief of injunction was filed before the Additional District Judge, Srinagar, the trial court (**TC**) by Abdul Rehman Dar (“**Abdul**”) against Ghulam Qadir Dar (“**Ghulam**”) and others.
2. Ghulam entered appearance and filed Written Statement and CC seeking relief to declare the will/adoption deed as null, void and *non est* in law.
3. The primary suit was dismissed by the TC in 2016 for non-prosecution.
4. In March 2018, Ghulam filed an application to retrieve and restore the CC he filed in the suit. His contention was that the CC should be treated as counter suit, which also stood consigned to records. Hence, the CC should be proceeded as a suit.
5. Abdul’s Legal Representatives (“**LRs**”) contention was that the restoration application was filed after two years, despite having sufficient knowledge that the primary suit was dismissed.
6. In December 2018, the TC allowed Ghulam’s application and restored the CC.
7. The LRs filed revision petition before the HC challenging order of TC restoring the CC.

C. LRs Contentions

1. Restoration application was filed after two years, despite having sufficient knowledge that the suit is dismissed.
2. No explanation was given for the delay of filing restoration application.
3. Since Abdul died, the suit as well as the CC had abated. Ghulam had to implead the LRs, which was not filed. Since the application to bring the LRs on the record was not done, the application for restoration of suit was not maintainable under Order 22² Rule 3³ & 4⁴ and Order 22 Rule 9(2)⁵ of the Code of Civil Procedure, 1908 (“**CPC**”).

¹*Abdul Rashid Dar and others vs. Ghulam Qadir Dar and others*, (2023) SCC OnLine J&K 409.

² Order 22- Death, Marriage and Insolvency or Parties.

³ Order 22 Rule 3 - Procedure in case of death of one of several plaintiff or of sole plaintiff.

⁴ Order 22 Rule 4 - Procedure in case of death of one of several defendants or of sole defendant.

⁵ Order 22 Rule 9(2) – “*The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside t,,be abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.*”

D. HC's Judgment & Reasoning

The HC:

1. Held that TC erred in dismissing the CC and relied on Order 8 Rule 6D of CPC, which directs as under :
“6D. Effect of discontinuance of suit.— If in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with”.
2. Relied on well-settled principle of the Supreme Court in *Neeraj Kumar Sainy*⁶ where it followed the maxim *actus curiae neminem* which means ‘the act of court shall prejudice no one’.
3. Underlined that the obligation to implead the LR's only arises when the CC is revived and given its original status when it addressed the question of impleading the LR's in situations where the original party has died.
4. Emphasised, citing *Syed Bilal Absan*,⁷ that the abatement provisions of Order 22 of CPC do not apply to matters that are not pending now.
5. Dismissed the petition stating that the TC's order does not suffer with any illegality as it is observed that Ghulam could not be put to disadvantageous position by the TC's order, which had resulted in consigning their CC
6. Directed that the CC must be proceeded in accordance with law.

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⁶ *Neeraj Kumar Sainy vs. State of U.P* (2017) 14 SCC 136.

⁷ *Syed Bilal Absan vs. Wastana Rubi* (1979) AIR Pat 319.