

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No.286/2012**

% **16th January, 2014**

SIRJAN PAL SINGH Appellant
Through: Mr. D.P. Bhatia, Advocate.

VERSUS

HARMINDER SINGH BAKSHI & ORS. Respondents
Through: Mr. Peeyush Kalra, Advocate for
respondent No.1.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? Yes

VALMIKI J. MEHTA, J (ORAL)

1. By this first appeal under Order 43(1)(1) of the Code of Civil Procedure, 1908 (CPC) the appellant impugns the order of the probate Court dated 19.9.2008 by which the probate Court dismissed the application under Order 22 Rule 10 CPC filed by the appellant herein and who was the applicant before the probate Court.

2. The facts of the case are that the original petitioner in the probate petition was one Sh. Prahlad Singh Bakshi, husband of the deceased

testator Smt. Sujan Kaur. Sh. Prahlad Singh Bakshi sought probate petition with respect to the Will dated 22.1.1996 executed by his late wife. The appellant Sh. Sirjan Pal Singh during the pendency of the probate petition is said to have purchased the property which was owned by late Smt. Sujan Kaur from the petitioner Sh. Prahlad Singh Bakshi who had propounded the Will dated 22.1.1996 of Smt. Sujan Kaur. Suit property was purchased by means of the registered sale deed dated 19.5.2005. The probate petition had been filed on 5.5.2005. Trial Court has dismissed the application on grounds including of delay and laches and the fact that the original petitioner had since expired.

3. Order 22 Rule 10 CPC reads as under:-

“Procedure in case of assignment before final order in suit.”-(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”

4. The provision of Order 22 Rule 10 CPC was the subject matter of decision by the Supreme Court in the case of *Dhurandhar Prasad Singh Vs. Jai Prakash University and Ors. (2001) 6 SCC 534* wherein the

Supreme Court held that unlike Order 22 Rules 3 and 4 CPC which deal with death of a plaintiff/petitioner and defendant/respondent in the proceedings, Order 22 Rule 10 CPC deals with a person seeking impleadment being the person upon whom interest in the subject matter of suit had devolved during the pendency of the proceedings. Supreme Court has in this judgment held that unlike Order 22 Rules 3 and 4 CPC where death results in abatement there is no abatement in case no application is filed to substitute the person on whom interest in the subject matter of the suit devolves. Supreme Court has further held that original parties, although interest in the suit property has devolved during the pendency of the proceedings, can continue such proceedings and such proceedings will bind the person on whom interest is devolved during the pendency of the proceedings. Supreme Court has further laid down that it is always however open to a person on whom the property devolved during the pendency of the suit to urge in a subsequent proceeding, in case the decision in the earlier proceedings go against his predecessor-in-interest, that a fraud was played upon him including from the fact that he was not made aware of the pendency of the proceedings. The relevant observations of the Supreme Court in the case of *Dhurandhar Prasad Singh (supra)* are contained in paras 6, 7 and 26 of the judgment and which read as under:-

“6. In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the Court on an application made in that behalf is required to substitute legal representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in a husband on marriage and Rule 8 deals with case of assignment on the insolvency of a plaintiff. Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of suit is devolution upon another during its pendency but such a suit may be continued with the leave of the Court by or against the person upon whom such interest has devolved. But, if no such a step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom interest had devolved. The Legislature while enacting Rules 3, 4 and 10 has made clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the Legislature has not prescribed any such procedure in the event of failure to apply for leave of the court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the Legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject

of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record.

7. Under Rule 10, Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles, the person who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the Plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in **Moti Lal v. Karab-ud-Din** [1898] 25 Cal. 179, he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in **Prannath v. Rookea Begum** [1851] 7 M.I.A. 323, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

26. The plain language of Rule 10 referred to above does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of plaintiff has devolved. Likewise, in a case where interest of defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the court has to be obtained. If it is laid down that leave can be obtained by that person alone upon whom interest of party to the

suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the subject matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. If the submission of Shri Mishra is accepted, a party upon whom interest has devolved, upon his failure to apply for leave, would be deprived from challenging correctness of the decree by filing a properly constituted suit on the ground that the original party having lost interest in the subject of dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Any other party, in our view, may also seek leave as, for example, where plaintiff filed a suit for partition and during its pendency he gifted away his undivided interest in the Mitakshara Coparcenary in favour of the contesting defendant, in that event the contesting defendant upon whom the interest of the original plaintiff has devolved has no cause of action to prosecute the suit, but if there is any other co-sharer who is supporting the plaintiff, may have a cause of action to continue with the suit by getting himself transposed to the category of plaintiff as it is well settled that in a partition suit every defendant is plaintiff, provided he has cause of action for seeking partition. Thus, we do not find any substance in this submission of learned counsel appearing on behalf of the appellant and hold that prayer for leave can be made not only by the person upon whom interest has devolved, but also by the plaintiff or any other party or person interested.” (underlining added)

5. Therefore, so far as Order 22 Rule 10 CPC is concerned the judgment in the case of *Dhurandhar Prasad Singh (supra)* is a direct

judgment and which will apply in the facts of the present case for substitution of the appellant/applicant because no limitation period is provided for a person to be substituted under Order 22 Rule 10 CPC in place of original party to the proceedings. Also, I do not see any prejudice whatsoever to the respondent before the probate Court, and the respondent in these proceedings, inasmuch as the applicant/appellant is being substituted at the same stage which existed when the application under Order 22 Rule 10 CPC is filed and there is not putting of any clock back or other similar prejudice to the respondent.

6. (i) Learned counsel for the respondent sought to argue in support of the impugned judgment of the court below by placing reliance upon the judgment of the Supreme Court in the case of ***Sunil Gupta Vs. Kiran Girhotra and Ors. (2007) 8 SCC 506***. The Supreme Court in the case of ***Sunil Gupta (supra)*** has held that under Order 1 Rule 10 CPC in probate proceedings a person cannot be made a party if such person has purchased the property pendente lite.

(ii) Firstly, I must note that the judgment in the case of ***Sunil Gupta (supra)*** is rendered by a Division Bench of the Supreme Court and the earlier judgment in the case of ***Dhurandhar Prasad Singh (supra)*** is also rendered by a Division Bench of the Supreme Court.

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Therefore, it is the ratio of the earlier judgment in the case of ***Dhurandhar Prasad Singh (supra)*** which will prevail in case of any inconsistency in the ratio of the two judgments and which is now so held by the Supreme Court in many cases.

(iii) Further, I must note that the judgment in the case of ***Sunil Gupta (supra)*** is rendered under the provision of Order 1 Rule 10 CPC whereas the judgment in the case of ***Dhurandhar Prasad Singh (supra)*** is directly under Order 22 Rule 10 CPC, the provision under which the application has been disposed of by the court below.

(iv) In addition to the aforesaid aspects, it requires to be noted that, in the case of ***Sunil Gupta (supra)*** relied upon by the respondent the original party to the petition was continuing with the petition whereas in the present case the original petitioner to the probate petition has died and therefore there would be no continuation of the probate petition in the absence of the applicant/appellant and who has vital interest to ensure that Will is proved because it is only if the Will will be proved, to have been executed in favour of the original petitioner late Sh. Prahlad Singh Bakshi, that the applicant/appellant will get an interest in terms of the registered sale deed dated 19.5.2005. I have already observed above that there is no prejudice to the respondents by any delay in the proceedings.

7. In view of the above, the impugned order dated 19.9.2008 is set aside and the applicant/appellant will be substituted as petitioner in place of original petitioner Sh. Prahlad Singh Bakshi at the stage at which the application u/O 22(10) CPC was filed by the appellant/applicant. It is clarified that I have not made observations one way or the other either with respect to validity of the sale deed in favour of the applicant/appellant or the merits of the probate proceedings. Parties are left to bear their own costs.

JANUARY 16, 2014
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VALMIKI J. MEHTA, J