

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 26 of 2014

1. Smt. Mohni Bai (Since Dead) through Legal Representatives Bedwati & Others R/o Parsadakhurd, Tahsil Bindranawagarh, District Raipur (C.G.)/Chip House, Dhanpuri No. 3, P.S. Amlai, District Shahdol (M.P.)
2. Amrit Lal Tiwari aged about 55 years (Since Not Traceable Though the Legal Representatives), R/o Parsadakhurd, Tahsil Bindranawagarh, District Raipur (C.G.)/Chip House, Dhanpuri No. 3, P.S. Amlai, District Shahdol (M.P.)
 - (a) Smt. Bedwati W/o Amrit Lal Tiwari, aged about 50 years, R/o Parsadakhurd, Tahsil Bindranawagarh, District Raipur (C.G.)/Chip House, Dhanpuri No. 3, P.S. Amlai, District Shahdol (M.P.)
 - (b) Babol Tiwari S/o Amrit Lal Tiwari, aged about 30 years, R/o Parsadakhurd, Tahsil Bindranawagarh, District Raipur (C.G.)/Chip House, Dhanpuri No. 3, P.S. Amlai, District Shahdol (M.P.)
 - (c) Rajendra Kumar Tiwari S/o Amrit Lal Tiwari, aged about 24 years, R/o Parsadakhurd, Tahsil Bindranawagarh, District Raipur (C.G.)/Chip House, Dhanpuri No. 3, P.S. Amlai, District Shahdol (M.P.)
 - (d) Rakesh Tiwari S/o Amrit Lal Tiwari, aged about 21 years, R/o Parsadakhurd, Tahsil Bindranawagarh, District Raipur (C.G.)/Chip House, Dhanpuri No. 3, P.S. Amlai, District Shahdol (M.P.)
 - (e) Umesh Tiwari S/o Amrit Lal Tiwari (Minor), aged about 16 years, Through his mother as per (a), R/o Parsadakhurd, Tah. Bindranawagarh, District Raipur (C.G.)/Chip House, Dhanpuri No. 3, P.S. Amlai, District Shahdol (M.P.)

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Versus

1. Rampratap Tiwari S/o Balaram Tiwari (dead) R/o Parsadakhurd, P.S. Chura, Tahsil Gariaband, District Raipur (C.G.)
 - 1.(A) Lokkant Tiwari S/o Ram Pratap Tiwari (dead), R/o Parsadakhurd, P.S. Chura, Tahsil Gariaband, District Raipur (C.G.)
 - 1.(A)(i) Smt. Kaushilya Bai W/o Lokkant Tiwari R/o Parsadakhurd, P.S. Chura, Tahsil Gariaband, District Raipur (C.G.)
 - (ii) Pradeep Tiwari S/o Lokkant Tiwari R/o Parsadakhurd, P.S. Chura, Tahsil Gariaband, District Raipur (C.G.)
 - (iii) Jay Kumar Tiwari S/o Lokkant Tiwari R/o Parsadakhurd, P.S. Chura, Tahsil Gariaband, District Raipur (C.G.)
 - (iv) Suryakant Tiwari S/o Lokkant Tiwari R/o Parsadakhurd, P.S. Chura, Tahsil Gariaband, District Raipur (C.G.)
 - (v) Ku. Sarita Tiwari D/o Lokkant Tiwari R/o Parsadakhurd, P.S. Chura, Tahsil Gariaband, District Raipur (C.G.)
- 1.(B) Smt. Rukhmani Shukla W/o Ram Awadh Shukla, aged about 29 years, R/o Fafadih Chowk, District Raipur (C.G.)

- 1.(C) Jitendra Kumar Tiwari S/o Ram Pratap Tiwari, aged about 35 years, R/o Math Para, Dudhadhari Math, District Raipur (C.G.)
- 1.(D) Smt. Ramsakhi Tiwari Widow of Ram Pratap Tiwari, aged about 68 years, R/o Parsadakhurd, Tahsil Bindranawagarh, District Raipur (C.G.)

---- Respondents

For Appellants – Shri Surendra Kumar, Advocate.

For Respondents 1(A)(i) to 1(A)(v) & 1(B) and 1(D) – Shri Sumesh Bajaj, Advocate.

For Respondent 1(C) – Shri A.D.Kuldeep, Advocate.

Judgment on Board

14-09-2015

1. Appellant No.1 already died as mentioned in the cause title of the judgment of the first appellate Court. Appellant No.2 had shown not traceable in the cause title of the instant second appeal. The LRs. shown in the cause title of the appeal are not till date permitted to prosecute the appeal as appellant.

2. Heard on I.A.No.2/14 under Order 22 Rule 3 read with Section 151 of the CPC for substitution of LRs. of appellant No.1 Mohni Bai and appellant No.2 Shri Amrit Lal Tiwari from the cause title.

3. Also heard on I.A.No.6/15 under Section 146, 151 under Order 22 Rule 10 and 11 of the CPC for continuation of proceedings through substitution of LRs of appellant No.2 Shri Amrit Lal Tiwari from the cause title.

4. Also heard on I.A.No.7/15 under Order 22 Rule 10 read with Section 151 of the CPC for grant of leave for continuation of proceeding.

5. Learned counsel for the applicants submits that as instructed he is not pressing for the prayer made in I.A.No.2/14 regarding appellant No.2 Amrit Lal Tiwari who is not traceable. Presently he is pressing for the relief as in I.A.No.2/14 that the applicants be substituted as their LRs. as Amrit Lal Tiwari is not traceable.

6. Learned counsel for the applicants submits that as appellant No.2 is missing since 10 days prior to Holi during year 2011, i.e., at about 11-03-2011. Learned counsel for the applicants submits that as the LRs. of appellant No.1 (since dead) is also not traceable left the house 11-03-2011, The applicants are LRs. of appellant No.1 as their interest devolved as appellant No.2 is not traceable during pendency and they be permitted to continue the instant second appeal by substituting their names in place of appellant No.2, they be granted leave to continue with the instant second appeal to meet the ends of justice.

7. Learned counsel for the applicants placed reliance on the matter of **Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass (deceased) through his Chela Shiam Dass**¹, wherein Hon'ble the Supreme Court held that after death of defendant at appellate stage and on failure to implead for the reason the plaintiff was unaware of defendant's death, the application and the meaning of the word 'interest' as mentioned in Order 22 Rule 10 of the CPC are appreciated wherein Hon'ble the Supreme Court held at para 8 and 9 that :-

8. This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22 Rule 10 is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule. The word 'interest' which is mentioned in this rule means interest in the property i.e., the subject-matter of the suit and the interest is the interest of the person who was the party to the suit.

9. It was, however, contended on behalf of the respondent that there was no devolution of the interest in the subject-matter of the suit on the death of Som Dass, since there was no certainty as to the person who would be elected as mahant to succeed him. The argument was that it was uncertain on the death of Som Dass as to who would become the mahant by election, that it was only when a person succeeded to the mahantship on the death of a previous mahant by virtue of law or custom that there would be devolution of interest in the subject-matter of the suit and, therefore, Order 22 Rule 10, would not be attracted. We see no

¹ (1976) 1 SCC 103

force in this argument. We are of the view that devolution of the interest in the subject-matter of the suit took place when Shiam Dass was elected as mahant of the Dera after the death of Som Dass.

8. Learned counsel for the applicants submits that cited case law is identical for the facts of the present case, hence, I.A.No.2/14, I.A. No.6/15 and I.A.No.7/15 be allowed.

9. Learned counsel for the respondents present opposed all the three interim applications and submitted:-

1. Mohni Bai died during the pendency of the first appeal; Mohni Bai and Amrit Lal Tiwari both were defendants. After the death of Mohni Bai, during hearing in the first appeal Amrit Lal Tiwari continued as appellant and as per facts mentioned in I.A.No.5/15, Amrit Lal Tiwari left his house on 11-03-2011 about 6 months prior to the judgment and decree passed by the first appellate Court. If for the sake of argument, Amrit Lal Tiwari be held as dead, then the application for substitution was required to be filed before the first appellate Court along with the application under Section 5 of the Limitation Act. But, no any application was filed for the substitution of LR. of appellant No.2 Amrit Lal Tiwari within time before the first appellate Court and the instant second appeal also barred by the limitation of 754 days.

2. Learned counsel further submitted that as Mohni Bai has already died during hearing of the first appeal, Amrit Lal Tiwari was permitted to continue as appellant as he was also defendant No.2 before the trial Court. As the Amrit Lal is the LR. of Mohni Bai, the present applicants cannot be held as legal representatives of Mohni Bai because the Amrit Lal Tiwari continued before the first appellate Court as LR. of Mohni Bai so the present applicants cannot be held as LR. of deceased Mohni Bai.

3. Learned counsel further submitted that there is no any application filed under Section 5 of the Limitation Act in support of I.A.No.2/14. Also as there is no any application filed by the applicants under Section 22 Rule 9 of the CPC thereby the appeal at first appellate stage itself abated as there is no any application to set aside the abatement and to condone the delay either before the first appellate Court or before this Court.

Learned counsel for the respondents further submitted that as the Amrit Lal Tiwari not traceable since 11-03-2011, the application of the Order 22 Rule 10 would be applicable after declaring Amrit Lal Tiwari as dead or after a period

of seven years as required in a case of not traceable person.

Learned counsel further submitted that from the memo of appeal it goes to show that the applicants are straightway named as LRs. of Amrit Lal and they are shown the LRs. of Amrit Lal. If in application under Order 22 Rule 10 of the CPC, I.A.No.2/14 learned counsel for the applicants are not pressing the relief regarding Amrit Lal, with the above prayer, as the applicants are shown LRs. of Amrit Lal, they cannot be held as LRs. of Mohni Bai as per their cause title itself, even then the appeal cannot be prosecuted against the respondents.

It is further submitted that as Order 22 Rule 10 of the CPC is not applicable prior to the period of 7 years for declaration of Amrit Lal as legally dead then only the interest may devolve. Even otherwise the provisions of Order 22 Rule 10 are only applicable after the set aside of the abatement. Learned counsel further submitted that as the cited case law is on the different facts, the same is not applicable. Hence, the applications may be dismissed and the appeal may also be dismissed as abated and not maintainable.

10. For the purposes of appreciation of all the three interim applications, the facts mentioned are perused.

11. From close scrutiny, it goes to show that Amrit Lal Tiwari left the house on 11-03-2011. The judgment and decree passed by the first appellate Court on 16-09-2011. Nothing reported before the judgment for this fact, no any relief/prayer was made before the first appellate Court regarding setting aside the abatement after the death of Amrit Lal Tiwari within time or even after that no any application is filed along with prayer to condone the delay in the present case; no any application for condonation of delay, for setting aside the abatement is filed, no any application for setting aside the abatement is filed, in the instant second appeal. In the cause title of the instant appeal, the applicants were directly shown as LRs. of Amrit Lal. As the prayer made on behalf of the applicants that in I.A.No.2/14, the prayer regarding Amrit Lal is not pressed, after the prayer as shown in the memo of appeal wherein the applicants are

mentioned as LR. of Amrit Lal, the status of the applicants as the LR. of appellant Amrit Lal (A-2) has gone, they cannot be held as LR. of appellant No.1 Mohni Bai died since hearing before the first appellate Court, wherein the Amrit Lal Tiwari only continued as the sole LR. of Mohni Bai, there also prayer of the applicants to hold them as LR. of appellant No.1 Mohni Bai cannot be accepted. The case law cited is on the different facts not applicable to the present matter, hence, the same is of no help to the applicants. As there is no any application for setting aside the abatement before the first appellate Court and also before this Court for setting aside the same along with condonation of delay, this Court is of considered view that after stipulated time given for prayer for setting aside the abatement after the death of sole appellant before the first appellate Court suo moto stands abated and as there is no any application for setting aside the abatement, all the three applications are not acceptable. Consequently, I.A.No.2/14, I.A.No.6/15 and I.A.No.7/15 are dismissed as not maintainable. The instant second appeal also is hereby dismissed as abated as abovementioned.

12. No order as to cost.

Sd/-

(Chandra Bhushan Bajpai)
JUDGE