

HIGH COURT OF CHHATTISGARH, BILASPUR

CR No. 51 of 2016

- Lallu Prasad Jaiswal S/o Late Shri Rameshwar Prasad Jaiswal, Aged about 62 Years, R/o Lawan Road Baloda Bazar, Tehsil and District Baloda Bazar (Chhattisgarh)

---- Applicant

Versus

1. Smt. Mantora Bai Wd/o Late Shri Motilal Jaiswal, Aged About 55 Years, R/o Village Baltara, District Bilaspur (Chhattisgarh)
2. Munna @ Suresh S/o Shri Nathulal Jaiswala, Aged About 30 Years, R/o Singarpur, Tehsil Bhatapara, District Baloda Bazar, (Chhattisgarh)
3. Smt. Shashi Bai D/o Nathulal Jaiswala, Aged About 28 Years, R/o Lormi, Tehsil Lormi, District Mungeli (Chhattisgarh)
4. Ram Bharosh S/o Gopi Prasad, Aged About 50 Years, R/o Bajranga Chowka, Baloda Bazar, Tehsil and District Baloda Bazar (Chhattisgarh)
5. Smt. Rukhamani Bai Wd/o Late Devananda Jaiswala, Aged About 58 Years, R/o Bajranga Chowka, Baloda Bazar, Tehsil and District Baloda Bazar (Chhattisgarh)(Applicant No.2)

---- Non-applicants

For Applicant : Shri M.D. Sharma, Advocate.
For the Non-applicants : Shri Manay Nath Thakur, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

19/08/2016

1. The short question for consideration is whether the First Appellate Court is justified in rejecting an appeal filed under Order 43 Rule 1(k) of the Code of Civil Procedure (for short 'the CPC') against an order rejecting application for setting aside abatement and dismissing the suit as abated?
2. Civil Suit No.16-A/1998 was filed by plaintiff Smt. Janak Dulari against defendants Mantora Bai & others. During pendency of the

suit, plaintiff Smt. Janak Dulari died on 25-09-2008. Her Legal Representative applicant herein & another filed an application under Order 22 Rule 3 and Order 22 Rule 9 of the CPC before the trial Court on 05-05-2009 inter-alia stating that he was not aware of the suit having been instituted by his mother against defendants Mantora Bai & others about it's pending and when he visited the office of his counsel in connection with Civil Suit No.11-A/2002 (Malti Bai v. Janak Dulari), then only he was informed by his counsel that suit filed by his mother Janak Dulari is pending consideration and thereafter immediately, he filed an application for substitution and setting aside for abatement on 05-05-2011. This application was supported by an affidavit and this was opposed by the non-applicants herein by filing reply but the said reply was not supported by affidavit. Trial Court by its order dated 14-09-2012 rejected the application finding no sufficient cause for setting aside the abatement and rejected the application for substitution as well as application for setting aside the abatement and consequently, dismissed the suit as abated.

3. Feeling aggrieved against the order dismissing the suit as abated, legal representatives of the original plaintiff preferred a Miscellaneous Appeal before the First Appellate Court. The Appellate Court by impugned order dated 20-03-2015 dismissed the appeal preferred under Order 43 Rule 1(k) of the CPC holding

that the appeal is not maintainable, against which this revision has been preferred.

4. Shri M.D. Sharma, learned counsel for the applicant would submit that by the impugned order, the trial Court not only rejected the application for substitution but also rejected the application for setting aside the abatement, therefore, the appeal before First Appellate Court was maintainable under Order 43 Rule 1 (k) of the CPC and the First Appellate Court is absolutely unjustified in dismissing the appeal as not maintainable. He relied upon the judgement of Supreme Court in the matter of **Banwari Lal & Others Vs. Balbir Singh**¹ in support of his submission.

5. Shri Manay Nath Thakur, learned counsel appearing for the non-applicants would support the impugned order holding that the application for substitution was dismissed and consequently, setting aside the abatement was also rejected and the impugned order is in accordance with law and no interference is warranted by this Court in exercise of revisional jurisdiction under Section 115 of the CPC.

6. I have heard learned counsel for the parties and considered their rival submissions made herein and gone through the record with utmost circumspection.

¹. (2016) 1 SCC 607

7. In order to consider the plea raised at bar, it would be appropriate to notice the provisions contained in Order 43 Rule 1 which provides for appeal against the orders. Order 43 Rule 1 (k) of the CPC as under:

“1. Appeals from orders:- An appeal shall lie from the following orders under the provisions of Section 104, namely:-

(a) to (ja)

(k) An order under Rule 9 of Order XXII refusing to set aside abatement or dismissal of a suit.

8. A careful and close perusal of Order 43 Rule 1 (k) of the CPC would show that an appeal shall lie against an order refusing to set aside the abatement of the suit or dismissal of the suit. So if an application has been rejected declining to set aside the abatement, it would be appealable under Order 43 Rule 1 (k) of the CPC.

9. The Supreme Court in the matter of **Madan Naik vs. Mst. Hansubala Devi and others**² has also considered the issue and held that an order under Order 22 Rule 9(2) of the CPC refusing to set aside the abatement is appealable under Order 43 Rule 1 (k) of the CPC. Their Lordships have held as under :

“8.....Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22 Rule 9 (1) that no fresh suit could be brought on the same cause of action. Therefore when the appeal abated there was no decree, disposing of the first appeal, only course open is to

². (1983) 3 SCC 15

move the court for setting aside abatement. An order under Order 22 Rule 9 (2) CPC refusing to set aside abatement is specifically appealable under Order 43 Rule 1(k). Such an adjudication if it can be so styled would not be a decree as defined in Section 2(2) CPC.
.....”

10. The above stated judgment of Supreme Court has followed by the High Court of Madhya Pradesh in **Hukumchand v. Biharilal**³ and held in paragraph 5 as under:

“5. The Punjab and Gujarat High Courts have taken a different view, but it is not necessary for me to deal with those cases, as the Supreme Court in case of *Madan Naik (dead) by L.Rs. v. Mst. Hansubala Devi* (supra), while laying down that an order passed in appeal under O. 22 R. 9(2) CPC, refusing to set aside abatement, is specifically appealable under Order 43 R. 1 (k)”

11. In the instant case, the trial Court by its order dated 14-09-2012 rejected the application under Order 22 Rule 3 and also Order 22 Rule 9 of CPC and dismissed the suit as abated. Since the trial Court has declined to set aside the abatement and dismissed the suit abated, I am of the considered opinion that the provisions contained in Order 43 Rule 1 (k) of the CPC is attracted and the appeal filed before the First Appellate Court against the rejection of application under Order 22 Rule 9(2) of the CPC was clearly maintainable. The First Appellate Court is absolutely unjustified in rejecting the appeal preferred under Order 43 Rule 1(k) of the CPC

³. A.I.R. 1993 M.P. 145

as the impugned order is contrary to provisions contained in Order 43 Rule 1(k) of the CPC as well as the decision rendered by their Lordships of the Supreme Court in **Madan Naik vs. Mst. Hansubala Devi & others** (supra) followed by decision of Madhya Pradesh High Court in **Hukumchand v. Biharilal** (supra). Therefore, the impugned order holding the appeal to be not maintainable is set aside.

12. This Court would have ordinarily remitted the matter to the First Appellate Court for deciding the appeal on merits but in peculiar facts of the case and further taking note of the fact that the suit was instituted on 26-10-2012 and there is no sufficient progress in the suit, this Court considered the matter on merits. The sole plaintiff died on 25-09-2008, the present applicant and Smt. Rukhmani Bai, sister of the present applicant were not aware of the institution & pendency of the instant suit from which this revision has arisen and when the present applicant contacted his counsel in connection with other Civil Suit No. 11-A/2002 (Smt. Malti vs. Janak Dulari) on 21-04-2009, he was informed by his counsel that another Civil Suit No.16-A/98 filed by his mother Janak Dulari is pending consideration, then they immediately filed an application for substitution and setting aside abatement on 09-09-2009. Thus, there is delay in filing the application and the trial Court has rejected holding that no sufficient cause has been shown for setting

aside the abatement of suit. In the application filed the reason assigned by the applicant is, he was not aware of the institution & pendency of suit filed by his mother and when he came to know about such pendency, immediately he filed the application for substitution and setting abatement, which in my considered opinion constitutes “sufficient cause” within the meaning of Section 22 Rule 9(2) of the CPC.

13. Shri Sharma, learned counsel for the applicant has relied the decision of the Supreme Court in the matter of **Banwarilal (dead) by Legal Representatives and others** (supra) in which their Lordships have held that provisions of Order 22 of the CPC is not penal in nature. The relevant paragraph of report states as under:

“9. Provisions of Order 22 CPC are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law. In *Sardar Amarjit Singh Kalra v. Pramod Gupta*⁴, a five-Judge Bench of this Court held as under : (SCC p. 300-01, para 26)

“26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and

⁴. (2003) 3 SCC 272

not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. *The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.* The fact that the Khata was said to be joint is of no relevance, as long as each one of them had their own independent, distinct and separate shares in the property as found separately indicated in the jamabandi itself of the shares of each of them distinctly. We are also of the view that the High Court⁵ should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even de hors the cause for the delay in filing the applications keeping in view the serious manner in which it would otherwise jeopardize an effective adjudication on merits, the rights of the other remaining appellants for no fault of theirs. *Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttled the whole process to foreclose an*

⁵. Amarjit Singh v. Pramod Gupta, 1991 SCC OnLine Del 131: (1991) 20 DRJ 337

adjudication of the claims of others on merits. The rejection by the High Court of the applications to set aside abatement, condonation and bringing on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of the Court to do real, effective and substantial justice."

10. In **Sital Prasad Saxena v. Union of India**⁶, it was observed that the rules of procedure under Order 22 CPC are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties. On sufficient cause, delay in bringing the legal representatives of the deceased party on record should be condoned. Procedure is meant only to facilitate the administration of justice and not to defeat the same. The dismissal of the second appeal by the High Court does not constitute a sound and reasonable exercise of its power and the impugned order⁷ cannot be sustained."

14. In view of the principle laid down by their Lordships of Supreme Court in **Banwari Lal & Others Vs. Balbir Singh** (supra) and keeping in view the finding recorded herein above that applicant has established that he was prevented by sufficient cause from continuing the suit, this Court is of the opinion that the trial Court has committed grave legal error in rejecting the application

⁶. (1985) 1 SCC 163

⁷. Banwari Lal v. Balbir Singh, 2013 SCC OnLine Del 6406

for setting aside abatement and application for substitution thereby dismissing the suit, therefore, abatement of suit is set aside under Order 22 Rule 9(2) of the CPC and application for substitution of the plaintiff is allowed and the legal representatives of plaintiff be brought on record within three weeks after appearance before the trial Court or time as extended by the trial Court and thereafter, the trial Court would do well to decide the suit expeditiously as the suit was instituted on 26-02-2012. Parties are directed to appear before the trial Court on **16-09-2016**.

15. The revision is allowed to the extent indicated herein above.

Sd/-
(**Sanjay K. Agrawal**)
JUDGE