

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A No.18 of 2017**

1. Kashiram Sahu S/o Late Bisesar Sahu, Aged About 61 Years R/o Pacharipara, P.S. & P.O. Durg, Tahsil Durg, District Durg, Chhattisgarh
2. Onkar Bai Sahu D/o Late Bisesar Sahu, Aged About 47 Years W/o Ramchandra Sahu, R/o Village Murra, P.O. Kumhari, Tahsil Dhamdha, District Durg, Chhattisgarh(Proposed Lrs Of Plaintiff)

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1. Ramesar @ Rameshwar Sahu S/o Sonuram, Aged About 56 Years R/o Village Kherdha, Vahaya Jamul, Tahsil Dhamdha, District Durg, Chhattisgarh
2. Smt. Bisahin Bai Wd/o Late Bisambhar Ram, Aged About 65 Years R/o Village Kherdha, Vahaya Jamul, Tahsil Dhamdha, District Durg, Chhattisgarh
3. Chironjilal S/o Late Bisambhar, Aged About 42 Years R/o Village Kherdha, Vahaya Jamul, Tahsil Dhamdha, District Durg, Chhattisgarh
4. Kailash S/o Late Bisambhar, Aged About 38 Years R/o Village Kherdha, Vahaya Jamul, Tahsil Dhamdha, District Durg, Chhattisgarh
5. Bhunesru S/o Bisambhar, Aged About 36 Years R/o Village Kherdha, Vahaya Jamul, Tahsil Dhamdha, District Durg, Chhattisgarh
6. Smt. Bambeshwari W/o Mohan, Aged About 40 Years R/o Village Ahiwara Nandani, Tahsil Dhamdha, District Durg, Chhattisgarh
7. Smt. Kusum W/o Sujit, Aged About 32 Years R/o Village Devari, P.O. Sarda, Tahsil Berla, District Bemetara, Chhattisgarh
8. Bisahuram S/o Sonuram Sahu, Aged About 50 Years R/o Village Kherdha, P.O. Surdug, Tahsil Dhamdha, District Durg, Chhattisgarh
9. Smt. Fuleshwari Bai W/o Meghnath Sahu, Aged About 52 Years R/o Village Akola, P.O. Kumhari, Up Tahsil Ahiwara, District Durg, Chhattisgarh
10. Gitabai W/o Topram Sahu, Aged About 41 Years R/o Village Guma, Tahsil & District Raipur, Chhattisgarh
11. Anusuiyabai D/o Parmeshwar Sahu, Aged About 35 Years R/o Village Murra Vahaya Kumhari, Up Tahsil Ahiwara, District Durg, Chhattisgarh
12. Shivkumar S/o Parmeshwar Sahu, Aged About 30 Years R/o Village Murra Vahaya Kumhari, Up Tahsil Ahiwara, District Durg, Chhattisgarh
13. Ghanshyam S/o Parmeshwar Sahu, Aged About 28 Years R/o Village Murra Vahaya Kumhari, Up Tahsil Ahiwara, District Durg, Chhattisgarh
14. Hemlal S/o Ramesar Sahu, Aged About 42 Years R/o Village Kherdha Vahaya Jamul, Up Tahsil Ahiwara, District Durg, Chhattisgarh
15. Narendra S/o Ramesar Sahu, Aged About 36 Years R/o Village Kherdha Vahaya Jamul, Up Tahsil Ahiwara, District Durg, Chhattisgarh

16. Toman S/o Ramesar Sahu, Aged About 31 Years R/o Village Kherdha Vahaya Jamul, Up Tahsil Ahiwara, District Durg, Chhattisgarh
17. Dinesh S/o Chamru Sahu, Aged About 10 Years Minor Through Father And Natural Guardian Chamru Sahu, R/o Village Kherdha Vahaya Jamul, Up Tahsil Ahiwara, District Durg, Chhattisgarh
18. Amit Kumar S/o Hemlal Sahu, Aged About 14 Years Minor Through Father And Natural Guardian Hemlal Sahu, R/o Village Kherdha Vahaya Jamul, Up Tahsil Ahiwara, District Durg, Chhattisgarh
19. Amru S/o Ramesar Sahu, Aged About 29 Years R/o Village Kherdha Vahaya Jamul, Up Tahsil Ahiwara, District Durg, Chhattisgarh
20. State Of Chhattisgarh, Through Collector Durg, P.S. & P.O. Durg, District Durg, Chhattisgarh(Defendants)

---- Respondents

For Appellants:	Ms. Priyanka Mehta, Advocate.
For Respondents No.1 to 7 & 11 to 19:	Shri HB Agrawal, Senior Advocate along with Smt Meera Jaiswal, Advocate.
For Respondent No.20/State:	Smt Shobha Kashyap, Dy. G.A
For Respondents No.8 to 10:	None, though served.

Single Bench: Hon'ble Shri Sanjay Agrawal, J
Order On Board

12.09.2017

1. Heard on admission.
2. This is a Miscellaneous Appeal preferred under Order 43 Rule 1(k) of the Code of Civil Procedure, 1908 (for short 'the CPC') by the legal representatives/Applicants of the sole deceased Plaintiff namely Bisesar Sahu against the order dated 22.12.2016 passed by the 1st Additional District Judge, Durg in Civil Suit No.3-A/2002, by which the applications filed under Order 22 Rule 3, order 22 Rule 9 CPC and Section 5 of the Indian Limitation Act have been rejected.
3. The undisputed facts of the case are that the original Plaintiff Besesar instituted a suit for declaration of title, partition and for separate possession by claiming 1/7th share with regard to the Plaint-Schedule A, B & C properties as

described detailed in the said Schedules. During the pendency of the suit, the sole Plaintiff Besesar expired on 28.2.2012. Upon his death, an application as required under Order 22 Rule 3 CPC has been made by his legal representatives/Applicants on 21.9.2012. After filing of the said application, other applications as required under Order 22 Rule 9 of the CPC and Section 5 of the Indian Limitation Act have also been filed by the Applicants on 12.11.2014 by submitting *inter alia* that they were not aware with regard to the legal proposition in filing the same on account of the death of the sole Plaintiff-Besesar. They submit in their said applications that their senior counsel Shri JK Shrivastava was not well and was hospitalized and subsequently expired on 30.8.2014. Therefore, a request was made that by taking liberal view while entertaining this application, the same may kindly be allowed while permitting the Applicants to be substituted in place of the deceased sole Plaintiff in order to pursue the suit. The said applications were supported by the affidavits.

4. Likewise, during the pendency of suit, Defendant No.2 has also expired on 11.10.2014. Therefore, the Applicants have moved an application in this regard also on 20.11.2015 as per the provisions prescribed under Order 22 Rule 4 of CPC duly supported by an affidavit.

5. The aforesaid applications were opposed by the Defendants and it was submitted that sufficient reasons have not been assigned in the aforesaid applications, therefore, the same deserve to be rejected.

6. After considering the aforesaid applications, the trial Court, by its order impugned dated 22.12.2016, has rejected the said applications by holding that each day's delay has not been assigned while filing the aforesaid applications for setting aside the abatement on account of the death of the sole Plaintiff. After rejecting these applications, the trial Court has further decided the

application which was filed on account of death of Defendant No.2 on the same day.

7. Being aggrieved, the Applicants/legal representatives of the sole Plaintiff has preferred this Miscellaneous Appeal. Ms. Priyanka Mehta, learned Counsel for the Appellants submits that while entertaining the application filed under Order 22 Rule-9 of CPC and Section 5 of the Indian Limitation Act, the trial Court ought to have adopted a liberal view in order to provide substantial justice to the parties. However, while adopting hyper technical view, the trial Court has erred in rejecting these applications. She submits further that after refusing to set aside the abatement, the trial Court ought not to have decided the application which was filed on account of death of Defendant No.2. In support, she placed her reliance upon a decision rendered in the matter of Banwari Lal (dead) by Legal representatives and another versus Balbir Singh reported in **(2016) 1 Supreme Court Cases 607**

8. On the other hand, Shri HB Agrawal, learned Senior Advocate has supported the order impugned and stated that since sufficient reasons have not been assigned in the application for bringing the legal representatives of the deceased sole Plaintiff on record as well as for condonation of delay in filing application for setting aside the abatement, therefore, the trial Court has not at all committed any illegality in rejecting the same.

9. I have heard learned Counsel for the parties and perused the entire record carefully.

10. During the pendency of the suit, for declaration of title, partition and for separate possession, the sole Plaintiff Besesar has expired on 28.2.2012. On account of the said demise, an appropriate application as required under Order 22 Rule 3 CPC was made by his legal representatives/Applicants on

21.9.2012. Thereafter, applications as required under Order 22 Rule 9 and Section 5 of the Indian Limitation Act were also moved by submitting therein that the application could not have been submitted in time because they were not aware with regard to the legal position and on account of ill-advice in this regard, they should not be suffered. Although the said applications have been opposed by the Defendants but without holding an enquiry, the trial Court, by adopting hyper technical view, has rejected the said application while refusing to set aside the abatement. The approach of the trial Court under such circumstances ought to have been liberal in nature so as to advance the substantial justice to the parties. Even upon refusing to set aside the abatement, the trial Court has erred further in entertaining and thereafter rejecting the application which was filed on account of death of Defendant No.2. Once it is held that the suit is abated, the trial Court has no jurisdiction to entertain the said application. The trial Court has thus committed an illegality in rejecting the said application by way of its order impugned and therefore, the same could not be held to be sustainable in law. The order impugned therefore deserves to be and is hereby set aside.

11. In the matter of *“Banwari Lal (dead) by Legal representatives and another versus Balbir Singh (supra)”*, it was held very specifically by the Supreme Court at paragraphs-9 & 10 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 [5 (2003) 3 SCC 272], a five -Judge Bench of this Court held as under:

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 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 Court 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 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 on it conformity with¹⁰. In *Sital Prasad Saxena v. Union of India* [(1985) 1 SCC 163], 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 powers and the impugned order cannot be sustained." h the avowed object of the Court to do real, effective and substantial justice".*

¹⁰. In *Sital Prasad Saxena v. Union of India* [(1985) 1 SCC 163], 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 powers and the impugned order cannot be sustained."

12. In view of the aforesaid facts and based upon the aforesaid principles laid down in the above mentioned case, the order impugned deserves to be and is hereby set aside. The Applications as filed under Order 22 Rules 3 & 9 CPC and Section 5 of the Indian Limitation Act are hereby allowed by setting aside the abatement of the suit. The suit is accordingly restored to its original number and the Applicants/legal representatives of the deceased sole Plaintiff-Besesar are hereby permitted to be substituted in his place in the suit.

13. Accordingly, the matter is remitted back to the trial Court to proceed further with the suit for deciding the application which was filed on 20.11.2015 on account of death of Defendant No.2, who expired on 11.10.2014. The Appellants/legal representatives are permitted to move necessary application, if they so desire, before the trial Court. The trial Court, in turn, shall decide the said application in accordance with law.

14. The Appeal is allowed. No order as to costs.

Sd/-
(Sanjay Agrawal)
JUDGE