

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP (227) No.137 of 2016**

Laxmin Bai W/o Dhanlal, 40 years, R/o Village
Dhourabhata, Tahsil-Bilha, District Bilaspur (CG)

---- Petitioner

Versus

1. Samaru S/o Kislal, 45 years, R/o Village - Churaghat, Tahsil-Bilha, District-Bilaspur (CG)
2. Tethiya Bai D/o Kislal, 47 years, W/o Premlal, R/o Village-Bagbudwa, Tahsil-Bhatapara, District Raipur At present R/o Village Dhanpuri, Tahsil-Raipur, District Raipur (CG)
3. The Tahsildar, Bilha, District-Bilaspur (CG)
4. State of C.G. Through: Collector Bilaspur, District-Bilaspur (CG)

---- Respondents

 For Petitioner : Mr. Prafull Bharat, Advocate
 For Res.No.1 and 2 : Mr.Malay Shrivastava, Advocate
 For Res.No.3 and 4 : Mr.Avinash Singh, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****30/1/2017**

1. Respondents No.1 and 2/plaintiffs instituted a suit for declaration of title and permanent injunction against deceased defendant-Bhagaiya Bai, in which Bhagaiya Bai made counter-claim against the plaintiffs. Suit filed by respondents No.1 and 2/plaintiffs was dismissed and counter-claim filed by defendant-Bhagaiya Bai was allowed by the judgment dated 4.4.2012.
2. Feeling aggrieved against the order dated 4.4.2012, respondents No.1 and 2/plaintiffs preferred an appeal

before the First Appellate Court. During pendency of the appeal, Bhagaiya Bai died on 4.2.2014, for which intimation was given by petitioner-Laxmin Bai and ultimately the petitioner filed an application under Order 1 Rule 10 of the CPC for impleading her on the basis of Will executed by Bhagaiya Bai and ultimately that application was withdrawn. Thereafter, the petitioner filed applications under Order 22 Rule 4 and Order 22 Rule 9 of the CPC. Application under Section 5 of the Limitation Act has also been filed. The First Appellate Court inquired the application through the trial Court and on 07.11.2014 the trial Court held that Laxmin Bai is legal heir of deceased Bhagaiya Bai. Thereafter, the First Appellate Court by its order dated 1.8.2015 rejected the applications under Order 22 Rule 9 of the CPC and Section 5 of the Limitation Act and consequently, dismissed the application under Order 22 Rule 4 of the CPC for substitution. Against which, this writ petition under Article 227 of the Constitution of India has been filed by the petitioner.

3. Mr.Prafull Bharat, learned counsel appearing for the petitioner, would submit that petitioner has already filed applications under Order 22 Rule 9 of the CPC and Section 5 of the Limitation Act, therefore, the First Appellate Court could not have been rejected the applications holding that the application filed by the petitioner was beyond the

period of limitation i.e. after three months and also rejected the application for substitution stating inter-alia that the order passed by the trial Court is perverse and contrary to the record.

4. Mr.Malay Shrivastava, learned counsel appearing for respondents No.1 and 2 would vehemently oppose the writ petition and submit that no substitution is permissible by way of Will and the First Appellate Court has rightly rejected the application for substitution as it is barred by the provisions of the Hindu Succession Act and the Indian Evidence Act.
5. The fact remains that sole defendant-Bhagaiya Bai died and on the application filed by the petitioner, an enquiry was conducted by the trial Court. The trial Court has held the petitioner is legal heir of Bhagaiya Bai on the strength of Will.
6. Since the application for setting aside abatement was filed beyond the period of 90 days, application for condonation of delay was filed. The First Appellate Court failed to notice that since an application for setting aside abatement was filed after the period of 90 days, therefore, condonation of delay application was filed by the petitioner. The application ought to have considered on merits.
7. The Supreme Court recently in the the matter of **Banwari**

Lal (Dead) by legal representatives and another Vs.

Balbir Singh¹ has held that 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. It was observed as under:-

“9. Provisions of Order XXII 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*², 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

¹ (2016) 1 SCC 607

² (2003) 3 SCC 272

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 dehors 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 or in conformity with the avowed object of the Court to do real, effective and substantial justice."

(emphasis supplied)

11. In *Sital Prasad Saxena (D) by Lrs. v. Union of India and Ors.*³, it was observed that the rules of procedure under Order XXII 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."

8. Prima-facie finding has been recorded by the trial Court

³ (1985) 1 SCC 163

that the petitioner is legal heir of deceased- Bhagaiya Bai. Sufficient cause has been shown by filing an application as the petitioner was not party to the appeal, therefore, application under Section 5 of the Limitation Act is allowed and delay in filing the application is condoned. Abatement is set aside and substitution application is allowed. The First Appellate Court is directed to implead Laxmin Bai in place of deceased Bhagaiya Bai and decide the appeal within a period of three months from the date of receipt of certified copy of this order. However, it is made clear that substitution on the basis of Will will not confer any title to Laxmin Bai as it is for Laxmin Bai to establish her title in accordance with law.

9. The writ petition is allowed to extent indicated hereinabove.

Sd/-

(Sanjay K Agrawal)
Judge

B/-