

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**M.C.C. No. 160 OF 2015**

1. Tikaram (Since Dead), Through Legal Representatives

1(a) Hiralal Sahu aged about 58 years, son of Late Tikaram Sahu alias Tiknuram

1(b) Damrudhar Sahu aged about 54 years, son of Late Tikaram Sahu alias Tiknuram

1(c) Khushiram Sahu, aged about 48 years, son of Late Tikaram Sahu alias Tiknuram

All above R/o Baikunthpur, District Raigarh (Chhattisgrh)

---- Applicants

Versus

Kehar Singh (Since Dead) Through Legal Representative

1.(a) Taranjeet Singh, S/o Late Keher Singh Aged about 56 years, R/o Nayaganj, Gaurishankar Mandir Road, Raigarh, Tahsil & District Raigarh (Chhattisgarh).

---- Non-applicant

For Applicants	: Mr. Ashish Shrivastava and Mr. Anurag Verma, Advocates.
For Non-applicant	: Mr. Anand Shukla, Advocate.

Hon'ble Shri Justice Sanjay Agrawal

Order On Board

01/11/2017

1. This MCC has been filed for setting aside the abatement of Second Appeal No.460 of 1991 on account of death of sole appellant Tikaram, who expired on 24.09.1994 and also for bringing the legal representatives of said deceased appellant on record along with an application for condonation of delay in setting aside the said abatement.

2. Undisputed facts of the case, are that, the original plaintiff Kehar Singh had instituted a suit for eviction against the deceased sole appellant Tikaram on

the ground enumerated under Sections 12(1)(a) & (c) of the Madhya Pradesh (Chhattisgarh) Accommodation Control Act, 1961 (hereinafter called as 'Act of 1961'). The said suit was contested by the said defendant Tikaram, however, the trial Court by its judgment and decree dated 24.01.1984 in Civil Suit No.78-A of 1983 had decreed the plaintiff's claim entitling him for eviction of the said defendant Tikaram on the grounds enumerated under Sections 12(1)(a) & (c) of the Act of 1961.

3. Being aggrieved with the aforesaid judgment and decree, the deceased sole appellant Tikaram preferred an appeal as per the provisions prescribed under Section 96 of the Code of Civil Procedure, 1908 (hereinafter called as 'CPC'). The said appeal was registered as Civil Appeal No.15-A of 1989. The appellate Court, in turn, after considering the facts involved in the matter has dismissed the appeal while affirming the judgment and decree of the trial Court vide its judgment dated 25.10.1991.

4. Being aggrieved, the deceased sole appellant Tikaram preferred an appeal under Section 100 of the CPC. The said appeal was registered as Second Appeal No.460 of 1991 and was admitted for hearing vide order dated 01.04.1992 by framing the following substantial question of law:-

“Whether in view of the facts and circumstances of the case, particularly the fact that the sale in favour of the respondent by the appellant was claimed to be nominal, a decree for eviction under Section 12(1)(a) and (c) of the M.P.(CG) Accommodation Control Act, 1961 is legal and valid ?”

5. The aforesaid appeal was adjourned from time to time and on 01.02.2010, when the matter was listed, it was submitted by learned counsel for the appellant that the sole appellant has expired and therefore, prayed time for taking the necessary steps as provided under the law in this regard. The matter was then

adjourned and listed on 23.02.2010. However, on the said date, none was present on behalf of the appellant, therefore, the said appeal was dismissed for want of prosecution.

6. For restoration of the said second appeal, which was dismissed as aforesaid, MCC was filed, registered as MCC No.1035 of 2013. The said MCC was dismissed as withdrawn vide order dated 12.12.2013 with liberty to revive the same if occasion so arises. Thereafter, another MCC was filed, which was registered as MCC No.83 of 2014. During pendency of this MCC, an order was passed on 30.04.2014, by which, notices were directed to be issued while directing the parties to maintain status quo with regard to possession of the suit property till the next date of hearing. On 02.02.2015, the requisite applications as required under Order 22 Rule 9 of the CPC along with other applications for setting aside the abatement and for substitution was filed and it was pointed out also when the matter was taken up on 25.02.2015. In view of the said information, the said MCC being MCC No.83 of 2014 was dismissed as not maintainable by providing liberty to the applicants to file independent application under Order 22 Rule 9 of the CPC along with other supporting applications. Thereafter, the instant MCC has been filed and it has been registered as MCC No.160 of 2015.

7. Mr. Ashish Shrivastava, learned counsel for the applicants submits that there is no malafide intention in filing the instant application for setting aside the abatement occurred on account of death of the sole appellant Tikaram. It is submitted that on 01.02.2010, the matter was adjourned but it was escaped over to note down the date when the appeal was dismissed in default on 23.02.2010. It is submitted further by him that after the dismissal of the appeal as such, the notice was issued by the executing Court on 11.09.2013 and immediately therefore, an application for restoration of said appeal was filed which was registered as MCC No. 1035 of 2013. It is submitted further that although the

said MCC was dismissed on 12.12.2013, but another MCC of similar nature was filed which was registered as MCC No. 83 of 2014 while pointing out all these material events, it is submitted by him that the delay in filing the application for setting aside the abatement has thus been occurred bonafidely. He, therefore submits that in order to provide the substantial justice to the parties, the alleged abatement be set aside while adopting the liberal approach in the matter as the provisions prescribed under Order 22 is not in a penal nature. In support, Mr. Shrivastava has placed his reliance upon the decision rendered by the Supreme Court in the matter of ***Banwarilal (Dead) by Legal Representatives and another v. Balbir Singh*** reported in ***(2016) 1 SCC 607***.

8. On the other hand, Mr. Anand Shukla, learned counsel for the non-applicant has contested the application vehemently on the ground that the applicants were very well aware with regard to the proceedings as required for setting aside the abatement occurred on account of death of the sole appellant Tikaram, who expired on 24.09.1994. He pointed out certain applications, which were filed before the executing Court, particularly, the application dated 07/02/2001 filed under Section 151 of the CPC by pointing out the fact that since deceased Tikaram has expired therefore, it was prayed therein that the execution proceedings deserves to be dropped. Meaning thereby, the applicants were very well aware with regard to the actual legal position in order to initiate the proceeding for setting aside the abatement. Having failed so, even upon obtaining the time on 01.02.2010 for initiating the steps in this regard when the appeal was pending, it can not be said that the delay as has been occurred is bonafide. It rather shows his malafide intention just to keep the suit property as long as possible. Mr. Shukla, therefore submits that the reasons as assigned while filing the said application for setting aside the abatement and also for substitution of the legal representatives of deceased sole appellant, is apparently malafide in nature and deserves to be rejected.

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

10. Undisputedly, the suit for eviction was made by the original plaintiff Kehar Singh, which was registered as Civil Suit No.78-A of 1983. The said suit was ultimately decreed by the trial Court vide its judgment and decree dated 24.01.1984, which was affirmed further in an appeal preferred by the said deceased sole appellant Tikaram by the lower appellate Court vide its judgment and decree dated 25.10.1991 in Civil Appeal No.15-A of 1989. After dismissal of the said appeal, the deceased sole appellant had preferred a second appeal, which was registered as Second Appeal No.460 of 1991 and the substantial question of law as mentioned in preceding paragraph was framed.

11. A perusal of the record would show that during the pendency of the said second appeal, the sole appellant had expired on 24.09.1994. In view of the said demise of sole appellant, a submission was made before the Court on 01.02.2010 for filing an appropriate application in this regard and the matter was adjourned as per request of the counsel for the appellant. The matter was then listed on 23.02.2010, however, it was dismissed for want of prosecution. For restoration of the said appeal, the MCC was filed, which was registered as MCC No.1035 of 2013. The said MCC was dismissed as withdrawn on 12.12.2013 by obtaining liberty to revive the same, if occasion so arises. Thereafter, the applicants have moved another MCC for its restoration, which was registered as MCC No.83 of 2014. However, it was again withdrawn on 25.02.2015 with liberty to file an appropriate application as required under Order 22 Rule 9 of the CPC for setting aside the said abatement. Thereafter, the instant MCC has been filed registered as MCC No.160 of 2015. Perusal of the record would therefore, show that there are some lapses in not filing the application for setting aside the abatement under Order 22 Rule 9 of the CPC in time. But, that alone is not enough to turn down their plea and to shut the door against them, particularly

when there is no malafide intention behind it and based upon the facts, it can not be held to be made deliberately.

12. Consequently, in order to provide the substantial justice to the parties and particularly where the provision framed in this regard is not penal in nature, I am inclined to allow this petition by following the principles laid down in **Banwarilal** (supra), wherein, it was observed by the Supreme Court in paragraphs 9 & 10 as follows:-

“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*, 2003 3 SCC 272, a five-Judge Bench of this Court held as under: (SCC pp. 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 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 or in conformity with the avowed object of the Court to do real, effective and substantial justice."

(emphasis supplied)

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."

13. In view of the principles laid down by the Supreme Court in the aforesaid decision and that by considering all the materials available on record, this MCC, deserves to be and is hereby allowed subject to costs of Rs. 10,000/- payable to the respondent within a period of two months from today. Accordingly, the Second Appeal No.460 of 1991 is restored to its original number and the applicants are directed to be substituted in place of sole deceased appellant Tikaram in cause title of memo of appeal.

Sd/-

(Sanjay Agrawal)
Judge