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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 02.01.2017

+ CM(M) 1202/2016 & CM No.43701/2016 (stay)

PARAMJIT KAUR Petitioner
Through Mr.Sanjay Sehgal, Advocate

versus

GURDIP SINGH MARWAH Respondent
Through Mr.S.C.Singhal, Advocate

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 21.10.2016 by which an application filed under Order 22 Rule 2 CPC was dismissed.
2. The petitioner along with plaintiff No.2 namely Smt.Sushila Kumari filed a suit for declaration, mandatory and permanent injunction and for rendition of accounts. Smt. Sushila Kumari was the owner of property bearing No.B-10/16, Rajouri Garden, Delhi. The said property was purchased on 14.05.1962. It was the case in the plaint that Smt.Sushila Kumari started showing signs of dementia. On 07.02.2011, it is contended in the plaint that the respondent got executed a gift deed in his favour. Further, it is stated that a fraud was played by the respondent upon the sick and mentally ill plaintiff No.2 and the gift deed is void. Plaintiff No.2 has died

on 27.12.2013 issueless. She is survived by one sister. Her parents had already pre-deceased her. She also had two brothers who had also pre-deceased her. The petitioner and the respondent are the children of the pre-deceased brothers.

3. The petitioner has filed repeated applications seeking different reliefs but somehow has not managed to bring on record LRs of deceased Smt.Sushila Kumari. First an application was filed under Order 22 Rule 3 CPC to bring on record the children of the deceased two brothers as LRs of Smt.Sushila Kumari. The application was filed in 2014 and was dismissed as withdrawn.

4. Subsequently, the petitioner has filed a second application under Order 6 Rule 17 read with Order 1 Rule 10 CPC which was dismissed on 13.05.2016. Another application was filed by some other legal representatives who sought to be impleaded as legal heirs of the deceased which was also dismissed on 05.07.2016. Now, this application has been filed by the petitioner under Order 22 Rule 2 CPC.

5. The trial court by impugned order came to the conclusion that right to sue does not survive after the death of plaintiff No.2 and hence, dismissed the application under Order 22 Rule 2 CPC.

6. I have heard the learned counsel for the parties.

7. The learned counsel appearing for the respondent has vehemently argued that the right to sue has not survived and hence the present application was rightly dismissed. He further argued that even if the right to sue survives and the petitioner is impleaded as an LR of deceased Smt.Sushila Kumari, the suit is not maintainable as the petitioner at best is a co-owner and the suit would not be maintainable for declaration without

seeking relief of partition._

8. Order 22 Rules 1 and 2 of the CPC read as follows:

“1. No abatement by party’s death if right to sue survives:

The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

2. Procedure where one of several plaintiffs or defendants dies and right to sue survives: Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.”

9. When does a right to sue survive? Order XXII Rule 1 CPC provides that the death of a plaintiff or defendant shall not cause suit to abate if the right to sue survives. Reference may be had to the judgment of the Supreme Court in the case of *Puran Singh and Others vs. State of Punjab and Others, (1996) 2 SCC 205/(MANU/SC/0298/1996)* wherein the Supreme Court in paragraph 4 held as follows:-

“4. A personal action dies with the death of the person on the maxim "action personalis moritur cum persona". But this operates only in a limited class of actions ex delicto, such as action for damages for defamation, assault of other personal injuries not causing the death of the party, and in other actions where after the death of the party the granting of the relief would be nugatory *Girja Nandini v. Bijendra Narain* MANU/SC/0287/1966 : [1967]1SCR93 . But there were other case where the right to sue survives in spite of the death of the person against whom the proceedings had been initiated and such right continues to exist against the legal representative of the deceased who was a party to the proceeding. Order 22 of the Code deals with this aspect of

the matter. Rule 1 of Order 22 says that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. That is why whenever a party to a suit dies, the first question which is to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which is extinguished with the death of the person concerned and does not devolve on the legal representatives or successors, then it is an end of the suit. Such suit, therefore, cannot be continued. But if the right to sue survives against the legal representative of the original defendant, then procedures have been prescribed in Order 22 to bring the legal representative on record within the time prescribed...”

10. Reference may also be had to the judgment of the Supreme Court in the case of ***Smt. Phool Rani & Ors. vs. Sh. Naubat Rai Ahluwalia (supra)*** the judgment relied upon by the petitioner. The court elaborated as to when the right to sue would survive and held as follows:-

“9. .. It is patent and would be a truism to say that the death of the plaintiff will not cause the ejectment proceedings to abate if the right to sue survives. That is the formula contained in Order 22 Rule 1 of the CPC, a formula simple in its wording but not simple in its application. The "right to sue" as said succinctly in *Sarat Chandra v. Nani Mohan* (1909) ILR 36 Cal. 799 means “the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death”. Thus contracts involving the exercise of special skill like a promise to paint a picture do not bind the representatives of the promisor nor do they create in them a right that can survive the death of the promisor.”

11. Hence right to sue has survived in the present case.

12. When right to sue survives and where there are more plaintiffs or defendants than one, any of them dies, and the right to sue survives to the

surviving plaintiff or plaintiffs alone, the court may cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs.

13. The Supreme Court in the case of *Mahabir Prasad v. Jage Ram & Ors.*, AIR 1971 SC 742, held as follows:

“Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi there can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate. On that ground also the order passed by the High Court cannot be sustained. The appeal is allowed and the proceeding remanded to the High Court to be dealt with and disposed of according to law. Defendants will pay the costs of this appeal. Costs in the High Court will be the costs in the appeal.”

14. Hence, merely because the petitioner was on record as the guardian of the deceased plaintiff No.2 would not mean that Order 22 Rule 2 would not apply to the present case and the petitioner could be noted as one of LRs of the deceased plaintiff No.2. The fact that the other LRs i.e. children of the two deceased brothers and the sister of Smt.Sushila Kumari have not pursued the matter, cannot be a ground to knockout the petitioner from the proceedings.

15. Regarding the contention of the respondent that the suit would not be

maintainable, as a suit for declaration cannot be pursued without seeking partition, it is clear that the suit was filed by plaintiff No.2. She seeks the relief of declaration regarding the gift deed and does not need to seek the relief of partition as she was the absolute owner originally. The petitioner would merely step into the shoes as the LRs of deceased plaintiff No.2. Hence, there is no merit in the contention of the respondent. Accordingly the impugned order is set aside as it suffers from material irregularities. The application of the petitioner under Order 22 Rule 2 CPC is allowed. The petition is allowed as above.

JAYANT NATH, J.

JANUARY 02, 2017/v