

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

% **Date of decision: 13th SEPTEMBER, 2017**

+ **C.R.P. No.203/2017**

GURVINDER PAL SINGH

.... Petitioner

Through: Mr. Vishwa Bhushan Arya and Mr.
H.D. Aneja, Advs.

Versus

**BANARSI DASS (DECEASED) THROUGH LR ASHWANI
GULATI & ORS**

.....Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.33448/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

C.R.P. 203/2017 & CM No.33447/2017 (for stay)

3. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 31st May, 2017 in CSDJ-10394/16 of the Court of Additional District Judge (ADJ)-14 (Central), Tis Hazari Courts, Delhi] allowing the application under Order XXII Rule 3 of CPC of the respondent No.1 Ashwani Gulati for impleadment in place of his deceased father Banarsi Dass, who had instituted the suit (from which this petition arises) against the respondents Nos.2&3 and petitioner, *inter alia* for specific performance of an agreement of sale of immovable property.

4. Banarsi Das, being the predecessor of the respondent No.1/plaintiff, died on 1st August, 2009 and the application aforesaid under Order XXII Rule 3 of CPC was filed on 28th July, 2012. The petitioner/defendant No.3

opposed the application on the ground that the same, filed after nearly three years from the date of the death of the plaintiff Banarsi Das, could not be entertained.

5. The learned ADJ has however allowed substitution reasoning (i) that the deceased plaintiff had preferred C.R.P. No.577/2003 in this Court against an order in the suit; (ii) that the proceedings in the suit stood stayed during the pendency of C.R.P. No.577/2003; (iii) that the legal heirs of the deceased plaintiff were substituted on 23rd November, 2009 before this Court in C.R.P. No.577/2003; (iv) that C.R.P. No.577/2003 was finally decided on 6th March, 2012; (v) that when the legal heirs of the deceased plaintiff Banarsi Das were impleaded in the Revision Petition, that order would merge with the proceedings in the suit and the legal heirs would be deemed to have been impleaded in the suit as well; (vi) that once the proceedings in the suit were stayed, there was no reason for the legal heirs of the deceased plaintiff to file an application in the suit; (vii) that the delay in applying for substitution had occurred in the aforesaid facts.

6. I have at the outset only put it to the counsel for the petitioner/defendant No.3 that though I have not had an occasion to check the law on the aforesaid aspect but have for the last 35 years seen the practice, as aforesaid, being followed.

7. The counsel for the petitioner/defendant No.3 has drawn attention to ***Kunhayammed Vs. State of Kerala*** (2000) SCC 359 but on enquiry clarifies that the said judgment is on the aspect of merger of the order of the Trial Court in the order of the Higher Court and is not concerned with the aspect of substitution of legal heirs. He, on the basis thereof contends that it is the

order of the Lower Court which merges in the order of the High Court and not the other way round. It is thus contended that the order in the Revision Petition substituting the legal heirs of the deceased plaintiff would not be an order in the suit. It is yet further argued that if it was so, there was no need for the heirs of the deceased plaintiff to apply in the suit, after the dismissal of the Revision Petition, inasmuch as the substitution in the Revision Petition would be enough; from the said fact alone, it has to be held that substitution in the Revision Petition of legal heirs was not substitution of the legal heirs in the suit. It is yet further contended on the basis of Order XXII Rule 9 that the suit, on the application for substitution being not filed within the prescribed time, abated on the 91st day and there was thus no suit in which the legal heirs of the deceased plaintiff could have been substituted.

8. However, on enquiry, whether the petitioner/defendant No.3 before this Court contended that the Revision Petition had become infructuous owing to the suit having abated, the answer is in the negative. Attention is drawn to the order dated 23rd November, 2009 disposing of Revision Petition and in which no such contention is found to have been raised.

9. It is further argued that in the present case, there was no order of the Lower Court on the aspect of substitution in which the order of substitution in the Revision Petition could merge.

10. I am of the view that once the petitioner/defendant No.3 allowed the Revision Petition to be decided, on 6th March, 2012, on merits, after nearly three years of the demise of the plaintiff, without contending that the suit having abated, the Revision Petition had become infructuous, it is now not open to the petitioner/defendant No.3 to contend so. In fact, a perusal of the

order dated 23rd November, 2009, in C.R.P. No. 577/2003 by which the heirs of the deceased plaintiff who was the petitioner therein were substituted, shows the same to be a consent order.

11. The purpose of a substitution is to, where a cause of action survives, allow the legal representative/s to continue a pending proceeding. The legal representative of the deceased plaintiff in the present case, by continuing to pursue the Revision Petition and having themselves substituted therein sufficiently indicated their desire to continue with the cause of action on which the suit was filed. Though, I am unable to agree with reasoning given by the ADJ, of owing to the proceedings in the suit having been stayed, it being not possible for the legal representatives of the deceased plaintiff to apply for substitution, but otherwise do not find any error requiring interference in exercise of jurisdiction, under Article 227 of the Constitution of India.

12. I have nevertheless checked the legal position. In ***Rangubai Kom Shankar Jagtap Vs. Sunderabai Bhratar Sakharam Jedhe*** AIR 1965 SC 1794 the Supreme Court considered the question on principle and on combined reading of Order XXII Rules 3,4 and 11 of the CPC found that though if a respondent dies and his legal representatives are not brought on record within the prescribed time, the appeal abates as against that respondent but there is another principle recognized by the Judicial Committee in ***Brij Indar Singh Vs. Kanshi Ram*** AIR 1917 PC 156 which softens the rigour of this Rule; the said principle is that (i) if the legal representatives are brought on record within the prescribed time at one stage of the suit, it will enure for the benefit of all the subsequent stages of the suit;

ii) the application of this principle to different situations will help to answer the problem presented in different facets; iii) if legal representatives of the defendant are brought on record in the interlocutory applications for production of documents, the order bringing them on record would enure for the benefit of the entire suit; iv) if an appeal is filed against an interlocutory order made in the suit and pending the appeal, the defendant dies and his legal representatives are brought on record in the appeal, even after appeal is dismissed, the appeal being a continuation or a stage of the suit, the order bringing the legal representatives on record would enure for the subsequent stages of the suit – this is so whether in the appeal the trial court's order is confirmed, modified or set aside; v) thus an order bringing on record the legal representatives made at one stage of the suit, be it in the suit or in appeal against interlocutory order or final order made in the suit would enure for the benefit of all subsequent stages of the suit, for an appeal is only a continuation of the suit; vi) however the same legal position cannot be invoked in the reverse or converse situations; an order made in a suit subsequent to the filing of an appeal at an earlier stage will move forward with the subsequent stages of the suit or appeal taken therefrom but it cannot be brought backwards into the appeal that had already been filed. I find the same to be followed in ***Panna Lal Agrawala Vs. Kanhaiya Lal Jain*** AIR 1974 Pat 284 and in ***Raj Mal Vs. Phulan Devi*** MANU/HP/0057/1982.

13. The counsel for the petitioner/defendant No.3 has also argued that the conduct of the legal representative of the deceased respondent No.1/plaintiff does not entitle him to any relief. It is stated that first an application was filed falsely stating that an application for substitution had been filed in the

suit also, soon after the demise of the plaintiff and if it was not traceable, the legal representative may be substituted. It is contended that no such application was found to have been filed and the said application was dismissed; only thereafter the application for substitution was filed.

14. In view of aforesaid legal position, there was indeed no need for applying for substitution in suit after substitution in C.R.P. No.577/2003 had been effected.

15. There is no merit in the petition.

16. Dismissed

No costs.

SEPTEMBER 13, 2017

'bs'/gsr..

(Corrected & released on 3rd October, 2017)

RAJIV SAHAI ENDLAW, J.