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**HIGH COURT OF CHHATTISGARH, BILASPUR****Second Appeal No.336 of 2012****Judgment reserved on: 27/09/2018****Judgment delivered on: 04/10/2018**

1. Pawan Kumar, aged 26 years, son of Baldau
2. Baldau, son of Chandulal Chandrakar, aged 45 years,  
Both residents of Village Kuthrail, Tehsil and District Durg (CG)

**---- Appellants****Versus**

1. Guhan, son of Bharosa, aged 65 years, through legal heirs:-
  1. Mangtu, son of Guhan Lal, 30 years,
  2. Gautam Bai, wife of Jeevrakhan, aged 36 years
  - 3 Khedia Bai (died and deleted)
  4. Parwati Bai, wife of Tulu, aged 34 years,
 All residents of Village Daganiya, Tehsil & District Durg (CG)
5. Manglu, son of Guhan, aged 20 years
6. Dhursai, son of Bishal, aged 28 years
7. Ramji, son of Bishal, aged 25 years
8. Ramgulal, son of Bishal, aged 23 years
9. Babulal, son of Bishal, aged 8 years, minor through natural guardian father Bishal
- All residents of Village Kuthrail, Tehsil and District Durg (CG)
10. State of Chhattisgarh, through the Collector, Durg

**---- Respondents**


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| For Appellants              | : Mr.Malay Shrivastava, Advocate  |
| For LR's of Res.No.1        | : Mr.Vinod Kumar Sharma, Advocate |
| and for Res.No.,6,7,8 and 9 |                                   |
| For Respondent No.10        | : Mr.Ashish Surana, P.L.          |

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**Hon'ble Shri Justice Sanjay K. Agrawal****C.A.V. Judgment**

1. The substantial question of law involved, formulated and to be answered by this Court in the defendants' second appeal is as under:-

“Whether the judgments passed by both the Courts below would be rendered nullity in the light of the fact that defendant No.1 – Jhumuk Ram, S/o Ramadhin had died during the pendency of the suit before the trial court itself and that no steps have been taken by the plaintiff for bringing the legal heirs on record ?”

[The parties will be referred hereinafter in this second appeal as per their status shown in the plaint before the trial Court.]

2. In order to answer the above-stated substantial question of law, the following facts essential to be noticed are as under:-

(i) The respondents/plaintiffs filed a suit for declaration of sale deed dated 5.8.80 as null and void and also for permanent injunction restraining the defendants from interfering with the suit land. In the said suit, defendant No.1- Jhumuk Ram did not appear and remained ex-parte throughout. Ultimately, the trial Court by its judgment and decree dated 25.9.2001 dismissed the suit.

(ii) First Appeal was filed by the plaintiffs, in which again defendant No.1 proceeded ex-parte and ultimately, the First Appellate Court allowed the appeal and held that sale deed

dated 5.8.80 executed by plaintiffs No.1 and 2 in favour of defendant No.2 is null and void and the plaintiffs are entitled for decree of possession from defendants No.2 and 3.

(iii) Assailing the judgment and decree passed by the First Appellate Court, this second second appeal under Section 100 of the CPC has been filed by defendants No.2 and 3, in which substantial question of law has been framed by this Court, which has been set-out in opening paragraph of this judgment.

3. Mr.Malay Shrivastava, learned counsel for the appellants, would submit that since defendant No.1-Jhumuk Ram died during pendency of the suit and his legal representatives were not brought on record, and no exemption was obtained under Order 22 Rule 4 sub-rule (4) of the CPC, decree passed by the First Appellate Court would be nullity. He would rely upon judgment of the Supreme Court in the matter of T. Gnanavel v. T.S. Kanagaraj<sup>1</sup> and judgment of the Kerala High Court in the matter of Uma Andarjanam v. Neelakandan Namboodiri<sup>2</sup>.

4. Mr.Ashish Surana, learned Panel Lawyer for respondent No.10, would submit that the State is formal party in this appeal.

5. I have heard learned counsel appearing for the parties and considered their rival submissions made herein-above and also

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1 (2009) 14 SCC 294

2 AIR 2001 Kerala 314

gone through the records with utmost circumspection.

6. It appears from perusal of the record that defendant No.1-Jhumuk Ram died during pendency of the suit before the trial Court itself, but no steps were taken for his substitution either before the trial Court or before the First Appellate Court. The case set-out by defendants No.2 and 3 before this Court is that decree passed by the First Appellate Court is nullity as legal representatives of defendant No.1 (since deceased) were not at all brought on record.

7. A careful perusal of the plaint would show that the plaintiffs claimed main relief that sale deed dated 5.8.80 (Ex.D/1) executed by plaintiffs No.1 and 2 i.e. Guhan and Vishal in favour of defendant No.2-Pawan Kumar be declared null and void, as it has been obtained by fraud and it does not confer title to them which was granted by the First Appellate Court. In the plaint also, no specific relief was claimed against defendant No.1-Jhumuk Ram. It appears that defendant No.1-Jhumuk Ram was impleaded as party defendant No.1 in the suit as he was instrumental in getting Ex.D/1 registered in favour of defendant No.2. Legal notice Ex.P/1 was also issued by plaintiffs No.1 and 2 for return of land, as such, defendant No.1-Jhumuk Ram was formal party in the suit, which is also apparent from the fact that in suit and first appeal, he remained ex-parte throughout and did not appear and ultimately, the First Appellate Court has granted decree declaring sale deed

dated 5.8.80 executed by plaintiffs No.1 and 2 in favour of defendant No.2 as null and void and further granted decree against defendants No.2 and 3 to deliver peaceful possession to the plaintiffs.

8. The question for consideration would be whether for want of substitution of legal representatives of defendant No.1, decree granted by the First Appellate Court would be nullity ?

9. At this stage, it would be appropriate to notice Order 22 Rule 4 sub-rule (4) of the CPC which states as under:-

**“4. Procedure in case of death of one of several defendants or of sole defendant.-**

(1) to (3) xxx      xxx      xxx

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.”

It is true that exemption under Order 22 Rule 4 (4) of the CPC was neither claimed nor granted to the plaintiff exempting them from substituting legal representatives of defendant No.1.

10. In the matter of Kanhaiyalal v. Rameshwar and others<sup>3</sup>, the Supreme Court has held that when the *proforma* respondent dies and no relief is claimed against him and in the

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<sup>3</sup> AIR 1983 SC 503

absence of whom the appeal proceeds, then the appeal shall not abate due to failure to bring the legal representatives of such party on record in time.

11. In the matter of Mangalsingh and others v. Smt. Rattno by her legal representatives and another<sup>4</sup>, the Supreme Court has held that death of unnecessary party, who is a respondent during the pendency of an appeal, would not result in the abatement of the appeal because the death of such a defendant does not affect the right of the party claiming relief without effecting any contradictory decree.

12. Likewise, the Supreme Court in the matter of Hira Lal and another v. Gajjan and others<sup>5</sup> relying upon State of Punjab v. Nathu Ram<sup>6</sup> has held as under:-

“12. The contention that the second appeal abated on account of non-filing of substitution application after the death of defendants Nos. 6, 10 and 11 had been reiterated before us. These defendants were only proforma parties and the High Court was right in holding that appeal did not abate. We may refer to State of Punjab v. Nathu Ram (supra) where it is held "that ordinarily the considerations which weigh with the court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the court."

13. Reverting to the facts of the present case in the light of

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4 AIR 1967 SC 1786

5 (1990) 3 SCC 285

6 AIR 1962 SC 89

principle of law laid-down in above-stated judgments (supra), it is quite vivid that defendant No.1-Jhumuk Ram was only proforma defendant in the suit and neither relief was sought against him nor granted against him as decree was granted against defendants No.2 and 3, though he died during pendency of suit and his legal representatives were not brought on record during pendency of suit and appeal, but he being proforma or unnecessary party in the suit, substitution of his legal representatives would not be necessary and decree so passed by the First Appellate Court cannot be branded as nullity.

14. In view of above-stated discussion, it is held that decree passed by the First Appellate Court without bringing legal representatives of defendant No.1-Jhumuk Ram is not nullity. Accordingly, substantial question of law is answered against the appellants/defendants. The judgment and decree of the First Appellate Court is affirmed.

15. The second appeal being without substance is liable to be and is hereby dismissed. No cost(s).

16. A decree be drawn up accordingly.

Sd/-

(Sanjay K Agrawal)  
Judge

B/-