

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 504 of 2005**

Shamsuddin, S/o. Ali Mohammad, Aged about 67 years, R/o. Village Nagari,
Tahsil Nagari, District Dhamtari (C.G.) (deceased appellant)

1. Riyazuddin, S/o. Late Shamsuddin, Aged about 30 years,
2. Sitara Rizvi, W/o. Shri R.A. Rizvi, Aged about 39 years,
3. Salma Rizvi, D/o. Late Shamsuddin, Aged about 30 years,
4. Smt. Zohra Begum, W/o. Late Shamsuddin, Aged about 60 years,

All R/o. Vill. Nagari, Tahsil Nagari, District Dhamtari (C.G.)

5. Tahera Qureshi, W/o Gulam Mohammad, Aged about 40 years, R/o. Sanjay
Nagar, Raipur (C.G.) (Legal representatives of appellant)

----Appellants

Versus

1. Smt. Mangtin Bai, W/o. Shri Paras Ram Kalar, Aged about 62 years, R/o. Village
Bhitarras, P.O. Sihawa, Tahsil Nagari, District Dhamtari (C.G.)
2. State of Chhattisgarh, through Collector, Dhamtari, District Dhamtari (C.G.)

---- Respondents

For appellants	:	Mrs. Smita Jha, Advocate.
For Respondent No.1	:	None present
For Respondent No. 2	:	Mr. S.K. Agrawal, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

01/03/2019

(1) The substantial question of law involved, formulated and to be answered in this plaintiff's second appeal states as under:

“Whether the first appellate Court is justified in dismissing the appeal by the impugned judgment and decree without bringing

legal representatives of deceased Shamsuddin on record as Shamsuddin died on 25.8.2000 and application for substitution was filed on 21.11.2000 ?”

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court).

(2) The plaintiff's suit for declaration of title and permanent injunction was dismissed by the trial Court. He preferred first appeal there-against before the first appellate Court under Section 96 of the Code of Civil Procedure. During pendency of the first appeal, original plaintiff/ appellant – Shamsuddin died on 25.8.2000 and application for substitution on behalf of his legal representatives was filed on 21.11. 2000 but the first appellate Court did not consider and decide their application and the appeal was dismissed, against which this second appeal has been preferred by the appellants/plaintiffs in which substantial question of law has been formulated for consideration, which has been set out in the opening paragraph of the judgment.

(3) Learned counsel for the appellants/plaintiffs would submit that the first appellate was absolutely unjustified in dismissing the appeal by the impugned judgment and decree without bringing legal representatives of deceased Shamsuddin on record as he died on 25.8.2000 and the application for substitution was filed on 21.11.2000 and, therefore, the impugned judgment & decree is liable to be set aside.

(4) None for respondent No.1, though served.

(5) I have heard learned counsel appearing for the appellants/plaintiffs and considered his submissions and went through the record with utmost circumspection.

(6) True, it is that original plaintiff / appellant – Shamsuddin died on 25.8.2000 whereas application for substitution was filed on 21.11.2000 and the appeal could have been decided after considering the application for substitution of legal representatives

of plaintiff on record, but that was not done and appeal was dismissed without considering the application for substitution filed on behalf of legal representatives of plaintiff.

(7) The Supreme Court in the matter of **Jaladi Suguna (Deceased) through LRs.**

Vs. Satya Sai Central Trust and others¹ has held the provisions of Rules 4 and 5 of

Order 22 are mandatory. Relevant paragraphs of the report states as under:-

“14. When a respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the court can proceed further in the appeal. Where the respondent-plaintiff who has succeeded in a suit, dies during the pendency of the appeal, any judgment rendered on hearing the appeal filed by the defendant, without bringing the legal representatives of the deceased respondent - plaintiff on record, will be a nullity. In the appeal before the High Court, the first respondent therein (Suguna) was the contesting respondent and the second respondent (tenant) was only a proforma respondent. When first respondent in the appeal died, the right to prosecute the appeal survived against her estate. Therefore it was necessary to bring the legal representative/s of the deceased Suguna on record to proceed with the appeal.

15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-...-vis other rival claimants to the estate of the deceased.

1 (2008) 8 SCC 521

16. The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 make it clear that the appeal can be heard only after the legal representatives are brought on record.”

(8) In the instant case, since application for substitution was filed for bringing legal representatives of plaintiff on record, therefore, the first appellate Court should have considered it and should have decided firstly whether the persons named therein as legal representatives, should be brought on record to represent the estate of the deceased/plaintiff, which the first appellate court has not done and proceeded to decide the appeal on merits and which is contrary to the principle of law rendered by the Supreme Court in **Jaladi Suguna (Deceased)** (supra). Thus, the impugned judgment and decree is liable to be set aside.

(9) Accordingly, the impugned judgment and decree is set aside. The matter is remitted to the first appellate court for hearing and disposal in accordance with law. First appellate Court should firstly decide the application for substitution and depending upon the result thereof to proceed further with the appeal on merits in accordance with law without being prejudiced by the impugned judgment and decree. The First

appellate Court would consider and decide the appeal expeditiously preferably within a period of three months from the date of receipt of certified copy of this order as the first appeal was preferred on 12.03.1999.

(10) Parties are directed to appear before the first appellate Court on 26th March, 2019.

(11) Record of courts below be sent back forthwith.

(13) Before parting with the record, it is appropriate to mention here that the provisions of Order 22 Rules 3 & 4 of the Code of Civil Procedure are mandatory and applicable to appeal also. Non-consideration of the application for substitution, though filed well in time by the party to *lis*, is a serious matter and the first appellate Court is legally obliged to consider and decide the application before hearing the appeal on merits. Non-consideration of application for substitution though filed and pending, yet the First Appellate Court proceeded and decided the appeal on merits without consideration of application for substitution is nothing but shirking of responsibility by said court, which cannot be countenanced. I hope and trust that the Judicial Officer manning the appeal Court would not give opportunity like this in future and will consider the application for substitution well before hearing the appeal on merits.

Sd/-
(Sanjay K. Agrawal)
Judge

D/-

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No. 504 of 2005

Shamsuddin (since deceased) through Lrs:- Riyazuddin & others.

Versus

Smt. Mangtin Bai & another

Head Note

English

Provisions of Order 22 Rule 4 of the Code of Civil Procedure is mandatory.

Hindi

आदेश 22 नियम 4 सिविल प्रक्रिया संहिता के प्रावधान आज्ञापक हैं ।