

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 89 of 2002****Judgment reserved on 25.02.2019****Judgment delivered on 11.03.2019**

Narayan S/o. Shri Shiv Gulam Dewangan (dead) through legal representatives:-

- (A) Shanti Bai W/o. Narayan, aged about 60 years.
- (B) Inder Kumar S/o. Narayan, aged about 35 years.
- (C) Neklal S/o. Narayan, aged about 32 years.
- (D) Krishan Kumar (deleted)
- (E) Tirath Ram S/o. Narayan, aged about 19 years.
- (F) Sita Bai W/o. Radheshyam, aged about 36 years.
- (G-1) Darwin Dewangan S/o. Dhaneshwar, aged about 22 years,
R/o. Village Soma Jhitia, Tahsil Dongargaon, District
Rajnandgaon (Chhattisgarh).
- (H) Timan Bai W/o. Narendra Kumar, aged about 27 years.
- (I) Bhuneshwari Bai W/o. Manohar Ram, aged about 21 years.
- (J) Gulapa Bai D/o. Narayan, aged about 19 years.

All resident of Village-Soma Jhitia, Tah. Dongargaon, District
Rajnandgaon (Chhattisgarh).

---Appellants

Defendants

Versus

- 1. Parma Alias Parmanand, aged 24 years.
- 2. Maniram, aged about 26 years.
- 3. Madan Lal, aged about 21 years.
All sons of late Shri Vikram Yadav, resident of Station Para,
Rajnandgaon, Permanent address – Soma Jhitia, Tah.
Dongargaon, District Rajnandgaon (Chhattisgarh).
- 4. Tulasa Bai W/o. Kishan Dewangan, aged about 45 years,
Resident Village -Soma Jhitia, Tah. Dongargaon, District
Rajnandgaon (Chhattisgarh).
- 5. Udayram S/o. Shivagulam (dead).

---Respondents

For Appellants/Defendant No.1 : Mr. Aditya Bhardwaj, Advocate.

For Res. 1 to 3 /LRs of original : Mr. P.K.C. Tiwari, Senior Advocate
Plaintiff-Soni Bai with Mr. Ashutosh Trivedi, Advocate

For Respondents No. 4 & 5 : None present.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial question of law involved, formulated and to be answered in the second appeal preferred by defendant No.1/his legal representatives is as under:-

“Whether on the facts and circumstances of the case, the Court below was justified in holding that the appeal did not abate though the legal representatives of the deceased respondent No.2 – Udayram, were not brought on record?”

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

2. Original plaintiff-Soni Bai filed a suit for declaration of title, partition and possession stating *inter alia* that she is entitled for ½ share in the suit land and also entitled for possession to that extent over the suit land, which was opposed by defendants-Narayan and Udaylal by filing joint written statement. The trial Court after appreciating oral and documentary evidence available

on record, by its judgment and decree dated 29.04.1980 partly decreed the suit for declaration only holding that the plaintiff is only entitled for 3.56 acres of the suit land. First appeal was preferred by plaintiff-Soni Bai, but during pendency of first appeal, she died and her legal representatives were brought on record. During pendency of first appeal, defendant No.2 – Udaylal also died. Respondents No.1 to 3 herein/legal representatives of the plaintiff moved an application under Order 22 Rule 4 of the CPC for bringing legal representatives of defendant No.2 – Udaylal on record. The first appellate court by order dated 13.08.1998 allowed that application and directed legal representatives of defendant No.2 – Udaylal to be brought on record. In the original memo of appeal, though name of defendant No.2 – Udaylal stands deleted, but names of his legal representatives were not arrayed in the cause title in memo of appeal and thereafter, first appeal was heard and decided finally by the impugned judgment and decree and appeal was allowed in part, against which, this second appeal under Section 100 of CPC has been filed by the appellants/legal representatives of defendant No.1, in which substantial question of law has been formulated by this Court, which has been set-out in opening paragraph of this judgment.

3. Mr. Aditya Bhardwaj, learned counsel for the appellants/legal representatives of defendant No.1, would submit that due to non-

substitution of legal representatives of defendant No.2 – Udaylal, the first appeal had already abated and therefore, the judgment and decree passed by the first appellate court deserves to be set aside only on that ground alone by granting this appeal.

4. Mr. P.K.C. Tiwari, learned Senior Counsel with Mr. Ashutosh Trivedi learned counsel for respondents No. 1 to 3/legal representatives of plaintiff-Soni Bai, would submit that application for bringing legal representatives of defendant No.2 – Udaylal on record was filed and that was granted by the first appellate court and notices were directed to be issued for hearing of appeal after granting the application, but legal representatives were formally not arrayed in the cause title of memo of appeal, as such defect being only technical, the appeal had not abated and the first appellate court is absolutely justified in hearing & granting the appeal on merits. He would further submit that legal representatives were noticed on the application for substitution and they also entered their appearance through Mr.M.K. Vaidya, Advocate, as such, the judgment and decree passed by the first appellate court is in accordance with law and this appeal deserves to be dismissed.
5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

6. The plaintiff's suit for declaration, partition and possession was partly decreed by the trial court against two defendants-Narayan and Udaylal granting declaration in her favour that she is entitled for declaration of only 3.56 acres of land. She preferred first appeal under Section 96 of the CPC before the first appellate court, during the pendency of appeal, one of the defendants/respondent No.2 therein Udaylal died, application for bringing his legal representatives on record was filed and granted on 13.08.1998 and thereafter his legal representatives were brought on record, but by the legal representatives of the plaintiff. The said court directed issuance of notice to the legal representatives of Udaylal, but they were not served with notice of appeal, but first appellate court proceeded further and decided the appeal finally on merits. It was open to the legal representatives of defendant No.2 – Udaylal to appear regularly after order of substitution was passed by the court in their presence and participate in the further proceeding of appeal, but they also decided not to do so and allowed the appeal to be decided finally and also they had not preferred appeal against decree.
7. The question for consideration is, whether the first appellate court is justified in deciding the appeal on merits after holding that appeal had not abated ?

8. Order 22 of CPC is also applicable to appeal(s) by virtue of provisions contained in Order 22 Rule 11 of the CPC. The provisions contained in Rule 4 of Order 22 of CPC is mandatory. [See Jaladi Suguna (deceased) through LRs. v. Satya Sai Central Trust and others¹].

9. At this stage, it would be appropriate to notice provisions contained in Order 22 Rule 4(1) CPC, which states as under:-

“4. Procedure in case of death of one of several defendants or of sole defendant.- (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.”

The above-stated provision states, where the right to sue survives, the court on application made in this behalf cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. As such, after the order of substitution is passed, it is either for the court establishment or for the plaintiff to carry out the necessary amendment in the plaint, or in memo of appeal, as the case may be, but fact remains that job of carrying out amendment in the plaint or memo of appeal is purely ministerial function.

10. The Bombay High Court in the matter of H. H. Darbar

¹ (2008) 8 SCC 521

Alabhai Vajsurbhai v. Bhura Bhaya² has held that taking of necessary steps to carry out the Court's order for substitution of names of the heirs of deceased respondents in records of the Court in terms of its order was a ministerial function which the Court's establishment is charged to perform and it was no part of the appellant's duty to take necessary steps in that regard. It has also been pointed out that if it is not performed or neglected, the fault will not lie with the appellants. It was held by Their Lordships as under:-

"It was no part of the appellant's duty to take the necessary steps to carry out the Court's order for the substitution of the names of the heirs of the deceased respondents who were properly served with notices in order to correct the record of the Court in terms of its order. That was a ministerial function which the Court's establishments was urged to perform. If it was not performed or neglected, the fault would not lie with the appellants."

11. Following the principle of law laid down by the Bombay High Court in the matter of **H. H. Darbar** (supra), the Karnataka High Court in the matter of **Kariyappa and others v. Patel Rudrappa and others**³ has held that once order is made under Order 22 Rule 3 or 4 CPC, the said order is to be given effect to, by recording the names in cause title of pleadings either by the party obtaining the order or by office of the court. K. Jagannatha Shetty J. (as then His Lordship was) speaking for the Bench, formulated the following question in this regard:-

² AIR 1937 Bombay 401

³ AIR 1976 Karnataka 29

“1. What is the duty of a party who has obtained an order from the Court under Order XXII, Rule 4 of the Code of Civil Procedure? Is it for him to correct the cause title of the plaint to give effect to the said order? Should he file an application under O.VI, Rule 18 of the Civil P. C. for leave to amend the cause title? These are the questions that arise for consideration in this revision petition.”

12. The question so posed for consideration was answered by His Lordship as under:-

"Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

13. The principle of law enunciated by the Bombay High Court in H. H. Darbar (supra) and the Karnataka High Court in Kariyappa (supra) was followed again by the Bombay High Court in the matter of Smt. Rukmini Dattatraya Naik & Ors. v. Mr. Parmanand Lalchand Joshi & Ors.⁴ R.M. Lodha, J. (as then His Lordship was) speaking for Bombay High Court held as under:-

“5. I have already noted above that amendment in the cause title is not the amendment in the pleading and once the Court passes an order directing substitution of deceased party, the cause title may be corrected by the concerned party or the establishment of the Court unless ordered otherwise. Once the Appeal Court allowed the application made by the legal representatives of deceased appellant for bringing

⁴ (2000) 3 Bombay Law Report 632

them on record, the order has to be given effect to and there was no question of abatement of the appeal. The application for bringing legal representatives was already made in time which was allowed as such and merely because the cause title was not corrected as per the order for bringing the legal representatives on record, by no stretch of imagination, can it be said that appeal has abated. When the appeal did not abate, there was no question of making any application for setting aside the abatement. The whole approach of the Appeal Court in the impugned order is misconceived.”

14. The Madhya Pradesh High Court in the matter of Amar Singh and others v. Pooran and others⁵ has followed the principle of law laid down in H. H. Darbar (supra) and Kariyappa (supra) with approval.
15. Thus, once the application under Order 22 Rule 3 or 4 is granted by the court directing substitution of legal representatives, order of substitution so passed by the court has to be given effect to either by party who has obtained the said order of substitution or on his failure to do so, it is duty of office of the Court to see that necessary change in the cause title of plaint or the appeal, as the case may be, is brought out expeditiously to keep the record straight and failure if any to carry out change/amendment in the cause title would not amount to abatement of suit or appeal, as the case may be. In this regard, Order 22 Rule 4(3) CPC may be noticed herein profitably, which states as under:-

⁵ (2007) 2 M.P.L.J. 215

“(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”

16. The above-stated provision mandates that if no application is made under sub-rule (1) for substitution of legal representatives of defendant, the suit which includes appeal by virtue of Order 22 Rule 11 CPC shall abate. So, what is required is the filing of application for bringing legal representatives of deceased defendant on record within the period of limitation prescribed for filing an application for substitution, but once an application for bringing the legal representatives of deceased defendant is made within the time prescribed and that application is considered and granted, no time limit has been prescribed in Order 22 of CPC mandating the party who has obtained the order of substitution to carry out the necessary amendment in the plaint or appeal within the particular time, therefore there is no scope to contend that though the application for substitution is made right in time and even though that application is granted directing substitution of legal representatives, yet the appeal would abate for failing to bring the necessary change in the cause title in plaint or appeal, as the case may be.

17. The provision fixing a particular time for making an application for bringing legal representatives on record with the consequence of the suit or appeal abating if no application is made within time,

have been enacted for expeditious disposal of cases in the interest of proper administration of justice. It is further to be borne in mind that when a suit or an appeal abates, a very valuable right accrues to the other party and such a right is not to be ignored or interfered with lightly in the name of doing substantial justice to the party, as depriving a party of a lawful right created in the interest of administration of justice in the absence of good grounds results in injustice to the party concerned. For doing justice to the parties, the courts have consistently held that whenever sufficient cause is shown by a party at default in making an application for substitution, abatement will have to be set aside as the good cause shown for explaining the delay in making the application is sufficient justification to deprive the other party of the right that may accrue to the other party as a result of the abatement of the suit or appeal. [See **Bhagwan Swaroop and others v. Mool Chand and others**⁶].

18. Reverting to the facts of the case in light of principle of law laid down in the above-stated judgments, it is *quite vivid* that the plaintiff's suit for declaration, partition and possession was partly decreed by the trial court against two defendants-Narayan and Udaylal granting declaration in her favour that she is entitled for declaration of only 3.56 acres of land. She preferred first appeal under Section 96 of the CPC before the first appellate Court,

⁶ (1983) 2 SCC 132

during the pendency of appeal, one of the defendants/respondent No.2 therein Udaylal died, application for bringing his legal representatives on record was filed by the plaintiff right in time and on that application notices were issued to the legal representatives of defendant No.2 and after hearing all the parties, the first appellate court, on 13.08.1998, passed the following order directing legal representatives of defendant No.2 to be brought on record on that date itself. The order states as under:-

“अपीलार्थी की ओर से श्री पी.के.सी तिवारी
उत्तरवादी द्वारा श्री भरतराज एडवो.

अपीलार्थी की ओर से दिनांक 12/8/97 को एक आवेदन आ0 22 नियम 04 व्य.प्र.सं. के अन्तर्गत पेश किया है कि उत्तरवादी उदेलाल की मृत्यु होने से उसके वारिसानों को पक्षकार बनाये जाने की अनुमति दी जावे।

उभयपक्ष को इस आवेदन पर सुना गया प्रकरण में उदेलाल के अतिरिक्त अन्य उत्तरवादी भी है अतः आवेदन पत्र स्वीकार किया जाता है।”

19. It appears from the record of the first appellate Court that despite the order of substitution passed by the court, as extracted hereinabove, legal representatives of plaintiff/their counsel failed to carry out necessary amendment in the cause title of the appeal memo on that day or till the appeal is decided on merits. The office of the court also did not take care to see that appeal memo is corrected as per order of the court and court proceeded to hear the appeal on merits and ultimately, passed the impugned judgment and decree granting the appeal against which this

appeal has been preferred.

20. In the considered opinion of this court, as already held hereinabove, once the application for substitution of the legal representatives of defendant No.2 on record is made, considered and granted by the court, it was the duty of the plaintiff to bring-out the necessary change in the appeal memo, but they failed to do so, but since order directing substitution was not pre-emptory in nature, non-carrying out the change in memo of appeal would not have the effect of wiping out the order of substitution resulting in abatement of appeal, as no time limit has been prescribed in Order 22 of the CPC for the said purpose. Therefore, the first appellate court is absolutely justified in holding that appeal of the plaintiff had not abated and further justified in hearing and deciding the appeal on merits. I do not find any illegality or perversity in the judgment and decree of the first appellate Court.

21. Yet, there is one more reason for not entertaining this second appeal preferred by defendant No.1. It has already been held that legal representatives of defendant No.2 were brought on record except it was not mentioned in the cause title of memo of appeal, but while filing second appeal, defendant No.1/his legal representatives chose not to bring legal representatives of defendant No.2 as party respondent in this second appeal and only claimed that appeal had abated, which has already been

held that appeal had not abated. It is the case where appeal has been filed against dead person Udaylal though his legal representatives are available on record, therefore, this appeal against dead person cannot be entertained.

22. On the basis of above-stated analysis, the second appeal deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

23. A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge