

HIGH COURT OF CHHATTISGARH, BILASPUR**Civil Revision No. 4 of 2019**

1. Devendra, S/o. Goverdhan Kolta, aged about 28 years,
2. Sushma, D/o. Goverdhan Kolta, aged about 20 years,
3. Smt. Bhargavi, Wd/o. Mandhata Kolta, aged about 55 years,
4. Krishna Kumar, S/o. Mandhata Kolta, aged about 30 years,
5. Deepa, D/o. Mandhata Kolta, aged about 22 years,
6. Reeta, D/o Mandhata Kolta, aged about 20 years,
7. Minor Rashmita, D/o. Mandhata Kolta, aged about 17 years, through her natural guardian mother Smt. Bhargavi, Wd/o. Mandhata Kolta
8. Geeta, W/o. Narsingh Kolta, D/o. Mandhata Kolta, aged about 28 years,
9. Murli, S/o. Vrindavan Kolta, aged about 40 years,

All above R/o. Village Semalia, Post Toresinha, Tahsil Saraipali, District Mahasamund (C.G.)

----Applicants/appellants

Versus

1. Vipin, S/o Dingro Kolta, aged about 55 years, R/o. Village Sambalpuri, Tahsil Padampur, District Bargarh (Orissa)
2. Tripura, Wd/o. Mayadhar Kolta, aged about 55 years, R/o. Village Heerapur, Post Paikmal, District Bargarh (Orissa)
3. Panchmi, W/o. Bhujol Kolta, R/o. Village Jharband, Post Jharband, District Bargarh (Orissa)

----Respondents/non-appellants

For Applicants	: Mr. Manoj Paranjpe, Advocate.
For Respondents No. 1 & 2	: Mr. L.C. Dash, Advocate.
For Respondent No. 3	: None

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

28/03/2019

(1) An *ex parte* decree was passed against the applicants by the trial Court on 31.03.1997. An application under Order 9 Rule 13 of the Code of Civil Procedure (for short "CPC") for setting aside *ex parte* decree was filed before the said Court on 11.01.1999. Meanwhile, defendant No. 2 and defendant No. 3 arrayed in that application died, for which application for bringing their legal representatives were filed on 6.4.1999 & 02.07.2001, respectively, those applications for substitution remained pending as they were not considered by the trial Court yet and main application filed under Order 9 Rule 13 of the CPC was rejected on merits by the trial Court on 24.04.2010. Misc. Appeal preferred there-against under Order 43 Rule 1(c) before the Miscellaneous Appellate Court was also dismissed affirming the order passed by the trial Court, against which instant civil revision has been filed questioning the same.

(2) Mr. ManojParanjpe, learned counsel for the applicants/judgment debtors would submit that provisions of Order 22 of the CPC are also applicable in the miscellaneous proceedings by virtue of Section 141 of the CPC. He further submits that provisions of Rules 4 and 5 of Order 22 of the CPC are mandatory and, therefore, the trial Court is absolutely unjustified in deciding the application under Order 9 Rule 13 of the CPC on merits without bringing legal heirs of defendants No. 2 & 3 in that application on record and the miscellaneous appellate Court has also committed illegality in affirming the order of the trial Court rejecting the application filed under Order 9 Rule 13 of the CPC, which is liable to be quashed and the application under Order 9 Rule 13 of the CPC be restored to its original number for hearing and disposal in accordance with law.

(3) On the other hand, Shri L.C. Dash, learned counsel appearing for decree

holder/plaintiffs/respondents No. 1 & 2 would submit that both the courts below were justified in rejecting the application under Order 9 Rule 13 of the CPC filed by the applicants, which does not call for any interference by this Court in its revisional jurisdiction.

(4) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also went through the record with utmost circumspection.

(5) In order to adjudicate a dispute finally between the parties on merit presence of/availability of alive *lis* is condition precedent, once the party to *lis* dies determination of *lis* is suspended and , thereafter, no effective order can be passed on merit of the matter unless his/her legal representatives are brought on record and, therefore, it is the duty of Court to pass order on merits of matter only when *lis* is alive.

(6) The Supreme Court in the matter of **Jaladi Suguna (Deceased) through LRs. Vs. Satya Sai Central Trust and others**¹ has held the provisions of Rules 4 and 5 of Order 22 of the CPC are mandatory. Relevant paragraphs of the report state 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

1 (2008) 8 SCC 521

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.

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.”

- (7) The question for consideration would be whether in the proceedings under Order 9 Rule 13 of the CPC, provisions of Order 22 of the CPC and the Rules made

thereunder would be applicable or not.

(8) By virtue of Section 141 of the CPC, the procedure provided in this Code in regard to suit shall be followed as far as it can be made applicable in all proceedings in any court of civil jurisdiction, as such, the provisions contained in Rules 4 & 5 of Order 22 of the CPC are mandatory and are applicable in the proceedings under Order 9 Rule 13 of the CPC.

(9) As held by their Lordships of the Supreme Court in the afore-cited case (supra), provisions of Rules 4 & 5 of Order 22 is mandatory, the court hearing application under Order 9 Rule 13 of the CPC ought to have taken cognizance of the fact that two defendants have already died and, and applications for bringing their legal representatives is pending consideration, therefore, the trial Court should have decided firstly whether the persons named therein as legal representatives, should be brought on record to represent the estate of the deceased/defendants No. 2 & 3 in that application, which the trial Court has not done and proceeded to decide the application under Order 9 Rule 13 of the CPC on merits by rejecting the same. The said decision taken by the trial Court is in teeth of the provisions contained in Rules 4 & 5 of the CPC as well as decision rendered by the Supreme Court in **Jaladi Suguna (Deceased)** (supra). Thus, the order dated 24.04.2010 (Annexure A-10) as affirmed by miscellaneous appellate Court dated 31.10.2018 are liable to be quashed.

(10) Accordingly, the order dated 24.04.2010 (Annexure A-10) is set aside and consequently the order dated 31.10.2018 passed by miscellaneous appellate Court is also set aside. The matter is remitted to the trial court for hearing and disposal of the application under Order 9 Rule 13 of the CPC in accordance with law. The trial Court

would consider and decide the application under Order 9 Rule 13 of the CPC expeditiously preferably within a period of three months from the date of receipt of certified copy of this order after considering the application under Order 22 Rule 4 of the CPC for substitution of legal heirs of defendants No. 2 & 3 in that application as the original suit was filed on 2.8.1984.

(11) The civil revision is allowed to the extent indicated hereinabove.

Sd/-
(Sanjay K. Agrawal)
Judge

D/-

