

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (Art.227) No.543 of 2019

1. Smt. Kanika Dey D/o Haripad Ghosh, W/o Saroj Kumar Dey, aged about 55 years, R/o House No.Mongra-23, Aasma City, Phase-2, Sakri Bilaspur, Police Station Sakri, Tahsil and District Bilaspur (CG)
2. Smt. Monika Dhar D/o. Haripad Ghosh, W/o. Jaidev Dhar, aged about 53 years, R/o C.C.-55A, Narayan Tala (East) Kolkata, P.O. Ashwani Nagar, Baguihati (W.B.) - 700159

---- Petitioners

Versus

Alok Ghosh S/o Haripad Ghosh, aged about 58 years, R/o House No.1166, Vinoba Nagar, Bilaspur, Police Station Tarbahar, Tahsil and District Bilaspur (CG)

---- Respondent

For Petitioners	:	Mr.T.K.Jha, Advocate
For Respondent	:	Mr.Ratnesh Kumar Agrawal, Advocate
Mr.R.N.Pusty, Advocate, appears as Amicus		

Hon'ble Shri Justice Sanjay K. AgrawalOrder on Board06/09/2019

1. Original plaintiff-Haripad Ghosh filed a suit for declaration of title and permanent injunction in respect of the suit property stating that it was purchased in the name of his wife Benami on 24.5.1980 and after death of his wife on 5.3.2017, defendants No.1 and 2 are claiming partition and seeking to interfere it and he had impleaded respondent herein, his son, as defendant No.3, stating that he was residing along with him in the suit premises. Defendants No.1 and 2 filed their reply and were contesting the suit. In the meanwhile, on 29.3.2019 original plaintiff-Haripad Ghosh died and defendant No.3, who is son, filed an application for transposition under Order 1 Rule 10(2) of the CPC on 18.4.2019 within one month from the death of his father to be

transposed him as plaintiff. By the impugned order, the trial Court has allowed that application filed by defendant No.3 & permitted him to be transposed as plaintiff. Against which, defendants No.1 and 2/daughters have filed this writ petition questioning that order.

2. Mr.T.K.Jha, learned counsel for the petitioners/defendants No.1 and 2, would submit that the trial Court is absolutely unjustified in granting the application under Order 1 Rule 10(2) of the CPC holding that after death of original plaintiff-Haripad Ghosh no cause of action survived in the suit. He would further submit that application for transposition was not maintainable and defendant No.3 could have filed an application under Order 22, Rule 3 of the CPC for substitution as Order 1 Rule 10 (2) of the CPC would not apply, as such, the trial Court is absolutely unjustified in granting that application.
3. Mr.Ratnesh Kumar Agrawal, learned counsel for the respondent, would support the impugned order.
4. Mr.R.N.Pusty, learned counsel appearing as amicus, would submit that though the application was filed under Order 1 Rule 10 (2) of the CPC, but it was substantially an application for substitution and mere quoting wrong provision does not preclude the Court from considering that application under right provision, which was applicable. Even otherwise, defendant No.3 was taking care of his father-plaintiff Haripad Ghosh and living with him and being son he has rightly directed to be impleaded as party plaintiff in the suit in place of deceased Haripad Ghosh on the basis of Will dated 24.10.2018.
5. In rejoinder submission, Mr.T.K.Jha, learned counsel, would submit that enquiry as to the validity and correctness of the Will is yet to be held

and Will is yet to be proved and application has been allowed on the basis of Will and defendant No.3 has been permitted to continue in the suit.

6. I have heard learned counsel for the parties and considered their rival submissions made hereinabove thoughtfully and also went through the records with utmost circumspection.
7. Admittedly, defendant No.3 is son of the deceased plaintiff and according to plaint averment, he was staying with his father in the suit accommodation and in the suit filed by his father Haripad Ghosh, he (plaintiff) claimed that the house which was in the name of his wife is Benami transaction. The application was though filed as an application for transposition under Order 1 Rule 10 (2) of the CPC, but it was principally and substantially an application for substitution in place of deceased plaintiff.
8. It is well settled that mere quoting of wrong provision would not preclude the Court to consider the application if that Court has right and jurisdiction to consider that application as per law. In this case, application was filed by defendant No.3 under Order 1 Rule 10(2) of the CPC, which the trial Court considered and passed the order impleading/substituting defendant No.3 as plaintiff as according to plaint averment he was staying along with his deceased father/original plaintiff being his one of legal representative, which cannot be held to be illegal merely because in that application Order 1 Rule 10(2) of the CPC was quoted. The trial Court has rightly allowed that application.
9. So far as the validity and correctness of Will is concerned, despite his substitution, if newly substituted plaintiff claims the suit property

exclusively by way of Will, he is required to plead and establish the due and valid execution of Will in his favour under Section 63(c) of Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 and the defendants are at liberty to question the Will as per law. However, it is made clear that impugned substitution/transposition would not preclude defendants No.1 and 2 to question the Will on permissible grounds and all the pleas are left and kept open to be considered by the trial Court if raised by the parties by an appropriate pleading. The original plaintiff died on 29.3.2019 and application was filed on 18.4.2019, therefore, it cannot be said that suit had abated on the date when the application for transposition was filed by the respondent.

10. In view of the matter, the writ petition is disposed of modifying the impugned order directing that issue of Will in favour of Alok Ghosh, present plaintiff, by his father Haripad Ghosh is left/kept open and to be considered by the trial Court, as stated above, if an appropriate pleading is raised by the parties including defendants No.1 and 2. This court appreciates the valuable assistance rendered by Mr. R.N.Pusty, learned amicus on short notice.

11. The writ petition is accordingly disposed of. No cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-