

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WP(227) No. 462 of 2015

1. Bhau Das S/o Guha Das Aged About 30 Years R/o Village- Kothari, Police Station, P.O. And Tah. Kartala, Distt. Korba Chhattisgarh
2. Kushwa @Laxman S/o Guha Das Aged About 28 Years R/o Village- Kothari, Police Station, P.O. And Tahsil- Kartala, Distt. Korba Chhattisgarh.

---- Petitioners

Versus

1. Itwari Das S/o Late Samal Das @ Kanwal Das Aged About 56 Years R/o Infront Of Radha Krishna Temple, Shankar Nagar, Bilaspur, Tah. And Distt. Bilaspur Chhattisgarh.
2. Nayab Tehsildar Barpali, P.S., P.O. And Tahsil- Barpali, District : Korba, Chhattisgarh.
3. State Of Chhattisgarh Through- Collector, Korba, P.O. Korba, P.S. Kotwali, District : Korba, Chhattisgarh.
4. Prakash Das S/o Itwari Das caste Panika, R/o Village- Kothari, P.S., P.O. And Tahsil- Kartala, District : Korba, Chhattisgarh.

---- Respondents

For Petitioner	:	Shri Sanjay Kumar Patel, Advocate.
For Respondent No.1	:	Shri Basant Dewangan, Advocate.
For Respondent/ State	:	Shri Sameer Oraon, G.A.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order on Board

22.09.2021

Heard.

1. This petition under Article 227 of the Constitution of India has been brought being aggrieved by the order dated 20.3.2015 passed by the Civil Judge, Class-II, Kartala, District Korba, Chhattisgarh in Civil Suit No.43-A of 2009.
2. It is submitted by counsel for the petitioner that the civil suit was filed by plaintiff – Samal Das @ Kanwal Das against the petitioners in the year

2009. In the order dated 31.3.2009 of the civil suit, it is mentioned that the plaintiff remained absent on number of dates posted for hearing, therefore, notice was issued to him. It is mentioned that the notice was returned unserved with a note that the plaintiff has expired on 4.8.2007. On this basis, the civil suit was dismissed on the ground of abatement by order dated 31.3.2009.

3. It is submitted by counsel for the petitioner that an application for setting aside the abatement of the suit under Order XXII Rule 9 read with Section 151 of the CPC was filed later on by the private respondent and by order dated 19.2.2013, the same was allowed and the civil suit was restored. No application was filed for substitution of legal representatives of the deceased/ plaintiff at the time of filing that application under Order XXII Rule 9 of the CPC or later on, the suit continued without any plaintiff for about two years. The petitioners then filed an application praying for dismissal of the suit on the ground of abatement due to death of the plaintiff, on 9.3.2015. Subsequent to which, respondent No.1 filed an application under Order I Rule 10 read with Section 151 of the CPC praying for impleadment as plaintiff in the civil suit, which has been allowed by the impugned order.
4. It is submitted by counsel for the petitioner that the order impugned is illegal, arbitrary and unsustainable. The suit had abated on account of death of the original plaintiff. The restoration of the suit under Order XXII Rule 9 of the CPC by order dated 19.2.2013 is by itself an unlawful order because no application was filed for substitution of legal representatives of the plaintiff alongwith the application for setting aside the abatement of the civil suit. This application was opposed by the petitioners stating that this application was not fit to be allowed. However, even after the restoration of the civil suit, the suit has

continued for almost two years without plaintiff. The impugned order suffers from great infirmity and respondent No.1 has lost the entitlement to be substituted in place of plaintiff in the civil suit. It is also submitted that the application filed under Order I Rule 10 read with Section 151 of the CPC which should have been constituted under Order XXII Rule 9 of the CPC because respondent No.1 can have entitlement only on that basis that he is a legal representative of the deceased, therefore, the impugned order is unsustainable, which may be set aside.

5. Learned counsel for respondent No.1 opposes the submissions made by counsel for the petitioners in this respect. It is submitted that the impugned order is lawful and sustainable.
6. Learned State counsel has made formal objection.
7. Heard counsel for both the parties and perused the documents present on record.
8. Considered on the submissions. As per the submissions if it is to be believed that the civil suit was filed in the year 2009; due to absence of the original plaintiff continuously on the dates fixed by learned trial Court, issuance of notice was ordered, which was returned unserved with a report that the plaintiff has expired on 4.8.2007; in that case, there appears to be reason to believe that the civil suit was filed by a dead person, therefore, a civil suit which is not being contested by a person alive is itself is not maintainable.
9. A civil suit by a dead person is not conceivable under the Code of Civil Procedure. As the facts are present in the proceeding, the civil suit was closed on the ground of abatement on 31.03.2009 although the civil suit was restored by the order dated 19.02.2013 by allowing the application under order XXII Rule 9 of the CPC, but no application was filed under

Order XXII Rule 3 of the CPC for substitution of LRs. of the deceased plaintiff. It was after passing of about more than two years, an application was filed by respondent No.1 under Order 1 Rule 10 of the CPC read with Section 151 of the CPC. As there is specific provision present under the Code of Civil Procedure for bringing the legal representatives of the deceased plaintiff on record of civil suit under Order XXII Rule 3 of the CPC, therefore, the application under Order 1 Rule 10 was misconstrued. However, if it is considered that the provision of law has been wrongly quoted in the application and that the application for impleading party under Order 1 Rule 10 of the CPC can be regarded as the application under Order XXII Rule 3 of the CPC, in that case the impugned order has to be examined in the light of this observation.

10. As per the report received on the notice issued by the trial Court the original plaintiff had expired on 04.08.2007, therefore, the right to file application under Order XXII Rule 3 of the CPC existed, but that was required to be filed within limitation as the law of limitation is applicable on filing of such application under Order XXII Rule 3 of the CPC as well as for filing application under Order XXII Rule 9 of the CPC. Article 120 of the Limitation Act, 1963 provides for limitation of 90 days for filing application for bringing LRs. of deceased plaintiffs or appellant, or of a deceased defendant or respondent. Similarly Article 121 of the Limitation Act, 1963 provides that limitation for filing application to set aside the abatement would be 60 days. In this case, the information was received by the Court on much after completion of 90 days after death of the plaintiff which has occurred on 04.08.2007, therefore, the limitation for bringing the application for setting aside the abatement had also expired even then the application for setting aside the abatement

was allowed by the learned trial Court at subsequent stage by order dated 19.02.2013 and that application was not filed along with the application for bringing LR's. of the deceased plaintiff on record. The application under Order 1 Rule 10 of the CPC that was filed after passing of more than two years if considered as the application under Order XXII Rule 3 of the CPC it is again hopelessly barred by the limitation, therefore, even if the application of respondent No.1 was to be considered as the application for substitution of LR's., that was not fit to be allowed for the reason that it was barred by limitation.

11. Therefore, I am of this view that the impugned order is unsustainable. Hence, the petition is allowed and the impugned order is set aside. Learned trial Court is directed to consider on the application filed by the petitioners praying for dismissal of the suit on the ground of abatement and pass the order accordingly.

12. Accordingly, the petition is disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge