

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CMP No. 874 of 2022**

***Fakira Charan Jena and others* .... *Petitioners***

Mr. A.Kejriwal, Advocate

*-versus-*

***Babaji Charan Jena* .... *Opp. Party***

**CORAM:  
JUSTICE K.R. MOHAPATRA**

**ORDER  
13.12.2022**

**Order No.**

3.
  1. This matter is taken up through Hybrid mode.
  2. Petitioners in this CMP seek to assail the order dated 31<sup>st</sup> August, 2021 (Annexure-1) passed in CS No.252 of 2016, whereby learned Civil Judge (Senior Division), Jagatsinghpur allowed an application for substitution of the Plaintiff and a direction was made to file consolidated plaint. Petitioners further assail the order dated 8<sup>th</sup> July, 2022 (Annexure-3) passed therein, whereby the petition for modification of order dated 31<sup>st</sup> August, 2021 was rejected.
  3. Mr. Kejriwal, learned counsel for the Petitioners submits that during pendency of CS No.252 of 2016, the sole Plaintiff died and accordingly her legal heirs filed application under Order XXII Rule 3 CPC to be substituted in her place. In terms of order dated 31<sup>st</sup> August, 2021 Petitioners filed consolidated plaint along with the amended cause title. But the Office pointed out defect to the effect that the consolidated plaint was not supported by an affidavit as required under Section 26(2) CPC. Hence, Petitioners filed an application dated 21<sup>st</sup> June, 2022 for modification of order under Annexure-1 to the extent of filing of '*consolidated cause title*' in place of '*consolidated*

*plaint*'. The said application was rejected vide order dated 8<sup>th</sup> July, 2022 (Annexure-3). Hence, this CMP has been filed.

3.1 Mr. Kejriwal, learned counsel relying upon the case of ***Salem Advocate Bar Association, Tamil Nadu Vs. Union of India***, reported in AIR 2005 SC 3353, wherein it is held as under:-

*“4. Prior to insertion of the aforesaid provisions, there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided in Section 26(2) and the person verifying the pleadings to furnish an affidavit in support of the pleading [Order 6 Rule 15(4)]. It was sought to be contended that the requirement of filing an affidavit is illegal and unnecessary in view of the existing requirement of verification of the pleadings. We are unable to agree. The affidavit required to be filed under amended Section 26(2) and Order 6 Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.*

He, therefore, submits that the Petitioners will be required to file an affidavit in support of the pleadings and verification in the event an amended plaint is filed. But Section 26(2) CPC is not applicable in the instant case, as the Petitioners are only required to file a consolidated cause title in terms of Order XXII Rule 3 CPC. Learned trial Court, without considering the same, has rejected the application. Hence, this CMP has been filed.

4. Considering the submission made by learned counsel for the Petitioners and on perusal of relevant provisions of CPC along with case law cited, it is crystal clear that Petitioners were only required to file consolidated cause title pursuant to substitution of the deceased Plaintiff, but vide order under Annexure-1, the

direction was made to file consolidated plaint. Newly added Petitioners/Plaintiffs accepting the said order, had in fact filed the consolidated plaint, but a defect was pointed out by the Office to the effect that it is not supported by an affidavit in terms of Section 26(2) CPC. Thereafter, Petitioners filed an application to modify the said order of substitution to the extent stated above and the order under Annexure-3 has been passed. Once the Petitioners accepted the order dated 31<sup>st</sup> August, 2021 and filed consolidated plaint they have to adhere to the procedure under Section 26(2) CPC. Once accepting the order under Annexure-1 they cannot turn around and find fault with the said order. Petitioners before filing the consolidated plaint could have prayed to the Court to modify the order by directing them to file consolidated cause title. That having not been done, and the Petitioners having filed a consolidated plaint pursuant to order under Annexure-1, they are required to comply with the provisions of law. It also appears that the Petitioners will in no way be prejudiced, if they file the consolidated plaint supported by an affidavit. Thus, this Court finds no infirmity in the order under Annexure-3. As the order dated 31<sup>st</sup> August, 2021 under Annexure-1 has already been given effect to by filing the consolidated plaint, this Court declines to interfere with the same.

5. Accordingly, the CMP is disposed of with an observation that Petitioners, if so wish may file the consolidated plaint supported by an affidavit as required under Section 26(2) CPC.

Issue urgent certified copy of the order on proper application.

**(K.R. Mohapatra)**  
**Judge**