



\$~78(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CM (M) 685/2022**

BHAGWAN SINGH

..... Petitioner

Through: Mr. Gaurav Mitra, Mr. Lakshay
Laroiya and Mr. K.K. Jha, Advs.

versus

**KANHAIYA LAL NOW DECEASED THROUGH HIS LRS
AND ORS**

..... Respondents

Through: Mr. Ajjay Arurag, Adv.
Mr. Kunal Lakra, Adv. on
behalf of Mr. Ashim Vachhar,
Standing Counsel DDA-
Respondent 3

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

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18.07.2022

**CM No. 31377/2022 (exemption) and CM No. 31378/2022
(exemption)**

1. Allowed, subject to all just exceptions.

2. The applications stands disposed of.

CM (M) 685/2022

3. This petition throws up a very limited controversy.

4. Respondent 1 Kanhaiya Lal filed *Suit 956/2018 (Kanhaiya Lal*



v. MCD & others) against, *inter alia*, the Municipal Corporation of Delhi (MCD) and the petitioner Bhagwan Singh. In the suit, Kanhaiya Lal claimed to be a lessee of the suit premises.

5. The case set up by the plaintiff in the suit was this: The plaintiff is a washerman. A particular area in Timarpur, New Delhi, was demarcated, prior to India attaining independence, for washermen to wash clothes. It was identified as a “Dhobi Ghat”. Yearly leases of the Dhobi Ghat were granted by the municipal authorities. Shyam Lal, the father of Kanhaiya Lal, was a lessee, to whom such a lease was granted. He also used to pay yearly lease money to the civic authorities without default. The plaintiff asserts that Kanhaiya Lal continues to be a lessee in respect of the Dhobi Ghat. Consequent to the demise of Shyam Lal, Kanhaiya Lal applied, to Respondent 2 (hereinafter, “MCD”), on 30th July 1965, seeking issuance of lease, as earlier issued to Shyam Lal, in his name and for mutation of the revenue records, incorporating his name in place of Shyam Lal as the lessee of the Dhobi Ghat. This request was reiterated on 9th March, 2001. The plaintiff further asserts that Kanhaiya Lal had deposited the lease money for the period 1st April, 2005 to 31st March, 2009. In such circumstances, Kanhaiya Lal, by the suit, sought a declaration that he was the lessee in respect of the Dhobi Ghat, as well as an injunction against the petitioner Bhagwan Singh who, he alleged, was illegally seeking to dispossess him from the Dhobi Ghat.

6. Bhagwan Singh and the MCD contested the claim and asserted, *per contra*, that Kanhaiya Lal was not a lessee but was merely a



licensee.

7. An application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC) filed by Kanhaiya Lal in the suit came to be dismissed by the learned Civil Judge by order dated 21st July, 2020, opining that Kanhaiya Lal was not a lessee but was merely a licensee. The appeal, wherein the impugned order has come to be passed was instituted, thereagainst, by Kanhaiya Lal, before the learned Additional District Judge (“the learned ADJ”).

8. During the pendency of the appeal, Kanhaiya Lal expired. The legal heirs of Kanhaiya Lal moved an application under Order XXII Rule 3¹ of the CPC, seeking to be impleaded in his place. The application was opposed by Bhagwan Singh, contending that, as Kanhaiya Lal was not a lessee but was merely a licensee, his legal heirs had no right to be impleaded in the proceedings.

9. The learned ADJ has, in the impugned order dated 18th April 2022, held that, as Kanhaiya Lal claimed, in the plaint filed by him, to be a lessee, his legal heirs had a right to be impleaded in the suit,

¹ Rules 1 and 3 of Order XXII read thus:

“1. **No abatement by party's death, if right to sue survives.** – The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

3. **Procedure in case of death of one of several plaintiffs or of sole plaintiff.** –

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

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.”



consequent on his demise.

10. It is this order which forms subject matter of challenge of the present petition under Article 227 of the Constitution of India.

11. Learned Counsel for the petitioner acknowledges the fact that there is no statutory proscription against the learned ADJ impleading the legal representatives of Kanhaiya Lal even while the issue whether Kanhaiya Lal was a lessee or licensee, remains at large. He, however, draws my attention to Order XLI Rule 25² of the CPC, and submits that the learned ADJ should have framed an issue as to whether the legal heirs, who sought to be impleaded in the appeal, were claiming their rights through a lessee or a licensee, i.e., essentially, whether Kanhaiya Lal was a lessee or a licensee, before proceeding to allow their impleadment. According to learned Counsel, it was incorrect on the part of the learned ADJ to have allowed the impleadment of the legal heirs of Kanhaiya Lal in the proceedings without, in the first instance, framing an issue as to whether Kanhaiya Lal was a lessee or a licensee and arriving at a conclusion in that regard.

12. Learned Counsel has also drawn my attention, in this context, to the fact that the legal heirs of Kanhaiya Lal have, in fact, moved an application in CS 956/2018 before the learned Civil Judge under Order

² 25. **Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.** – Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be



I Rule 10(2)³ of the CPC, seeking to be impleaded in the suit. The impugned order, according to learned Counsel, effectively prejudices this application and predetermines its fate. If the impugned order were to be upheld, the contention of learned Counsel is that the learned Civil Judge would have to allow the application under Order I Rule 10 of the CPC, filed by the legal heirs of Kanhaiya Lal, as the impugned order lends its imprimatur to the proposition that Kanhaiya Lal was, in fact, a lessee and not a licensee.

13. To my mind, the contention of learned Counsel cannot merit acceptance.

14. In the first place, this Court is exercising jurisdiction under Article 227 of the Constitution of India. When exercising jurisdiction under Article 227 of the Constitution of India, the Court is not concerned with what the learned Trial Court or the learned Appellate Court hierarchically below this Court *could* have done or even *should* have done. Unless the order passed by the Courts below was in violation of any legal proscription, whether statutory or precedential, the Article 227 Court would refrain from interfering.

fixed by the Appellate Court or extended by it from time to time.

³ **10. Suit in name of wrong plaintiff.** –

(2) **Court may strike out or add parties.** – The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.



15. There is no dispute about the fact that Kanhaiya Lal has, in his plaint, claimed to be a lessee in respect of the suit property. The issue of whether Kanhaiya Lal is a lessee or a licensee is still at large, as the suit has still to be decided. What learned Counsel effectively seeks is an *a priori* determination of the legal character of Kanhaiya Lal, and of the correctness of his stand in the plaint that he is a lessee, even before the application of the legal heirs of Kanhaiya Lal under Order XXII Rule 3 of the CPC is decided. Worse, such an *a priori* determination is being sought, not in the suit, which is presently pending before the learned Trial Court, but in the appeal preferred by Kanhaiya Lal against the order dated 21st July, 2020, passed by the learned Single Judge in the stay application filed by him under Order XXXIX Rules 1 and 2 of the CPC.

16. To say the least, the petitioner's challenge is completely misguided.

17. There was clearly no statutory or other legal interdiction on the learned ADJ deciding the application under Order XXII Rule 3 of the CPC, preferred by the legal heirs of Kanhaiya Lal before taking a decision on whether Kanhaiya Lal was a lessee or a licensee.

18. I am also unable to accept the contention of learned Counsel that the impugned order amounts to determination of the actual status of Kanhaiya Lal qua the suit property, and effectively prejudices the issue of whether Kanhaiya Lal was a lessee or a licensee. It does, to my mind, no such thing.



19. The petitioner, in fact, is seeking to reinvent the CPC, by raising what is, essentially, a non-issue. Kanhaiya Lal was the plaintiff in the suit. He claimed leasehold rights, in respect of the Dhobi Ghat, as a lessee. Whether the claim is meritorious or moonshine, has to be decided in Suit 956/2018, which is presently pending. Any order, passed in the said Suit under Order XXXIX Rules 1 and 2 of the CPC, would not amount to a decision on the point. At best, it represents a *prima facie* view, towards deciding whether an interlocutory injunction should, or should not, be granted.

20. During the pendency of the suit, Kanhaiya Lal expired. Order XXII of the CPC specifically deals with “Death, Marriage and Insolvency of Parties”. Rule 1, thereunder, saves the suit, even if a party to the suit expires, provided the right to sue survives. Rule 3 mandates – as is apparent from the use of the word “shall” – that, if a sole plaintiff dies, and the right to sue survives, on an application being made by the legal representatives of the plaintiff for being impleaded in the proceedings, the Court *shall cause* the legal representative of the deceased plaintiff to be made a party and *shall* proceed with the suit.

21. The connotation of the word “shall” is, it is trite, mandatory, and it is only where the structure of the statute requires the provision to be treated as directory, that the Court is entitled to read “shall” as “may”. Where the ingredients of Order XXII stand satisfied, therefore, the Court is under a statutory duty to implead the legal



representatives of the deceased plaintiff or defendant.

22. If Kanhaiya Lal had a right to sue, indisputably, so would his legal representatives. The operation of Rule 1 of Order XXII proceeds on a demurrer that there existed a right to sue, prior to the expiry of the plaintiff or the defendant, as it were. Its applicability is not *dependent* on the existence of a right to sue, prior to the expiry of the plaintiff or defendant. The enquiry that Rule 1 of Order XXII envisages is only whether the right to sue, if it existed prior to the expiry of the concerned plaintiff or defendant, would survive, even after the plaintiff or defendant has expired. If, for example, the right was personal to the plaintiff, or personal against the defendant, and not one which would continue to survive, even after the expiry of said plaintiff or defendant, then the suit would abate on the date of said plaintiff or defendant.⁴ In such an event, no occasion would arise, to implead the legal representative of said plaintiff or defendant. After the concerned plaintiff or defendant expired.

23. All that the impugned order says is that, as Kanhaiya Lal had claimed to be a lessee in the suit property, his legal heirs, consequent to his demise, have a right to be impleaded in the proceedings. Undoubtedly, the learned Civil Judge did take a *prima facie* view against Kanhaiya Lal, in the order dated 21st July, 2020. Kanhaiya Lal was, however, entitled, under Order XLII Rule 1 (r)⁵ of the CPC, to

⁴ For example, in **Phool Rani v. Naubat Rai**, (1973) 1 SCC 688, it was held that an application by a landlord for eviction of a tenant on the ground of the personal bona fide requirement of the landlord would perish with his death, and would not survive on his legal heirs, as the bona fide requirement claimed was personal in nature.

⁵ “1. **Appeals from orders.** – An appeal shall lie from the following orders under the



appeal against the decision. He did so. During the pendency of the appeal, Kanhaiya Lal expired. *The only question that arises for consideration, therefore, on the application by Kanhaiya Lal's legal representatives, seeking impleadment in the appeal, is whether the right to prosecute the appeal survived, consequent to the death of Kanhaiya Lal. The merits of the claim of Kanhaiya Lal in the suit, or even in the appeal, are completely foreign to the determination of the right of his legal representatives to be impleaded in the appeal. If Kanhaiya Lal had a right to prosecute the appeal, so, too, must his legal representatives, irrespective of the merits of the appeal or of the original suit instituted by Kanhaiya Lal.*

24. The only consideration to be borne in mind by the Court, in exercising jurisdiction under Order XXII Rule 3, is whether the right to sue – or, in this case, the right to prosecute the appeal against the order dated 21st July, 2020, of the learned Single Judge – survived, or did not survive. The petitioner does not seek to contend that the legal representatives of Kanhaiya Lal who sought, by the application under Order XXII Rule 3, to be impleaded in the appeal, were not, in fact, his legal representatives. Nor is it the petitioner's case that the leasehold rights asserted by Kanhaiya Lal were personal in nature. Rather, they seek to contest the very existence of the right as, in their submission, Kanhaiya Lal was merely a licensee and not a lessee, such a contention, in my considered opinion, is not permissible as a ground to oppose an application for impleadment under Order XXII Rule 3 of

provisions of section 104, namely: –



the CPC.

25. In their undisputed capacity as the legal heirs of Kanhaiya Lal, the applicants, whose application under Order XXII Rule 3 was allowed by the impugned order dated 18th April, 2022 of the learned ADJ, were entitled, *ipso facto*, to be impleaded in his place. The matter must rest there, insofar as the application of the legal representatives, under Order XXII Rule 3 of the CPC, is concerned. The merits of the case urged by Kanhaiya Lal in the suit, or even in the appeal, and the issue of whether Kanhaiya Lal was a lessee or licensee, are foreign to Order XXII Rule 3.

26. No exception, to my mind, whatsoever, can be taken to the decision of the learned ADJ.

27. The reliance, by learned Counsel for the petitioner, on Order XLI Rule 25, is clearly completely off target. The provision has no application, whatsoever, to the present case. The CPC does not, expressly or by necessary implication, make adjudication of an impleadment application by legal representatives, under Order XXII Rule 3, subject to Order XLI Rule 25, which applies in circumstances which are not even remotely proximate to the circumstances in which the application under Order XXII Rule 3 was moved the present case.

28. Plainly, Order XLI Rule 25 applies where the Court, from whose decree an appeal has been preferred, omitted to frame or try an issue,



or determine a question of fact, which appears, to the appellate court, to be essential *to the right decision of the suit upon the merits*.

29. Even so, the exercise of jurisdiction under Order XLI Rule 25 is, one may say, statutorily subjected to a “double discretionary caveat”. If it appears, to the appellate Court, that the Court, whose decree is in appeal before it, has committed to frame or try an issue which is essential to a right decision of the suit, the Appellate Court “*may, if necessary*”, frame issues and refer the issues for trial to the Court from whose decree the appeal is preferred, and direct the Court to take additional evidence as is required. Even if, therefore, the ingredients of Order XLI Rule 25 are satisfied, the framing of issues by the appellate court does not, *ipso facto*, follow as a matter of right. The appellate court would frame issues, and direct the Trial Court to decide the issues so framed, only where *it is necessary* to do so. Even then, no statutory duty is cast on the appellate Court to do so; the use of the expression ‘may’ indicates that the jurisdiction is discretionary in nature.

30. Even otherwise, on its plain words, Order XLI Rule 25 cannot apply, where the order under challenge before the appellate Court is rendered under Order XXXIX Rules 1 and 2 of the CPC. The reason is plain. “Decree” is defined, in clause (2) of Section 2 of the CPC, as meaning “the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit”. An order under Order XXXIX Rules 1 and 2 of the CPC,



needless to say, does not “conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit”. To avoid any ambiguity on this score, Section 2 (2) goes on to clarify that the expression “decree” “shall not include ... any adjudication from which an appeal lies as an appeal from an order”. An appeal, against an order passed under Order XXXIX Rules 1 and 2 lies to the appellate court as an “appeal from an order”, under Order XLIII Rule 1 (r). The order passed under Order XXXIX Rules 1 and 2 is not, therefore, a “decree”, within the meaning of the CPC. Per sequitur, Order XLI Rule 25, too, has no application.

31. Indeed, if the appellate Court were to frame issues in the appeal preferred by Kanhaiya Lal against the order dated 21st July, 2020, of the learned Civil Judge, under Order XLI Rule 25, the appellate Court would be acting in excess of jurisdiction.

32. Equally, I am unable to subscribe to the contention of learned Counsel for the petitioner that, as an application under Order I Rule 10 of the CPC, filed by the legal heirs of Kanhaiya Lal was pending before the learned Civil Judge in CS 956/2018, the learned ADJ ought not to have passed the impugned order. There is no mandate on the learned ADJ, in law, to defer adjudication of the application, preferred before him under Order XXII Rule 3 of the CPC, till the learned Civil Judge decides the application under Order I Rule 10 of the CPC filed before him. If the impugned decision does, in any manner, influence the fate of the application filed by the legal heirs of Kanhaiya Lal before the learned Civil Judge, that is merely because the learned ADJ



is hierarchically superior to the learned Civil Judge.

33. For the aforesaid reasons, I am of the opinion that no case whatsoever is made out for this Court to interfere with the impugned order passed by the learned ADJ, in exercise of the jurisdiction vested in it by Article 227 of the Constitution of India.

34. This petition is dismissed *in limine*.

35. It is made clear that this Court has expressed no opinion on whether Kanhaiya Lal was a lessee or a licensee in respect of the suit property.

JULY 18, 2022
r.bararia

C.HARI SHANKAR, J