

CR-1789 of 2019

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR-1789 of 2019

Reserved on: 06.07.2023

Pronounced on: 27.09.2023

Ashok alias Babbu

.....Petitioner

Versus

Bahadurgarh Agro Industries (P) Ltd. and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE NAMIT KUMAR

Present: - Mr. Akshay Kumar Jindal, Advocate, for the petitioner.
Mr. Aalok Jagga, Advocate, for respondent No.1.
Mr. Abhishek Sharma, Advocate, for respondent No.2.

NAMIT KUMAR, J.

1. Instant revision petition has been preferred by the petitioner impugning the order dated 26.02.2019 rendered by the learned Additional District Judge, Gurugram, whereby his application filed under Order 1 Rule 10 CPC for transposing him as co-appellant, has been dismissed.

2. Parties to the *lis*, hereinafter, shall be referred to by their original position in the suit.

3. The relevant facts of the case required for the adjudication of the present revision petition are that respondent No.1-Bahadur Agro Industries (P) Ltd. filed a civil suit for possession by way of specific performance and in the alternative suit for recovery and suit for permanent injunction against the petitioner-respondent Nos.2 to 13 (hereinafter referred to as defendants) for enforcement of agreement to

sell dated 24.07.2006, which was decreed by the trial Court vide

judgment dated 12.01.2018 in favour of the plaintiff-respondent No.1 and against the defendants and a decree for specific performance of agreement to sell dated 24.07.2006 was passed with a direction to the defendants to execute the sale deed in favour of the plaintiff in respect of the suit property on receipt of the balance sale consideration within two months, failing which the plaintiff shall be at liberty to get the sale deed executed through Court. Against the said judgment and decree dated 12.01.2018, defendant No.1, namely, Narender Singh Yadav filed an appeal on 26.02.2018. Other defendants, including the present petitioner did not opt to file any appeal and they were arrayed as proforma respondents by the defendant No.1. Thereafter, in the appeal, respondents No.2 to 13 have filed an application under Order 1 Rule 10 CPC for transposing their names in the array of appellants. The said application was contested by the appellant-respondent No.2 Narender Singh Yadav by filing a detailed reply and finally the said application was dismissed by learned Additional District Judge, Gurugram, vide order dated 26.02.2019 by recording the following findings:

“7. It is not disputed that the suit for specific performance filed by the respondent-plaintiff against the appellant-defendant No.1 and applicants-respondents No.2 to 13 was decreed in favour of the respondent-plaintiff and it is only the appellant-defendant No.1 who has filed the present appeal and the applicants/respondents No.2 to 13 have been made proforma respondents who have now made application under Order 1 Rule 10 CPC for transposing them as co-appellants. It is also categorically argued by learned counsel for the applicants-respondents No.2 to 13 that

they will not pay the proportionately court fee to the appellant-defendant No.1 which he has affixed. It is also not disputed that the appellant-defendant No.1 is claiming his absolute right in the suit property by excluding the applicants-respondents No.2 to 13.

8. On the other hand, the applicants-respondents No.2 to 13 are claiming that they are owners in possession of the half share of the suit property and appellant/defendant No.1 is only owner in possession of remaining half share.

9. In view of the factual position as claimed by the appellant-defendant No.1 and applicants-respondents No.2 to 13, their interest is not common. Rather totally contrary to each other. Under these circumstances, the applicants-respondents No.2 to 13 cannot claim that their interest is common with appellant-defendant No.1. The law settled in Santosh Gupta, Kiran Tandon and Moji Ram & another (supra) referred to by learned counsel for the applicants-respondents No.2 to 13 is not applicable to the facts and circumstances of the present case as in the reported cases, the interest of the applicants-respondents No.2 to 13 with the appellants/plaintiffs of those cases was common, whereas the facts and circumstances of the present case are similar/common to those of that judgments Madaka Anjaneyulu and Bikhari Charan Pothal (Supra) wherein it has been held that if the interest of the parties are not common or similar then applicants seeking transposing cannot succeed. The contention of learned counsel for the applicants/respondents No.2 to 13 that they have been declared co-owners to half share of the suit property in an other civil suit finds no force as learned counsel for the appellant/defendant No.1 submits that he has filed an appeal against that judgment and decree. So,

it cannot be said that the judgment and decree have become final. Similarly, the contention of learned counsel for the applicants/respondents No.2 to 13 that the appellant/defendant No.1 has pleaded in his reply that he has no objection if the application in hand is allowed, is without any merit. The contents of the reply reveal that the appellant/defendant No.1 has only pleaded that he has no objection if the application is allowed, if he is paid the amount of court fee proportionately. So his admission is conditional which is not agreed to by the applicants/respondents No.2 to 13.

10. Not only this, the conduct and intention of the applicants-respondents No.2 to 13 further reveals that they want to contest their claim on the basis of court fee affixed by the other party as they have specifically asserted that they would not contribute the ad-volerm court fee which has been affixed by the appellant. This assertion is totally against the principle of equity. If such plea is allowed then a clever party will not file an appeal to avoid the affixation of ad-volerm court fee and when other aggrieved party files an appeal he would make simple application for transposing him as a co-appellants without contributing court fee. There is no such intention and purpose of the provisions of Order 1 Rule 10 CPC. Moreover the applicants-respondents No.2 to 13 are not going to suffer any prejudice as they have right to argue their case on merits even being impleaded as proforma respondents.

11. In view of the same, the application stands dismissed without any cost. Now, adjourned to 26.02.2019 for arguments on merit of appeal.”

4. Aggrieved against the said order dated 26.02.2019, the petitioner has preferred the instant revision petition.

5. Learned counsel for the petitioner has contended that although the appellant including respondent Nos.2 to 13 in the application filed under Order 1 Rule 10 CPC were not ready to pay the proportionate court fee to appellant-defendant No.1-Narinder Singh as they were not bound to affix *ad valorem* court fee, however, now the petitioner is ready to share the proportionate court fee with defendant No.1 (appellant in the appeal). He further submits that respondent No.2 has no objection to the application of the petitioner for transposition as co-appellant before the appellate Court subject to sharing of proportionate Court fees. He further submits that judgment and decree dated 12.01.2018, whereby suit for specific performance of Agreement to Sell dated 24.07.2006 was allowed in favour of respondent No.1, is already under challenge before the first Appellate Court, therefore, there is no question of any part of judgment being left unchallenged arises and there is no need for filing objections under Order 41 Rule 22 CPC or for the Court to exercise powers under Order 41 Rule 33 CPC. He further submits that there is a common interest of the petitioner and respondent Nos.2 to 13 in the present case i.e. to defeat the rights of the plaintiff and since the judgment and decree is already *sub judice* before the first appellate Court, therefore, the question of limitation does not arise in the present case and since the entire court fee has already been affixed by the appellant, therefore, no question of paying another court fee to challenge the same judgment and decree arises and as there is

specific provision under Order 1 Rule 10(2) CPC for transposition, therefore, the impugned order dated 26.02.2019 dismissing the application of the petitioner for transposition is totally erroneous and perverse in the eyes of law. In support of his contentions, he has placed reliance upon the judgments of the Hon'ble Supreme Court in ***Kiran Tandon v. Allahabad Development Authority, 2004 AIR Supreme Court 2006; Smt. Saila Bala Dassi vs. Smt. Nirmala Sundari Dassi and Another, 1958 AIR (SC) 394*** and this Court in ***Santosh Gupta Vs. State Bank of Patiala, 2010(4) PLR 336*** and ***Mauji Ram v. Ramkali, 2009(3) R.C.R.(Civil) 592***.

6. He also submits that provisions of Order 23 Rule 1-A only applies for withdrawal of the suit and not for withdrawal of appeal.

7. Per contra, Sh. Aalok Jagga, learned counsel for respondent No.1 has submitted that the application filed by the petitioner for transposition is premature as the transposition is permitted under Order 23 Rule 1A CPC where appellant prefers to withdraw and then respondent can apply for transposition and since the appeal has been filed by respondent No.2/defendant No.1 only and as the appellant has not filed any application for withdrawal of his name before the appellate Court and is pursuing the appeal, therefore, no question of transposition arises in the present case and consequently, the application for transposition is premature and not maintainable. He further submitted that the petitioner has approached the lower Appellate Court by filing application for transposition by mis-stating the facts as in para 3 of the application for transposition it has been stated that there

is no *inter se* dispute between the defendants and appellant and whereas civil suit No.88 of 2011 was filed by the petitioner along with other defendants against defendant No.2/respondent No.2 wherein former claimed title to the properties of late Babru Bhan on the basis of 'will' dated 30.12.2008 whereas contrary stand has been taken by defendant No.1 Narender Singh Yadav that he is absolute owner being real brother of the deceased as Class-II legal heir as per Hindu Succession Act, 1956 as Babru Bhan **has died intestate** and no 'will' was executed. Therefore, there is *inter se* dispute between them. He further submitted that even in the appeal itself, the appellant has submitted that there is *inter se* dispute between the defendants and separate statements were filed before the trial Court in the suit filed by plaintiff/respondent No.1 and, therefore, appeal was filed only by respondent No.2/defendant No.1 and since it is the own case of the appellant that there is no commonality of interest and there is dispute *inter se* between the parties and since the interest of the appellant and petitioner (respondent Nos.2 to 13) is totally different, therefore, no question of transposing the present petitioner as co-appellant in the appeal arises. He further submitted that no reasons have been assigned either in the application filed before the lower appellate Court or in the present revision petition as to why, although petitioner (including respondent Nos.2 to 13) have contested the civil suit and decree passed in their presence, being aware of the judgment, they have not chosen to file appeal under Order 47 Rule 1 CPC and since no appeal has been preferred by the petitioner, now he cannot be transposed as appellant.

He further submitted that since the petitioner is party in the appeal as proforma respondent yet he has a right to make submissions to support or oppose the impugned judgment/decreed under Order 41 Rule 33 CPC. Although in case the appeal is allowed, he would have no right to file regular second appeal and the actual reason for filing the application for transposition is to file regular second appeal, which cannot be permitted at this stage as the petitioner has chosen not to file the appeal nor the cross-objections. He further submitted that under Order 41 Rule 4 CPC, petitioner can still take the benefit although he has not preferred any appeal yet as the appeal is pending, and if the decision is varied or altered, such variance in the order shall be for all the plaintiffs or defendants, which will include even those who did not file appeal. He further submitted that there is an infirmity in the application and the present revision petition as the application for transposition was filed in the appellate Court was neither signed by defendants No.2 to 13 nor supported by an affidavit and even the present revision petition has been preferred by only one person i.e. defendant No.5 in the suit, namely, Ashok @ Babbu and he is seeking transposition for respondents/defendants No.2 to 13.

8. I have heard learned counsel for the parties and perused the record.

9. In the present case, on 20.03.2019, notice of motion was issued to respondent Nos.1 and 2 and the trial Court was directed to adjourn the proceedings beyond the date fixed. Thereafter, on

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04.04.2022, following order was passed by the Coordinate Bench of this Court:-

“Requires detailed consideration.

Admit.

Further proceedings before the First Appellate Court shall remain stayed.

To be listed within one year.”

10. Before proceeding further in the matter, this Court deems it appropriate to give certain facts pertaining to long back history of the case required for the proper adjudication of the present revision.

11. One B.B. Yadav entered into an agreement to sell dated 24.07.2006 with Plaintiff-Bahadur Agro Industries Limited in respect of certain land which was allotted to him vide allotment letter dated 08.05.1979 by the Haryana Government in recognition of his receiving a Gallantry Award, who died intestate in the year 2010. In the year 2001, the said land became a subject matter of acquisition proceedings initiated by the Haryana Government and subsequent thereafter as well. The matter was reached upto Hon’ble Supreme Court and the civil appeal filed by the State Government was finally dismissed in the year 2015. In the meanwhile, Respondent No.1 got published the public notice in the newspaper to know the whereabouts of legal heirs of B.B. Yadav so that matter may be contested before the Supreme Court and his legal heirs perform the remaining part of agreement to sell. In terms of public notice, Respondent No.2-Narinder Singh approached the Director of Plaintiff-Industry and stated that he is the sole legal heir of B.B. Yadav. Plaintiff has never admitted the alleged claim of the defendant No.1 to be the sole legal heir of B.B. Yadav. No claim of any

kind whatsoever was ever lodged by the defendant Nos.2 to 13 in respect of said land and/or in pursuance of said public notice at any point of time. When defendants Nos.2 to 13, along with respondent No.1, refused to perform their part of Agreement to Sell and stated that Agreement to Sell is fake and fictitious, plaintiff filed the suit and decreed in his favour and defendant No.1-Narinder Singh preferred the appeal and the remaining defendants were made proforma respondents on whose behalf the application under Order 1 Rule 10 CPC was filed with a prayer to transpose them as co-appellants. Firstly, the interest of the defendants is totally conflicting to each other as on the one hand, Narinder Singh is showing himself as the sole legal heir and on the other hand, other defendants, on the basis of Will dated 30.12.2018, stated that they have 1/2 share in the suit property and the same is not common, so, there is no reason as to why the present petitioner and other defendants who have not preferred the appeal, be transposed as co-appellants as they have not chosen to file appeal challenging the judgment and decree dated 12.01.2018. Since they have also not chosen to file cross-objections on receipt of notices in the appeal, they cannot be permitted to be transposed as co-appellants. No reasons have been assigned either in the application or in the revision petition as to for what reasons they did not prefer an appeal and what prevented them to do so. Since they are parties in the appeal being proforma respondents, they still have a right to challenge the findings recorded by the trial Court. A perusal of judgment and decree dated 04.01.2019 passed by the Court of learned Civil Judge (Junior Division), Gurugram, in the

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case of Harshvardhan and others v. Narender Singh and others (Civil Suit No.88/2011) filed for declaration with consequential relief of permanent injunction, would reveal that this suit was filed by Harshvardhan and others (co-defendants) against Narender Singh Yadav and others wherein Harshvardhan claimed title to the properties of late Babru Bhan on the basis of 'will' dated 30.12.2008 whereas the claim of defendant No.1/Narender Singh Yadav was that he is the absolute owner being real brother of the deceased and no 'will' was executed. The said judgment and decree dated 04.01.2019 is stated to be pending before the lower appellate Court and there is dispute which is pending between the defendants *inter se*. Even in the appeal filed by appellant/defendant No.1 that there is *inter se* dispute between the plaintiff and the defendants. Both, respondent No.2/defendant No.1/appellant and the petitioner/other defendants filed separate written statements before the trial Court in the suit filed by plaintiff/respondent No.1 and the relevant portion thereof is reproduced as under:-

“That the suit of the plaintiff is bad for mis-joinder of unnecessary party. It is submitted that deceased Babru Bhan died intestate and the answering defendant received the suit land by way of survivorship as per the provisions of Hindu Succession Act and the remaining defendants have no concern whatsoever with the suit land. The answering defendant has also apprehension that the plaintiff and defendant No.2 to 13 in collusion with each other have filed this present fake and fictitious suit.”

12. Relevant para of written statement filed by defendant Nos.2 to 13 is as under:-

“xxx xxx xxx xxx

It is further wrong to allege that defendant No.1 is the sole legal heir of Late Sh. Babru Bhan Yadav. It appears that the defendant No.1 in collusion with the plaintiff illegally wants to grab the

property of Late Sh. Babru Bhan Yadav. It is submitted that the deceased had duly executed a Will in favour of the answering defendants and Defendant No.1, for which suit for the declaration as stated above is pending.

xxx xxx xxx xxx”

13. Therefore, for this reason, appeal was filed by respondent No.2/defendant No.1 and, therefore, there was no question of joining the other defendants as appellants in the appeal preferred by the appellant as there is not commonality of interest. This negates the very basis of the application preferred by the petitioner for transposition and solitary contention raised that defendant No.1/appellant ought to have joined the other respondents as co-appellants instead of proforma respondents is totally fallacious.

14. Whether there is commonality of interest or not, is to be seen from the point of the appellant who has stated that there is diversion of interest. Version or pleading of a party cannot be substituted by the other contesting party or by the Court as what has been pleaded is only to be taken into consideration. As to whether there is commonality or not, if is stated by one of the parties that there is diversion of interest, it is a statement of fact and belief, and cannot be substituted by the version of any other party to forcefully change this statement of fact as pleaded in ground of appeal and hence cannot seek allowing impleadment/transposition contrary to the pleaded interest of the appellant. Transposition cannot be permitted to condone deliberate, unexplained and admitted omission in law. Defendant suffering a decree has two option in law. Appeal could be filed under Order 41

Rule 1 for which record does not even remotely describe what prevented the petitioner and other defendants to file such appeal. Secondly, law takes care of a situation where even if no appeal is filed, as then such defendant was supposed to file objections under Order 41 Rule 22 and that too, within one month from the receipt of notice of appeal filed by the other party. Limitation of one month can be extended only if the Appellate Court deems fit and appropriate under Order 41 Rule 22. Admittedly, both these remedies have not been availed and no reason or justification is stated. The Hon'ble Supreme Court in *Eureka Forbes Limited v. Allahabad Bank and others*, **(2010) 6 SCC 193** has held that law does not provide for a premium for an omission. No person can be allowed to take benefit of its own wrong.

15. If argument of petitioner is accepted, anomalous situation will arise as if a person belatedly files cross-objections under Order 41 Rule 22 i.e. beyond one month stipulated therein and the delay is not condoned by the Appellate Court and such objection is dismissed and prefers no appeal, allows it to attain finality; then can he still file a transposition application to defeat such dismissal order passed by the Appellate Court which cannot be the correct interpretation of law.

16. Order 41 Rule 22 is a special provision which allows the respondent who has not appealed against the decree to object to the decree by filing cross-objections in the appeal filed by the other party. However, the respondent's filing of cross-objections is discretionary and voluntary. The provision is permissive and encouraging and not

mandatory or peremptory. Where the suit is partly decided in favour of the plaintiff and partly in favour of the defendant and the aggrieved party (either the plaintiff or the defendant) files an appeal, the opposite party may adopt any of the following courses:

A. He may prefer an appeal from the part of the decree which is against him. Thus there may be two appeals against the same decree; one by the plaintiff and the other by the defendant. They are known as "cross-appeals". Both these appeals will be disposed of together. Cross appeals can be filed on the following grounds by the respondent-

1. if he could have filed an appeal against any part of the decree
2. if he is aggrieved by a finding in the judgment, even though the decree is in his favour because of some other finding.

B. He may not file an appeal against the part of the decree passed against him but may take objection against that part. Such objections are called "cross-objections".

17. The terms of Order 41 Rule 22 allow for the right to file cross-appeals only where an appeal is filed and even when the appeal is accepted by the court of appeal and a notice is issued to the respondent. Only after an appeal is accepted and the court orders notice to be given to the respondent should the process of filing cross-objections begin.

18. Therefore, no cross objections can be brought where no appeal has been filed by the appellant or an appeal has been filed but has not been accepted.

Cross-objections can be filed by the respondent-

- 1) if he could have filed an appeal against any part of the decree: or
- 2) if he is aggrieved by a finding in the judgement, even though the decree is in his favour.

19. Cross-objections shall be in the form of a memorandum of appeal and they should be served on the party affected thereby or his pleader. A respondent can file cross-objections as an indigent person. Cross-objections can be filed within one month from the date of service on the respondent or his pleader of the notice of the date fixed for hearing of the appeal. Once the respondent files cross-objections, even if the appeal is withdrawn or dismissed for default, cross-objections will be heard and decided on merits.

20. **A party in whose favour a decree has been passed has a substantive and valuable right which should not be lightly interfered with. As an ordinary rule, therefore, in the absence of a cross-appeal or cross-objection by a respondent, the appellate court has no power to disturb the decree of the lower court so far as it is in favour of the appellant. This is, however, subject to the provisions of Order 41 Rule 33 of the Code of Civil Procedure.**

21. Hon'ble Supreme Court in *Samundra Devi Versus Narendra Kaur-2008-AIR-Supreme Court-3205* in Para No. 16 & 18, held as under:-

"16. Indisputably, in relation to a third party, the grounds upon which the insurer can deny its liability are contained sub-section (2) of Section 149 of the Act. Ordinarily and

subject to just exceptions, the insurance company would have no right to question the quantum of compensation in absence of any leave having been granted in its favour in terms of Section 170 of the Act. The High Court, with respect, failed to consider this aspect of the matter. Appellants preferred appeals before it on limited grounds. Their contentions could have been rejected or accepted. The High Court, however, could not have considered the contention raised on behalf of the respondent No. 3 which was not available to them in law. It was legally impermissible for the respondent No. 3 to question a finding of fact arrived at by the Tribunal, taking umbrage under Order 41 Order Rule 33 of the Civil Procedure Code or otherwise. It could not have been permitted to do so. It is well settled that what cannot be permitted to be done directly, cannot be permitted to be done indirectly. Indisputably, no leave was obtained in terms of Section 170 of the Act. The quantum of compensation awarded by the learned Tribunal was accepted by the owner. Only in some exceptional cases and that too when the liability to pay the amount of compensation is fastened upon the insurance company and insured, it can be heard on issues relating to the quantum of compensation and not otherwise.

X X X X

18. In the aforementioned situation, we are of the opinion that even Order 41 Rule 33 of the Civil Procedure Code was not applicable as in a situation of this nature, the respondent No. 3 ordinarily could not have maintained an independent appeal on the quantum of compensation having regard to the fact situation obtaining herein, and, thus, in our opinion, the High Court committed a serious error in issuing the impugned directions, despite noticing

that even no appeal has been preferred by the owner or driver of the vehicle as also respondent No.3."

22. It has, thus, been held while dealing with Order 41 CPC and right of appeal itself i.e. the subject involved herein that once independent appeal could be filed and omitted to do so, no relief could be sought indirectly and the order of the Court granting such relief was set aside. Law takes care of a third eventuality as well. When neither appeal nor objections are filed. Order 41 Rule 33 is the answer to the grievance of petitioner but then again law ensures that it is not a substitute for omission and hence while if appeal/objection would have been filed, chance to file Regular Second Appeal is available but in these circumstances Regular Second Appeal cannot be filed for which appeal/objection was mandatory but then no prejudice will be suffered because such defendant can still make submissions to support or oppose the impugned order and appellate Court can modify impugned judgment under Order 41 Rule 33 but with a rider that such defendant cannot file Regular Second Appeal. Petitioner exactly seeks to undo this which law specifically prohibits. CPC is a self-contained Code. Order 41 Rule 33 CPC reads as under:-

"33. Power of Court of Appeal. - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or

objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

[Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

Illustration A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X, appeals, and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y."

23. Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties.

24. Therefore, the power is very wide and in this enabling provision, the crucial words are that the Appellate Court is empowered to pass any Order which ought to have been made as the case may require. The expression 'Order ought to have been made' would obviously mean an Order which justice of the case requires to be made. This is made clear from the expression used in the said Rule by saying 'the court may pass such further or other Order as the case may require.'

This expression 'case' would mean the justice of the case. Of

course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.

25. The power envisaged under the provision can be exercised subject to three limitations: firstly, this power cannot be exercised to the prejudice of a person who is not a party before the Court; secondly, this power cannot be exercised in favour of a claim which has been given up or lost; and thirdly, the power cannot be exercised when such part of the decree which has been permitted to become final by a party is reversed to the advantage of that party.

26. Interestingly, placement of the provision is after Order 41 Rules 1 and 2 CPC. The placement of the provision reflects that it is meant for those persons who have omitted to file appeal/objections, like the petitioner. Such person cannot now seek to remedy omission by indirectly filing application for transposition to be treated as appellant to defeat the prescribed limitation. Such person can only seek remedy under Order 41 Rule 33, wherein such persons who have not filed appeal, can make their submissions to support or oppose the decree and the Appellate Court shall have power to pass any decree or make any order on the basis of such contentions advanced by such party. Petitioner cannot be permitted to make out a grievance of his own deliberate, intentional, unexplained and unjustified omission to file appeal. His only plea could be that he should be heard even though not filed appeal for which appellate court has allowed his prayer and taken note of the provision of law in the last para of the impugned order.

Therefore, there is no prejudice caused to such parties, deliberately

omitting to file an appeal as the CPC takes care, but such omission will not permit them to file a Regular Second Appeal.

27. Order 41 Rule 4 CPC also takes care of the interest of such person who omits to file appeal. Order 41 Rule 4 CPC reads as under:-

"Order 41 Rule 4. One of several plaintiff or defendants may obtain reversal of whole decree where it proceeds on ground common to all. - Where there are more plaintiff or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

28. As per provisions of Order 41 Rule 4 CPC, when the decree passed by the trial Court has more than one defendants or plaintiff and the ground for appeal is common to all, any one of the plaintiff or defendant may appeal and the appellate court may reverse or vary the decree in favour of all defendants or plaintiffs which will include even those who didn't prefer an appeal (this is a general rule and does not surpass the requirement of necessary party). For example, A, B and C (plaintiffs) filed a suit against D for X relief, suit was dismissed and aggrieved by the finding of trial Court, A filed an appeal, the appellate court MAY reverse or vary the judgment of trial Court in favour of all the plaintiffs i.e. A, B and C.

29. Hon'ble Supreme Court in ***Banarshi v. Ramphal, 2003(2) R.C.R. (Civil) 248*** has held as under: -

"10..... A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarification and also enabling and this may be made precise by analysing the provision.

x x x x

12. The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage.....It follows as a necessary corollary from the above said statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross objection.

x x x x

15..... While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice..... The power is subject to

$$x \qquad x \qquad x \qquad x$$

The aforesaid judgment has been reiterated by Hon'ble Court in ***Lachhman v. G. Ayyasamy-2016(13)-SCC-165***.

transposition may be allowed and defendant may be transposed as

plaintiff in the suit. For example, A filed a suit against B, C and D, after some time, A wants to withdraw his suit, then B files an application to Court to transpose him as plaintiff while deciding this application the Court has to decide whether the defendant (applicant) has any substantial question to be decided against any other remaining defendants in the suit.

32. In the present case, since the appellant has not filed any application for withdrawal of his name before the Appellate Court and is pursuing the appeal, therefore, no question of transposition arises. The contention raised by the learned counsel for the petitioner with regard to the applicability of provision of Order 23 Rule 1A CPC to the suit only is also wholly untenable as since the appeal is the continuation of the proceedings of the suit and in the absence of any separate provisions. To deal with such a situation, it has been held that the principles contained under Order XXIII Rule 1A CPC and Order 1 Rule 10 CPC must apply to the proceedings in appeal as well (See **Abraham v. Joseph, AIR 2003 (Kerala) 1**).

33. Perusal of judgment relied upon by the petitioner in **Kiran Tandon's** case (supra) clearly reflects that application for transposition was supported by the appellant and there was no contrary plea. Secondly, issue of limitation was not raised like in Order 41 Rule 22 CPC raised herein and therefore, the Court did not have occasion to consider this aspect. Thirdly, Judgment of **Banarsi Versus Ramphal** (supra) which has been reiterated in 2016 by Hon'ble Supreme Court, was not considered and brought to the notice of Court. Fourthly, in the

last four lines of Para No.4, it is stated that the pleas raised by ADA and State of U.P. were identical and in order to effectuate complete adjudication of the questions involved, the Court had permitted transposition, whereas in the present case, memo of appeal pleading reveals totally contrary stands and both the parties are divergent to each other and litigating amongst each other. Fifthly, both authorities i.e. one which filed appeal and the one which transposed with Government authority and it was merely a technical objection which was sought to be remedied even though both are arms of the same Government, but different Departments, so appeal having been filed by one Government Department was permitted to be transposed in favour of the other Department of the same Government which is not the case herein. Lastly, Implication of Order 41 Rule 22 and Rule 33 was neither canvassed nor were pressed before the Court.

34. Further, the judgment in the case of ***Santosh Gupta (supra)*** relied upon by learned counsel for the petitioner is also not applicable to the facts of the present case. Firstly, the Judgment in the case of ***Banarsi*** (supra) was not considered therein. Secondly, LRs of Nasib Chand had independently filed RSA No. 1034 of 2008 which was earlier allowed vide order dated 21.04.2009 (as noticed in Para No. 1 of the said Judgment), the matter was remanded back. After remand, the LRs filed an application for transposition. In Para No.7 of the said Judgment, it is mentioned that the Respondent Bank has not brought to the notice of the Court any contrary case law. Thus, the said Judgment is not a binding precedent as the Respondent practically did not contest.

Secondly, in Para No.8, it is mentioned by the Court that this order is being passed keeping in view earlier order passed in the RSA No.1034 of 2008 permitting LR's to contest on merits before the Court below and therefore, in order to completely effectuate the said order, transposition was permitted in the peculiar facts of those cases.

35. Similarly, judgment in the case of *Mauji Ram (supra)* is also not applicable to the facts and circumstances of this case.

36. In view of the foregoing discussion made above, this Court is not inclined to invoke revisional jurisdiction under Article 227 of the Constitution of India and therefore, the present revision petition is dismissed. Interim orders dated 20.03.2019 and 04.04.2022, passed by this Court, stands vacated. Since the appeal was filed on 26.02.2018 and more than five years have elapsed, therefore, the Appellate Court is directed to make every endeavour to decide the appeal expeditiously by not granting unnecessary and unwarranted adjournments.

27.09.2023
R.S.

(NAMIT KUMAR)
JUDGE

Whether speaking/reasoned

:

Yes/No

Whether Reportable

:

Yes/No