

**IN THE CIRCUIT BENCH CALCUTTA HIGH COURT
AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

C.O. 92 of 2024

Smt. Prabha Ajay Agarwal & Ors.

Vs.

Ram Kishan Mittal & Ors.

For the petitioners : Mr. Ajay Singhal, Adv.
Ms. Heena Yasmin Shaikh, Adv.

For the Opposite Party No. 1 : Ms. Rima Sarkar, Adv.
Mr. Sidhi Sethia, Adv.

For the OP : Rahul Kedia Adv.

Reserved On : 25.09.2024

Judgment On : 30.09.2024

Subhendu Samanta, J.

1. A very short legal point is involved in the instant revision- as to whether order passed ex-parte against a dead person, which was sought to be set aside by the legal heirs of the dead person under Order 9, Rule 13 CPC can be rejected.
2. One Banshidhari Agarwal inducted present OP No. 2 as a tenant in the premises in question. OP No. 2 occupied the premises along with her relatives Banshidhari Agarwal instituted a suit for ejectment and consequential prayers before the learned Civil Judge, (junior Division) Darjeeling being OC Suit No. 15 of 1997. The suit was contested by the OP No. 2. During pendency of the said suit Banshidhari Agarwal expired his legal heirs gifted the suit premises in favour of one Ajay Kr. Agarwal. The suit was decreed. Ajay Kr. Agarwal initiated an execution proceeding. Present OP No. 1 (one relative of OP 2) filed a suit being OC suit No. 3 of 2013 before the learned civil Judge (Senior Division) at Kalimpong State. OC Suit No. 3 of 2013 was dismissed as not maintainable.
3. OP No. 1 filed an application under Order 21 Rule 99/100/101 of the Code of Civil Procedure 1908, before the Learned Civil Judge (Senior Division) Kalimpong which was

registered as Misc Case No. 1 of 2017. Misc Case No. 1 of 2017 was dismissed on contest OP No. 1 preferred an appeal before Learned District and Sessions Judge, Kalimpong, who was registered as misc appeal 1 of 2019.

- 4.** Ajay Kumar Agarwal appeared as a respondent in the said appeal. During the pendency of the said appeal Ajay Kr. Agarwal died at Mumbai on 5th October 2022. On 14th October respondent i.e. deceased Ajay Kr. Agarwal did not appear before the learned Appellate Court, in absence of the deceased respondent the learned Additional District Judge disposed of the appeal by passing the impugned Judgment dated 30st October, 2022. One application was filed for setting aside the Ex- parte order passed in the misc appeal under Order 9 Rule 13 CPC. The Additional District Judge, denied to entertain the said application on the ground that the order and judgment passed in misc appeal 1 of 2021 was delivered by the court on merit.
- 5.** Being aggrieved by the order passed by Learned Additional District Judge, the instant C.O has been preferred.

6. Learned Counsel for the petitioner submits that the impugned judgment dated 30.10.2022 as well 01.02.2024 is nullity. An order passed against a dead person cannot be entertained by any forum. He cited a decision of Hon'ble Apex Court passed in **Kavarampeta Venkataiah and Ors** reported in **2021 SCC Online SC 113**

“The basic fact remains that a decree against a dead person is treated as a nullity because it cannot be allowed to operate against his legal representative when he was never brought on the record to defend the case. Any other view would not be possible or permissible for it would fasten on him a liability for which he did not have any hearing. So while the law treats such a decree as a nullity qua the legal representative of the deceased defendant or respondent, there is nothing to prevent him from deciding that he will not treat the decree as a nullity, but will abide by it as it stands, or as it may be mollified thereafter on appeal. If a legal representative adopts that alternative or course of action, it cannot possibly be said that his option to be governed by the decree is against the law or any concept of public policy or purpose, or the public morality. It is thus a matter entirely at the

discretion of the legal representative of a deceased respondent against whom a decree has been passed after his death to decide whether he will raise the question that the decree has become a nullity, at the appropriate time, namely, during the course of the hearing of any appeal that may be filed by the other party, or to abandon that obvious technical objection and fight the appeal on the merits. He may do so either because of his faith in the strength of his case on the merits, or because of incorrect legal advice, or for the reason that he may not like to rely on a mere technical plea, or because in the case of cross-appeals, he may have the impression that bringing the legal representative of the deceased respondent on record in an appeal by a co-appellant will enure for the benefit of or be sufficient for purposes of the cross-appeal. An abandonment of a technical plea of abatement and the consequential dismissal of the appeal, is therefore a matter at the discretion of the legal representative of the deceased respondent and there is no justification for the argument to the contrary. It is equally futile to argue that an appellate court is denuded of its jurisdiction to hear an appeal in which one of the respondents has died and the

right to sue does not survive against the surviving defendant or defendants alone merely because no application has been made to bring his legal representative on the record when no objection to that effect is raised by anyone."

7. Learned Counsel appearing on behalf of the OP submits that the impugned order dated 01.02.2024 was passed in Misc case No. 2 of 2022 under Order 9 Rule 13 of CPC; there is a specific provision to challenge the impugned Order in terms of order XLIII, Rule (1) CPC, thus the instant civil revision u/s 115 of CPC is not at all maintainable. There are specific provision enumerated in the Code itself to challenge the impugned order, where there is a specific forum to challenge the impugned order, the High Court cannot interfere the same in a jurisdiction u/s 227 of the Constitution of India.
8. Heard the learned Advocates.
9. It is true that the impugned order dated 01.02.2024 is passed by the Learned Additional District Judge, in terms of application under order 9 Rule 13 CPC. It is also true that there is effective remedy available with the petitioners in Order 43 Rule 1 CPC to challenge the said order. But it appears to me

that the Additional Dist. Judge, has turned down the prayer of the petitioner on the ground that impugned Order Dated 31.10.2022 was passed on merit.

10. The Order against a dead person is itself nullity. Thus, how the said order can be sustained by observing that it was passed on merit. The learned Additional District Judge must have *suo motu* proceeded to re-hear the matter being Misc appeal No. 1 of 2021 in presence of the legal heirs of the deceased respondent.

11. Article 227 of the Constitution of India has enumerated superintending power of High Court over the Subordinate Courts within its jurisdiction. The superintendent power of High Court is both administrative and judicial. If it appears to the High Court that the subordinate judiciary has passed an order and judgment in a manner which is without jurisdiction or without following the Procedure of Law, the High Court has the authority to pass necessary direction upon the Subordinate court to pass any order/judgment in a particular manner. In the attending facts and circumstances, it appears to me that the orders passed by the Learned Additional District Judge, on

31.10.2022 is actually a nullity, subsequent order dated 01.02.2024 is also beyond the jurisdiction of the Additional District Judge, concerned when it appears to him that the order in question passed against a dead person.

- 12.** Under the above observation the instant C.O is allowed. Order dated 31.10.2022. passed by Learned Additional District Judge, Kalimpong, in misc appeal No. 1 of 2021 as well as the subsequent Order dated 01.02.2024 in misc case No. 2 of 2022 are set aside.
- 13.** Learned Additional District Judge, concerned is directed to re-hear the misc appeal in presence of the legal heirs of the deceased respondent Ajay Kumar Agarwal. The petitioners are directed to approach the court within 08 weeks from date, with a specific application; so that they may be impleaded in the said misc appeal as a party respondents. On such application Learned Additional District Judge, concerned shall dispose of the same in accordance with the law.
- 14.** Under the above observations the instant C.O is disposed of.
- 15.** Connected applications if pending, are also disposed of.

- 16.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[Subhendu Samanta, J.]