

07.08.2025  
Court No.25  
Item No.84  
sudipta

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

**C.O. 871 of 2021  
With  
CAN 1 of 2023**

**Reba Das & Ors.  
Vs.  
Maloti Das & Ors.**

Ms. Somoshree Saha

...for the petitioners

Mr. Mrityunjoy Goswami  
Mr. Parikshit Goswami

...for the opposite parties

1. Present petition has been challenged assailing the order dated 17<sup>th</sup> December, 2019 whereby the application was moved under Order 1 Rule 10(2) of CPC by the appellant for adding the legal heirs of Late Khedi Das as respondent in this appeal was rejected, inter alia, on the ground that the appeal had already been abated.
2. The facts as emerged from the record are that petitioner / appellant was the defendant in original Title Suit No. 345 of 1995. The said suit was decreed against the petitioner / appellant vide order dated 29<sup>th</sup> March, 2018 and 12<sup>th</sup> April, 2018. Late Khedi Das was plaintiff No. 5 in the original Title Suit. In the appeal, Late Khedi Das was impleaded as respondent no. 8. The appeal

challenging the decree in Title Suit was filed on 4<sup>th</sup> May, 2018. During the pendency of this appeal, the death of opposite party no. 8 was communicated before the learned Appellate Court on 23<sup>rd</sup> August, 2018.

3. Pursuant to that an application under Order 1 Rule 10(2) of the CPC was filed by the petitioner / appellant for expunging the name of the opposite party no. 8 and impleaded legal heirs.
4. Learned Trial Court noted that Khedi Das had expired on 13<sup>th</sup> April, 2018 that is before 4<sup>th</sup> May, 2018 when the appeal was filed. However, the application was moved after more than 4 months of the death of Khedi Das and, therefore, the appeal had already been abated automatically. Another fact which needs to be mentioned here is that the legal heir of Late Khadi Das that is Sri Ajit Das is reported to have died on 27<sup>th</sup> September, 2018 that is before filing of the present revision petition.
5. Let this fact be parked in the side for the time being and examine the legality and validity of the impugned order dated 17<sup>th</sup> December, 2019. Before proceeding further, it is necessary to examine the relevant provisions of Order 22 Rule 4 CPC which is as under :

***“4. Procedure in case of death of one of several defendants or of sole defendant. –***

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

*(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

*(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.*

*(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.*

*(5) Where –*

*(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and*

*(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36), for setting aside the abatement and also for the admission of that application under section 5 of the*

*Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,*

*the Court shall, in considering the application under the said section 5 have due regard to the fact of such ignorance, if proved.”*

6. It is also pertinent to mention here Order 22 Rule 11 CPC which is as under :

**“11. Application of Order to appeals.** – *In the application of this Order to appeals, so far as may be, the word “plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.”*

7. In this regard the amendment vide Notification No. 10428-G, dated 25<sup>th</sup> July, 1928 is also as under :

**“Calcutta.** – *In Order XXII, in rule 11, insert the following proviso, namely :-*

*“Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under Order XLI, rule 14(3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party.”*

8. Thus, Order 22 Rule 4 provided that in case one of the respondents dies the appellant shall cause the legal heirs of the deceased defendant to be made a party and shall proceed with the suit. Article 120 of the Limitation Act, 1963 provides limitation of

90 days for moving such an application. Order 22 Rule 3 also provides that if no such application has not been moved within the limitation prescribed the suit / appeal shall abate as against the deceased / defendant. Order 22 Rule 5 also provides that if the plaintiff / appellant was ignorant of the death of the defendant and for that reason application could not be moved within the period prescribed in the limitation and application can be moved for condonation of delay for setting aside the abatement. Such an application for setting aside the abatement is required to be made within 60 days as provided under Article 121 of the Limitation Act, 1963.

9. Thus, in the present case the information of death was brought to the notice of the appellant on 23<sup>rd</sup> August, 2018 and the application was moved within 60 days thereafter.

10. Be that as it may, the question is that whether the rigour of Order 22 Rule 3 would apply in the present case as the opposite party / respondent no. 8 had died before the institution of the appeal. In **AIR 1982 Bombay 589** as being relied upon by the appellant before the learned Trial Court that if the defendant was not alive on the date of the

institution of the suit for which the provision Order 1 Rule 10 CPC could be invoked.

11. Order 1 Rule 10(2) CPC provides that upon moving an application, the Court may order addition or deletion if the presence of such persons are necessary in order to enable the Court adjudicate and settle the questions effectively and completely.

12. It is pertinent to mention here that the Supreme Court in **Pankajbhai Rameshbhai Zalavadia Vs. Jethabhai Kalabhai Zalavadiya (Deceased) through LRs & Ors.** in **Civil Appeal No. 15549 of 2017** at paragraphs 13, 14 and 15, inter alia, has held as under.

*“13. In the Case of Banwari Lal vs Balbir Singh, 2016 (1) SCC 607, defendant no. 1, (who was respondent no. 1 in the first appeal) had expired 2 years prior to the decision in the first appeal, but no steps were taken to bring his legal representatives on record. The first appellate Court decided in favour of the plaintiff. When the matter came up in second appeal, the legal representatives of defendant no. 1 filed an application for condonation of delay and restoration. This Court though observed that the application ought to have been filed under Order 22 Rule 4 of the Code inasmuch as the death had occurred during the subsistence of the matter before the Court and the application under Order 1 Rule 10 of the Code was not maintainable, had proceeded to allow the application on the ground that it would be unjust to non-suit the applicant on the ground of technicalities. This Court permitted the legal representatives of defendant No. 1 to convert*

the application into one filed under Order 22 Rule 4 of the Code.

*In the cases relied upon by the respondents, viz., Jayalaxmi Janardhan Walawalkar (supra) and in the case of Madhukar Ramachandra Keni (supra), the death had occurred during the pendency of the matter and consequently the suit stood abated. The case of Arora Enterprises (supra) is also not applicable as it deals with the finality of an abatement order. In that context, the Courts have concluded that the only course open to the plaintiff/appellant in case if the death occurs in a pending matter, is to file an application under Order 22 Rule 4 of the Code, and not under Order 1 Rule 10 of the Code or under Section 151 of the Code.*

*14. In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial Court at that point of time itself could have treated the said application filed under Order 22 Rule 4 of the Code as one filed under Order 1 Rule 10 of the CPC, in order to do justice between the parties. Merely because of the nonmentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the Courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add any one as a plaintiff or defendant if it finds that such person is a necessary or proper party. The Court under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice. The expression "to settle all questions involved" used in*

*Order 1 Rule 10 (2) of the Code is susceptible to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject matter thereof. The Parliament in its wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties. There cannot be any dispute that the party impleaded must have a direct interest in the subject matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties. In the matter on hand, since the purchaser of the suit property, i.e., defendant no.7 has expired prior to the filing of the suit, his legal representatives ought to have been arrayed as parties in the suit while presenting the plaint. As such impleadment was not made at the time of filing of the plaint in view of the fact that the plaintiff did not know about the death of the purchaser, he cannot be non-suited merely because of his ignorance of the said fact. To do justice between the parties and as the legal representatives of the purchaser of the suit property are necessary parties, they have to be impleaded under Order 1 Rule 10 of the Code, inasmuch as the application under Order 22 Rule 4 of the Code was not maintainable.*

*As mentioned supra, it is only if a defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the defendants i.e. defendant No.7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased defendant No.7 under Order 1 Rule 10 of the Code, for the simple reason that the plaintiff in any case could have instituted a fresh*

*suit against these legal representatives on the date he moved an application for making them parties, subject of course to the law of limitation. Normally, if the plaintiff had known about the death of one of the defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the plaintiff under Order 1 Rule 10 of the Code discloses, with great respect, a hyper-technical approach which may result in the miscarriage of justice. As the heirs of the deceased defendant no.7 were the persons with vital interest in the outcome of the suit, such applications have to be approached keeping in mind that the Courts are meant to do substantial justice between the parties and that technical rules or procedures should not be given precedence over doing substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice.*

*15. Having regard to the totality of the narration made supra, there is no bar for filing the application under Order 1 Rule 10, even when the application under Order 22 Rule 4 of the Code was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties under Order 1 Rule 10 of the Code read with Section 151 of the Code subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code and Section 21 of the Limitation Act, to be decided during the course of trial.”*

13. In the present case also the petitioner / appellant had filed the appeal against the opposite party no. 8 being unaware of the fact that he had died on 13<sup>th</sup> April, 2018 that is before filing of the appeal. The appellant came to know about the date of the death of the opposite party only on 23<sup>rd</sup> August,

2018. Had the appellant knew about the death of the opposite party no. 8, nothing could have restrained to implead the legal heirs of opposite party no. 8 at the time of filing of the appeal. It is also pertinent to mention here that plaintiff no. 6 / opposite party no. 8 was one of the co-owner who had filed the suit for eviction. Thus, she or her legal heirs are necessary party for the effective and proper adjudication of the matter in dispute.

14.The Court considers that the learned Trial Court has fallen into error by not appreciating the facts in totality and mechanically rejected the application under Order 1 Rule 10(2) CPC. Thus, the impugned order cannot be sustained in eyes of law and liable to be set aside.

15.Thus, the application under Order 1 Rule 10 CPC filed by the petitioner / appellant is allowed so as to bring on record of legal heirs of Late Khedi Das in the appeal being filed by the petitioner / appellant.

16.Now coming to the issue of death of Sri Ajit Das that is one of the legal representatives of Late Khedi Das. Admittedly, Sri Ajit Das died on 27<sup>th</sup> September, 2018. Learned counsel for the petitioner states that the petitioner came to know

about the death of Ajit Das on 20<sup>th</sup> April, 2023 and thereafter present application was moved within 30 days.

17. There is no dispute as to the date of death of Ajit Das. There is also no dispute as to the date of information of death of Late Ajit Das to the petitioner.

18. The Court has time and again reiterated that the Court should avoid hyper-technical approach which may result in the miscarriage of justice. It is necessary to mention that the Courts are meant to do substantial justice between the parties and the technical approach and procedure should not be given precedents overdoing substantial justice.

19. Learned counsel for the opposite party has very fairly submitted that in order to put a quietus to the present issue, the legal heirs of Ajit Das may be allowed to brought on record in the file of first Title Appeal No. 32 of 2018.

20. Thus, in view of the discussions made hereinabove, the present petition is allowed with the following directions.

- i. The application under Order 1 Rule 10(2) CPC being moved by the petitioner /

appellant for adding the legal heirs of Late Khedi Das is allowed.

ii. The legal heirs of Late Khedi Das and Late Ajit Das be brought on record on the file of Title Appeal No. 32 of 2018.

iii. The cause title be amended accordingly.

21. Accordingly, the present petition stands disposed of. Consequently, connected applications, if any, stands disposed of.

22. All parties shall act on the basis of the server copy of this order duly downloaded from the official website of this Court.

**(Dinesh Kumar Sharma, J.)**