HIGH COURT OF UTTARAKHAND AT NAINITAL

HON'BLE SRI JUSTICE MANOJ KUMAR TIWARI

Writ Petition Misc. Single No. 1809 of 2022

20 June, 2025

Sachin Thakur --Petitioner

Versus

Hare Krishan Tourism
Development Limited --Respondent

with

Writ Petition Misc. Single No. 1814 of 2022

Sachin Thakur --Petitioner

Versus

Hare Krishan Tourism
Development Limited --Respondent

Writ Petition Misc. Single No. 1815 of 2022

Sachin Thakur --Petitioner

Versus

Hare Krishan Tourism
Development Limited --Respondent

Presence:-
Mr. Neeraj Garg, Advocate for the petitioner.
Mr. Vikas Bahuguna, Advocate for the respondent.

JUDGMENT

Since common questions of law and fact are involved in these writ petitions, therefore they are heard together and are being decided by a common judgment. However, for the sake of brevity, facts of Writ Petition (M/S) No. 1809 of 2022 alone are being

considered and discussed.

2. Respondent filed a suit for specific performance of an agreement to sell, against Smt. Mithilesh Madhukar, on 15.09.2020, which was registered as Original Suit No. 28 of 2020 in the Court of Senior Civil Judge, New Tehri. Learned Trial Court directed for issuance of summons to the defendant, fixing 14.10.2020. The summon, however, returned unserved with the remark that ‘defendant is no more alive’.

3. The plaintiff (respondent herein) then moved application under Order 22 Rule 2 & 4 read with Order 6 Rule 17 and Section 151 CPC, for substituting legal representative of sole defendant. Notice on the application was issued to legal representative of late Mithilesh Madhukar, who was proposed to be substituted.

4. Despite service of notice, legal representative of late Mithilesh Madhukar did not enter appearance. Learned Trial Court allowed the substitution application, vide order dated 18.11.2021 and the plaintiff was directed to carry out necessary amendment in the plaint within three days and summons were directed to be issued to the substituted defendant (petitioner).

5. Petitioner entered appearance and moved application under Section 151 CPC for dismissal of suit on the ground that it was filed against a dead person, inasmuch as, the sole defendant Smt. Mithilesh Madhukar passed away before filing the suit, on 25.08.2020.

6. Plaintiff contended before the Trial Court that he had no information regarding death of Smt. Mithilesh Madhukar (defendant), and as soon as he learnt about her death, he moved application for substituting legal representative of sole defendant; it was the petitioner who executed the agreement to sell in favour of the plaintiff, as power of attorney holder of his mother.

7. Learned Trial Court rejected the application for dismissal of the suit made by petitioner by holding that there is no evidence on record to show that plaintiff had knowledge about death of sole defendant before filing of the suit.

8. Petitioner has challenged the orders passed by Trial Court, whereby substitution application was allowed and his application for dismissal of the suit was rejected.

9. Learned counsel for petitioner submits that the application made by respondent under Order 22 Rule 2 & 4 CPC was not maintainable, as the sole defendant had died before filing of the suit, thus, learned Trial Court was not justified in rejecting petitioner's application for dismissal of the suit, vide order dated 12.07.2022.

10. There cannot be any quarrel with the proposition that if one of the defendants has expired prior to filing of the suit, legal representatives of such deceased defendant cannot be brought on record by invoking Order 22 Rule 4 CPC. However, due to non-mentioning of correct provision, parties should not be made to suffer, if power to add legal representatives of a deceased defendant can be traced to some other provision in CPC.

11. In the case of Pankajbhai Rameshbhai Zalavadiya v. Jethabhai Kalabhai Zalavadiya (Deceased) through Legal Representatives and others, (2017) 9 SCC 700, Apex Court was dealing with a case where defendant to the suit had died prior to filing of the suit. Paragraph nos. 16, 17, 18, 19 & 20 of the said judgment are extracted below:-

"16. 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 CPC, in order to do justice between the parties. Merely because of the non-mentioning 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 anyone 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.

17. The expression "to settle all questions involved" used in Order 1 Rule 10(2) of the Code is susceptive to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject-matter thereof. 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.

18. In the matter on hand, since the purchaser of the suit property i.e. Defendant 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.

19. 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 7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased Defendant 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 hypertechnical approach which may result in the miscarriage of justice. As the heirs of the deceased Defendant 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.

20. 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.”

12. Similarly, in the case of Karuppaswamy and others v. C. Ramamurthy, (1993) 4 SCC 41, Hon'ble Supreme Court while dealing with a similar question, held that benefit of proviso to Section 21(1) of the Limitation Act, 1963 can be given, if the Court is satisfied that the mistake of impleading a dead defendant in the suit, was committed in good faith and upheld the view taken by High Court. Paragraph Nos. 4 & 5 of the said judgment are extracted below:-

> "**4**. A comparative reading of the proviso to sub-section (1) shows that its addition has made all the difference. It is also clear that the proviso has appeared to permit correction of errors which have been committed due to a mistake made in good faith but only when the court permits correction of such mistake. In that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to sub-section (1) of Section 21 of the Act is obviously in line with the spirit and thought of some other provisions in Part III of the Act such as Section 14 providing exclusion of time of proceeding bona fide in court without jurisdiction, when computing the period of limitation for any suit, and Section 17(1) providing a different period of limitation starting when discovering a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficient proviso to sub-section (1) of Section 21 of the Act an averment that a mistake was made in good faith by impleading a dead defendant in the suit should be made and the court must on proof be satisfied that the motion to include the right defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breathes life in the suit.
>
> **5**. It is noteworthy that the trial court did not attribute any neglect or contumacy to the conduct of the plaintiff-respondent. It was rather observed

> that the plaintiff could have known the date of the death of the first defendant only by the counter filed to IA 265 of 1975. Normally, if he had known about the date of death of the defendant, he would have filed the suit in the first instance against his heirs and legal representatives. The trial court has also opined that the plaintiff was ignorant as to such death and that is why he filed IA 265 of 1975 under Order 22 Rule 4 of CPC. The High Court too has recorded a finding that there was nothing to show that the plaintiff was aware of the death of the first defendant and yet knowing well about it, he would persist in filing the suit against a dead person. In conclusion, the learned Single Judge held that since plaintiff-respondent had taken prompt action it clearly showed that he had acted in good faith. Thus the High Court made out a case for invoking the proviso to sub-section (1) of Section 21 of the Act in favour of the plaintiff-respondent. Sequelly, the High Court found no difficulty in allowing IA 785 of 1975 permitting change of the provision whereunder IA 265 of 1975 was filed and in allowing IA 265 of 1975 ordering the suit against the heirs and legal representatives of defendant 1 to be dating back to November 14, 1974, the date on which the plaint was originally presented."

13. In the present case also, plaintiff learnt about death of the sole defendant only when the summons returned unserved with the endorsement that the defendant has died. Stand taken by plaintiff before Trial Court was that he was not aware about death of the sole defendant. Petitioner was not able to produce any evidence to attribute knowledge, about death of his mother, to the plaintiff. Thus, the inference drawn by Trial Court that it was a bonafide mistake in good faith cannot be faulted.

14. Even otherwise also, while exercising supervisory power under Article 227 of the

Constitution, this Court does not act as a Court of Appeal. In the case of Garment Craft v. Prakash Chand Goel, reported in (2022) SCC 181, Hon'ble Supreme Court has enunciated the law on the point as under:-

> "**15.** Having heard the counsel for the parties, we are clearly of the view that the impugned order [*Prakash Chand Goel* v. *Garment Craft*, 2019 SCC OnLine Del 11943] is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. [*Celina Coelho Pereira* v. *Ulhas Mahabaleshwar Kholkar*, (2010) 1 SCC 217 : (2010) 1 SCC (Civ) 69] The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.
>
> **16.** Explaining the scope of jurisdiction under Article 227, this Court in *Estralla Rubber* v. *Dass Estate (P) Ltd.* [*Estralla Rubber* v. *Dass Estate (P) Ltd.*, (2001) 8 SCC 97] has observed : (SCC pp. 101-102, para 6)
>
> "*6*. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is

> also well settled that the High Court while acting under this Article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."

15. For the aforesaid reasons, any interference with the orders passed by learned Trial Court would not be warranted in the facts and circumstances of the case.

16. The writ petitions thus fail and are dismissed. No order as to costs.

MANOJ KUMAR TIWARI, J.

Dt: 20.06.2025
Navin