Writ Petition No.11651/2015

6.10.2016.

Shri A.D. Mishra, learned counsel for petitioner.

Shri Abhishek Singh, learned counsel for respondent.

With consent of learned counsel for the parties, the matter is finally heard.

Respondent filed a suit for recovery of possession of land bearing Araji No.62 Area 0.42 Acre Mouja Futaodhi Tahsil Raghraj Nagar District Satna against one Thakurdeen Singh, son of Devideen Singh Rajput. Later on, the plaintiff discovered that the sole defendant had already expired before filing of suit. An application under Order 22 Rule 4 of the Code of Civil Procedure, 1908 was filed for substitution of his legal heirs. The trial Court exercising its power under Order 23 Rule 1(3) CPC, permitted the plaintiff to withdraw the suit as it was of the opinion that the plaint was inhibited with "formal defect".

Sub-rule (3) of Rule 1 of Order 23 CPC mandates -

> ***"Rule 1. Withdrawal of suit or abandonment of part of claim.-***
> ...
> (3) Where the court is satisfied,—
> (a) that a suit must fail by reason of some formal defect, or
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> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,
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> it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a

> fresh suit in respect of the subject matter of such suit or such part of the claim.
> ..."

The question as to whether a suit brought against a person who is later discovered to have been dead at the time the suit was filed, can be said to have incurred a formal defect, which crops up for consideration in the present case need not detain us long as the issue has already been dwelt by the Division Bench of High Court of Mysore in **C. Muttu vs Bharath Match Works AIR 1964 Kar 293**, wherein it has been held :-

> "6. In Mohun Chunder Koondoo v. Azeem Gazee Chowkeedar, 12 Suth W.R. 45 : 3 Beng LR AC 233 Sir Barnes Peatock C.J. who delivered the judgment of the Bench held that courts have no jurisdiction to decide the suit filed against a dead person and it is a nullity. This decision was followed by the Madras High Court in Veerappa Chetty v. Tindal Ponnen, ILR 31 Mad 86 and observedin the Madras case as follows :-
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> "It does not appear to have ever been suggested that the issue of a writ against a dead man could be anything but a nullity, and we see no reason for regarding the presentation of a plaint, which under our system corresponds to the issue of the writ, as anything more".
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> This decision was followed by Sadasiva Aiyar and' Napiet JJ., in re : Arunachalam Chettiar, 30 Ind Cas679 : (AIR 1916 Mad 440) and by Srinivasa Aiyangar, J. in Rasa Goundan v. Pichamuthu Pillai, 42 Ind Cas 539 : (AIR 1918 Mad 794 (1)). The High Court of Bombay took, the same view in

Rampratab Brijiuohandas v. Qowrishankar Kashiram 85 Ind Cas 464 : (AIR 1924 : Bom 109). In that case Mull'a J. observed thus :

"If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons, issued in the suit, by whomsoever accepted is also a nullity. Similarly, any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such person".

In Bejoy Chand Mahatap Bahadur v. Amulya Charan Mitra 24 Ind Cas 112 : (AIR 1914 Cal 895) a Division Bench of the Calcutta High Court held that the provisions as to the substitution of the heirs of a deceased defendant as parties to the suit in his place apply only to casts where the original defendant was alive at the date of the institution of the suit. In Sisir Kumar v. Manindra Kurnat Biswas, AIR 1958 Cal 681 the Division Bench of the Calcutta High Court followed the above decision and K.C. Das Gupta J.(as he then was) who delivered the judgment observed as follows :

"Sub-rule (2) of O. I r. 10 is not limited to casesof bona fide mistake. For two parts of this sub-rule provide for two different powers of the court. The first gives the court the power to strike out the name of any party improperly joined as plaintiff or defendant. The second part provides for the addition of a party as the plaintiff or defendant where it appears to the court that such person 'ought to have been joined'. The use of the words 'joined' and 'added' is significant. Omission to use

the word 'substituted' cannot but be considered deliberate. It must, therefore, be held that the power given to the Court under sub-rule (2) of R. 10 of O. 1 to add a party contemplates only those cases where there is somebody else as plaintiff or defendant and the effect of bringing on record another person as plaintiff or defendant would be really a case of 'addition' of plaintiff or defendant. A case of mere substitution as distinct from addition is not contemplated in sub-r. (2). If the Court strikes out the names of the defendants and brings on the record the name of another person as sole defendant this will not be a case of addition at all. If there bad been some other person on the record as defendant, even after the names of the original defendants were struck out, that would be a case of addition and might be allowed by the Court in proper circumstances."

A careful review of the decisions of the several High Courts relating to substitution of a defendant in a suit in place of the original defendant makes it clear (1) that no such substitution can be permitted in a case where there was a sole defendant, (2) where there are more defendants than one and one of them was dead when the suit was filed, the Courts have held that the legal representatives of the deceased defendant can be brought on record subject to any question of limitation that may be raised by the legal representatives of the deceased person who were brought on record as the suit had been validly presented in so far as the living defendants are concerned, and (3) where an appeal is filed against a person who was dead on the date of the presentation of the memorandum of appeal, the Courts have held that the appellant can be permitted to bring the legal representatives of the dead person on record. In other words, the Courts have held that substitution is permissible. The principle on

> the basis of which the Courts have taken this view is that an appeal is a continuation of the original proceedings and as the suit had been validly instituted and the defendant died subsequently, an application to bring his legal representatives under Order XXII, Rule 4 is maintainable and the legal representatives can be brought on record. But in cases where there was a sole defendant and he was dead before the suit was instituted, all the High Courts have held that such a suit is a nullity arid no application for amendment of the plaint by deleting the name of the original defendant and substituting another person in his place, can be permitted."

This Court is in respectful agreement with the view taken by the learned Judges in **C. Muttu** (supra).

The impugned order when tested on the anvil of the proposition of law culled out from the decision in **C. Muttu** (supra), cannot be faulted with.

Consequently, petition fails and is **dismissed**. No costs.

(SANJAY YADAV)
JUDGE

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