

07.06.2024

Present: None for plaintiff.  
Defendant no. 1 and 2 in person.

Put up for orders at 04.00 PM.

(SHILPI M JAIN)  
DJ-05 (SW)/Dwarka Courts  
New Delhi: 07.06.2024

**At 04:00 PM**

Present: None for plaintiff.  
Defendant no. 2 in person.

1. Vide this order, this court shall dispose off application u/o XXII Rule 10 r/w Sec. 151 CPC filed on behalf of applicant claiming successor in interest of plaintiff after her demise. But, before going ahead, it is imperative to discuss the law on impleadment of legal representative<sup>1</sup> case of death of plaintiff.

**Order XXII Rule 3 CPC**

Order XXII Rule 3 CPC deals with the procedure in case of death of one of several plaintiffs or of sole plaintiff. It states as follows:

- (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.*
- (2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs*

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<sup>1</sup> Section 2(11) CPC

“legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

*which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.*

### **Order XXII, Rule 9 CPC**

Effect of abatement or dismissal.

- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*
- (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.*
- (3) The provisions of section 5 of the Indian [Limitation Act, 1877](#) shall apply to applications under sub-rule (2).*

### **Order XXII, Rule 10 CPC**

Procedure in case of assignment before final order in suit.

- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.*
- (2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)*

### **Article 120 of the Limitation Act, 1963**

Under Article 120 of the Limitation Act, 1963, the period of limitation to have the legal representative of a deceased respondent made a party to an appeal under the Code of Civil Procedure, is 90 days from the date of death of the respondent.

### **Article 121 of the Limitation Act, 1963**

Article 121 provides that for an application under the Code of Civil Procedure for an order to set aside abatement, the period of limitation is 60 days from the date of abatement.

2. By way of present application, applicant is seeking impleadment of his name in place of deceased plaintiff on the basis of Will dt. 08.04.2005 executed by plaintiff in his favour qua the suit property. Ld. Counsel for applicant submitted that, by virtue of registered Will dt. 08.04.2005 Late plaintiff bequeathed the built up properties of plot no. 28 & 29 i.e. admeasuring 137 sq. yards each out of Khasra no. 62, 64, 72, 73 and 74 situated in area of Village Bindapur, Uttam Nagar, New Delhi (New No. WZ-15-C/3) Manas Kunj, Uttam Nagar, New Delhi). It is further submitted that, during her lifetime, plaintiff sold portion out of built up property no. 29, thereby leaving 47 sq. yards, thus, on 22.01.2022 plaintiff executed another Will in favour of applicant qua the plot no. 28 (admeasuring 137 sq. yards), plot no. 29 (admeasuring 47 sq. yards), Manas Kunj, Uttam Nagar, New Delhi.

3. It is further submitted that, since plaintiff left for heavenly abode on 31.08.2022, right to sue survives in favour of applicant and in terms of Order XXII rule 10 CPC, the suit be continued by the applicant as devolved in his favour qua the suit property.

4. Ld. counsel for plaintiff has relied upon the following judgments

***a) Ashok K. Chauhan And Ors. Vs. Ch. Financial Services Inc. Panama 2016 LRC Online 381(Del)*** wherein Hon'ble High Court of Delhi held that:-

*“The rationale behind this being that procedural laws are meant to regulate the object of doing substantial and real justice and not to foreclose adjudication on merits and hence the provision did not require a detailed inquiry. The court remitted the matter, requiring the learned Single Judge to conduct a preliminary inquiry, under Order XXII Rule 10, to determine the applicant’s claim as the rightful successor in the suit.*

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*14. The learned Single Judge after perusing the relevant material brought on record before the Court was of the view that the respondent's application for substitution as plaintiff, could be allowed. The Court held that it was not required for it to conduct a detailed enquiry to adjudicate upon the substitution application moved by the respondent: What is required is a prima facie satisfaction that the party moving the application is the proper party for claiming those rights, which are subject matter of a dispute. No hard and fast rule of procedure has been laid down in this regard. Several judgments of the*

*Supreme Court as well as this Court support this proposition and have spelt out that at the time of adjudication of application for substitution under Order XXII Rule 10, an enquiry has to be made, albeit prima facie, to ascertain the entitlement of a successor to prosecute a suit.*

*XXXXX*

*20. The appellants' contentions regarding the invalidity of the applicant's claims are at this stage without merit. If the appellants' arguments were to be accepted, the Court would, without a fuller inquiry, be holding that the documents were such that the plaintiff had no cause of action. That is not the scope of the remit of the Division Bench; also, crucially, accepting it would be akin to reading more into the order of the Supreme Court. What the clarification meant was that the appellants were free to raise the issue of limitation at the time of trial, and an adjudication at the stage of the hearing of application under Order XXII Rule 10 did not preclude their right of raising it at the time of trial.*

*XXXX*

*These contentions can be decided only after issues are framed and trial has begun and necessary evidence has been brought on record. Furthermore, it is to be noticed that the provision itself enables the proceeding: "by leave of Court to be continued by or against the person to or upon whom such interest has come to be devolved." The emphasis is on the subject here, i.e "against the person".*

*22. This Court of the opinion that there is no infirmity with the impugned order. It is open for the parties to raise these issues at the time of trial. Consequently, any question challenging the validity of the documents as well as on the issue of limitation has to be raised then and decided on merits after relevant evidence has been adduced. All rights and contentions of the parties on the facts and merits of the rival claims are reserved. The appeal is dismissed with no order as to costs."*

***b) Dhurandhar Prasad Singh Vs. Jai Prakash University AIR 2001 Supreme Court 2552*** wherein Hon'ble Supreme Court of India held as follows:

*"Under R. 10. O 22, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles, the person who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested to apply to the Court for leave to continue the suit."*

*XXXXX*

*1. Whether in case of devolution of interest during the pendency of a suit as postulated under Order 22 Rule 10 of the Code, decree passed against the predecessor-in-interest without bringing the successor-in-interest on the record would make the decree nullity and the same can be executed against such a person who was not impleaded as party ?*

*2. Whether application under Order 22 Rule 10 seeking leave of the*

*Court is required under law to be filed by that person alone upon whom interest has devolved during the pendency of the suit and by nobody else?*

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*24. Now we proceed to consider the second question posed, but before doing so. for better appreciation of the point involved. it would be appropriate to refer to the provisions of Order 22. Rule 10 of the Code which runs thus:-*

*"10. Procedure in case of assignment before final order in suit. - (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may: by leave of the Court, be continued by or against the person to or upon whom such interest has come or de- volved.*

*(2) the attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."*

*25. Plain language of Rule 10 referred to above does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of plaintiff has devolved.*

***c) Parwatibai W/O Namdeo (Thru L.R) Vs. Ramrao Barikrao Lahane 2002(2) All MR 788*** wherein Hon'ble High Court of Judicature at Bombay (Aurangabad Bench) held as under:

*"The enquiry contemplated under Order 22 Rule 5 Civil Procedure Code is also summary in nature. In a summary enquiry contemplated under Order 22 Rule 5 Civil Procedure Code, the Court should refrain from going into the question of genuineness of the will in such type of enquiry. Because the question of validity of will is not in issue in such type of summary enquiry. The issue is who is the legal representative of the deceased for the purpose of proceeding with the pending matter.*

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*21. The learned Advocate Shri. Agrawal submitted that Anna s/o Sheku is not the legal representative of deceased Parwatibai. I do not agree with learned Advocate Shri. Agrawal. "Legal Representative" is defined in section 2(11) of the Civil Procedure Code. The legal representative means a person who, in law, represents the estate of a deceased person and includes any person, who intermeddles with the estate of the deceased and where a party sues or sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. In this behalf, I would like to refer to the decision of Supreme Court in the case of Andhra Bank Ltd. Vs. R. Srinivasan & Ors. (AIR 1962 SC 232) wherein it is held that a legatee who represents only part of the estate of the deceased under a will, can be said to be representing the estate and is, therefore,*

*a legal representative under section 2(11) of the Civil Procedure Code.*

5. *Per contra*, Ld. Counsel for defendant opposed the present applicant on the ground that, Late Smt. Harbhajan Kaur (deceased plaintiff) left for heavenly abode thereby leaving several LRs. Hence, applicant cannot be stand alone be impleaded in place of plaintiff. It is further averred that, present suit become infructuous at the demise of plaintiff. Lastly, it is submitted that even if present application u/o XXII Rule 10 CPC is allowed, then separate issue w.r.t. the authenticity of the Will dt. 08.04.2005 and 21.01.2022 is to be proved as deceased plaintiff has also executed a registered Will dt. 28.10.2009 in favour of the defendant.

6. Ld. Counsel for defendant relied upon the following judgments:

a) ***Dhurandhar Prasad Singh vs. Jai Prakash University And Ors. dt. 24.07.2001 Appeal (civil) 4481 of 2001*** wherein Hon'ble Supreme Court of India held that:

*“Under Rule 10, Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles, the person who has acquired an interest in the subject- matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit.*

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*It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit.”*

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*“This rule is based on the principle that trial of a suit cannot be brought to an end merely because the Brest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22, Rule 10, is not confined to*

*devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule.”*

b) ***Mrs. Sheela Wanti vs. Kuldeep Singh and Anr. dt. 20.08.2002*** passed by Hon’ble High Court of Delhi

c) ***Amit Kumar Shaw & Anr. vs. Farida Khatoon & Anr. dt. 13.04.2005 Appeal (civil) 2592 of 2005*** wherein Hon’ble Supreme Court of India held that:-

*“Under Order XXII, Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit.”*

d) ***Varadarajan vs. Kanakavalli & Ors. CA 5673 of 2009*** wherein it is held by Hon’ble Supreme Court of India that:-

*“The appellant who is the son of Umadevi's younger sister filed an application to execute the decree as her legal representative on the basis of a Will dated 16th July, 1999 (Ex.P/1). The said application was allowed by the Executing Court on 29th March, 2004.*

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*The learned Executing Court held that the appellant as legal representative of the deceased Umadevi is entitled to execute the decree.”*

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*In view of the aforesaid judgments, we find that the appellant is the sole claimant to the estate of the deceased on the basis of Will. The Executing Court has found that the appellant is the legal representative of the deceased competent to execute the decree. In view of the said fact, the appellant as the legal representative is entitled to execute the decree and to take it to its logical end.*

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*Consequently, the order passed by the High Court is set aside*

*and that of the Executing Court is restored. The appeal is allowed.”*

**e) *Harvinder Singh & Another vs. Smt. Ranjit Kaur (Deceased) through her Legal Heirs And Others dt. 18.01.2011*** wherein Hon’ble High Court of Delhi held that:

*“I am unable to agree with any of the contentions as rated by the learned counsel for the appellants. So far as the first argument is concerned I may state that in the State of Delhi, probate of a will is not compulsory. Probate of will is only compulsory in the cities of Bombay, Calcutta and Madras or for properties situated in the cities of Bombay. Madras and Calcutta though the Will may be executed outside the three cities. This is a well settled law and there are many judgments of this Court which lay down so and which arises from a reading of Sections 57 and 213 of the Indian Succession Act, 1925. Two of these judgments are Pradeep Bhalla Vs. Sangeeta 2007 (94) DRJ 548 and Sanjay Gupta Vs. Ved Kanti Gupta 1994 (4) AD (Delhi) 330.”*

**f) *Kanta Yadav vs. Om Prakash Yadav & Ors. CA no. 5823 of 2019*** wherein Hon’ble Supreme Court of India held that:

*“Therefore, there is no problem in arriving at the conclusion that if the will is made in Delhi relating to immovable property in Delhi by Hindu, Buddhist, Sikh or Jaina, no probate is required.”*

**g) *Clarence Pais & Ors. vs. Union of India dt. 22.02.2001 WP (civil) 137 of 1997 and WP (civil) 674 of 1998*** wherein Hon’ble Supreme Court of India held as under:

*“As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situate outside those territories.”*

7. Although, it is well settled law that where sole plaintiff dies and the right to sue survives, the court on application made in that behalf shall call the legal representative of deceased plaintiff to be made a party and shall perceive the suit under Order XXII Rule 3 CPC. However, Order XXII Rule 10 CPC provides a procedure in case of assigning, creation or devolution of interest during the pendency of the present suit. It is also well settled law that, the

property mentioned in Will is said to bequeathed only after the death of the executant. Moreover, Order XXII Rule 10 CPC is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. Thus, in the present case, interest cannot be said to be created or devolve during the pendency of the present suit. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22, rule 10 and not rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason.

8. Record reveals that, DE was closed on 06.04.2021 and matter kept pending for final arguments for several dates of hearing. Infact, part argument were already heard but during pendency of the final arguments, plaintiff left for heavenly abode on 02.09.2022 and application u/o XXII Rule 3 r/w Sec. 151 CPC filed on behalf of the LR of plaintiff but, same was withdrawn vide order dated 02.11.2022 with liberty to file afresh and accordingly, present application u/o XXII Rule 10 CPC was filed.

9. During the course of arguments, Ld. Counsel for plaintiff submits that, he has no objection in case additional issue w.r.t. the Wills executed by plaintiff is framed as now he has entered into the shoes of the plaintiff and claiming possession being the owner of the suit property.

10. Thus, considering the overall facts and circumstances of the present case and material placed on record and also going through the submissions made by the respective parties, this court is of considered opinion that to avoid multifarious litigations, it would be imperative to allow the present application and frame an additional issue w.r.t. the adjudication of better right, title or interest for relief of possession as claimed by the plaintiff. Hence, present application

stands allowed. Additional issue framed as follows:

***“Whether Sh. Randhir Singh Lote S/o Late Sh. Nirver Singh has better right, title or interest qua the suit property then defendant? OPP”***

11. Plaintiff shall file amended memo of parties and also shall lead additional evidence by way of affidavit, if any on above issue within four weeks with advance copy to defendant. It is clarified that since matter was already listed for final arguments before the death of the plaintiff and now after disposal of application u/o XXII Rule 10 CPC additional evidence is to be led for the purpose of additional issue, further proceedings shall be time bound. Plaintiff shall be given only one opportunity to lead evidence, if any for additional issue and *vice-versa* for defendant herein.

12. Put up for PE on **04.10.2024**.

**(SHILPI M JAIN)**  
District Judge-05, South West District  
Dwarka Courts, New Delhi  
07.06.2024