

CNR No. MH1S02000674-2019



ORDER BELOW EXH.66 IN R.C.S. No.82/2019

Laxminarayan Vs. Suresh & Ors.

(Date :- 31.10.2023)

1. This is an application filed by Nandkishor Laxminarayan Somani (defendant no. 8 in present suit) for adding him as plaintiff under Order 1 Rule 10 of Civil Procedure Code and alternatively prayed to transpose him as plaintiff under Order XXIII Rule 1-A read with Section 151 of Civil Procedure Code in the present suit.
2. It is stated in this application that original plaintiff Laxminarayan Dagdulal Somani died on 10.11.2020 at village Ansing. He was father of defendant no. 1, 6 to 11, grand father of defendant no. 12 and father-in-law of defendant no. 13. Defendant no. 1, 6 to 13 are the legal representatives of deceased plaintiff Laxminarayan. All the legal representatives of deceased plaintiff are already on record as defendants.
3. Defendant no. 1 executed sale deed of suit property described in para no. 1-A of the plaint in favour of defendant no. 2 to 5. Hence, deceased plaintiff Laxminarayan filed suit for declaration and permanent injunction against defendant no. 1 to 13. Plaintiff Laxminarayan died during the pendency of this suit. Prior to his death he executed will in presence of witnesses in favour of defendant no. 8. It is stated in the will that present suit will be contested by applicant Nandkishor Laxminarayan Somani (defendant no. 8 in present suit) in future after his death. Thus, cause of action is still survived. The other defendants numbers 6, 7, 9 to 11 have no objection if the applicant is transpose or added as plaintiff. The applicant knows all the facts of the suit and was residing along with

deceased Laxminarayan. Hence, as per the will of deceased plaintiff, applicant filed this application to either add his name as plaintiff or to transpose him as plaintiff in the present suit.

4. Defendant no.1 has filed his say below this application on 24.08.2021. He submitted that all the legal heirs are not made party to the application on this sole count the application deserves to be rejected. Moreover, under section 213 of Succession Act 1925 rights of plaintiff/applicant must be established by probate or letter of administration. The applicant has not proved his right by producing probate or letter of administration from competent Court as required under section 213 of Succession Act. Hence, he prayed to reject the application with heavy costs.

5. Defendant no. 2 to 5 has filed their say below this application on 19.06.2021. They submitted that as per provision of Hindu Law all legal representatives are not taken on record. They denied that on 26.02.2020 plaintiff Laxminarayan executed will as alleged. The application is not filed by all legal heirs of deceased. Hence, it is not tenable and liable to be rejected.

6. Defendant no. 6, 7 and 9 to 11 filed their say to this application at Exh. 73 on 04.04.2022. It is submitted that defendant no. 1 Nandkishor and defendant no. 6, 7, 9 to 11 are the legal representatives of deceased Laxminarayan Dagadulal Somani. They admitted that Laxminarayan executed his will on 26.02.2020 and nominated applicant Nandkishor to contest pending Court matters. All the legal representatives of deceased Laxminarayan are defendants in present suit. The only way to proceed this suit is by transposing defendant no. 8 as legal representative

of deceased plaintiff. They have no objection to allow this application. Hence, they prayed to allow this application.

7. Perused the application and say of defendant no. 1, defendant no. 2 to 5 and of defendant no. 6, 7, 9 to 11 filed on record respectively. Perused the record and roznama. Heard Ld. Advocate Mr. U. A. Deshmukh for the applicant. He argued that all legal representatives of deceased plaintiff Laxminarayan are already on record as defendant no. 1, 6 to 11. Laxminarayan was grand father of defendant no. 12 and father-in-law of defendant no. 13. Plaintiff Laxminarayan died on 10.11.2020. However, as all the legal representatives of plaintiff are already on record this suit cannot be abated. He further argued that applicant who is defendant no. 8 in present suit is aware about all the facts of this case. Deceased Laxminarayan executed will in favour of defendant no. 8 on 26.02.2020 to proceed with the present suit. Hence, he prayed to allow this application by either adding or transposing applicant as plaintiff.

8. Heard Ld. Advocate A.S. Bakliwal for defendant No. 2 to 5 he argued that all legal representatives have not filed this application within limitation. Hence, suit is abated. Defendant can be transpose as plaintiff only if plaintiff is alive as per order 23 rule 1-A of Civil Procedure Code. Advocate for defendant no. 6, 7, 9 to 11 submitted that they have no objection if the application is allowed. Advocate for defendant no. 1 failed to argue on this application inspite of sufficient opportunity, hence, application is taken up for decision without hearing of defendant no. 1 and considering his say only. This suit proceeded *Ex-parte* against defendant no. 12 and 13 vide order below Exh. 1 dated 29.09.2021.

9. Perused the record and documents filed on record. On perusal of certified copy of death certificate of plaintiff below list of document at

Exh. 65 it can be seen that plaintiff Laxminarayan Dagdulal Somani died on 10.11.2020. On perusal of copy of will filed below list of documents at Exh. 65, it can be seen that will is executed by plaintiff on 26.02.2020 in presence of two witnesses. In the said will plaintiff mentioned defendant no. 1, defendant nos. 6 to 8 as his sons. He further mentioned defendant nos. 9 to 11 as his daughters and Mangla Madhusudhan Chandak as his deceased daughter and Kamlabai Laxminarayan Somani as his deceased wife. On perusal of plaint it can be seen that aforesaid mentioned living legal heirs of deceased plaintiff are joined as defendants in this case and legal heirs of deceased Mangala Madhusudan Chandak are joined as defendant nos. 12 & 13. Defendant no. 1, 2 to 5 opposed this application stating that all the legal heirs of deceased plaintiff are not on record as defendants. However, on perusal of copy of will plaintiff mentioned defendant no.1, 6 to 11 and mother of defendant no. 12 and wife of defendant no. 13 as his only legal heirs. Further defendants opposing this application have not clarified as to who are the other legal heirs of deceased plaintiff who are not joined as parties to this suit. Thus, there seems to be no substance in the arguments raised by advocates of defendant no. 1 and defendant nos. 2 to 5.

10. After the death of plaintiff, all legal heirs of plaintiff were already on record as defendants. Now the question arises how this suit will be survived after the death of plaintiff where all his legal heirs are contesting the suit as defendants? The applicant has filed this application under the provisions of Order I Rule 10 read with Order 23 Rule I-A and under Section 151 of Civil Procedure Code. It is the contention of applicant that prior to death of plaintiff he executed will on 26.02.2020 and appointed his son named Nandkishor Laxminarayan Somani as his legal

representative to contest all the criminal and civil cases, suits, appeals and applications on his behalf after his death.

11. As far as present suit is concerned, son of deceased plaintiff namely Nandkishor Laxminarayan Somani is joined as defendant no. 8 in this suit and on the basis of said will he filed this application to add him as plaintiff or transpose him as plaintiff. Thus, it is necessary to consider powers conferred on this court under Order I Rule 10 read with Order 23 Rule I-A and under Section 151 of Civil Procedure Code. The provision of Order I, Rule 10(2) of the Civil Procedure Code provides as follows:-

(2) Court may strike out or add parties.—The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

12. Thus, under Order I Rule 10 (2) the court may at any stage of proceeding either upon or without the application of either party order that name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

13. Order XXIII Rule 1-A provides as follows:-

1A. When transposition of defendants as plaintiffs may be permitted.

— *Where a suit is withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order I the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.*

14. On perusal of aforesaid provision it can be seen that defendant may apply to be transpose as plaintiff under Order I Rule 10 where a suit is withdrawn or abandoned by a plaintiff. However, the present suit is neither withdrawn or abandoned by a plaintiff under Rule 1-A of Order XXIII of C.P.C. Hence, provision of Order XXIII Rule 1-A will not be applicable in the present case. However, considering the facts and circumstances of this case, the situation which arised in this case is where sole plaintiff is died and his legal heirs are already on record as defendants. It is not a clear situation as laid down under Order XXIII Rule 1-A considering the circumstances of present case. Thus, it is now necessary to consider powers conferred on this court under Section 151 of Civil Procedure Code.

15. Applicant has filed this application under Section 151 of Civil Procedure Code. Section 151 of the C.P.C. provides as follows:-

Section 151. Saving of inherent powers of Court.—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

16. Section 151 of C.P.C. provides inherent powers to the court to make such orders as may be necessary for the ends justice or to prevent abuse of process of law. Considering the facts and circumstances of the

case, the sole plaintiff died on 10.11.2020 and all his legal heirs as stated by deceased plaintiff in his will are joined as defendants in this case. However, on perusal of will it can be seen that deceased plaintiff has nominated/appointed Nandkishor Laxminarayan Somani (defendant no.8) as his legal representative to conduct all legal civil and criminal cases, suits, appeals and applications pending in the court. In addition to this, except defendant no. 1 all other legal heirs of deceased plaintiff admitted execution of will in favour of defendant no. 8 to conduct all pending legal criminal and civil cases of deceased plaintiff. All other legal heirs except defendant no. 1 have no objection if defendant no. 8 is added as plaintiff as legal representative of deceased plaintiff in this present suit. They have further filed on record copy of power of attorney executed by them in favour of Nandkishor Laxminarayan Somani dated 18.02.2022 to conduct all legal criminal and civil cases after death of deceased plaintiff as his legal representative. Thus, it becomes clear that deceased plaintiff appointed Nandkishor Laxminarayan Somani as his legal representative to conduct this present suit. Section 2 (11) of Civil Procedure Code defined the term “Legal Representative” as follows :-

“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.

17. Thus, the term legal representative is different from the term legal heirs. Order XXII Rule 3 of C.P.C. laid down procedure in case of death of one of several plaintiffs or sole plaintiff which provides as follows:-

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.—(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 which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

18. Thus, as per Order XXII Rule 3 of C.P.C., on death of sole plaintiff where right to sue survives, the court on application shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. As discussed above defendant no. 8 namely Nandkishor Laxminarayan Somani is appointed as legal representative of deceased plaintiff as per will executed by deceased plaintiff dated 26.02.2020. Plaintiff died on 10.11.2020 and applicant filed this application on 01.02.2021. As per article 120 of limitation Act, 1963 period of limitation to take legal representatives of deceased plaintiff or defendant on record is of 90 days from date of death of the plaintiff or defendant. Therefore, this application is filed by applicant on 83rd day after death of plaintiff to add him as plaintiff being legal representative of deceased plaintiff on record, which is within limitation of 90 days.

19. The present suit is filed by deceased plaintiff for declaration and permanent injunction. All other legal heirs of deceased plaintiff are

contesting the suit as defendants. Moreover, defendant no. 6 to 11 including applicant filed their written statement along with their counter claim at Exh.27 against deceased plaintiff. The said counter claim is for partition, separate possession and for injunction. In a suit for partition and separate possession all plaintiffs are defendants and all defendants are plaintiffs. Rights of all the parties are decided in such suits. Hence, even if defendant no. 8 is added as legal representative of deceased plaintiff in the present suit, no prejudice will be caused to the rights of other legal heirs in the present suit and counter claim. They have every opportunity to contest this suit and counter claim.

20. Moreover, there is no question of abatement of this suit as this application is filed by applicant within limitation as legal representative of deceased plaintiff. It is settled law that law of procedure are devised for advancing justice and not impeding the same. Though, applicant has filed this application under Order I Rule 10 read with Order XXIII Rule 1-A and Section 151 of the C.P.C. and provision of Order XXIII Rule 1-A is not applicable in the present facts and circumstance of the case. However, technical approach to this present application would impair substantial justice to the parties.

21. Hence, considering the powers extend to this court under Order XXII Rule 3, Order I Rule 10 read with Section 151 of Civil Procedure Code, it is necessary to add applicant Nandkishor Laxminarayan Somani as plaintiff being legal representative of deceased plaintiff as per the will executed by deceased plaintiff. The applicant is directed to carry out necessary amendment in the plaint after adding himself as the legal representative of deceased plaintiff in the plaint. The effect of adding applicant as plaintiff being legal representative of deceased plaintiff will

result into striking out his name as defendant no. 8 from the plaint. Hence, I pass the following order:-

ORDER

- 1) Application is allowed.
- 2) Applicant Nandkishor Laxminarayan Somani is permitted to add himself as plaintiff as legal representative of deceased sole plaintiff namely Laxminarayan Dagdulal Somani in the present suit.
- 3) Applicant shall carry out necessary amendment on or before next date and shall submit a copy of the amended plaint.

Place: Washim
Date: 31/10/2023

(N. J. Pachade)
3rd Jt. C.J.J.D., Washim

"CERTIFICATE"

I affirm that the contents of this P.D.F. file Order are same word to word as per original Order.

Court & Judge Name	:	N. J. Pachade 3 rd Jt. C.J.J.D & J.M.F.C., Washim.
Name of Stenographer	:	N.F. Syed
Date of Order	:	31.10.2023
Order signed by the Presiding Officer on	:	31.10.2023
Order uploaded on	:	01.11.2023