

15. STATE OF M.P. THROUGH COLLECTOR
DEWAS, DIST. DEWAS (MADHYA PRADESH)

.....RESPONDENTS

(RESPONDENT NO.15/STATE BY SHRI RAJWARDHAN GAWDE, GOVT.
ADVOCATE AND CAVEATOR BY SHRIADITYA GOYAL - ADVOCATE)

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Reserved on : 23.08.2023

Pronounced on : 09.10.2023
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This petition having been heard and reserved for orders, coming on for pronouncement this day, the court passed the following:

ORDER

1. This Revision under Section 115 of the CPC has been preferred by the plaintiffs being aggrieved by the order dated 06.07.2023 passed in RCS No.49-A/2019 by the Civil Judge, Junior Division, Dewas whereby their application under Order 23 Rule 1 of the CPC for withdrawal of the suit with liberty to institute a fresh suit has been rejected.

2. The facts in brief are that on 20.03.2019 the plaintiffs instituted an action for declaration of their title to the suit land and for permanent injunction. Summons of the suit were issued to the defendants and defendants 1 to 3 were purportedly served by way of publication in a daily newspaper. On 19.09.2022, at the time of recording of plaintiff's *ex parte* evidence, Smt. Abhaya Bai @ Kalka, legal representative of deceased defendant No.2 Krishnarao, filed an application for dismissal

of the suit on the ground that the same has been instituted against dead persons. By order dated 15.12.2022 the application was rejected by the trial Court holding that Smt. Abhaya Bai is not a party to the suit hence has no right to file the application.

3. On 08.05.2023, the plaintiffs filed an application under Order 23 Rule 1(3) of the CPC for withdrawal of the suit with liberty to institute a fresh suit in respect of the subject matter of the suit submitting that since the same has been instituted against dead persons, it is a nullity and the defect goes to the root of the matter hence they deserve permission to withdraw the same. By the impugned order the application has been rejected by the trial Court observing that defendants 1 to 3 had expired prior to filing of the suit itself hence their legal representatives cannot be brought on record. Since the suit was filed against dead persons, the same does not fall within the category of a formal defect. In consequence the application filed by the plaintiffs has been rejected.

4. Learned counsel for the plaintiffs has submitted that the suit was instituted by plaintiffs against dead persons. They had no knowledge at the time of institution of the suit that they have already expired. The said fact became known to them only upon an application having been filed by one of the legal heirs of defendant No.2 for dismissal of the suit. Since the suit was filed against dead persons, their legal representatives also cannot be brought on record. The same is a formal

defect and does not strike at the root of the suit hence provisions of Order 23 Rule 1(3) of the CPC were very much applicable. In fact, the suit was itself a nullity. Reliance was placed by him on the decision of the Supreme Court in **V. Rajendran and Another V/s. Annasamy Pandian (dead) through Legal Representatives Karthyayani Natchiar (2017) 5 SCC 63**, of the Punjab and Haryana High Court in **Naseem Hushain and Another V/s. Smt. Mahender Kaur and Another 2015 SCC OnLine P&H 8414**, of the Bombay High Court in **Indana International Limited V/s. Santana Miguel Fernandis and Another 2007 SCC OnLine Bom. 381** and of this Court in **Thakur Deen Singh (dead) through Legal Representatives Rampratap Singh and Others V/s. Surendra Singh @ Radhika Singh 2017 (2) MPLJ 580**.

5. Per contra, learned counsel for the caveator/respondent No.8 has submitted that institution of the suit against dead persons is not a formal defect and goes to the very root of the matter. It cannot be said that the suit was a nullity. The trial Court has hence not committed any error in rejecting the application filed by the plaintiffs. Reliance was placed by him on the decisions of this Court in **Raghuraj and Others V/s. Ramprakash and Others 2017 (2) MPLJ 158** and **Vinod Kumar Gupta V/s. Ramadevi Shivhare and Another 2008 (2) of MPLJ 151** and of the Himachal Pradesh High Court in **Promila Bakshi and Others V/s. Ashok Bhatia and Others AIR 2007 HP 14**.

6. I have considered the submissions of the learned counsel for the parties and have perused the record.

7. The question of consideration is as to whether institution of the suit by plaintiffs against defendants 1 to 3 who had already expired prior to such institution would be a formal defect and would not go to the root of the matter in which case the provisions of Order 23 Rule 1(3) of the CPC would be applicable. The said provision reads as under :-

“O.23 rule 1 **Withdrawal of suit or abandonment of part of claim—**

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(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(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, 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.”

8. In **Indana International Limited (supra)** it was held by the Bombay High Court as under :-

“6. The learned trial Court has made a correct observation that the legal heirs of a sole defendant who is dead, cannot be brought on record, since the suit against a dead person itself is a *nullity*. In fact, it appears that to prevent this, that the plaintiff sought to withdraw the suit itself, which has been denied on the ground that the suit is a *nullity*.

7. Undisputedly, such a suit must be held to be a *nullity* and therefore not instituted at all. However, it does not follow that the fact that a suit has been filed upon payment of Court fees must be

ignored. In such a case, the withdrawal that is sought by the plaintiff must be viewed as a request for withdrawal of the filing of the suit which is the physical aspect of the suit. For this purpose therefore, filing of the suit against a dead person must be treated to be a formal defect within the meaning of Order 23, Rule 1(3) since the defect is in the nature of mis-joinder and non-joinder.”

9. The aforesaid decision was relied upon in the case of **Naseem Hushain and Another (supra)** in which it was held as under :-

“4. In the present case, petitioners while filing the suit had impleaded Virsa Singh as defendant No. 1. However, defendant No. 1 had already died on 22.12.1999, whereas, the suit was filed in the year 2008. The said fact was highlighted by defendant No. 1 at the time of filing of the written statement. Thereafter, petitioner No. 1 moved an application for bringing on record the legal representatives of deceased-Virsa Singh. However, the said application was dismissed. Since the defendant No. 1 was already dead at the time of filing of the suit, the trial Court should have permitted the petitioners to withdraw the suit with permission to file a fresh one on the same cause of action as per law.”

10. The aforesaid judgments were relied upon by this Court in the case of **Thakur Deen Singh (supra)** in which judgments of various other High Courts were also relied upon to hold that a suit instituted against a dead person was a nullity and since substitution of legal representatives was impermissible, the same was a formal defect in view of which the plaintiffs could be permitted to withdraw the suit.

11. Thus, the principle which emerges is that a suit instituted against a dead person believing him to be alive on the date of filing of the suit but later on being discovered that he has already expired, is a nullity since the very inception. The same shall be deemed not to have been

instituted at all. Since the suit is against a dead person, substitution of legal representatives would also not be permissible under the provisions of Order 22 Rule 4 of the CPC. However, since the suit has already been filed, which is its physical aspect, a prayer for its withdrawal ought to be permitted with liberty to file a fresh suit on the same cause of action.

12. The judgments in the case of **Raghuraj and Others (supra)** and **Vinod Kumar Gupta (supra)** were dealing with the issue of non-joinder of a necessary party to the suit and for that reason withdrawal of the suit was not permitted upon holding that non-impleadment of a necessary party is not a formal defect within the meaning of Order 23 Rule 1(3) of the CPC as the same strikes at the root of the suit. It was not held that the suit itself is a nullity. Non-impleadment of a necessary party would certainly not be a formal defect but institution of a suit against a dead person would be a formal defect as the suit itself would be a nullity. **In Promila Bakshi and Others (Supra)** withdrawal was not permitted for the reason that the entire trial in the suit had been concluded and at the fag end of the trial plaintiff had sought permission to withdraw the suit. However, in the present case the suit is at the very initial stage and the trial has not even begun. The judgments relied upon by the learned counsel for the respondents hence do not support him in any manner.

13. As a result of the aforesaid discussion, the impugned order

passed by the trial Court cannot be sustained and is hereby set aside. The application under Order 23 Rule 1(3) of the CPC filed by the plaintiffs stands allowed and they are permitted to withdraw the suit with liberty to file a fresh suit as may be permissible in law. The Revision is accordingly allowed and disposed off. No costs.

(PRANAY VERMA)
JUDGE

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