Kanwal Sarup Khurana Vs Kunwar Harendra Pratap Sahi and Others

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: Feb. 20, 2013

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 22 Rule 10, Order 22 Rule 3, Order 22 Rule 4, Order 6 Rule 17

Hon'ble Judges: Sudhir Agarwal, J

Final Decision: Dismissed

Judgement

Sudhir Agarwal, J.
The plalntiffpetitioner (hereinafter referred to as ""petitioner"") is aggrieved by order dated 22.12.1979 passed by Civil

Judge, Malihabad, Lucknow rejecting petitioner"s application seeking amendment in the plalnt and revisional order dated 9/10.2.2006 rejecting

petitioner"s application C17 and holding that revision has abated and consequently returning the record of original suit no.48 of 1967 to the Trial

Court for further proceedings.

2. The petitioner, K.S.Khurana vide plalnt dated 1.9.1967 filed regular suit no.48 of 1967 seeking decree for permanent injunction restraining

defendant respondent no.1 (hereinafter referred to as ""respondent"") Kunwar Harendra Pratap Sahi from selling or otherwise encumbering

Bungalow no.11, Rai Behari Lal Road, (Then P.S. Hazratganj now P.S. Mahanagar), Lucknow.

3. The case set up by petitioner in the above suit is that respondent no.1 clalmed to be owner of the aforesaid bungalow, built at plot no.440/3 and

440/4, leased it out to plalntiff on the lease charge of Rs.100 per month. The bungalow was built on a Nazul land held by the respondent 1 under

lease of 90 years period from Nazul Department which commenced from 1935. There was an oral agreement dated 12.8.1965 for sale of

aforesaid property pursuant whereto partial payment of Rs.200/ as earnest money was made vide cheque no.BW/600944380 dated 12.8.1965.

The respondent 1 issued receipt dated 12.8.1965 acknowledging the payment. Thereafter respondent 1 not only refused to accept lease charge of

Rs.100/ per month but also sent a letter dated 26.10.1965 terminating the lease and all other agreements etc.. Hence the suit for permanent

injunction.

4. The petitioner sought an amendment in the plaint filing an application (no.ka 140) dated 29.11.1979 under Order VI Rule 17 C.P.C. for

insertion of para 15A regarding payment of additional court fees and a relief regarding specific performance. The amendment application was

contested by respondent 1 asserting that relief of specific performance is now barred by limitation and amendment in order to bring in a relief which

is barred by limitation shall not be allowed.

5. The objection raised by respondent 1 found favour with the Trial Court. The petitioner''s amendment application no.Ka140 was rejected vide

order dated 22.12.1979.

6. The petitioner, on 17.3.1980, preferred Civil Revision No.45 of 1980, against order dated 22.12.1979. On 8.11.2004, he filed an application

no.1269 of 2004 in C.R. No.45 of 1980 under Order XXII, Rule 10 read with Section 151 C.P.C. for impleadment of respondent No.4 to 7 on

the ground that during pendency of revision, he has come to know that respondent No.1 sold property in question to Sri Gokran Nath Bajpai, who

has now died and the property is succeeded by heirs and legal representatives of late Gokaran Nath Bajpayee. The petitioner thus prayed for

impleadment of heirs and legal representatives of late Gokaran Nath Bajpayee as defendants No.2 to 6. The petitioner also stated in para 3 of

application No.1269 of 2004 in Civil Revision No.45 of 1980 that in another civil revision No.855 of 1978, the aforesaid heirs and legal

representatives already made an application stating that Kunwar Harendra Pratap Sahi had sold disputed property to Sri Gokaran Nath Bajpayee

and after his death, they have succeeded the said property and therefore they should be impleaded as they are successors in interest. The said

application was allowed in Civil Revision No.855 of 1978 which itself was decided vide this Court''s judgment dated 20.8.2004 but it appears that

no such impleadment application was submitted in Revision No.45 of 1980 hence the said heirs and legal representatives of late Gokaran Nath

Bajpayee could not be impleaded in the aforesaid revision.

7. While this revision No.45 of 1980 was pending, this Court passed an order remitting record of revision to District Judge, Lucknow due to

increase in pecuniary jurisdiction of District Judge. The application no.1269 of 2004 was also directed to be disposed of by the District Judge.

8. After transfer of revision No.45 of 1980, it was registered again afresh as Civil Revision no.69 of 2005 in the Court of District Judge, Lucknow

and notices were issued to the parties.

9. The application No.1269 of 2004 was objected/contested by the proposed defendants vide objection dated 27.10.2005 (Annexure 7 to the

writ petition). They pleaded that respondent 1 himself has died long back, property in question was transferred vide sale deed dated 5.12.1983,

executed by respondent 1 in favour of Sri Gokaran Nath Bajpayee and neither heirs and legal representatives of respondent 1 were substituted nor

any suit for specific performance has been filed within period of limitation, nor legal heirs of Gokaran Nath Bajpayee were brought on record

within time hence civil revision itself having already abated, the application, not covered by order XXII, Rule 10 C.P.C. not maintainable and liable

to be rejected.

10. The petitioner filed reply dated 3.2.2006 (Annexure 8 to the writ petition) to the objection filed by proposed defendants (i.e. respondents

No.4 to 7 in this writ petition). He said that earlier, Gokaran Nath Bajpayee himself had filed an application dated 9th February, 1987 registered

as Civil Misc. Application No.158(M) of 1987 in Civil Revision No.855 of 1978 seeking his impleadment/amendment in memo of revision as

applicant no.2. Sri Gokaran Nath Bajpayee died on 22nd September, 1987 and thereafter application dated September, 1989 registered as Civil

Misc. Application No.735 of 1989 in Civil Revision no.855 of 1978 was filed by respondents 4 to 7 seeking substitution in place of Sri Gokaran

Nath Bajpayee having died on 22nd September, 1987. The Civil Revision No.855 of 1978 was filed by respondent 1 against judgment and

decree dated 28th August, 1978 passed by Trial Court in another suit i.e. S.C.C. Suit No.68 of 1976. It is pointed out that aforesaid suit filed by

respondent 1 was dismissed by Trial Court and thereafter Revision No.855 of 1978 was filed, which has also been dismissed vide this Court''s

judgment dated 20.8.2004.

11. The petitioner''s application no.1269 of 2004, which was numbered as paper no.C17 in the Court of Additional District Judge, Court No.2,

Lucknow was heard and decided vide order dated 9/10th February, 2006 (Annexure 10 to the writ petition).

12. The Revisional Court has observed that respondent 1 executed sale deed in respect to the property in question in favour of Gokaran Nath

Bajpai on 5.12.1983. It is also true that Sri Harendra Pratap Sahi has died and no application for substitution was filed within the period of

limitation. Since he was the sole contesting respondent and after his death, none of his legal heir was impleaded resulting in abatement of revision

itself. The Revisional Court, therefore, took a view that revision having abated, let the matter be further examined in the suit by Trial Court.

13. Learned counsel for the petitioner submitted that limitation for substitution would commence from the date of knowledge particularly when no

such information was given by the counsel for respondent 1 as provided in order XXII, Rule 9A C.P.C..

14. In substance, the submission advanced on behalf of petitioner is that knowledge about death of respondent 1 and also that of subsequent

assignee and non impleadment of their heirs and legal representatives in revision came to the petitioner only in 2004 when he found that in another

Civil Revision No.855 of 1978, impleadment was made but not in the present case. Therefore for the purpose of substitution of legal heirs,

limitation would have to commence from the date of knowledge and not from the date of death. It is contended, when a property was transferred

by a person during his lifetime to some one else and thereafter he died, it would be a case of devolution of interest and no question of abatement

would arise. Provisions of Order XXII, Rule 10 in such a case would be attracted and not Order XXII, Rule 3 and 4 C.P.C. and to support this

proposition, he placed reliance on Apex Court"s decisions in Ghafoor Ahmad Khan Vs. Bashir Ahmad Khan (Dead) by L.Rs., (1982) 3 SCC

486, Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass (Deceased) through his Chela Shiam Das, (1976) 1 SCC 103 and Urban

Improvement Trust Jodhpur Vs. Gokul Narain & Anr., AIR 1996 SC 1819.

15. I have seriously pondered over the matter and perused record as well as judicial authorities cited at the Bar.

16. So far as facts relating to Civil Revision No.855 of 1978 are concerned, I am of the view that those facts are totally irrelevant for the purpose

of present case, in as much as, the said revision has arisen from a different proceedings i.e. Original Suit No.68 of 1976 which was filed by

respondent 1 himself and the same having been dismissed, he filed Revision No.855 of 1978. During pendency of that revision, firstly, an

application was filed by Sri Gokaran Nath Bajpai himself seeking his impleadment as defendant 2 and after his death by his legal heirs i.e.

respondent no.4 to 7 praying for their substitution in place of Gokaran Nath Bajpai. The proceedings of another suit and revision cannot help the

petitioner in the present case except if is relied for information of some fact like death of an individual etc. In the present case he has to show

maintainability of his application on its own and cannot clalm any credence on the basis of different proceedings.

17. Some of the undisputed facts, if chronologically arranged, in respect to suit no.48 of 1967 with which this Court is concerned and proceedings

arising therefrom, would emerge as under:

Dates Events

01.09.1967 O.S. No.48 of 1967 instituted by petitioner.

29.11.1979 Amendment application filed by petitioner.

22.12.1979 Amendment application rejected.

17.3.1980 Civil Revision No.45 of 1980 instituted by petitioner before this Court.

05.12.1983 Respondent 1 executed sale deed in favour of Gokaran Nath Bajpai transferring disputed property to him.

06.11.1984 Publication of notice to effect service of Civil Revision No.45 of 1980 (reregistered as C.R. No.69 of 2005)

22.09.1987 Gokaran Nath Bajpai died.

08.11.2004 Petitioner filed application No.1269/2004

18. The date of death of respondent no.1 is not on record. Learned counsel for the parties also could not tell date of death of respondent 1. The

learned counsel for petitioner, however, could not dispute that legal heirs of respondent 1 have not been substituted in Revision No.45 of 1980 (69

of 2005) or in the original suit.

19. The date of death of respondent 1, in my view, would be of utmost importance irrespective of the fact whether it is Rule 3 and 4 of Order

XXII, which would be applicable in the present case or it is Rule 10 thereof. The above view find support from the discussion with reference to

various authorities rendered after considering Order XXII, Rule 3, 4 and 10 C.P.C. as discernable from the discussion herein below.

20. Rule 1 Order XXII C.P.C. provides, if the right to sue survives, the death of plalntiff or defendant shall not cause the suit to abate. Therefore,

vide Rule 1, Order XXII, first principle declared is that mere death of a party to suit shall not result in abatement of suit if the right to sue survives.

No doubt this Rule 1 has to be read with in conformity with other Rules under Order XXII.

21. Rule 2, Order XXII lays down the procedure to be observed by Court where there are more than one plalntiffs or defendants, as the case may

be, and one of either the two parties dies and right to sue also survives. It says that in such a case the Court shall cause an entry to that effect to be

made on the record, and the suit shall proceed at the instance of the surviving plalntiff or plalntiffs,or against the surviving defendant or defendants.

The above provision apparently, in my view has no application to the case in hand.

22. Then comes Order XXII, Rule 3. It lays down the procedure to be observed in case of death of one of several plalntiffs or of sole plalntiff. It

contemplates that in such a case, on an application made to the Court, it shall cause the legal representative(s) of deceased plalntiff to be made

party and shall proceed with the suit. In a case where no such application is made within the period of limitation, the suit shall abate so far as the

deceased plalntiff is concerned, and, if there is an application of defendant, the Court may award him costs also, which he may have incurred in

defending the suit, and such cost, if awarded, may be recovered from the estate of deceased plalntiff.

23. Rule 4 Order XXII provides that on the death of sole defendant, if the right to sue survives, on an application made in that behalf, the Court

shall cause the legal representative(s) of deceased defendant, party to the suit.

24. Subrule (3) of Rule 4 says where within the time limit prescribed by law, no application is made under subrule (1), the suit shall abate as against

deceased defendant. Subrule (5) considers a case where a plaintiff due to ignorance of death of defendant, fails to make an application for

substitution within the period specified in Act, 1963 and suit in consequence has abated, and says that the Court shall consider this aspect and have

due regard to the fact of such ignorance, if proved, for setting aside abatement and for admission of that application under Section 5 of Limitation

Act, on the ground of such reasons, for the purpose of treating it sufficient cause of such application within the period specified.

25. Order XXII, Rule 4A applies where one of the party to the suit dies leaving no heir or legal representative and lays down procedure to be

followed therein. Rule 5 of Order XXII provides the manner, a dispute about legal representative would be determined by concerned Court.

26. Rule 6 specifically provides that death of either of the party after conclusion of hearing but before pronouncement of judgment shall not result in

abatement and judgment can be pronounced, which would have the effect as if it had been pronounced before the death took place.

27. Rule 7 provides that marriage of a female plaintiff or defendant shall not result in abatement of suit. Rule 8 contemplates the situation when

plaintiff''s insolvency may bar a suit.

28. None of these provisions namely Order XXII, Rule 4A, 5, 6, 7 and 8 have any application in the present matter but just to complete the

scheme of Order XXII, the same are being referred.

29. Then comes Order XXII, Rule 9, which provides the effect of abatement or dismissal and says that no fresh suit shall be brought on the same

cause of action. Sub Rule (2) of Rule 9, however, says that on an application filed by legal representative or the assignee or the receiver, as the

case may be, applying for an order to set aside abatement or dismissal, the Court may set aside the same as to such terms or costs or otherwise as

it thinks fit and if such an application has been filed after expiry of period of limitation, sub rule (3) thereof extend Section 5 of Limitation Act to

applications filed under Rule 9(2) of Order XXII.

30. Next is Order XXII, Rule 10 C.P.C. It contemplates continuation of suit where person against whom proceedings were initiated, by way of

assignment, creation or devolution of interest has given effect to a transfer in respect to the property to someone else. For example, where suit is

filed in respect to Company ''A'' and during pendency thereof this Company ''A'' is taken over by a new Company ''B'', the suit can continue by

new Company ''B''.

31. In other words, under Order XXII, Rule 3 and 4, there is a situation contemplated, which may result in automatic abatement of the suit but

such would not be a case in respect to a situation governed by Rule 10.

32. A close reading of Order XXII, Rules 3 and 4, shows if a party dies, and, right to sue survives, the Court on an application made in that behalf

would allow substitution of legal representative of the deceased party for proceeding with the suit. If such an application, however, is not filed

within the time prescribed by law, the suit shall abate so far as the deceased party is concerned.

33. Rule 10 however contemplates a situation arising in the cases of assignment, creation and devolution of interest during pendency of a suit other

than those referred to earlier Rules. It is based on the principle that the trial of a suit cannot be brought to an end merely on account of interest of a

party, subject matter of a suit, is devolved upon another during its pendency. Such a suit may be continued with the leave of the Court, by or

against the person upon whom such interest has devolved. But, if no such a step is taken, and transferor of interest is not brought on record and

impleaded, that does not mean that suit cannot proceed. It may be continued with the original party and the person upon whom interest has

devolved, will be bound by and can have the benefit of decree, as the case may be, unless it is shown in a properly constituted proceeding that the

original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse

to the party upon whom interest had devolved.

34. There is a clearcut and marked distinction made by legislature in the scheme of Rules 3, 4 and 10 of Order XXII. In the cases covered by

Rules 3 and 4, if right to sue survives and no application for bringing legal representatives of a deceased party is filed within the time prescribed,

there is an automatic abatement of suit. This is the effect of statutory provision and by operation of law the suit stands abated. Thereafter the

procedure prescribed for setting aside abatement under Rule 9 on the grounds postulated therein will have to be observed, failing which the

consequences of such abatement shall be attracted and followed. The situation of abatement, however, is not contemplated in the cases governed

by Order XXII, Rule 10. The legislature has not prescribed any such procedure where the party concerned has failed to apply for leave of the

Court to continue proceedings by or against a person upon whom interest has devolved during pendency of a suit. It can, thus, safely be concluded

that legislature was conscious of this eventuality yet has not prescribed of the consequences, if any, i.e. failure would entail dismissal of suit. It leads

to the conclusion that legislature always intended that proceeding would continue by or against the original party although he ceased to have any

interest in the subject of dispute, in the event of failure to apply for leave, to continue by or against the person upon whom the interest has

devolved, for bringing him on record.

35. Leave of the Court to bring on record such transferor can be sought either by the transferor himself or by a party to the suit. It is not obligatory

upon them to do so. The principle underlying behind it that if a party does not ask for leave, who has got the interest transferred upon him, he takes

the obvious risk that the suit may not be properly conducted by the Plalntiff on record or may not be property defended by the defendant on

record and yet he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation

was not properly conducted by the original party or he colluded with the adversary. This is what was held by Calcutta High Court in Moti Lal Vs.

KarabudDin (1898) 25 Cal. 179.

36. It is also plaln inference drawn from the aforesaid provision that the person who has acquired an interest by devolution, if obtains leave to carry

on suit, the suit in his hands is not a new suit. A cause of action is not prolonged by mere transfer of title. It is the old suit carried on at his instance

and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings. This is what was observed by Lord

Kingsdown of Judicial Committee in Prannath Vs. Rookea Begum (1851) 7 M.I.A. 323. The Apex Court in Sri Saila Bala Dassi Vs. Smt.

Nirmala Sundari Dassi and another, (1958) 1 SCR 1287, held, if a suit is pending when transfer in favour of a party was made, that would not

affect the result when no application had been made to be brought on record in the original court during pendency of suit.

37. In Shri Rikhu Dev, Chela Bawa Harjug Dass (supra), a three Judge Bench of Apex Court considered the scope and effect of Order XXII,

Rule 10. A suit was filed by Mahant, the appellant before the Apex Court, on the allegation that Dera at Patiala of which he was Mahant had other

branches, one at Landeke in Moga Tehsil and possession of that Dera and properties attached with, be restored to him. The defendant Som Dass

contended that the said Dera at Landeke was an independent Dera and he was in possession of the properties thereof, being a lawfully appointed

Mahant. The suit was decreed by Trial Court but in appeal the Trial Court''s judgment was reversed. The second appeal preferred before High

Court and when the same was pending, defendant Som Dass died on 13.10.1970. No application to bring on record legal representatives of Som

Dass was filed within the period of limitation. An application filed subsequently after the period of limitation was rejected by the High Court holding

that the appeal had abated and there was no ground for setting aside abatement. The Apex Court came to the conclusion that application for

impleadment of Chela Shiam Dass as legal representative of defendant Som Dass could not have been taken to be as an application under Order

XXII, Rule 3 C.P.c. but it is an application under Order XXII, Rule 10. When Som Dass died, the interest which was the subjectmatter of suit, i.e.

the property of Dera, devolved upon Shiam Dass as he was elected to be the Mahant of Dera and therefore appeal could be continued under

Order XXII, Rule 10 against the person upon whom the interest had devolved. The Court said that Order XXII, Rule 10 is based on the principle

that trial of a suit cannot be brought to an end merely because interest of a party in a subject matter of suit has devolved upon another during

pendency of suit. In fact such proceeding may be continued against the person acquiring 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 interest of such person, the rule that has to be applied is

Order XXII, Rule 10 and not Rule 3 or 4, irrespective of fact whether devolution has takes place as a consequence of death or for any other

reason. Order XXII, Rule 10, is not confined to devolution of interest due to death of a party but it also applies where the head of mutt or manager

of the temple resigns his office or is removed from his office. In such a case successor to the head of the mutt or to the manager of the temple may

be substituted as a party under this rule.

38. The word "interest" in Order XXII, Rule 10 means interest in the property i.e. the subject matter of the suit. The ""interest"" is the interest of the

person who was the party to the suit.

39. In Ghafoor Ahmad Khan (supra) during lifetime of sole respondent, there was a transfer of property, which was subject matter of appeal, by

way of gift to his wife. The High Court, where the appeal was pending, observing that the appeal has abated, dismissed the same. The Apex Court

observed that here is not a case where proceedings would stand abated and said:

In other words it is a case of devolution of interest and the case falls under Order XXII, Rule 10 C.P.C. and there will be no question of

abatement. We, therefore, direct that the transferee be brought on the record.

40. In P.P.K. Gopalan Nambiar Vs. P.P.K. Balakrishna Nambiar, AIR 1995 SC 1852 the suit was decreed by trial court but in appeal, decree

was partially modified excluding the property covered by a Will dated 1.11.1955 executed by one Lakshmi Amma, the mother of the first

defendant in the suit. On second appeal, the High Court reversed the decree of first Appellate Court and confirmed trial court"s judgment. Before

Apex Court, the defendant in suit, who was appellant, contended that three of the parties i.e. respondents No. 2, 4 and 11 since have expired,

their legal representatives were not substituted, the appeal stood abated. Rejecting this contention, the Court observed:

Admittedly, before their deaths, they sold their respective shares by registered sale deeds in favour of other respondents. So, by operation of

Order XXII Rule 10 CPC, their respective interest devolved by transfer of the respondents who are already on record. Therefore, there is no

need to bring the L.Rs. of the deceased on record or to transpose them as legal representatives.

41. In Dhurandhar Prasad Singh Vs. Jai Prakash University, AIR 2001 SC 2552, the Court, construing scope and ambit of Order XXII, Rule 10

C.P.C., said, it provides for cases of assignment, creation and devolution of interest during the pendency of a suit. Trial of a suit cannot be brought

to an end for the sole reason that interest of a party in the subject matter of suit has devolved upon another during its pendency. Such a suit may be

continued with the leave of Court by or against person upon whom such interest has devolved. The Court also observed that if no such steps is

taken, the suit may be continued with original party and person upon whom interest has devolved will be bound by decree particularly when such

transferor had knowledge of proceedings and made no attempt to get himself impleaded in pending proceedings. The Limitation Act provides

limitation in respect to applications under Order XXII, Rule 3 and 4 but it has not been shown to this Court that there is any provision providing

limitation for impleadment of a transferor by way of assignment, creation or devolution of interest in subject matter of suit property, pendency

thereof is governed by Order XXII, Rule 10. The relevant extract of the judgment discussing Order XXII, Rule 10 C.P.C. is as under:

Plaln 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 plalntiff has devolved. Likewise, in a case where interest of defendant has devolved, the suit may be continued against such a person upon

whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during

the pendency of the suit, leave of the court has to be obtained. If it is lald down that leave can be obtained by that person alone upon whom

interest of party to the suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about

the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound

by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plalntiff to apply for leave in case the

factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has

devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the

subject matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but

natural, or by colluding with the other side. If the submission of Shri Mishra is accepted, a party upon whom interest has devolved, upon his failure

to apply for leave, would be deprived from challenging correctness of the decree by filing a properly constituted suit on the ground that the original

party having lost interest in the subject of dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary.

Any other party, in our view, may also seek leave as, for example, where plalntiff filed a suit for partition and during its pendency he gifted away his

undivided interest in the Mitakshara Coparcenary in favour of the contesting defendant, in that event the contesting defendant upon whom the

interest of the original plalntiff has devolved has no cause of action to prosecute the suit, but if there is any other cosharer who is supporting the

plalntiff, may have a cause of action to continue with the suit by getting himself transposed to the category of plalntiff as it is well settled that in a

partition suit every defendant is plalntiff, provided he has cause of action for seeking partition. Thus, we do not find any substance in this

submission of learned counsel appearing on behalf of the appellant and hold that prayer for leave can be made not only by the person upon whom

interest has devolved, but also by the plalntiff or any other party or person interested.

42. The matter also came up for consideration in Amit Kumar Shaw and Anr. Vs. Farida Khatoon and Anr., AIR 2005 SC 2209. The Court

observed that power of a Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property or

not. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an

enforceable legal right. 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 existence and validity of 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.

43. In Rajkumar Vs. Sardari Lal and Ors., 2004 (1) Sup 532 the Apex court following and reiterating its view taken in Smt. Saila Bala Dassi

(supra) said that doctrine of lis pendens expressed in the maxim ''ul lite pendente nihil innovetur'' (during a litigation nothing new should be

introduced) has been statutorily incorporated in Section 52 of Transfer of the Property Act, 1882 (hereinafter referred to as ''''Act, 1882''''). A

defendant cannot by alternating property during the pendency of litigation, venture into depriving the successful plalntiff of the fruits of the decree.

The transferee pendente lite is treated in the eye of law as a representative in interest of the judgmentdebtor and is bound by the decree passed

against the judgmentdebtor though neither the defendant has chosen to bring the transferee on record by apprising his opponent and the Court

about the aforesaid transfer, nor, the transferee has chosen to come on record by taking recourse to Order XXII, Rule 10. The Court, further,

said:

In case of an assignment creation or devolution of any interest during the pendency of any suit to grant leave for the person in or upon whom such

interest has come to vest or devolve to be brought on record. Bringing of a lis pendens transferee on record is not as of right but in the discretion of

the Court. Though not brought on record the lis pendens transferee remains bound by the decree.

44. A question arose, whether period of limitation is attracted for filing an application under Order XXII, Rule 10. In Baijnath Ram and Ors. Vs.

Tunkowati Kuer and Ors., AIR 1962 Patna 285, A Full Bench of Patna High Court said :

Another thing to notice in connection with this rule is that a party on whom the interest of the deceased plalntiff or defendant devolves is not

entitled to continue the suit or appeal as a matter of right. It is essential to obtain the leave of the Court. The granting of leave is within the discretion

of the Court. The Court, however, is to exercise its discretion judicially and according to well established principles. Further, unlike Rules 3 and 4,

no limitation is prescribed for presentation of an application under this rule and no penalty is lald down for failure to substitute the person on whom

the interest of the deceased plalntiff or defendant has devolved. Therefore, the right to make an application under this rule is a right which accrues

from daytoday and can be made at any time during the pendency of a suit. There is no abatement under this rule.

45. The aforesaid decision on the question of limitation in respect to application under Order XXII, Rule 10 has been followed by a Division

Bench of Rajasthan High Court in Chandra Bai Vs. Khandal Vipra Vidyalay Samiti and Ors., AIR 2008 Raj. 1. The Court said, when matter is

subjudice, assignee can be impleaded at any stage and even at execution proceedings. Order XXII, Rule 10 C.P.C. therefore, is not applicable for

impleadment of legal heirs of parties to the suit but is confined for impleadment of person/persons who during pendency of suit have got

transferred. In para 16 of the judgment, the Court said:

...while deciding the application, the Court has to exercise the discretion judiciously and it should not result into miscarriage of justice. The

assignee unless brought on record, cannot protect his interest, therefore, is required to be arrayed as party in the proceedings during the currency

of suit or subsequent proceedings which includes even execution of the proceedings. It is settled law that an assignee on being arrayed as party,

steps into the shoes of the transferor to take part in the proceedings with the leave of the Court ceased of the lis.

46. To complete the analysis of Order XXII, there remains two more provisions and also the relevant period of limitation and its effect, which in

my view would be necessary to be discussed in this case.

47. Rule 10A has been inserted in Order XXII by Section 73 of Act 104 of 1976, w.e.f. 01.02.1977. It lays an obligation upon a pleader

appearing for a party to the suit whenever he comes to know of the death of that party, that he shall inform the court about it and court shall

thereupon give notice of such death to other party.

48. The period of limitation for the purpose of Rule 3 and 4 would be, as prescribed, in Article 120 of Limitation Act, 1963 (hereinafter referred to

as ""Act, 1963"") Article 120 of Act, 1963 provides 90 days as period of limitation. It further says that time from which the period begins to run

would be the date of death of plalntiff, appellant, defendant or respondent, as the case may be.

49. It in this context, learned counsel for petitioners contended that time commences from the date of death and hence application filed by

plalntiffrespondent was not within time.

50. Apparently what he says appears to be correct in reference to respondent 1 inasmuch as limitation commences under Article 120 from the

date of death. The provision is very clear. In Janky Vs. Sasi, 1999 AIHC 3841 the Kerela High Court said that limitation of 90 days under Article

120 commences/starts from the date of death for making application for impleading the legal representatives. If within 90 days from the date of

death, no application is filed, the suit would stand abated, though abatement can be set aside and the representatives of deceased defendanttenant

can be impleaded/substituted, if the Court is satisfied for the reasons of delay, that it is not on account of any negligence on the party concerned.

51. Under the old Limitation Act, namely, Articles 176 and 177 of Limitation Act No. 9 of 1908, the Apex Court in Union of India Vs. Ram

Charan, AIR 1964 SC 215 held that limitation starts from the date of death of respondent and not from the date of knowledge on the part of

appellant of such death. To the same effect is the view taken in Molu Vs. Soran, AIR 1993 P&H 81.

52. However, in Puthiya Purayil Kannan''s Widow Kozipurath Chemmarathi by L.R. Kozhipurathu Kanaran Vs. Patinhare Koyyattan Balan and

others, AIR 1997 SC 2440 the Court has given a bit new dimension. The original petitioner died on 01.09.1993 and application to bring on

record, the legal representatives, was filed on 27.01.1994. The Court observed that by operation of Article 120 of Schedule to Act, 1963 the

application to bring on record legal representatives of deceased plalntiffs or defendants should have been filed within 90 days from the date of

death of plalntiff/defendant. If the application is not filed within the date, the abatement takes place. It also observed that Article 121 of Schedule

to Act 1963 envisages that for an order for setting aside abatement, the application need be filed within 60 days from the date of abatement. The

Court then observed that application for substitution though not been filed within 90 days from the date of death, no doubt the abatement took

place, but the application definitely was filed within 60 days thereafter as prescribed under Article 121 of Act 1963, and that being within time, the

abatement could have been set aside and that being so, the abatement was set aside rightly and the Court declined to interfere in these facts. The

present case aptly covered by this authority.

53. Besides above, there are some more facets of the problem in hand. The procedure prescribed in the CPC is to ensure that a dispute between

the parties be adjudicated by a Court of Law in such a manner that the party should get adequate opportunity to bring their case before the Court

of Law, to assist it effectively in reaching a true and correct conclusion and thereafter to decide the matter. The Apex Court in Sangram Singh Vs.

Election Tribunal, Kotah, Bhurey Lal Baya, AIR 1955 SC 425 said that a Code of Procedure is a body of law designed to facilitate justice and

further its ends. It should not be treated as an enactment providing for punishments and penalties. The laws of procedure are grounded on a

principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their back, that

proceedings that effect their lives and property should not continue in their absence and that they should not be precluded from participating in it.

The Court further said that subject to clearly defined exceptions, the laws of procedure should be construed wherever reasonably possible, in the

light of that principle.

54. The Court is invested with widest possible discretion to see that justice is done to all concern. There is no magic word or frame or structure

within which an application should be filed and can be filed under Order XXII Rules 4 or 9 etc. It is the substance which has to be seen. The Court

finds that there are two contingencies contemplated under Order XXII. One commences with the death of party to the suit. A substitution

application is supposed to be filed within 90 days from the date of death. If no application is filed within this period, at the end of 90 days, the

second effect comes, i.e., abatement of suit. The earlier part is governed by Order XXII, Rule 4 and later one is governed by Order XXII, Rule 9.

Such abatement when takes place, it has certain legal consequences provided therein.

55. Under the Act 1963 also, therefore, separate limitations have been prescribed for both these occasions, namely, Article 120, under which 90

days period is prescribed for filing substitution application which commences from the date of death of party to the suit, and, Article 121

contemplates the second stage, namely, when suit stands abated, i.e., after expiry of 90 days, then a period of 60 days is prescribed for filing

application for setting aside abatement.

56. If an application for setting aside abatement is filed within 60 days after expiry of 90 days and the competent court allow such application, it

would have the effect that suit has not abated and would continue. This is what has been found to be the legal consequence by Apex Court in

Puthiya Purayil Kannan''s Widow Kozipurath Chemmarathi (supra), as already discussed above. This is also evident from Article 121 of the

Schedule to Limitation Act which says that 60 days commences from the date of abatement.

57. What should be the prayer made in the application, how the application should be moved, all depends. It is not mere the title or a literal

pedantic approach with which the application has to be considered but its substance, which needs to be seen.

58. It is also well established that non mention or wrong mention of a provision will not deprive an authority from exercising its power if it is

otherwise vested. In the matter of procedure it is the question of substantial justice and not any hyper technical view of the matter.

59. Such matters cannot be placed in straight jacket formula of a particular procedure and format. Time and again enough latitude has been given

by Courts in dealing such matters. The intention always has been to do justice with parties and not to nonsuit a party on hyper technical reasons.

60. In Babaji Padhan Vs. Mst. Gurubara, AIR 1962 Orissa 94 the Court said that an application made to bring legal representatives of deceased

defendant on record after time prescribed therefor by law should ordinarily be treated as an application to set aside abatement of suit which has

taken place though it is not asserted that delay was due to reasonable causes. The Court also observed, where such an application is made after

the death of deceased party to bring his legal representatives on record and continue a proceeding, the application in substance is an application to

set aside abatement under Order XXII, Rule 9 and absence of a formal order of abatement is no obstacle thereto. The Court has power to

entertain such an application and decide where the applicant was prevented by sufficient cause from continuing the proceedings. In the aforesaid

decision the Court relied on the decision of Lahore High Court in Kirpa Ram Vs. Bhagat Chand, AIR 1928 Lahore 746 and a decision of this

Court in Lachmi Narain Vs. Muhammad Yusuf, AIR 1920 All 284.

61. There is another decision in Ningthoujam Ongbi Radhey Devi Vs. Lalaram Ningol Ninghoujam Ongbi Devi, AIR 1970 Manipur 70 where in

para 5 of the judgment, the Court said that substitution of legal representatives without first setting aside the abatement would constitute a mere

irregularity which does not vitiate the order. In other words, an application for substitution can legally be treated as a composite application for

setting aside abatement and bringing the representatives of deceased party on record. Here also the Court relied on the Lahore High Court''s

decision in Diwan Chand Vs. Bhagwan Chand, AIR 1937 Lahore 455 and Orissa High Court''s decision in Babaji Padhan Vs. Mst. Gurubara

(supra).

62. In Bachan Ram Vs. The Gram Panchayat Jonda, AIR 1971 Punj & Hry 243 in para 2 of the judgment, the Court referred to the decisions of

Lahore High Court in Badlu Vs. Mt. Naraini, AIR 1924 Lahore 424; AtaurRahman Vs. MushkurunNisa, AIR 1926 Lahore 474; and, Kirpa Ram

Vs. Bhagat Chand (supra) and said that an application made to bring legal representatives of deceased defendant on record after time prescribed

thereforby law, should ordinarily be treated as an application to set aside abatement of suit which has taken place even though it is not asserted that

the delay was due to any reasonable cause. All that is necessary is that the Court should feel satisfied that discretion should be exercised in favour

of party seeking setting aside of abatement.

63. This Court has also observed in Sri Ram Prasad Vs. The State Bank of Bikaner, AIR 1972 All 456 that bringing on record legal

representatives should be treated as if the prayer of setting aside abatement is implicit therein. To the same effect are the decisions in Smt.

Shakuntala Devi Vs. Banwari Lal, AIR 1977 All 551 (paras 4 and 5); Kulsoomun Nissa Vs. Noor Mohamad, AIR 1936 All 666;

Kunhikayyumma Vs. Union of India, AIR 1984 Karela 184; Firm Gabrulal Vs. Court of Wards, AIR 1933 Nagpur 85; and recently in Smt.

Kamlesh Vs. Tekchand and others, AIR 2003 All 299.

64. The Full Bench judgment namely, (Smt.) Mahendra Kaur Vs. Hafiz Khalil, 1987 RD 392 FB is an authority to lay down a proposition that

after the death of a party, a suit can continue only if the cause of action survives and not otherwise. If the right to sue does not survive, the suit shall

come to an end. The Court observed, if an application for bringing on record the legal representatives/heirs is not filed within 90 days of the death

of party to the suit, the abatement of suit is automatic. No specific order is required to be passed by the Court for the said purpose. For 90 days

which is the period prescribed for moving application for substitution, the suit does not finish or is not put to an end but if no substitution application

is filed, by operation of law, the suit stands abated and that is how it brings in Order XXII, Rule 9. If an application is filed under Order XXII, Rule

9 and abatement is set aside it shall infuse life into the suit and it will proceed from the stage at which the death has taken place. The second issue

therein was application of Order 1 Rule 10 in a case governed by Order XXII and Full Bench observed, when a specific procedure has been

prescribed in Order XXII, Order 1, Rule 10 would have no application.

65. Now I proceed to examine the question up for consideration in this case in the light of the above discussion and exposition of law. The

property in dispute stood transferred by way of sale to Sri Gokaran Nath Bajpayee by the sole defendant vide sale deed dated 5.12.1983. He

being an assignee to the subject matter of suit, non impleading him to the suit in question may not have had any impact on the proceedings.

Whether the fact of such transfer/assignment came to the knowledge of the plalntiff immediately or within a reasonable time thereafter may not

make any difference for the purpose of continuance of the suit with the party originally impleaded. In another revision, the assignee i.e. Gokaran

Nath Bajpayee filed application seeking his impleadment and before that application could be allowed, he died whereupon his successor upon

whom the disputed property devolved came forward requesting for their impleadment in the said proceeding i.e. Civil Revision No.855 of 1878.

Therefore at least in September, 1987 the petitioner plalntiff positively must have got the information that the property, subject matter of suit, stood

transferred/assigned to another person namely Gokaran Nath Bajpayee and after his death suit property stood devolved upon legal heirs of

Gokaran Nath Bajpayee. The application he could have filed under Order XXII, Rule 10 in September, 1987 and onwards but by not doing so,

he did not and could not have incurred the risk of rendering either his suit or civil revision up for consideration in this case, to abatement since

impleadment of Gokaran Nath Bajpayee or his legal heirs would not have been referable to Order XXII, Rule 3 or Rule 4 but was referable to

Order XXII, Rule 10 where the rule of abatement is inapplicable. The abatement could have come into existence if the sole defendant died and his

legal representatives are not brought on record within the prescribed period of limitation.

66. In the rejoinder affidavit sworn on 17th July, 2012 before this Court it has been specifically pleaded that date of death of sole defendant was

not disclosed either by Sri Gokaran Nath Bajpayee or his heirs and legal representatives in the applications filed in Civil Revision No.855 of 1978

in which they sought leave of the Court to be impleaded so as to pursue the said revision in the capacity of subsequent assignee of the subject

matter of the suit. The petitioner therefore clalm that neither in 1987, he was aware about factum of death of sole defendant nor the date of death is

otherwise known to him. Thus there was no question of abatement of any of the proceedings instituted by the petitioner. He further stated that

though it was statutory obligation on the part of sole defendant''s counsel under Order XXII, Rule 10A to inform the Court or to other party about

death of the sole defendant but no such application has been given except of vague statement that the defendant Harendra Pratap Sahi has also

died. The fact as to when Harendra Pratap Sahi, the sole defendant/respondent in the proceedings before the Court below in question, died,

therefore was extremely important for the reason that if the application filed by petitioner before the said death, for impleadment of the persons

upon whom the property in dispute i.e. the subject matter of the suit has devolved, it cannot be said that the suit cannot continue. The rule of

abatement has no application in such a case, but, if the suit or the revision had already abated before such an application filed, the

plalntiff/revisionist would be entitled to request the Court concerned to set aside abatement provided in compliance of Rule 10A of Order XXII,

the date of death of the sole defendant is made known to him.

67. In my view the Revisional Court without looking to the factum about the date of death of sole defendant had committed a patent error of law

by observing that application in question has abated. The application in question is referable to Order XXII, Rule 10 since it purports to bring on

record the party upon whom subject matter of suit i.e. the property in dispute has devolved during pendency of the proceedings. The principle of

abatement under Order XXII, Rule 10 has no application.

68. But in case the Revisional Court comes to the conclusion that revision already stood abated due to death of sole defendant and non substitution

of his heirs and legal representatives within time, the same can be held only after investigation into the question, when the sole defendant Kuwar

Harendra Pratap Sahi died and also after examining the issue whether information of death and the date of death was communicated to the

petitioner i.e. the plalntiffs by the counsel for the defendant, or not, and if so, when. The application therefore, has not been considered by

Revisional Court correctly and in accordance with law. The impugned order therefore cannot sustain.

69. In the result, the writ petition is allowed to the extent that Revisional Court"s order dated 9/10th February, 2006 passed by Additional District

Judge, Court No.2, Lucknow is hereby set aside. The matter is remanded to Revisional Court to consider afresh in the light of the observations

made herein above and pass order in accordance with law expeditiously and in any case within six months from the date of production of a

certified copy of this Court.

70. In the facts and circumstances of this case, the parties shall bear their own cost.