

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CR No. 53/2018

SADATI AL HUSSAINI AL JALALI TRUST

...Appellant(s)/Petitioner(s)

Through: Mr. H. U. Salati, Advocate

Vs.

QASIM GANAIE AND OTHERS

...Respondent(s)

Through: Mr. Sajjad Ahmad Mir, Advocate

CORAM:**HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE****ORDER****03.05.2024****Oral:**

1. The instant petition has been filed by **Sadat Ai-Hussaini Al-Jalali, Trust**, Srinagar (Kashmir) (for short the Trust) through its authorized representatives namely Syed Muzaffar Jalali & Syed Mehmood Jalali against orders dated 16th June, 2015 and 17th September, 2018 passed by the court of City Munsiff, Srinagar and First Additional District Judge, Srinagar (hereinafter for short the Trial and the Appellate court respectively).
2. Facts giving rise to the filing of the instant petition reveal that a suit for permanent prohibitory injunction came to be filed by the Trust through a Trustee against the defendants respondents herein pertaining to a graveyard situated at Zoonimar before the Trial Court, wherein the defendants/respondents herein appeared and filed written statement to the suit, whereafter the Trial Court framed various issues, and before evidence could be led by the plaintiff, Trust, the Trustee who had filed the suit on behalf of the Trust died on 16th July,

2011 during the pendency of the suit and on 30th March, 2012, the defendants/respondents herein filed an application under Order 22 Rule 3 (2) of Code of Civil Procedure stating therein that the suit stands abated on account of death of the said trustee which application, however, came to be contested by the Trust through another of its trustees on the ground that the suit having been filed in the representative capacity same would not abate owing to the death of the original trustee. The trial court after considering the said application, in terms of impugned order dated 16th June, 2015, allowed the same and held that the suit stands abated as right to sue did not survive more so, as no application seeking substitution of the deceased trustee have had been filed in the suit within prescribed period. Aggrieved of the impugned order dated 16th June, 2015, the Trust filed an appeal on 28th January, 2016 before the Appellate Court through two trustees which appeal came to be dismissed by the Appellate Court in terms of impugned order dated 17th September, 2018, upholding the order of the trial court dated 16.06.2015.

3. The petitioner Trust has in the instant petition questioned both the impugned orders on multiple grounds including that the impugned orders passed by the courts below suffer from illegality and material irregularity having caused serious miscarriage of justice and that the suit could not have been said to have abated as the suit was filed in representative capacity with the leave of the Trial Court.
4. The defendants-respondents herein oppose the petition and seeks its dismissal.

Heard learned counsel for the parties and perused on record.

5. Before adverting to the rival contentions of the appearing counsel for the parties, a reference to the following relevant provisions of Code of Civil Procedure become imperative being germane to the controversy:

Order 1 Rule 8 of the Code of Civil Procedure provides that one person may sue or defend on behalf of all in same interest and in essence deals with suits in a representative capacity which representative suit means a suit filed by or against one or more persons on behalf of himself or themselves and others having the same interest therein. It is significant to mention here that the general rule is that all persons interested in a suit ought to be joined as parties to it so that the matters involved therein may be finally adjudicated upon and fresh litigation over the same matters may be avoided.

Order 1 Rule 8 supra is an exception of the general principle which provides that when there are several persons similarly interested in a suit, one or more of them may, with the permission of the court or upon a direction from the court, sue or be sued on behalf of themselves and others. The provisions of Order 1 Rule 8 has been held to be rule of convenience based upon reason and public policy intended to avoid unnecessary litigations and to facilitate the decision of questions in a suit in which a large number of persons are interested without recourse to the ordinary cumbersome procedure.

Order 22 Rule 1 provides for no abatement by parties death, if right to sue survives suggesting that where a party to a suit dies, the suit will not abate on the death of the plaintiff or defendant if the right to sue survives. The expression right to sue has not been defined in the Code of Civil Procedure, however, it has been held to mean right to seek relief or right to bring a suit claiming relief or to be more specific

the right to bring a suit for the same relief which the deceased plaintiff could have sought at the time of his death.

Order 22 Rule 2 deals with the procedure where one of the several plaintiffs or defendants die and the right to sue survives. The said provision enacts that when one of the several plaintiffs dies and the right to sue survives to the surviving plaintiff or plaintiffs, the court will record such fact and proceed with a suit.

Order 22 Rule 3 deals with the procedure in case of death of one of the several plaintiffs or of sole plaintiff. The said Rule 3 applies to the cases where one of the several plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or where sole plaintiff dies and a right to sue survives. The said Rule 3 requires filing of an application for bringing on record legal representatives of the deceased plaintiff and in case no such application is made within the time allowed by law, the suit will abate so far as the plaintiff deceased is concerned.

Order 22 Rule 5 deals with determination of question as to the legal representative/s and can be invoked only where the question involves determination of legal representatives of a deceased plaintiff or defendant.

Order 22 Rule 9 deals with the effect of abatement or dismissal and contemplates that where a suit stands abated, the court cannot bring legal representatives of the deceased party on record unless the abatement is set aside.

Order 22 Rule 10 provides for procedure in case of assignment before final order in suit and cover cases of assignment, creation, or

devolution of interest other than those covered by the preceding Rules contained in Order 22.

Rule 10 *supra* enacts that if during the pendency of the suit, any interest as passed from one plaintiff or defendant to any other person, the suit can continue by or against the person in whose favor such interest is created. Rule 10 *supra* has been held to be a residuary provision governing cases not falling under the previous Rule/s.

6. Keeping in mind the aforesaid provisions of law and reverting back to the case in hand, it is not in dispute that the suit in question have had been filed by the Trust through the original Trustee in representative capacity which Trustee admittedly died during the pendency of the suit thus the provisions of Order 22 Rule 10 *supra* occupied the field in the case of the petitioner Trust. Moreso, in view of the law laid down by the Apex Court in case titled as “***Dhurandhar Prasad Singh Vs. Jai Prakash University and Ors.***” reported in 2001 (6) SCC page 534, wherein following has been observed and held:

“The Legislature while enacting Rules 3, 4 and 10 has made a clear-cut distinction. In cases covered by Rule 3 & 4, if right to sue survives and no application for bringing the legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated herein. In cases covered by Rule 10, the Legislature has not prescribed any such procedure in the event of failure to apply for leave of the Court to continue proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the Legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceedings would continue by or against the original party although he ceased to have any

interest in the subject of the 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.”

7. A further reference in this regard to the judgment of the Apex Court passed in case titled as “***G. Christudas and Antother Vs. Anbiah (dead) and others***” reported in 2003 volume 3 SCC page 502, will also be relevant, wherein the Apex Court has held that *a representative suit does not abate on the death of the plaintiff for two-fold reasons, firstly the plaintiff does not represent only himself but represents all other persons on whose behalf he is prosecuting the suit, thus all those persons are also parties to the suit albeit constructively, the conduct of the suit being in the hands one person to whom permission has been granted by the court and in case of his death, any other person can continue the suit and secondly the persons represented by the plaintiff cannot said to be “legal representatives of the deceased plaintiff within meaning of Section 2 (11) of Code of Civil Procedure and hence the provisions of order 22 would not apply to such case.* The said view has also been taken by the Apex Court earlier in case titled “***Charan Singh and Anr. Vs. Darshan Singh and Ors.***” reported in 1975 (1) SCC page 298 as also in case titled as “***Karuppaswamy and Ors. Vs. C. Ramamurthy***” in 1993(4) SCC page 41, wherein the Apex Court has held that on the death of a trustee new trustee (elected or appointed) cannot be said to be a legal representative of the deceased trustee but is a person on whom the interest of the Trust property devolves making the provisions of Order 22 Rule 10 applicable to him.
8. Perusal of the record in general and the impugned orders passed by the courts below in particular would manifestly demonstrate that both

the courts below have overlooked the aforesaid proposition of law laid down by the Apex Court in the judgments supra while dealing with the plea of abatement of the suit filed by the petitioner Trust on account of the death of the original Trustee, raised by the defendants/respondents herein and in the process have admittedly misdirected in the matter and committed gross error of jurisdiction besides causing serious miscarriage of justice, warranting indulgence of this Court.

9. Resultantly, the petition succeeds and the impugned orders, as such, are set aside, as a consequence whereof, the suit in question is deemed to have been restored/revived to its original number treating the present Trustees to represent the petitioner Trust in the suit with a direction to the Trial Court to proceed further in the matter in accordance with law.

10. Disposed of.

**(JAVED IQBAL WANI)
JUDGE**

SRINAGAR
03.05.2024
ARIF

<i>Whether the Order is reportable?</i>	<i>Yes/No</i>
<i>Whether the Order is speaking?</i>	<i>Yes/No</i>