

# **Pankajbhai Rameshbhai Zalavadiya vs Jethabhai Kalabhai Zalavadiya ... on 3 October, 2017**

**Equivalent citations: AIR 2018 SUPREME COURT 490, 2017 (9) SCC 700, AIR 2018 SC (CIVIL) 968, (2018) 1 MAD LJ 141, (2018) 1 GUJ LR 103, (2018) 2 MAH LJ 533, (2018) 2 MPLJ 1, (2017) 12 SCALE 134, (2017) 2 WLC(SC)CVL 781, (2018) 1 MAD LW 639, (2017) 2 ORISSA LR 1113, (2017) 4 PAT LJR 181, (2018) 2 ANDHLD 82, (2017) 4 RECCIVR 777, (2017) 4 ICC 759, (2017) 4 JLJR 165, (2018) 1 JCR 59 (SC), (2017) 180 ALLINDCAS 177 (SC), (2017) 2 CLR 1023 (SC), (2017) 3 ALL RENTCAS 485, (2018) 138 REVDEC 521, (2018) 1 CAL HN 1, 2018 (126) ALR SOC 10 (ALL), 2018 (2) KCCR SN 201 (SC), (2017) 6 BOM CR 611**

**Author: Mohan M. Shantanagoudar**

**Bench: Mohan M. Shantanagoudar, Arun Mishra**

1

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 15549 OF 2017  
Arising Out Of SLP (C) NO. 31212 of 2014

Pankajbhai Rameshbhai Zalavadiya

.....Appellant

Versus

Jethabhai Kalabhai Zalavadiya (Deceased)  
Through LRs & Ors

.....Respondents

J U D G M E N T

Mohan M. Shantanagoudar, J.

Leave Granted.

2. This appeal arises out of the judgment dated 05.03.2014 passed by the Gujarat High Court in Special Civil Application No. 16985 of 2011 dismissing the Special Civil Application filed by the appellant, consequently affirming the order passed by the trial Court rejecting the application filed under Order 1 Rule 10 of the Code of Civil Procedure (hereinafter referred to as the “Code”).

3. The brief facts leading to this appeal are as under:

The appellant filed a suit on 24.06.2008 seeking to set aside a sale deed executed in March 1995 in respect of a parcel of land which was purchased by defendant no. 7. As on the date of filing of the suit, defendant no. 7 was already dead. Upon the report of the process server to this effect, the trial Court on 31.03.2009 ordered that the suit had abated as against defendant no. 7. Initially, the appellant filed an application under Order 22 Rule 4 of the Code for bringing on record the legal representatives of deceased defendant no. 7. The trial Court while rejecting the said application on 09.09.2009 observed thus:

“According to the ratio laid down in the above said cases Order 22 Rule 4 of Code will apply only when the party dies during the pendency of the proceeding. Further held that a suit against dead person is admittedly a nullity and therefore, Order XXII Rule

4 cannot be invoked. Further held that the provisions of Order XXII Rule 4 of Code and Order 1 Rule 10 of Code are different and independent.

Therefore, according to heirs of deceased defendant, the heirs cannot be joined as party because the suit is filed against dead person.

Now in this case, the endorsement for the bailiff for the death of defendant No. 7 made on 31.01.2009 and the present application is filed on 20.05.2009. The application is filed for setting aside abatement and to join the heirs in this suit.

Moreover, there is no case of the plaintiff that he has no knowledge about the death of defendant No. 7 or he has made inquiry. Therefore, as per the judgment produced by the defendant, the suit against dead person is nullity. Moreover, the plaintiff has not mentioned the provision under which he has filed the present application. Moreover, the plaintiff has remedy against the heirs therefore, no injustice will cause to him. Moreover, there are other defendants on record.

Under these circumstances, the application cannot be allowed. Hence, I pass the following order in the interest of justice.

## ORDER

1. The application is not allowed.

2. No order as to cost.” Thereafter the appellant chose to file an application for impleading the legal representatives of deceased defendant no. 7 on record, under Order 1 Rule 10 of the Code. The aforementioned application also came to be dismissed by the trial Court on 03.09.2011, and confirmed by the High Court by passing the impugned judgment. Hence, this appeal.

4. Learned counsel for the appellant/original plaintiff contended that the subsequent application under Order 1 Rule 10 of Code could not be dismissed by applying the principle of res-judicata merely because the application filed earlier under Order 22 Rule 4 of the Code was dismissed on account of non-maintainability; that the appellant has accepted the order passed by the trial Court on the application filed under Order 22 Rule 4 of the Code since the reasons assigned by the trial Court were proper and acceptable inasmuch as the legal representatives cannot be brought on record under Order 22 Rule 4 of the Code in the suit filed against defendant no. 7, who had died prior to filing of the suit; the provisions of Order 22 Rule 4 of the Code will apply only if the sole, or one of the defendants, dies during the subsistence of the suit. Since defendant no.7 had expired prior to the filing of the suit, the only course open for the appellant was to implead the legal representatives/heirs of deceased defendant no.7 on record under Order 1 Rule 10 of the Code; hence, the earlier order rejecting the application filed under Order 22 Rule 4 of the Code as not maintainable will not operate as res-judicata for entertaining the subsequent application for impleading the legal representatives of deceased defendant no.7, under Order 1 Rule 10 of the Code. As the appellant did not have knowledge about the death of defendant No.7, the suit has a right to survive and the mistake committed by the appellant in not arraying the legal representatives of deceased defendant no. 7 at the time of filing of the suit is a bona fide mistake and not a deliberate one. Since such mistake has occurred in good faith, the right to continue the suit against the legal representatives of deceased defendant no.7 remains. The trial has not yet begun and hence the issue of delay, if any, in bringing the legal representatives on record, will not prejudice the legal representatives of defendant No.7. Since the proposed parties are necessary parties to the suit and their impleadment cannot prejudice anybody, the interests of justice require bringing of the legal representatives of deceased defendant no. 7 on record.

Per contra, learned counsel appearing on behalf of the respondents relying upon the catena of judgments reported in *Ram Prasad Dagduram vs Vijay Kumar Motilal Mirakhanwala & Ors.*, AIR 1967 SC 278, *Madhukar Ramachandra Keni vs Vasant Jagannath Patil & Ors.*, 2013 (4) Mh. L. J. 403, *Jayalaxmi Janardhan Walawalkar & Ors. vs Lilachand Laxmichand Kapasi & Ors.*, 1998 (3) Mh. L. J. 618, *Arora Enterprises Ltd. vs Indubhushan Obhan* 1997 (5) SCC 366 contended that the trial Court as well as the High Court are justified in rejecting the application for impleading the legal representatives of deceased defendant no. 7 filed under Order 1 Rule 10 of the Code; since the application filed by the appellant initially under Order 22 Rule 4 of the Code was dismissed and as the second application filed under Order 1 Rule 10 of the Code was for the very same purpose, the Courts below were justified in rejecting the application preferred under Order 1 Rule 10 of the Code. He further submits that the application preferred under Order 1 Rule 10 of the Code to implead the legal representatives of deceased defendant no.7 is not maintainable, since the appellant has not questioned the earlier Order dated 09.09.2009 rejecting the application filed under Order 22 Rule 4 of the Code, and therefore the said order has attained finality and binds the appellant; the appellant cannot be allowed to file another application for the same relief by invoking different provision of

the Code.

5. The only question which is to be decided in this appeal is, whether the legal representatives of one of the defendants can be impleaded under Order 1 Rule 10 of the Code where such defendant expired prior to the filing of the suit, particularly when the application filed by the plaintiff to bring the legal representatives of the deceased on record under Order 22 Rule 4 of the Code was dismissed earlier as not maintainable.

6. The bare reading of Order 22 Rule 4 of the Code makes it clear that Order 22 Rule 4 of the Code applies only in the case where the death of one of the several defendants or the sole defendant occurs during the subsistence of the suit. If one of the defendants has expired prior to the filing of the suit, the legal representatives of such deceased defendant cannot be brought on record in the suit under Order 22 Rule 4 of the Code. Before proceeding further, it is relevant to note the provisions of Order 1 Rule 10 and Sections 151 & 153 of the Code, which read thus:

“Order 1 Rule 10:                      Suit in name of  
wrong plaintiff. –

1. Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

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.

3. No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

4. Where defendant added, plaint to be amended.- where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

5. Subject to the provisions of the India Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

**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.

**Section 153: General power to amend** – The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

7. In the matter on hand, the sale was made in favour of defendant no. 7, and the validity of the sale deed was the subject matter of the suit. The purchaser of the property, i.e. defendant no.7, though dead at the time of filing the suit, was made one of the defendants erroneously. The persons who are now sought to be impleaded under Order 1 Rule 10 of the Code are the legal representatives of the deceased defendant no. 7. Therefore, there cannot be any dispute that the presence of the legal representatives of the deceased is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions in the suit. Their presence is necessary in the suit for the determination of the real matter in dispute. Therefore, they are needed to be brought on record, of course, subject to the law of limitation, as contended under Section 21 of the Limitation Act.

8. Merely because the earlier application filed by the appellant under Order 22 Rule 4 of the Code was dismissed on 09.09.2009 as not maintainable, it will not prohibit the plaintiff from filing another application, which is maintainable in law. There was no adjudication of the application to bring legal representatives on record on merits by virtue of the order dated 09.09.2009. On the other hand, the earlier application filed under Order 22 Rule 4 of the Code was dismissed by the trial Court as not maintainable, inasmuch as defendant no. 7 had died prior to the filing of the suit and that Order 22 Rule 4 of the Code comes into the picture only when a party dies during the pendency of the suit. The only course open to the appellant in law was to file an application for impleadment to bring on record the legal representatives of deceased defendant no. 7 under Order 1 Rule 10 of the Code. Hence, the order passed by the trial Court on the application filed under Order 22 Rule 4 of the Code, dated 09.09.2009, will not act as res-judicata.

9. Order 1 Rule 10 of the Code enables the Court to add any person as a party at any stage of the proceedings, if the person whose presence in Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision. Order 1 Rule 10 of the Code empowers the Court to substitute a party in the suit who is a wrong person with a right person. If the Court is satisfied that the suit has been instituted through a bona fide mistake, and also that it is necessary for the determination of the real matter in controversy to substitute a party in the suit, it may direct it to be done. When the Court finds that in the absence of the persons sought to be impleaded as a party to the suit, the controversy raised in the suit cannot be effectively and completely settled, the Court would do justice by impleading such persons. Order 1 Rule 10(2) of the Code gives wide discretion to the Court to deal with such a situation which may result in prejudicing the interests of the affected party if not impleaded in the suit, and where the

impleadment of the said party is necessary and vital for the decision of the suit.

10. In the case of Vijay Kumar Motilal Mirakhanwala (supra), a bench by majority held that the legal representatives of a party can be added under Order 1 Rule 10 of the Code, but the date on which they were impleaded shall be the date on which the suit was instituted by or against them. In the said matter, this Court on facts held that the suit was barred by limitation as per Section 22 of the Limitation Act of 1908. This Court, though it concluded that the Court has got the power to join a particular person as a party under Order 1 Rule 10 of the Code, did not interfere in the matter inasmuch as this Court found that the suit was barred by limitation. It is relevant to note that the said suit was of the year 1958. Since the Limitation Act, 1963 (now in force) was at that time not in existence, this Court applied the old limitation law and held that the suit was barred by limitation. As of now, the proviso to Section 21(1) of the Limitation Act 1963 empowers the Court to direct that the suit shall be deemed to have been instituted on an earlier date, where the omission to include a new plaintiff or defendant was due to a mistake made in good faith. Therefore, it is open to the plaintiff in the matter on hand to prove “good faith” on his part in not including the legal representatives of deceased defendant no. 7, during the course of trial of suit.

11. It would be relevant to note that in the Case of Bhagwan Swaroop and Ors. vs Mool Chand and Ors., 1983 (2) SCC 132, this Court observed thus:

“4. It is true that it was incumbent upon the appellants to implead the heirs and legal representatives of deceased respondent 1 in time. It is equally true that the appellants were negligent in moving the proper application. We would not question the finding of the High Court that appellants 2, 3 and 4 knew about the death of the deceased respondent 1. This being a suit for partition of joint family property, parties are closely interrelated and it is reasonable to believe that at least some of the appellants must have attended the funeral of deceased respondent 1, as contended on behalf of the contesting respondent 2. There is some force in the contention that when a specific provision is made as provided in Order 22, R. 4, a resort to the general provision like Order 1, Rule 10 may not be appropriate. But the laws of procedure are devised for advancing justice and not impeding the same. In Sangram Singh v. Election Tribunal, Kotah (AIR 1955 SC 425), this Court observed that a code of procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. This was reaffirmed in Kalipar Das v. Bimal Krishna Sen(1983) 1 SCC 14.

5. In a suit for partition, the position of plaintiffs and defendants can be interchangeable. It is that each adopts the same position with the other parties. Other features which must be noticed are that the appeal was filed somewhere in 1972. It has not come up for hearing and the matter came on Board only upon the application of the second respondent intimating to the Court that the 1st respondent had died way back and as his heirs and legal representatives having not been substituted, the appeal has abated. Wheels started moving thereafter. Appellants moved an application for substitution. The matter did not end there. Heirs of deceased respondent 1 then

moved an application for being brought on record. If the application had been granted, the appeal could have been disposed of in the presence of all the parties. The difficulty High Court experienced in granting the application disclosed with great respect, a hyper-technical approach which if carried to end may result in miscarriage of justice. Who could have made the most serious grievance about the failure of the appellants to substitute the heirs and legal representatives of deceased respondent 1? Obviously the heirs of deceased respondent 1 were the persons vitally interested in the outcome of the appeal. They could have contended that the appeal against them has abated and their share has become unassailable.

That is not their case. They on the contrary, want to be impleaded and substituted as heirs and legal representatives of deceased respondent

1. They had absolutely no grievance about the delay in bringing them on record. It is the second respondent who is fighting both the appellants and the 1st respondent who wants to derive a technical advantage by this procedural lapse. If the trend is to encourage fairplay in action in administrative law, it must all the more inhere in judicial approach. Such applications have to be approached with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. Undoubtedly, justice according to law; law to be administered to advance justice.”

12. This Court in the case of Karuppaswamy and Ors. vs C. Ramamurthy, 1993 (4) SCC 41 has permitted the plaintiff to modify the application filed by him under Order 22 Rule 4 of the Code to make it an application under the provisions of Sections 151 and 153 of the Code. In the said matter also the suit was filed against a dead person. This Court proceeded further to conclude that the plaintiff has shown good faith as contemplated under Section 21(1) of Limitation Act and hence the impleadment of the legal representatives/heirs must date back to the date of the presentation of the plaint. In the said matter, it was observed thus:

“4. A comparative reading of the proviso to Sub-section (1) shows that its addition has made all the difference. It is also clear that the proviso has appeared to permit correction of errors which have been committed due to a mistake made in good faith but only when the court permits correction of such mistake. In that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to Sub-section (1) of Section 21 of the Act is obviously in line with the spirit and thought of some other provisions in Part III of the Act such as Section 14 providing exclusion of time of proceeding bona fide in court without jurisdiction, when computing the period of limitation for any suit, and Section 17(1) providing a different period of Limitation starting when discovering a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficent proviso to Sub-section (1) of Section 21 of the Act an averment that a mistake was made in good faith by impleading a dead defendant in the suit should be made and the court must

on proof be satisfied that the motion to include the right defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breaths life in the suit.

5. It is noteworthy that the trial court did not attribute any neglect or contumacy to the conduct of the plaintiff-respondent. It was rather observed that the plaintiff could have known the date of the death of the first defendant only by the counter filed to IA 265 of 1975. Normally, if he had known about the date of death of the defendant, he would have filed the suit in the first instance against his heirs and legal representatives.

The trial court has also opined that the plaintiff was ignorant as to such death and that is why he filed IA 265 of 1975 under Order 22 Rule 4 of C.P.C. The High Court too has recorded a finding that there was nothing to show that the plaintiff was aware of the death of the first defendant and yet knowing well about it, he would persist in filing the suit against a dead person. In conclusion, the learned Single Judge held that since plaintiff respondent had taken prompt action it clearly showed that he had acted in good faith. Thus the High Court made out a case for invoking the proviso to Sub-section (1) of Section 21 of the Act in favour of the plaintiff-respondent. Sequally, the High Court found no difficulty in allowing IA 785 of 1975 permitting change of the provision whereunder IA 265 of 1975 was filed and in allowing IA 265 of 1975 ordering the suit against the heirs and legal representatives of defendant 1 to be dating back to 14.11.74, the date on which the plaint was originally presented.” (underlining is ours)

13. In the Case of Banwari Lal vs Balbir Singh, 2016 (1) SCC 607, defendant no. 1, (who was respondent no. 1 in the first appeal) had expired 2 years prior to the decision in the first appeal, but no steps were taken to bring his legal representatives on record. The first appellate Court decided in favour of the plaintiff. When the matter came up in second appeal, the legal representatives of defendant no. 1 filed an application for condonation of delay and restoration. This Court though observed that the application ought to have been filed under Order 22 Rule 4 of the Code inasmuch as the death had occurred during the subsistence of the matter before the Court and the application under Order 1 Rule 10 of the Code was not maintainable, had proceeded to allow the application on the ground that it would be unjust to non-suit the applicant on the ground of technicalities. This Court permitted the legal representatives of defendant No. 1 to convert the application into one filed under Order 22 Rule 4 of the Code.

In the cases relied upon by the respondents, viz., Jayalaxmi Janardhan Walawalkar (supra) and in the case of Madhukar Ramachandra Keni (supra), the death had occurred during the pendency of the matter and consequently the suit stood abated. The case of Arora Enterprises (supra) is also not applicable as it deals with the finality of an abatement order. In that context, the Courts have concluded that the only course open to the plaintiff/appellant in case if the death occurs in a pending matter, is to file an application under Order 22 Rule 4 of the Code, and not under Order 1 Rule 10 of the Code or under Section 151 of the Code.



14. In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial Court at that point of time itself could have treated the said application filed under Order 22 Rule 4 of the Code as one filed under Order 1 Rule 10 of the CPC, in order to do justice between the parties. Merely because of the non-mentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the Courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add any one as a plaintiff or defendant if it finds that such person is a necessary or proper party. The Court under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice. The expression “to settle all questions involved” used in Order 1 Rule 10 (2) of the Code is susceptible to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject matter thereof. The Parliament in its wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties. There cannot be any dispute that the party impleaded must have a direct interest in the subject matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties. In the matter on hand, since the purchaser of the suit property, i.e., defendant no.7 has expired prior to the filing of the suit, his legal representatives ought to have been arrayed as parties in the suit while presenting the plaint. As such impleadment was not made at the time of filing of the plaint in view of the fact that the plaintiff did not know about the death of the purchaser, he cannot be non-suited merely because of his ignorance of the said fact. To do justice between the parties and as the legal representatives of the purchaser of the suit property are necessary parties, they have to be impleaded under Order 1 Rule 10 of the Code, inasmuch as the application under Order 22 Rule 4 of the Code was not maintainable.

As mentioned supra, it is only if a defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the defendants i.e. defendant No.7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased defendant No.7 under Order 1 Rule 10 of the Code, for the simple reason that the plaintiff in any case could have instituted a fresh suit against these legal representatives on the date he moved an application for making them parties, subject of course to the law of limitation. Normally, if the plaintiff had known about the death of one of the defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the plaintiff under Order 1 Rule 10 of the Code discloses, with great respect, a hyper-technical approach which may result in the miscarriage of justice. As the heirs of the deceased defendant no.7 were the persons with vital interest in the outcome of the suit, such applications have

to be approached keeping in mind that the Courts are meant to do substantial justice between the parties and that technical rules or procedures should not be given precedence over doing substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice.

15. Having regard to the totality of the narration made supra, there is no bar for filing the application under Order 1 Rule 10, even when the application under Order 22 Rule 4 of the Code was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties under Order 1 Rule 10 of the Code read with Section 151 of the Code subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code and Section 21 of the Limitation Act, to be decided during the course of trial.

In view of the above, the impugned judgment of the High Court is set aside. The appeal is allowed. The Trial Court is directed to implead the legal representatives of deceased defendant no. 7 and bring them on record, subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code, as well as under Section 21 of the Limitation Act, 1963, to be decided during the trial.

.....J. [ARUN MISHRA] .....J. [MOHAN M. SHANTANAGOUDAR] NEW DELHI;

October 3, 2017.