

Smt. Sumitra Devi and Others Vs. District Judge Chitrakoot and Others

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Court : Allahabad

Decided On : Feb-06-2001

Reported in : 2001(1)AWC866

Judge : U.S. Tripathi, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 22, Rules 1 and 2; [Limitation Act, 1963](#) - Sections 5; [Transfer of Property Act, 1882](#) - Sections 106; Uttar Pradesh Act, 1972 - Sections 21; [Constitution of India](#) - Article 226

Appeal No. : C.M.W.P. No. 3388 of 2001

Appellant : Smt. Sumitra Devi and Others

Respondent : District Judge Chitrakoot and Others

Advocate for Def. : N.C. Tripathi, S.C.

Advocate for Pet/Ap. : A.K. Singh, Adv.

Judgement :

U. S. Tripathi, J.

1. This writ petition has been filed for quashing the order dated 17.11.2000 passed by respondent No. 1 in Civil (S.C.C.) Revision No. 15 of 1998 allowing the revision and setting aside the order dated 6.11.1998 passed by Judge, Small Causes

Court and allowing the substitution application moved on behalf of the respondents.

2. The plaintiff respondent No. 1 filed suit for ejectment and arrears of rent against the defendant petitioners on the ground of default in payment of rent. Defendants contested the suit on the ground that provisions of U. P. Act No. 13 of 1972 were applicable to the premises in question and he was entitled to the protection of the said Act. Therefore, by simple notice under Section 106 of Transfer of Property Act, his tenancy could not be terminated. The trial court decreed the suit holding that provisions of U. P. Act No. 13 of 1972 were not applicable to the premises in question and tenancy was terminated on service of notice under Section 106 of Transfer of Property Act.

3. Aggrieved with the above order, the tenants preferred revision before this Court being Civil Revision No. 3327 of 1977. The above revision was allowed and case was remanded on question of benefit of provisions of U. P. Act No. 13 of 1972 to the defendants and the question of validity of notice, vide order dated 30.6.1980.

4. After remand, the defendant Onkar Nath Dwivedi died on 31.1.1996. Application for substitutions of his legal representatives was moved on 14.8.1987 along with application under Section 5 of Limitation Act for condonation of delay in moving application for setting aside the abatement/substitution. The trial court rejected the above application on the ground that it was moved beyond time. The case had already been abated, and there was also no sufficient ground for setting aside the abatement. The landlord thereafter preferred revision before the District Judge, who allowed the revision by the impugned order setting aside the order of the trial court and allowed the substitution application on payment of Rs. 200 as costs.

5. I have heard the learned counsel for the petitioners and learned counsel for respondent Nos. 2 and 3.

6. It was contended by learned counsel for the petitioner that Bhairo Prasad Goyal also died, but no substitution application of his legal representatives was moved and, therefore, the case has already abated. In his application for substitution/amendment, Onkar Nath Agarwal had categorically mentioned that he

had purchased share of Bhairo Prasad Goyal and Rajeshwar Prasad Goyal and, therefore, they ceased their interest in the property. A request was made to mention 'dead' against the name of Bhairo Prasad Goyal. The purchase of share of Bhairo Prasad and Rajeshwar Prasad by Onkar Nath was not disputed before the revisional court and was admitted in the objection against the above application. Therefore, it was rightly held by the revisional court that on the death of Bhairo Prasad Goyal, the suit has not abated, as the plaintiff No. 1 on whom his interest devolved was already on record and as held by the Apex Court in the case of Mohammad Arif v. Allah Rabbani Alamin and others, AIR 1982 SC 948, when party was already on record sufficiently representing properly of the deceased respondent, there is no necessity of application to bring the legal representative of deceased on record.

7. The next contention of the learned counsel for the petitioner was that the application moved by petitioners was not a substitution application, but an amendment application. This contention is too technical. By moving application, Annexure-3 the respondent has prayed for making amendment by bringing heirs of defendant No. 1 on record. It may be said that application was not happily worded incorporating word 'substitution' in the prayer, but on that technical ground the application cannot be rejected as justice should not be denied on technicalities.

8. The next contention of the learned counsel for the petitioners was that the direction of this Court in revision was that provisions of U. P. Act No. 13 of 1972 are applicable and, therefore, the provisions of Order XXII, C.P.C. are also not applicable, consequently, no substitution application can be moved. He also placed reliance on case law Smt. Premawati and others v. IVth Additional District Judge, Bareilly and others, 1983 (2) ARC 85. The above contention of the learned counsel for the petitioners is misconceived as in the case relied on by him, it was held that provisions of Order XXII of Code of Civil Procedure have not been made applicable to the proceedings under Section 21 of U. P. Act No. 13 of 1972 nor there is any analogous provisions in the Act or the Rules framed thereunder. The proceeding in question was not under Section 21 of U. P. Act No. 13 of 1972 but it was a proceeding under Provincial Small Cause Courts Act and in proceeding governed by Provincial Small Cause Courts Act, certain provisions of C.P.C. are

applicable. Assuming that the provisions of Order XXII, C.P.C. are not applicable to the present proceeding then there was no question of abatement or bringing the legal representatives of deceased defendant on record, as held in the said case.

9. It was further contended by the learned counsel for the petitioners that substitution application was beyond time and it could not be allowed. The respondents had also moved application for condonation of delay in moving the substitution application and setting aside the abatement. The revisional court had considered the above application and condoned the delay. It is not disputed that Onkar Nath died on 13.9.1996 and application was moved on 14.8.1997, i.e., after lapse of one year and 7 months. Limitation for moving application for substitution/setting aside abatement is 150 days (90 days for moving substitution application + 60 days for moving application for setting aside the abatement) and therefore, the application was 14 months beyond time. The revisional court has considered the ground for delay and rightly condoned the same. The discretion of the revisional court condoning delay, therefore, cannot be interfered with in exercise of jurisdiction under Article 226 of the Constitution.

10. Lastly it was contended that case had already abated and, therefore, the separate applications for substitution and for setting aside abatement would have been moved, but only one application was moved. This contention has also no force. It was held by this Court in case of Smt. Shakuntala Devi v. Banawari Lal, AIR 1977 All 551, that the application for substitution can be treated as an application for setting aside the abatement and for bringing on record the heirs and legal representatives of the deceased respondent. It was further held in the said case that separate and formal application under Section 5 of Limitation Act is also not necessary. Court can decide whether delay deserves to be condoned on facts stated on affidavit in the application for setting aside abatement. Therefore, separate applications were not required.

11. Lastly, it was also contended by learned counsel for the petitioners that since no specific prayer for setting aside abatement and substitution was made, the revisional court wrongly allowed application. Reliance was also placed on case of Apex Court decision in Sri Jain Swetamber Terapanthi vid (s) v. Phundan Singh

and others, JT 1999(1) SC 380, The above case is not applicable to the facts of the present case as in the said case it was held that relief should be granted on pleadings of parties and no relief in interlocutory proceeding should be granted beyond the scope of the suit. The above case was totally on different point.

12. In view of above discussions and observations, I find that there is no scope for interference in the impugned order in the exercise of jurisdiction under Article 226 of the Constitution.

13. The writ petition having no force and is liable to dismissed.

14. The writ petition is, accordingly, dismissed.

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