

**Durg Singh Vs. liird Additional District Judge, Mainpuri and Others**

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**Court :** Allahabad

**Decided On :** Apr-27-1998

**Reported in :** 1998(4)AWC473

**Judge :** D.K. Seth, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 22, Rules 3, 4, 4(5), 9 and 9(2) and (3) - Order 43, Rule 1; Limitation Act - Sections 5

**Appeal No. :** C.M.W.P. No.6075 of 1991

**Appellant :** Durg Singh

**Respondent :** iird Additional District Judge, Mainpuri and Others

**Advocate for Def. :** S.C.

**Advocate for Pet/Ap. :** Swarajaya Prakash

**Judgement :**

**D.K. Seth, J.**

1. In Suit No. 99 of 1983. learned Munsif, Shikohabad by an order dated 17.10.1987, rejected the plaintiff's application under Order XXII. Rule 9, C.P.C. together with an application under Section 5 of the Limitation Act. on the ground that there was no sufficient reason that prevented the plaintiff from making the

application within time. An appeal being Appeal No. 19 of 1988. was preferred against the said order. The appellate court had allowed the appeal and set aside the order passed by the learned Munsif and allowed the application under Order XXII. Rule 9. C.P.C. This order has since been challenged in this writ petition.

2. Mr. Swarajaya Prakash. learned counsel for the petitioner, has assailed the order on the ground that the plaintiffs were aware of the death and had filed an application for impleadment on 16.1.1987 but did not press the said application. On expiry of 90 days from 3.10.1986. on which the death took place, the suit had abated. The period for setting aside the abatement also stood abated on 3rd March, 1987. whereas the application under Order XXII. Rule 9 was filed on 9.4.1987. Therefore, after having got their first application dated 16.1.1987 dismissed, the plaintiffs are estopped from making application under Order XXII, Rule 9- The order of dismissal of the application dated 16.1.1987 has the effect and attracts the principle of res Judicata which is also applicable even at different stages of the suit. He further contends that since the plaintiffs were aware of the factum of death of the deceased, who happened to be the father of the plaintiff, they cannot claim that they did not have any knowledge of the death and they having filed an application on 16.1.1987. It cannot be said that there could be a reasonable ground which could have prevented them from filing the application till 9.4.1987. Therefore, the delay could not be condoned despite objection filed by the defendant-petitioner. He further contends that the appellate court did not consider the impact of the ratio decided in the case of State of Gujarat v. Sayed Mohd. Baquir El Edross. 1981 (4) SCC 1. and that in the case of AJal Verma v. Ram Bharosey Lal and others, AIR 1951 All 794 (FB). According to the learned counsel, the appellate court had come to a finding that the plaintiffs were ignorant. Therefore, according to him, the application ought to have been filed under Order XXII, Rule 4, an order in which is revisable. As such even though the order is purported to have been passed under Order XXII, Rule 9, it was in effect under Order XXII, Rule 4, against which revision lies and. therefore, the appeal was not maintainable. On these grounds, he claims that the order impugned should be set aside.

3. I have heard Mr. Swarajaya Prakash at length. The last point may be taken up first with regard to the question of maintainability of the appeal as contended by Mr. Swarajaya Prakash. According to him, the plaintiffs being ignorant, of the application is one under Order XXII, Rule 4. Order XXII. Rule 4 prescribes under sub-rule (5) (a) that 'if the plaintiff was ignorant of the death of the defendant and could not for that reason make application for substitution of the legal representatives of the defendant within the period specified in the Limitation Act and the suit has, in consequence, abated, the Court shall in considering the application under the said Section 5. have due regard to the fact of such ignorance, if proved'.

4. The contention of Mr. Swarajaya Prakash on the basis of the above procedure, appears to be devoid of any merit for two reasons. First that Rule 4 applies in cases of death of the defendant and substitution of legal heirs and representatives of the defendant. But in the present case, it was plaintiff-Nayan Sukh. father of the substituted heirs who were applicants sought to be substituted and, therefore, Rule 4 has no manner of application when it comes to the substitution of legal representatives of the plaintiffs. Secondly, here the trial court has come to a finding that the applicants were ignorant of the procedure and having regard to the poverty and illiteracy relying on the decision in the cases cited in the said order, had found that ignorance of the procedure due to poverty and illiteracy, etc. was sufficient ground that prevented the applicants from seeking substitution. Therefore, it was not ignorance of death that too of the defendant as is contemplated under sub-rule (5) (a) of Rule 4 of Order XXII. Therefore, the contention that the application could have been made under Order XXII Rule 4 and be treated as such making the order revisable and rendering the appeal not maintainable, cannot be accepted.

5. Order XXII, Rule 9, on the other hand postulates that if the suit abates or is dismissed, in that event no fresh suit can be brought on the same cause of action. Whereas sub-rule (2) provides that legal representatives of the plaintiff may apply for setting aside the abatement or dismissal provided he is able to prove that he was prevented by sufficient cause from continuing the suit. Sub-rule (3) provides that Section 5 of the Limitation Act would apply in respect of the application under

sub-rule (2), Therefore, in the present case, the suit having abated on account of death of the plaintiff, Order XXII, Rule 9. Is very much applicable and the application was rightly made under the said provision and thus the order rejecting such application is appealable under Order XLIII or (1) (k), C.P.C. and as such appeal is very much maintainable. Therefore, I am unable to agree with the contention of Mr. Swarajaya Prakash on that score.

6. Mr. Swarajaya Prakash further contended that even when exercising jurisdiction under sub-rule (2) of Rule 9, Order XXII, the Court has to consider the question of grant of cost since sub-rule (2) clearly express that 'the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.' While allowing application for abatement, the Court may impose such terms as to costs or otherwise as it thinks fit. This expression does not lay down any mandate that the Court has to grant costs whenever abatement or dismissal is set aside. It leaves a discretion on the Court. It may grant cost if it thinks fit. Then again the terms as to cost or otherwise postulates an alternative that it may grant costs or may impose such other terms whatever the Court might think fit. Thus, the discretion appears to be absolute and by no stretch of Imagination it can be said to be mandatory. In the present case, no cost having been granted, sitting in revisional jurisdiction, it is not open to this Court to enter into such question as to how such cost has not been granted. Therefore, I do not find any substance in the submission made by the learned counsel for petitioner in this regard.

7. In the facts and circumstances of the case, it is apparent that death of the plaintiff had taken place on 3.10.1986 and admittedly the application for impleadment was made on 16.1.1987. In such a case, it ought to have been an application under Order XXII, Rule 3, and not an application . for impleadment. The very filing of the application for impleadment by the plaintiffs who were represented by lawyer, shows that they had filed such application on the advice of the counsel. It is apparent on the face of the record that the plaintiff had filed such application on 16.1.1987 on the basis of the advice of the learned counsel which on the face of it is a wrong advice, which is held to be a sufficient ground for condonation of delay. Then again, the said application was not pressed, therefore, there was no decision on merit of the said application. Since the application for

impleadment was not right kind of application which was to be made under Order XXII. Rule 3, non-pressing of the application would not amount to a decision deciding an issue between the parties attracting the principles of res Judicata neither non-pressing of the said application would attract the principle of estoppel since it was on the advice of the learned counsel the said application was not pressed particularly when the Court had, come to a finding that it was due to sheer ignorance of procedure by the applicants. Therefore, dismissal of the application dated 16.1.1987 for Impleadment as not pressed, cannot stand in the way of filing an appropriate application under Order XXII, Rule 9, after abatement set in. The application ought to have been filed either under Order XXII. Rule 3 or Order XXII. Rule 9. as the case may be. Inasmuch as if the abatement had set in, in that event it could be an application under Rule 9, Order XXII and if not, then an application under Order XXII. Rule 3. Therefore, I am unable to agree with the contention of the learned counsel with regard to this point as well.

8. Relying on the decision of Full Bench of this Court in the case of Ajai Verma (supra), Mr. Swarajaya Prakash sought to contend that this application having been filed after the period of limitation, though the applicants were well aware of the factum of death, there was no sufficient ground made out. In the case of Ajai Verma (supra), the death took place on 27.7.1946. whereas the application for setting aside abatement was made on 19.11.1949, on the ground that the date of death was not known. In the said case, it was the appellant, who sought to substitute the respondent, who died. There on facts, it was held that the appellant had knowledge of the death of deceased respondent and he did not take steps for substitution within time. The facts of the said case are distinguishable from the one at hand. In the present case, it was not pleaded that the fact of death was unknown. On the other hand, ignorance of procedure has been pleaded which found favour by the appeal court. Therefore, the ratio decided in that case cannot be attracted in the present case. That apart, in the present case limitation for setting aside abatement had expired on 3rd March. 1987. whereas the application was made on 9.4.1987, namely, after one month six days which is not a very long delay, what was one of the ground and was the consideration taken into account in the case of A/aj Verma (supra). Therefore, the ratio decided in the case of Ajai Verma (supra), cannot be attracted in the facts and circumstances of the present

case.

9. The case of Sayed Mohd. Baquir El Edross (supra) also does not help the counsel for the petitioner in view of the facts and circumstances of the present case which is distinguishable from that of the case cited by him. In the said case, respondent had died on 10.12.1978 and the application stating the fact of death was handed over to the clerk of the appellant on 20.2.1979 but till 29th August, 1979 no application was made. Even when the application was made on 29th August, 1979, the same did not accompany any affidavit. The affidavit was filed on March 4, 1980. In the said case on this background, it was held that the appellant had knowledge of the death and they did not take any steps either to substitute the legal representatives of the deceased or to set aside the abatement. No application for condonation of delay showing reason as to why such application could not be made within time, was filed. The Court had come to the finding that no reason, good, bad or indifferent is assigned for the failure of the counsel to move the Court for bringing the legal representatives of the deceased on record. Thus, the facts of the said case are distinguishable from the one at hand where the application was filed within one month six days showing reasons which was found to be sufficient by the appeal court. Therefore, the ratio decided in the case of Sayed Mohd. Baquir El Edross (supra), has no manner of application in the facts and circumstances of the present case.

10. Now with regard to sufficiency of the ground pleaded that prevented the applicant from making the application, may be taken up. The appeal court had found on the facts as detailed above, that the applicants had taken steps for bringing the representatives of the deceased on record through a misconceived application for impleadment. which was not ultimately pressed and thus it could be assigned to be a reason of wrong advice by the counsel and therefore, it can be said that they were prevented from making application for want of proper advice through the counsel on whom they had relied on. The appeal court relying on the decision in the case of Ram Sumirart v. D.D.C., 1985 (3) LCD 86 and Sml. Asharfi and others v. Jaipal Singh and others, 1985 13) LCD 87, had come to the conclusion that ignorance of the procedure cannot stand in the way of setting aside abatement. In the case of Ram Sumiran (supra), the Apex Court had held

that ignorance about legal requirement of moving application for substitution within the prescribed period of limitation, even though in the meantime six years have lapsed, though the fact of death was known to the appellant, who admittedly belonged to rural areas, were allowed the benefit of presumption that they were ignorant due to poverty, illiteracy about the steps to be taken for abatement and accordingly, the abatement was so set aside. In the case of Smf. Asharfi (supra), the Apex Court had observed that the Court may have regard to the prevalent social and economical conditions and large scale of poverty and illiteracy while condoning delay in setting aside abatement and technicalities should not be given much weight and the question of substitution should be liberally considered. Relying on these decisions, the appeal court had come to a finding that in the present case though fact of death was known to the applicant-plaintiff, but on facts he had found that they were ignorant of the procedure, which in my view is apparent from the fact that they had filed the application dated 16.1.1987 which stood dismissed as not pressed.

11. For all these reasons, in my view, it is not a fit case for interference in exercise of writ jurisdiction. The writ petition therefore, fails and is accordingly dismissed.

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