

Deewan Singh and ors. Vs. Bala Singh and ors.

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Court : Allahabad

Decided On : Jul-28-2004

Reported in : 2005(1)ARC182; 2004(4)AWC3639

Judge : S.N. Srivastava, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2 - Order 22, Rule 5

Appeal No. : C.M.W.P. No. 28582 of 2004

Appellant : Deewan Singh and ors.

Respondent : Bala Singh and ors.

Advocate for Def. : S.C.

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

Disposition : Petition dismissed

Judgement :

S.N. Srivastava, J.

1. Present petition has been preferred assailing the order dated 13.4.2004 passed by Additional District Judge (Court No. 4) Etawah. whereby revision was allowed and order dated 28.10.1997, passed by trial court was set aside and the matter was remanded to the trial court for decision afresh in accordance with law.

2. Who is the legal representative of deceased Tula Ram is the pivotal question from which emanates the controversy involved in this petition. Petitioner Deewan Singh claimed heirship on the basis of adoption deed, which he alleged to have been executed by the deceased Tula Ram on 30.11.1976. On the other hand, Bala Singh who is arrayed as respondent No. 1 in the instant petition claimed his rights on the basis of Will deed executed by Smt. Ram Devi alias Bhaggo, widow of deceased Tula Ram in favour of Ranjeet Singh, son of real brother of Tula Ram. The suit in question was instituted by Smt. Ram Devi alias Bhaggo for the relief of cancellation of adoption deed dated 30.11.1976 on the ground that it has been set up with ulterior motive. According to the plaint allegations, the adoption deed was executed on 30.11.1976 by deceased Tula Ram while deceased Tula Ram died on 27.11.1976 in Sarojini Naidu Hospital, Firozabad and by this reckoning, the adoption deed was wholly forged and concocted one. In the written statement filed by Deewan Singh and others, it was pleaded that Smt. Ram Devi alias Bhaggo widow of Tula Ram had died in the year 1962 and the plaintiff of the suit impersonated herself to be Smt. Ram Devi alias Bhaggo and further that she was not widow of deceased Tula Ram and by this reckoning, the Will deed in favour of . Ranjit Singh, son of real brother of Tula Ram was void ab initio and had no evidentiary value.

3. I have heard learned counsel for the parties and perused the papers bearing on the controversy involved in this petition.

4. The suit in question has been protracting since 1976. The plaintiff who instituted the suit, breathed her last in the year 1988. Consequent upon her death, Bala Singh respondent No. 1 preferred application for substitution of his name as legal representative of deceased plaintiff on the strength of registered Will deed dated 3.10.1980. The trial court who was seized of the substitution application rejected the prayer for substitution on two grounds firstly that it has not been proved that plaintiff was the widow of Tula Ram and secondly, substitution application was belated and was barred by time. Aggrieved by the order, Bala Singh respondent No. 1 went up in revision which was heard and decision in revision culminated in favour of Bala Singh. From a perusal of decision of the revisional court, it transpires that the revisional court relied upon registered Will deed dated

3.10.1980 and also the death certificate paper No. 115Ga citing which displays death of the plaintiff on 23.8,1988 and has assigned cogent and convincing reasons for reversing the findings of the trial court after reckoning with all relevant evidence on record. On the question of limitation, it has been held by the revisional court that it is established from the record that Smt. Ram Devi alias Bhaggo died on 23.8.1988 instead of 23.7.1988 and therefore, the finding of the trial court that the substitution application was time- barred was not sustainable.

5. From a perusal of the order passed by trial court, it is eloquent that the trial court rejected the substitution application appreciating evidence on record in correct perspective and it would seem that the trial court has not determined the question of legal representative of the deceased.

6. The expression 'legal representative' has been defined in Section 2 of the Civil Procedure Code and it reads as under:

"Legal representative' means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the 'party so suing or sued'."

7. Rule 5 of Order XXII, of the Civil Procedure Code relates to the determination of question as to the legal representative and being germane to the controversy may also be excerpted below :

'Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.'

8. It is settled position in law that when the right of a person to represent the estate of the deceased is in controversy the same has to be determined by holding an enquiry into the same which can be done by adducing evidence as provided by law. It is also enunciated that a determination under Order XXII Rule 5 of the Civil Procedure Code does not have the complexion of a res judicata. In this connection, a certain vintage decisions on the point may be taken into reckoning.

In *Chiragh Din v. Dilawar Khan*, AIR 1934 Lah 465, it was held that in a proceeding under Order XXII Rule 5, a certain person is or is not held to be the legal representative of a deceased party, the same question can be re-agitated in a separate suit and is not barred by the rule of *res judicata*. In another decision in *Daulat Ram v. Mt. Meero*, AIR 1941 Lah 142, it was held that a decision under Order XXII, Rule 5 shall be limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. In another decision in *Zalim v. Tirlochan Prasad Singh*, it was held that the determination of question whether a certain person is or is not the legal representative of a deceased party in a proceeding under Order XXII, Rule 5, C.P.C. does not operate as *res judicata* so as to preclude the same question from being re-agitated in a separate suit. In yet another decision on the point is decision rendered in *Suraj Mani v. Kishori Lal*, AIR 1976 IIP 74, it was held that an order under Order XXII, Rule 5, involves a summary enquiry as to who should be substituted in place of the deceased party in a pending proceeding and such a decision does not operate as *res judicata*. Yet another decision in , may also be cited and in this decision, it has been held that 'where on the death of the defendant two persons claimed to be his legal representatives, one on the basis of a Will and another on natural succession, the proper course would be to implead both the claimants.' Another decision which can be called in aid on the point is the decision in *Ganpatrao Sakharam Kakde v. Babarao alias Narayanrao*, AIR 1943 (30) Nag 233. In this decision it was held that 'whether a particular person is a legal representative of the deceased or not is a matter to be decided in the suit itself as required by Order XXII Rule 5. C.P.C. There is nothing in that rule to warrant the postponing of the enquiry to execution proceedings after the decision of the suit.....'

9. Reverting to the dispute involved in this petition it is eloquent from a perusal of the order of the trial court that the court below rejected the substitution application without proper enquiry and on materials which have not been appreciated in correct perspective. It may again be reiterated that the court below rejected the substitution application of Bala Singh on two grounds firstly that it was not proved that plaintiff was the widow of deceased Tula Ram and secondly that the substitution application was time-barred. The second ground is intertwined with the first ground. In relation to first ground it was held by the trial court that from the

evidence adduced on record, it is not proved that the plaintiff was the widow of deceased Tula Ram. The trial court also relied upon death certificate paper No. 106 Ka, which showed that death of plaintiff occurred on 23.7.1988 and not on 23.8.1988. On the other hand, I have traversed upon the reasoning adopted by the revisional court in aid of conclusion that death of plaintiff had actually occurred on 23.8.1988 and not on 23.7.1988 and in converging to the conclusion, the revisional court appreciated the evidence on record in correct perspective and relied upon the death certificate 115Ga and disbelieved the death certificate 106Ka which according to the finding of the revisional court had been obtained fraudulently. I am fully convinced with the plausibility of the finding recorded by the revisional court and it rightly remanded the case for decision on merits attended with further direction to decide the suit in accordance with law.

10. It is quite explicit from the precedents cited hereinabove, that the decision on the point of legal representative does not have the complexion of res judicata nor would it operate to clinch the issue of heirship and the question can be reagitated in a separate suit. Order XXII Rule 5 envisages determination, which according to enunciated position, cannot be equated to a decision and such determination is limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. In the circumstances, the conclusion is irresistible that the trial court erred in law in rejecting the substitution application and the revisional court rightly interfered and remanded the matter to the trial court for decision on merits. It cannot be gainsaid that if the trial court has failed to exercise its jurisdiction, the revisional court is vested with ample power to reverse the order and to pass appropriate order in accordance with law. In the above conspectus, there is no error or infirmity pervading the order impugned herein or any error apparent on the face of the record and therefore, the petition is liable to be dismissed being bereft of merits.

11. As a result of foregoing discussion, the petition fails and is accordingly dismissed in limine.