

Hazari Lal Vs. Ist Additional District Judge and ors.

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Court : Allahabad

Decided On : Sep-19-2003

Reported in : 2004(2)AWC1774

Judge : N.K. Mehrotra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 17 - Order 22, Rules 4 and 5; [Limitation Act, 1963](#) - Sections 5

Appeal No. : Writ Petition No. 8 of 2002 (R/C)

Appellant : Hazari Lal

Respondent : ist Additional District Judge and ors.

Advocate for Def. : Akhlaq Ali, Adv.

Advocate for Pet/Ap. : Prabhakar Tiwari, ;R.K. Tripathi and ;B.R. Tripathi, Advs.

Disposition : Petition allowed

Judgement :

N.K. Mehrotra, J.

1. This writ petition has been filed for issuing a writ in the nature of certiorari quashing the order dated 22.11.2001 allowing the application for condonation of delay passed in S.C.C. Suit No. 2 of 1981 by the 1st Additional District Judge,

Bahraich, as contained in Annexure No. 1 and for issuing a writ of mandamus directing the respondent-1 not to give effect to the impugned order on 22.11.2001 passed by the opposite party No. 1.

2. It appears that the opposite parties Nos. 2 and 3 filed a suit for ejectment and arrears of rent and ejectment and mesne profit against Hazari Lal and deceased Mewa Lal. During the pendency of the suit, Mewa Lal died on 16.6.1988. He left behind his wife Smt. Ram Janki who also died on 25.10.1996. A writ petition between the parties was pending in this Court and the proceedings for substitution of the legal heirs of deceased defendant Mewa Lal could not be taken in time. The plaintiff-opposite parties moved application under Order XXII, Rule 4 and Order XXXII, Rule 12 read with Order VI, Rule 17, C.P.C. for amendment by adding word 'deceased' with the name of defendant No. 3 Mewa Lal and since one of the petitioners Naveen Kumar has become major, a prayer was made for removing the phrase 'mother herself next friend'. It was alleged in this application that the suit has not been abated because there is no son or daughter of Mewa Lal and his wife Smt. Ram Janki and the only legal heir of Mewa Lal and Smt. Ram Janki, is Hazari Lal, the defendant No. 2 who is already party to the suit. It was further averred that in the pending Writ Petition No. 3414 (R/C) of 1982 in this Court the name of Smt. Ram Janki was substituted in place of Mewa Lal. This writ petition was dismissed. The plaintiff could not know about the dismissal of the writ petition. On coming to know about dismissal of the writ petition, the petitioner moved the aforesaid application. Along with this application, the plaintiff moved an application under Section 5 of Limitation Act and for setting aside abatement. The defendant-petitioner filed objection. The main objection was that the suit was abated against the surviving heir of Mewa Lal and after the death of Smt. Ram Janki, she left behind her adopted son Desh Raj. Desh Raj is the son of Hazari Lal and nephew of Mewa Lal. It was also pleaded that Desh Raj was adopted by Mewa Lal in the year 1978 and the adoption deed was executed in the year 1988.

3. The learned trial court allowed the application for amendment, condonation of delay and setting aside the abatement by impugned order dated 22.11.2001.

4. The learned counsel for the petitioner has referred me the adoption deed, the Photostat copy of which has been filed along with the rejoinder-affidavit. The learned counsel for the opposite parties referred to this Court a copy of the affidavit of Desh Raj filed in Writ Petition No. 3414 (R/C) of 1982. In this affidavit Desh Raj has shown his father as Hazari Lal. On the strength of this affidavit it was argued before me that Desh Raj was never treated to be an adopted son of Mewa Lal, therefore, the adoption deed is only a frivolous document, which has never been acted upon.

5. A perusal of the impugned order goes to show that the learned trial court has not determined the question as to whether Desh Raj is the legal representative of deceased Mewa Lal or not?

6. Order XXII, Rule 5, C.P.C. is as follows ;

'5. Determination of question as to legal representative.--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 :

Provided that where such question arises before an Appellate Court that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its finding and reasons therefore, and the appellate court may take the same into consideration in determining the question.'

7. It is clear from the aforesaid provisions that if, there is a question as to whether any person is or is not the legal heir of the deceased petitioner, such question shall be determined by the Court before disposal of the application for substitution or setting aside the abatement. This dispute has not been determined and this Court in a writ petition under Article 226 of Constitution of India will not go into the disputed question of fact.

8. In view of the above, I am of the opinion that the learned trial court has committed a gross error by not determining the question as to whether Desh Raj was legal representative of Mewa Lal or not before allowing an application for

amendment and setting aside the abatement moved by the opposite parties No. 3 and 4.

9. Therefore, the writ petition is to be allowed with the direction to the trial court to determine the fact whether Desh Raj is the legal representative of deceased Mewa Lal or not and after determining this question, he will pass order in accordance with provisions under Order XXII, Rule 5, C.P.C.

10. In view of the above the writpetition is allowed. The impugnedorder dated 22.11.2001 is set aside.The trial court is directed to decidethe application of the plaintiff-opposite party under Order XXII, Rule4 read with Order VI. Rule 17, C.P.C.and application under Section 5 of theLimitation Act and for setting aside theabatement afresh after recording afinding about the question whetherDesh Raj is a legal representative ofdeceased Mewa Lal or not?

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