

Rakesh Kumar Jain Vs. Devender Singh Mehta and anr.

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SooperKanoon Citation : sooperkanoon.com/702530

Court : Delhi

Decided On : Jan-03-1995

Reported in : 57(1995)DLT135; 1995(32)DRJ207

Judge : R.C. Lahoti, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 22, Rule 9

Appeal No. : Interim Application Nos. 9594 of 1991, 13426 and 13437 of 1992 and 2741 and 7946 of 1994 and Suit No

Appellant : Rakesh Kumar Jain

Respondent : Devender Singh Mehta and anr.

Advocate for Pet/Ap. : I.S. Mathur,; Tarun John and; Vivekanand, Advs

Judgement :

R.C. Lahoti, J.

(1) The plaintiffs have filed this suit for specific performance of contract for sale of a property and in the alternative for recovery of damages. The suit is valued at Rs.4,90,000.00 and a court fee of Rs.7,126.40p has been paid. The suit was filed in the year 1980. Since then it has been vigorously prosecuted and contested.

(2) The defendants No. 1 and 2 have been residing in U.K. It is their case in the written statement that they are British passport holders. On 16th July, 1991, the defendant's counsel delivered an information under Order 22 Rule 10 A Civil Procedure Code of Davinder Singh Mehta, the defendant No.1, having expired on 24th May, 1991. No certificate of death was filed.

(3) On 29th July, 1991, the counsel for the plaintiff gathered information in the Court, at the time of hearing, that the defendant No.1, Davinder Singh Mehta had died in U.K. Counsel for defendant No.1 was directed by the Court to file the death certificate on or before 28.8.91. That was not done.

(4) According to the facts stated in the application dated 26.8.91, (I.A. No. 9594/91 under Order 22 Rule 3 CPC), the plaintiffs made diligent enquiries in the neighborhood where defendant had last resided in Delhi and they could ascertain the names of the wife and a son only of the deceased. The application for substitution was filed, as already stated, on 26.8.91.

(5) On 2.11.92 is No-13426/92 has been filed by plaintiffs under Section 5 of the Limitation Act seeking condensation of delay in moving application under Order 22 Rule 3 Civil Procedure Code stating the facts noticed herein- above.

(6) On 2.11.92 is 13436/92 has also been filed styled as an amendment application under Order 6 Rule 17 read with Order 22 Rule 3 Civil Procedure Code which seeks to correctly describe the name of the wife of the deceased defendant which as mentioned earlier in is 9594/91 was not correct.

(7) On 2.11.92 another is 13437/92 was also filed seeking direction to the defendants to disclose the names of other LRs of deceased defendant No.1. Only on 7.8.93 the defendant No.2 furnished the addresses of the wife and a son of the deceased.

(8) On 11.7.94 is 7946/94 has been filed styled as one under Section 151 Cpc whereby the name of one more son of the deceased is sought to be brought on record.

(9) On 21.3.93, the Court had directed the counsel for the proposed legal representatives of defendant No. 1 to disclose on affidavit the names of all the legal representatives of defendant No.1 and their addresses. That order was complied with on 21.3.94. It was disclosed that there was one more son of the deceased defendant No.1.

(10) The prayers made in the applications filed on behalf of the plaintiff have been vehemently opposed on behalf of the proposed legal representatives submitting that the first application itself was filed beyond 90 days of the date of death of the deceased without being accompanied by a prayer for setting-aside abatement under Order 22 Rule 9 Civil Procedure Code and without an application under Section 5 of the Limitation Act and so the application for impleadment of LRs was barred by time and was liable to be dismissed. The learned counsel has further submitted that a prayer for impleadment is distinct from a prayer for setting aside abatement and application for one cannot be treated as an application for the other. Reliance is placed on Madan Naik & Ors. VS . Mst. Hansubala Devi & Ors., : AIR 1983 SC676 ; Durgalal VS . Asharafilal (Decd) and Ors., ; Kandanmal Uttamchand VS . Jwala Prasad & Anr., 0065/1963 : AIR 1963 MP183 and Kaushal Asaf Khan VS. Hari Singh Gopi Chand Air 1940 Pes 39. It is also submitted that the conduct of the plaintiffs has been one of gross negligence as they have never been diligent.

(11) Having heard the learned counsel for the parties, this Court is of the opinion that the applications filed by the plaintiffs deserve to be allowed and the objections preferred on behalf of the LRs deserves to be overruled.

(12) Much water has flown under the bridges after the decisions were rendered which have been relied on by the learned counsel for the LRs. Having reviewed the law laid down by the Supreme Court in Bhagsingh & Ors. VS . Major Dalit Singh & Ors. : 1987(32)ELT258(SC) , Union of India VS . Ramcharan : [1964]3SCR467 , Ram Sumiram & Ors. VS . D.D.C. & Or. : AIR 1985 SC606 , Sital Prasad Sexena VS . Union of India, : [1985]1SCR659 , Bhagwan Swaroop VS . Mool Chand, : AIR 1983 SC355 , Hansraj VS . Sunderlal Agarwal : (1982)1SCC476 , Bapurao VS. Smt. Jamunabai Air 1983 Sc 476 and Shadi VS.

Rampal & Ors. (1984) 2 Scc 255, I had an occasion to sum-up the approach to be adopted in such cases, in the light of the law laid down by the Supreme Court, in following words in Biniya Bai VS. Sikandar Khan 1993 (1) Mjpr 89. .

'WHILE dealing with applications seeking condensation of delay under Section 5 of the Limitation Act or for setting aside of abate- ment under Rule 9 of the Order 22 Cpc, the approach has to be liberal and judicious guided by the paramount consideration of not depriving a litigant ordinarily of adjudication of rights on merits. Hypertechnical, too strict, and pedantic approach as may cause injustice has to be avoided. Ignorance of law is not defense in law but the realities of life, the Courts of law cannot afford to overlook. Long pendency of cases in law Courts often results in link between litigants and lawyers being lost specially when the litigation is before the appellate forum. Litigants, often dejected, more so when they belong to rural folk, or are poverty stricken or are illiterate, are mostly not aware of the necessity of taking steps for substitution on the death of a party. The litigants are not supposed to enquire day to day about the life and well-being of their opponents. It is not by itself unbelievable to find that they do not know of the death of the opponent when it occurs, all the more when they are not residents of the same township or locality. A litigant fighting his case with diligence would not ordinarily allow the litigation to be lost by deliberately defaulting in taking steps for substitution if only he had known the factum of death of the opponent, and the legal necessity of taking steps for substitution.'

(13) While the plaintiffs are residents of Delhi, defendant No.1 had died in U.K. Ordinarily the plaintiffs would not learn or gather information about the death of defendant No.1 The plaintiffs have been contesting the suit through out with diligence. It cannot be assumed for a moment that the plaintiffs would permit the suit to abate by sheer negligence if only they would have been aware of the death of the defendant No.1 and of full particulars of the legal representatives. The counsel for the defendants for the first time made a disclosure of the death of the defendant No.1 on 16th July, 1991 by filing a memo in the Court which came to the knowledge of the plaintiffs on 29.7.1991. The plaintiffs took time for ascertaining the existence and names of the legal representatives and they filed the first application on 26.8.91. The time so spent by the plaintiffs cannot be said

to be unreasonably or unduly prolonged. All the subsequent applications made shall have to be read Along with first application and made in continuation thereof.

(14) In Gangadhar & Anr. VS . Shri Raj Kumar : AIR 1983 SC1202 , their Lordships of the Supreme Court have held :-

'RULE10-A which has been added in Order in Order 22 of Civil Procedure Code by the Amending Act of 1976 provides that when a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the Court about it and the court thereafter shall issue notice to the other party. In the case of an appeal, the word 'suit' has to be read as 'appeal'. This provision was introduced specifically to mitigate the hardship arising from the fact that the party to an appeal may not come to know about the death of the other party during the pendency of the appeal but when it is awaiting its turn for being heard. This duty cast upon the advocate appearing for the party who comes to know about the death of the party to intimate to the court about the death of the party represented by the counsel and torn this purpose a deeming fiction is introduced that the contract between the dead client and lawyer subsists to the limited extent after the death of the client.'

(15) The next question which arises for consideration is whether the application filed by the plaintiff can be treated as an application under Order 22 Rule 9, CPC. In Union of India VS . Kandan, : AIR1977 Delhi38 a Division Bench of our High Court has held :-

'THAT there ought to have been a proper application for setting aside the abatement cannot be doubted. But an application for substitution may, in substance, be treated as an application to set aside the abatement.'

I am bound by the view taken by a Division Bench of Delhi High Court.

(16) The result is that all the applications filed by the plaintiffs are allowed. The abatement is set aside. All the LRs of the deceased defendant are allowed to be brought on record. Amended memo of parties be filed within two weeks.

(17) las 9594/91, 13426, 13437/92, 2741 and 7946/94 stand disposed of.