

Smt. Shanti Devi Vs. Mr. Ramesh Kumar Gupta and ors.

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Court : Delhi

Decided On : Mar-21-2006

Reported in : 2006(88)DRJ528

Judge : Vijender Jain and; S.N. Aggarwal, JJ.

Acts : Oath Act - Sections 3; Limitation Act; Code of Civil Procedure (CPC) - Order, Rule 3

Appeal No. : CMs. 437-438A/2001 and CM. No. 472/2004 in FAO (OS) 366/2000

Appellant : Smt. Shanti Devi

Respondent : Mr. Ramesh Kumar Gupta and ors.

Advocate for Def. : G.N. Aggarwal, Adv.

Advocate for Pet/Ap. : Rajat Bhalla, Adv

Disposition : Application dismissed

Judgement :

Vijender Jain, J.

1. The appellant in this appeal is aggrieved by an order passed by the learned Single Judge on 7.11.2000 dismissing her application for restoration of the suit. The suit of the appellant was dismissed in default for non-prosecution on

31.7.2000. We need not go into the merit of the order of dismissal of the restoration application passed by the learned Single Judge as this appeal before us has abated. The appellant had died during the pendency of this appeal on 7.3.2001 and no steps were taken to bring her legal heirs on record within the limitation period prescribed for the said purpose. One application being CM No. 437/2001 (at page 292 of the paper book) under Order 22 Rule 3 CPC was filed by Sh.L.N. Gupta in his capacity as General Power of Attorney of the appellant. There is no date on this application. However, the affidavit filed along with the above application is shown to had been sworn by Sh. L.N. Gupta on 10.4.2001. The above application being CM No.437/2001 was not legally maintainable as it was filed by the appellant's attorney L.N. Gupta. We are of the view that since appellant Smt. Shanti Devi has expired on 7.3.2001, the right of the power of attorney holder also extinguished with her death. Hence L.N. Gupta was not competent to file the application under Order 22 Rule 3 CPC. Learned counsel for the appellant has contended that L.N. Gupta was the executor of Will of appellant-Shanti Devi. We have perused the application of L.N.Gupta (CM No. 437/2001) and we find that there is no whisper in the whole of the said application that the application was filed by L.N.Gupta as the executor of the Will of appellant-Shanti Devi. On 25.4.2001 when the matter came up for hearing before this Court, this Court had observed that the above application being CM No.437/2001 filed by L.N.Gupta was not on record. However, a copy of the said application was shown to the Court on that date and after that, the Court had observed that the application was sketchy and does not contain the requisite particulars i.e. the names of the legal heirs of the deceased appellant or about the particulars of her death. However, the Court gave two weeks' time to rectify the defects mentioned in the order dated 25.4.2001. Nothing was done by the applicants within the statutory period prescribed by law of limitation. Thereafter, an amended application being C.M.437/2001 (at page 306 of the paper book) was filed by Ms. Alka Aggarwal on 23.7.2001 along with an application being C.M.801/2001 (page 302 of the paper book) seeking amendment in earlier application under Order 22 Rule 3 CPC. We are of the view that since the earlier application filed by L.N.Gupta was not legally maintainable, question of its amendment as prayed for in CM No. 801/2001 could not arise. We are, thereforee, of the view that the appeal has abated because

steps for bringing the legal heirs of deceased appellant were not taken by the applicants within the period prescribed by law of limitation.

2 The counsel for the appellant has contended that this appeal has not abated as according to him Alka Aggarwal is one of the beneficiaries under the will of appellant Late Smt. Shanti Devi. This argument, in our opinion, also has no force because even Alka Aggarwal did not file application for her substitution till the abatement of this appeal by operation of law. It seems that yet another application was filed by Alka Aggarwal, Ajay Gupta and Asha Gupta being C.M.472/2004 (page 356 of the paper book) for their substitution as legal heirs of Late L.N.Gupta. This application at the outset is not maintainable because when L.N.Gupta himself was not substituted as legal heir of deceased appellant, then how the alleged legal heirs of L.N.Gupta can be substituted on record. Sh. L.N. Gupta expired on 4.10.2003 but his death is of no consequence for the decision on the point of plea of abatement. It shall be significant to mention that the application being CM No. 472/2004 filed on behalf of Alka Aggarwal, Ajay Gupta and Asha Gupta is supported by their respective affidavits shown to have been sworn by each one of them in India at Delhi on 20.10.2003. The learned counsel for the respondent Mr. G.N. Aggarwal has drawn our attention to the reply of the above application filed on behalf of Alka Aggarwal, Ajay Gupta and Asha Gupta and by reference to para 3 of the reply, he submitted that as per their own case Alka Aggarwal had returned back to Canada on 19.10.2003 and Ajay Gupta has returned to USA on 19.10.2003. When Alka Aggarwal and Ajay Gupta had returned to Canada and USA respectively on 19.10.2003, how they could have sworn affidavits filed along with CM No. 472/2004 on 20.10.2004 as they were not in India on that day. This casts a shadow of doubt on their bonafides and also violates the provisions of Section 3 of the Oath Act. Hence judging from any angle, the applications for bringing legal representatives of deceased appellant on record are not within parameters of law.

3 The counsel for the deceased appellant has relied upon a judgment of the Supreme Court in *Rajendra Singh and Anr. v. Krishna Mahato and Ors.* : JT2002(3)SC87 . With great respect we say that the said judgment is not applicable to the facts of the present case as in the case in hand, the legal heirs of

the deceased appellant had not approached the Court for their substitution within 90 days as prescribed under the Limitation Act for the purpose. We may also mention that nowhere in the application filed either by L.N.Gupta as power of attorney of appellant-Shanti Devi or subsequently by Alka Aggarwal, it has been mentioned that the right to sue survives in their favor which is an essential ingredient of Order 22 Rule 3 CPC. Counsel for the appellant/applicants is harping on a will which is stated to had been executed in favor of Alka Aggarwal and Ajay Gupta. It is for the beneficiary of the will to take recourse to law with regard to right, if any, under the said will but certainly the will relied upon by them would not come to their rescue unless they show that right to sue survives in their favor. We do not find any merit in any of the aforementioned applications and all these applications are hereby dismissed.

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As the application for substitution stands dismissed, appeal abates.

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