

Mahendra Singh Vs. Sohan Raj

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Court : Rajasthan

Decided On : Mar-09-1973

Reported in : AIR1973Raj219; 1973()WLN200

Judge : B.P. Beri, C.J. and; M.L. Joshi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 4 and 117 - Order 22; Rajasthan High Court Ordinance, 1949 - Sections 18; [Limitation Act, 1963](#) - Sections 29(2)

Appeal No. : Civil Spl. Appeal No. 149 of 1969

Appellant : Mahendra Singh

Respondent : Sohan Raj

Advocate for Def. : R.L. Maheshwari, Adv.

Advocate for Pet/Ap. : Lekhraj Mehta, Adv.

Disposition : Appeal dismissed

Judgement :

Joshi, J.

1. This appeal has come up before us for orders on the three applications under Order 22 Rule 4. Order 22, Rule 9 C.P.C. and Section 5 of the Indian Limitation

Act respectively in connection with determination of the question as to whether the appeal has abated or not.

2. The facts relevant for the determination of the points raised before us are as follows: Respondent Sohanraj died on 1st January 1972. His legal representatives were not brought on the record in time. An application was made on behalf of the appellant for impleading legal representatives of the deceased respondent Sohanraj on 24th October, 1972. This application was obviously not within the prescribed time of limitation. The delay in filing application was sought to be explained on the ground that the appellant learnt about the death of the deceased Sohanraj for the first time when he received a letter dated 3rd October, 1972 from his advocate Shri L. R. Mehta from Jodhpur wherein he informed that Sohanraj was reported to have died a year ago and enquired of the appellant the exact date of the death of the respondent Sohanraj along with names of his legal representatives. It was averred in this application that the appellant had been sick since long and was not in a position to move out and that the case was being looked after by his Kamdar Roodsingh who also died on 18th March, 1972. On receipt of the letter from his advocate, the appellant deputed one Babhutdan to proceed to Jodhpur for finding out the names of the legal representatives of the deceased Sohanraj. According to the appellant Babhutdan proceeded to Jodhpur on 14th October, 1972 and stayed there upto 22nd October, 1972 for the purpose of collecting the required information. Ultimately, Babhutdan collected the information and on its basis an application was moved on behalf of the appellant on 24th October, 1972 under Order 22 R, 4. C.P.C. This application was accompanied by affidavits of the appellant himself and that of Babhutdan. Another application was made under Section 5 of the Limitation Act on 4th January, 1972 wherein it was prayed that the delay in filing the application be condoned. This application was also supported by affidavits of the appellant and Babhutdan. Yet, a third application was moved under Order 22 Rule 9 on the same day praying for setting aside the abatement on the ground that there was sufficient cause for not bringing the legal representatives on the record in time. This application too was supported by affidavit of Babhutdan, the power-of-attorney holder of the appellant. A contest was put on behalf of the legal representatives of the deceased respondent by a written reply wherein the fact as to the illness of the appellant was

controverted. It was alleged that the appellant had knowledge of the death of the respondent Sohanraj at least on 22nd July, 1972 when an application was moved on behalf of the legal representatives of the deceased Sohanrai in the executing court for sub-stituting their names in place of the deceased Sohanrai. It was inter alia refer-red in the reply that the copy of this ap-plication was given to Shri Bhomsingh Advocate who was appearing on behalf of the appellant in the execution proceedings. The say of the opposite party is that the knowledge of the advocate of the appellant will be deemed to be the knowledge to the appellant as to the death of the respondent Sohanraj and consequently there was no sufficient cause for setting aside the abatement.

3. The point for determination is whether the appeal has abated and if so, whether the abatement should be set aside. Mr. Lekh Raj Mehta on behalf of the appellant made two-fold submissions in this regard. Firstly, he urged that the provisions of Order 22 of the C.P.C. relating to abatement do not apply at all to special appeals and therefore the question of abatement of this appeal does not arise. His second submission was that if the provisions of Order 22 are held to be applicable to special appeals then there is sufficient cause for not bringing the legal representatives of the deceased Sohanraj on the record in time and therefore the abatement. If any, should be set aside.

4. Taking up the first contention as to whether the provisions of Order 22 are applicable to special appeals under Section 18 of the Rajasthan High Court Ordinance, learned counsel for the appellant urged that the provisions for special appeals are not made under the Code of Civil Procedure but has been made by a special law, namely the Raiasthan High Court Ordinance. 1949. The argument of the learned, counsel Ss that if we look to the provisions of Section 4 of the Code of Civil Procedure it shall be evident that the provisions relating to abatement contained in Order 22 are not applicable to special appeals. Section 4 reads:

'4. (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or other-wise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in Sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land. Relying upon these provisions learned counsel strenuously urged that the applicability of the Code of Civil Procedure to the special appeals is wholly excluded by Section 4. We have considered the argument of the learned counsel carefully but we are unable to accept it. Section 4 does not mean that the Code does not apply to the proceedings under special or local laws, but only enacts that where there is inconsistency, the rules of the Code will have to yield before such laws. It follows therefore that Section 4 by itself does not exclude the applicability of the provisions contained in the Code of Civil Procedure to the special appeals. All that Section 4 says is that if the procedure is prescribed by virtue of a special law then the procedure laid down in the Code in respect of the proceedings under the special law shall yield to the special procedure prescribed in that law. We know it well that no special procedure has been provided in the Rajasthan High Court Ordinance in regard to special appeals. The question that arises therefore is whether the procedure prescribed under the Code of Civil Procedure will be applicable to the special appeals.

5. Mr. Maheshwari on behalf of the respondent urged that the provisions of abatement finding place in the Code of Civil Procedure are applicable to special appeals. In this regard he invited our attention to Section 117 of the Code of Civil Procedure, It reads as under :

'Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts'. Mr. Maheshwari also invited our attention to *Mt. Sabitri Thakurain v. Savi*, AIR 1921 PC 80. In that case the question that arose was whether the provisions of Order 41 Rule 10, C.P.C. applied to Letters Patent appeal. Their Lordships after examining the various provisions of the Code held that the provisions of Order 41 Rule 10, C.P.C. equally applied to appeals under Letters Patent. It was observed in that case that by Section 117 of the Code of Civil Procedure, 1908 the provisions of the Code applied to all the High Courts in India. It was further observed that regulations duly made by Orders and Rules

under the Code of Civil Procedure, 1908 were applicable to the jurisdiction exercisable under the Letters Patent, except that they did not restrict the express Letters Patent appeal. After perusing this Privy Council case we are of opinion that the question before us has been settled by the above mentioned judgment of the Privy Council. It is obvious from the plain language of Section 117, C.P.C. that the provisions of the Code are applicable to all proceedings before the High Court subject to their being not inconsistent with the procedure prescribed in the Letters Patent. The Rajasthan High Court Ordinance which provides for special appeal does not contain any inconsistent provision in the matter of abatement. It will therefore follow that provisions of Order 22, C.P.C. will be equally applicable to the Letters Patent appeal. In *Abhilakhi v. Sada Nand* AIR 1931 All 244 (FB) the question again came up for consideration as to whether the provisions of the Code of Civil Procedure applied to the Letters Patent appeals. The contention raised in that appeal was that Section 117 C.P.C. applied the provisions of the Code of Civil Procedure only to the original jurisdiction of the High Court. This contention was repelled and it was categorically laid down that the language of Section 117 is general and not limited to regulate the procedure of the High Court in its exercise of original jurisdiction only. It was therefore held that Section 117 applied provisions of the Code of Civil Procedure to High Court in the exercise of their appellate civil jurisdiction including their jurisdiction in Letters Patent. Mr. Mehta submitted that this case has been overruled in the later case of the same Court in *Jwala Prasad v. Jwala Bank Ltd. (in liquidation)*. AIR 1961 All 381. We have perused this case. As regards the question of the applicability of the Code of Civil Procedure to the Letters Patent jurisdiction it has been definitely held in this case also that by virtue of Section 117 the provisions of the Code of Civil Procedure are applicable to the Letters Patent appeals also. In AIR 1931 All 244 it was held that the provisions of Section 114 C.P.C. did not apply to the Letters Patent. In AIR 1961 All 381 it was however held that the provisions of Section 114, C.P.C. also applied to the Letters Patent appeals. There is therefore no force in this contention of Mr. Mehta.

6. Mr. Mehta further urged that in view of the Supreme Court judgment in *Dewaji v. Ganpatlal*. AIR 1969 SC 560. Section 117 cannot be taken to lay down that the provisions of the Code of Civil Procedure are applicable to Letters Patent appeals.

After carefully perusing this case we are of opinion that this case is distinguishable and does not make a departure from the view taken. In *Mt. Sabitri Thakurain v. Savi*.

7. In the aforesaid Supreme Court case the learned single Judge of the Bombay High Court had passed an interlocutory order setting aside the judgment and decree passed by the learned Additional District Judge and had directed that the record and proceedings in that case be sent to the revenue officer to decide whether the defendant's version was right or otherwise. This order being interlocutory was not appealable one. It was in this background that their Lordships after relying on the authority of *Satyadhyan Ghosal v. Smt. Deorajin Devi*. AIR 1960 SC 941 observed as follows:

'an interlocutory order which did not terminate the proceedings and which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken, could be challenged in an appeal from the final decree or order.'

It was held that Section 105, C.P.C. did not apply in this case and therefore the Letters Patent Bench was entitled to go into the validity of the order passed by the learned single Judge. The stress of Mr. Mehta learned counsel for the appellants was that Section 105 has been made inapplicable to an interlocutory order passed by a single Judge in the exercise of his special jurisdiction under the Letters Patent jurisdiction. He therefore argued that provisions of the Code of Civil Procedure cannot be held to be applicable to Letters Patent appeals. This argument though apparently attractive on a closer scrutiny is not at all acceptable. In the Supreme Court case their Lordships were dealing with the case of an interlocutory order not terminating the proceedings finally. Section 18 of the Rajasthan High Court Ordinance does not contemplate appeals against any interlocutory order either. Therefore, the procedure contained in Section 105, C. P. C. being inconsistent with the one provided in the general law will yield to the special law. The Supreme Court case is therefore of no assistance to the learned counsel. We are therefore disposed to hold that provisions of Section 117, C. R. C. including Order 22, C. P. C. are applicable to Letters Patent appeals also.

8. It was then urged that the provisions of the Limitation Act prescribing time for bringing the legal representative on the record could not be imported for determining application under Order 22 Rule 4, C.P.C. in special appeal. The argument of the learned counsel was that the limitation for bringing legal representatives is not prescribed in the Code of Civil Procedure but is prescribed in the Limitation Act which is not applicable to special appeals provided under a special Act and therefore the appellant was entitled to make application at any time for bringing the legal representatives of the deceased respondent on record in a special appeal. It is of course true that 'the Rajasthan High Court Ordinance is undoubtedly a special Act but there is no specific period of limitation prescribed under the special law for an application under Order 22, Rule 4 and Order 22 Rule 9, C.P.C. Reference may be made here to Section 29(2) of the Indian Limitation Act which reads as under:

'Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.'

Here is a case in which special or local law does not prescribe any period of limitation much less one different from the period prescribed by the Schedule I. Therefore, by implication, under the provisions of Section 29(2), the provisions of the Limitation Act are applicable to Letters Patent substantially regulated by the Code of Civil Procedure.

9. In this connection reference may be made to *C.P. Chidambaram v. State of Madras*. (1963) 2 Mad LJ 235 wherein it has been held that where the special law does not provide any period different from the one contained in the Indian Limitation Act, then by implication limitation prescribed in Schedule I will be applicable to the proceedings under the special law. Moreover, Order 22 Rule 4 (i)

provides that where one of the two respondents dies and the right to sue does not survive against the heirs of the deceased respondent, the Court on an application made in that behalf, by the appellant shall cause the legal representative of the deceased respondent to be made a party. Sub-rule (iii) of Order 22 Rule 4 further provides that where within the time prescribed by law no application is made under Sub-rule (i) the suit/ appeal shall abate. Limitation of such application is provided under Article 120 of the Limitation Act. The Code itself adopts the period of limitation prescribed under the Limitation Act. It is therefore, futile to contend that the provisions of Limitation Act cannot be applied to an application for bringing the legal representatives of the deceased-respondent in a special appeal.

10. It is not disputed now that the respondent died on January 1, 1972. The application for bringing the legal representatives was filed on October 24, 1972 which was admittedly beyond the limitation prescribed in this behalf.

11. The learned counsel for the appellant then submitted that there was sufficient cause for the delay in making the application for bringing the legal representatives of the deceased respondent on record and claimed benefit of Section 5 of the Limitation Act praying for setting aside the abatement of the appeal. The question that naturally arises for our consideration therefore is whether there is sufficient cause for setting aside the abatement.

12. The appellant has tried to explain the delay by relying on these circumstances. His case is that he received a letter dated October 3, 1972 from his advocate at Jodhpur on October 5, 1972 but he was sick and was not in a position to move. He therefore deputed Babhut-dan to go to Jodhpur and make enquiries as to the legal representatives of deceased Sohanraj. The allegations as to illness are quite vague. Neither the nature of illness nor the date from which the appellant had been suffering has been specified either in the application under Order 22 Rule 4, C.P.C. or in the affidavit accompanying it. On behalf of the respondent objections in this regard were specifically raised in the written reply. It was then that the appellant specified that he had been suffering from Peptic ulcers and had been treated by Dr. M. S. Mathur and Dr. Sister M. D. Costa at Ajmer. He further stated in the affidavit that he also got himself treated at village Ras by the compounder

posted there and also by Dr. Kesharsingh at village Pisangan. It will thus appear that on the appellant's own showing he is alleged to have been treated by as many as four medical practitioners. However, he has not specified the period during which he remained under the treatment of the particular medical practitioner. On the top of this all, he has failed to produce certificate of illness from any of the medical practitioners showing the nature of illness and his inability to go to Jodhpur. The allegations in respect of the illness and his inability to go to Jodhpur are vague and in absence of a corroborative evidence it is difficult to accept the version of the appellant explaining the delay. The provisions of Section 5 of the Limitation Act in a proper case may be construed liberally but that could be only done if there was no negligence or inaction on the part of the appellant. The appellant had received the information of the death of respondent Sobanrai as per his own admission on October 5, 1972. Each day's delay has to be explained satisfactorily to make out a sufficient cause for delay which, in our opinion, the appellant has failed to do. It may be further pointed out that an execution application of this very decree was pending in the court of the District Judge, Pali on behalf of the respondent Sohanraj and the appellant was duly represented by Shri Bhomsingh in the execution proceedings namely the Execution Case No. 68 of 1958. On the death of the deceased Sohanraj decree-holder, an application was moved by the legal representatives to bring them on the record in the execution proceedings on July 22, 1972. Notice of this application along with the copy thereof was given to the appellant's advocate on the very day, that is, July 22, 1972. The notice to the appellant's advocate ordinarily will amount to a notice to the appellant himself. The appellant has stated that he did not receive any information from Shri Bhomsingh, his advocate about the death of the deceased Sohan-rai and has in this connection filed an affidavit of Shri Bhomsingh Advocate on December 12, 1972. Shri Bhomsingh Advocate in his affidavit has admitted the receipt of the copy of application moved by the legal representatives of the deceased Sohanraj for bringing them on the record. The advocate has further admitted in his affidavit that he had sent the copy of the application along with the notice to Hoodsingh who happened to be the Kamdar of the appellant. The appellant has stated that Roodsingh had died in March 1972 and he did not receive the copy of the application or the notice as it was addressed to a person

who was already dead. What had happened to that notice and application has not been explained by the appellant. The letter sent by Shri Bhomsingh has not been shown to have been returned undelivered. It has not been explained what had happened to that letter containing the notice and the copy of the application for bringing the legal representatives on the record. Roodsingh's legal representatives have not filed any affidavit that the letter was retained by them or was not passed on to the appellant. In absence of all these circumstances we are not inclined to hold that the appellant has made out sufficient cause for setting aside the abatement. In the circumstances the prayer of the appellant for setting aside the abatement cannot be allowed. The application for setting aside abatement therefore deserves to be rejected.

13. In the result, the appeal is dismissed as abated. In the circumstances of the case the parties are left to bear their own costs.