

Lachhmi Devi and ors. Vs. S. Rajmal Golecha and anr.

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Court : Rajasthan

Decided On : Feb-06-1981

Reported in : AIR1981Raj308

Judge : M.L. Shrimal and; M.B. Sharma, JJ.

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

Appeal No. : Civil Spl. Appeal No. 6 of 1972

Appellant : Lachhmi Devi and ors.

Respondent : S. Rajmal Golecha and anr.

Advocate for Def. : R.C. Kasliwal, Adv.

Advocate for Pet/Ap. : P.N. Datt, Adv.

Disposition : Appeal allowed

Judgement :

Shrimal, J.

1. This special appeal under Section 18 of the Rajasthan High Court Ordinance, 1949, is directed against the judgment and decree of a single Bench of this Court, delivered on November 16. 1971, whereby the learned Judge held that as the appellant failed to bring in time the legal representatives of Shri Brijlal on record,

the appeal abated as a whole and in the absence of the legal representatives of Brijlal, the surviving appellants were not entitled to continue the appeal.

2. The facts giving rise to this special appeal are that Raimal Golecha Ltd. instituted a suit on November 15, 1948 for rendition of accounts against Shri Ganesh Narain and Phoolchand in the Court of the District Judge, Jaipur city. In the course of trial defendant No. 1 Shri Ganesh Narain died in August, 1951 and his sons Shri Brijlal and Dhanna Lal were brought on record as his legal representatives. Learned Senior Civil Judge, vide his judgment, dated 28th July, 1959, dismissed the plaintiffs suit against Phoolchand, but passed a preliminary decree declaring that the plaintiff was entitled to have the accounts taken of the transactions between the plaintiff Company and Ganesh Narain in his capacity as a partner of the firm Gourilal Ganesh Narain Barrily.

3. After the receipt of the report from the Commissioner, a decree for Rs. 9,992.53 was passed in favour of the plaintiff against Dhannalal alias Ramdhan and Brijlal in their capacity as legal representatives of the deceased Ganesh Narain on 15th October, 1966. Legal representatives of Dhannalal alias Ramdhan filed an appeal in the High Court which was registered as S. B. Civil First Appeal No. 74 of 1966. Brijlal, one of the appellants, died at Calcutta on 22nd October. 1966. The above noted S. B. appeal was filed through Advocate Shri Shyam Behari Lal, who died on 1st of June, 1967. The appeal came up for hearing on October 10. 1967 and nobody appeared on behalf of the appellant. The appeal was dismissed for want of prosecution.

4. On November 9, 1967. Nand Lal Todi and others as well as legal representatives of Brijlal and Ramdhan filed two applications (i) for re-admitting the appeal on its original number and setting aside the order, dated October 10, 1967, dismissing the appeal for non-prosecution; (ii) for bringing the legal representatives of Brijlal on record, and (iii) for substituting their names in place of Brijlal and setting aside the order of abatement under Order 22. Rule 9 C. P. C. Both these applications were supported by affidavits. The application for restoration was allowed by this court on September 20, 1968 and the appeal was ordered to be restored to its original number. The question as to whether the

legal representatives of Brijlal appellant could be brought on record, was left to be determined at the time of hearing of the parties.

The appeal came UD for decision on merits before Hon'ble Kan Singh J. on November 16. 1971. The case of the appellant before the learned single Judge was that after the death of Brijlal on October 22, 1966 an affidavit of Shri Kishanlal Todi, dated December 17. 1966, was got verified before the Notary Public at Calcutta. On January 9, 1967, information regarding the death of Brijlal alone with the names and addresses of the heirs and legal representatives together with the affidavit and Vakalatnama was sent to Shri Shyam Behari Lal, the then Advocate in the appeal and he was requested to apply to the court for bringing on record the legal representatives of Shri Brijlal. But due to ill-health. Shri Shyam Behari Lal failed to file an application for bringing the legal representatives on record in appeal. He also failed to give any information to the appellant, as such the appellant's Munim and Mukhtiyaram, Shri Surajmal, went to Jodhpur to find out about the causes of this long silence and he came to know that Shri Shyam Behari Lal had died. He thereupon contacted Shri P. N. Datt, Advocate and thereafter filed these two applications.

On September 14. 1968, a second application was moved on behalf of the appellant, supplementing the averments made in the application, dated November 9, 1967. In this application it was mentioned that the appellant's representative Shri Surajmal and his Munim went to Jodhpur on September 18, 1968 and sot the office of late Shri Sharma searched and they were able to find the original affidavit which the appellant had sent to Shri Sharma in January, 1967. This affidavit was also placed on record in support of the previous application. On the basis of the above noted facts, learned counsel for the appellants urged before learned single Judge that the delay in filing the application for bringing the legal representatives of late Shri Brijlal on record be condoned. In the alternative it was urged that even if the legal representatives of Shri Brijlal were not brought on record, the appeal could be decided on merits, as the remaining appellants represented the estate of late Shri Ganesh Narain. Though the decree was passed against the legal representatives of Ganesh Narain, it was passed only to the extent of the property of Shri Ganesh Narain received by them and it could not be said that the

remaining appellants did not sufficiently represent the estate of Shri Ganesh Narain. The arguments advanced on behalf of the appellants did not find favour with the learned single Judge and he dismissed the appeal vide his judgment and decree, dated November 16, 1971, as already indicated above.

5. Hence, this special appeal.

6. Mr. P.N. Datt, learned counsel for the appellant, strenuously urges that under Order 22, Rule 9, C. P. C., a discretion is vested in the court to condone the delay in filing an application to set aside the abatement on showing sufficient cause for continuing the suit or appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. The words 'sufficient cause', appearing in this rule, should receive a liberal construction and if no negligence or inaction or want of bona fide is imputable to the appellant, the appeal should be restored. But the learned single Judge has failed to consider the application for setting aside the abatement in proper perspective. He submits that in the application, dated November 9, 1967, filed before the learned single Judge, supported by an affidavit of Shri Surajmal, it has been clearly mentioned that the information regarding the death of Shri Brijlal with the names and addresses of his heirs and legal representatives together with 'Vakalatnama' on behalf of the heirs and legal representatives of the deceased, were sent to Shri Shyam Behari Lal, Advocate, who was conducting the case on behalf of the appellant on January 9, 1967. This averment finds support from the affidavits of Surajmal, filed before the learned single Judge on November 9, 1967 as well as on September 19, 1968. The fact of sending the affidavit to Shri Shyam Behari Lal stands corroborated by unimpeachable evidence of the affidavit of Shri Kishan Lal Todi placed on record. The affidavit was verified on December 17, 1966, at Calcutta. Its stamp had been purchased on November 10, 1966. The appellant was being assisted at Calcutta by his solicitor and there could be no other purpose of getting the affidavit of Shri Kishan Lal Todi verified on December 17, 1966, except to send the same to Shri Shyam Behari Lal, Advocate, for filing an application for bringing legal representatives of Shri Brijlal on record.

The facts mentioned in the affidavit of Shri Surajmal have not been controverted by a counter-affidavit of any person on behalf of the respondent. If the learned counsel, appearing for the respondent, wanted to challenge the facts, mentioned in the application along with the affidavit for bringing the legal representatives on record, he ought to have cross-examined the person giving the affidavit before the court. The respondent failed to avail himself of the provisions of Order 19. Rule 2, C. P. C. He neither cross-examined the respondent nor did he file a counter-affidavit. As such the facts mentioned in the affidavit filed by the appellant sought to have been held to be true. In support of this contention he placed reliance on Bhanwar Lal v. Bhanwar Lal, 1951 Ran LW 220. The facts mentioned in para No. 3 of the affidavit, filed by Shri Surajmal. on November 9, 1967, were verified by him to be true and correct according to his personal knowledge and as such there was sufficient evidence on record to hold that the affidavit of Shri Kishan Lal Todi, verified on December 17, 1966, before the Notary Public at Calcutta, was despatched to Shri Shyam Behari Lal on January 9. 1967.

We find considerable truth in the above statement of facts, made before us. This learned Judge took too stringent a view in not relying upon the statements of facts made in the affidavit of Surajmal on the ground that the affidavit of the person in whose presence or by whose permission Shri Sharma's house was searched, was not filed. This in itself cannot be held to be a sufficient cause for not placing reliance on the facts mentioned in the affidavit of Shri Surajmal and Kishan Lal. The affidavit of Shri Kishan Lal, verified at Calcutta. was filed in this court along with an application, dated September 19, 1968. but the fact of the verification of the affidavit and its despatch On January 9, 1967, from Calcutta was mentioned in the application, dated November 9, 1967. The appellant's counsel or Surajmal couldnot have presumed at that time that they would be able to search out the affidavit of Shri Kishan Lal Todi. The very look at the affidavit of Shri Kishan Lal, which bears the seal of the Notary Public. Calcutta, inspires confidence and there is nothing to hold this document was fabricated later on. The learned single Judge has also not doubted its authenticity. There is nothing on record to hold that the appellant after getting the affidavit of Shri Kishan Lal verified, did not despatch it to Shri Shyam Behari Lal Advocate, at Jaipur. Thus, the appellants were vigilant. They cannot be held guilty either of negligence or inaction or want of bona fide.

Shyam Behari Lal was a heart-patient and on account of the same disease, he met a premature death. In such circumstances if he could not file an application for bringing the legal representatives on record in time, it would not be fair to saddle the appellants with the responsibility of not filing an application for bringing the legal representative on record in time.

7. In *Shakuntala Devi Jain v. Kuntal Kumari*. AIR 1969 SC 575, Bachawat J., speaking for the court, while dealing with the question of condonation of delay in filing a certified copy, approved the following observations made in *Krishna v. Chathappan* ILR (1890) 13 Mad 269 (FB) (at p. 578):

'Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood: the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant.' On the facts of that case the Court observed that it was not a case where it was possible to impute to the appellant want of bona fides or such inaction or negligence as would deprive the appellant before them of the protection of Section 5 of the Limitation Act and allowed the appeal. The above noted observations of the Madras High Court were also read with approval in the *State of West Bengal v. Administrator, Howrah Municipality* AIR 1972 SC 749. We are satisfied from the two affidavits and the accompanying circumstances of the case that the appellant must have despatched the affidavit of Shri Kishan Lal Todi in time and had done everything which could be done by a vigilant litigant. Neither any negligence nor any inaction could be imputed to them and the learned single Judge was not correct in not extending the period of limitation for filing an application for bringing the legal representatives of the deceased Brijlal on record.

8. Viewed from another angle, the alternative Question, which needs to be determined, is whether or not on the facts and circumstances of this case, non-bringing the legal representatives of Shri Brijlal on record would lead to the abatement of appeal as a whole? Learned counsel for the appellant, placing reliance on *Pendela Adi Lakshmi v. Gandikota Durgamma* AIR 1935 Mad 737,

M.K. Mohd. Sulaiman Sahib v. N. C. Mohd. Ismail Saheb AIR 1966 SC 792, Giriianandini' Devi v. Biiendra Narain Choudhary AIR 1967 SC 1124 and Manjappa Moolya v. Rama Bhandarv AIR 1963 Mvs 202, urged that a claim for 'rendition of accounts is not a personal claim. It is not extinguished simply because the party, who claims an account or a party who is called upon to account, dies. The amount of Rs. 9,992.53 was made recoverable from the property of the deceased falling into the hands of the above noted two legal representatives and no personal liability was created against Ramdhan and (alias?) Dhannalal. The appeal could not abate on account of not having been brought on record the legal representatives of Brijlal because the estate of the deceased Ganesh Narain could be said to be sufficiently represented by the existing appellants in spite of the omission to bring the legal representatives of Brijlal on record. Learned counsel for the respondent has with equal vehemence urged that there is every likelihood of the two inconsistent and contradictory decrees being passed in the case on hand. If the appellant succeeded in the appeal, it would lead to the courts coming to a decision that the respondent No. 1 is not entitled to any amount being recovered from the property of the deceased Ganesh Narain in the hands of sons of Shri Ramdhan, whereas the decree against Brijlal has become final and the appeal having abated against Brij Lal, it abated as a whole against the other appellants. In support of the above contention, he has Placed reliance on State of Punjab v. Nathu Ram AIR 1962 SC 89. Rameshwar Prasad v. ShambahariLal Jagannath AIR 1963 SC 1901, Union of India v. Shree Ram Bohra AIR 1965 SC 1531. and Raj Kumar v. State of U. P. (AIR 1975 All 216). It is not in dispute before us that provisions of Order 22 of the Code of Civil Procedure, are applicable to the facts of this case. The question which needs to be considered is whether any of the legal representatives of Brijlal deceased was on the record already or had been brought on the record within the prescribed time limit and his estate could be said to be represented by him.

In Girijanandini Devi's case (AIR 1967 SC 1124) (supra) in a suit for partition and separate possession of the joint Hindu family property filed by Udit Narain and his sons and sons of Shvam Narain against the decendants of Indra Narain and Chandra Narain, the question arose whether the High Court was competent to pass a decree for account against the estates of the deceased Mod Narain Raj

Ballav Narain and Bidya Narain. Their Lordships after considering various arguments, advanced before them, held that the claim of rendition of accounts was not a personal claim. It could not be extinguished because a party, who claims an account or the party, who is called upon to account, dies. The maxim '*actio personalis moritur cum persona*', a personal action dies with the person, has a limited application. It operates in a limited class of actions *ex delicto*, such as, actions for damages for defamation assault or other personal injuries not causing the death of the Party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. An action for account is not an action for damages *ex delicto*, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory. Death of a person liable to render an account for property received by him does not therefore affect the liability of his estate.

In *Poonam Chand v. Moti Lal* ILR (1955) 5 Raj 77 : (AIR 1954 Raj 287), the point raised for consideration before a Division Bench of this Court was whether Motilal, one of the respondents, died during the pendency of the appeal and while an application was made to bring two of his minor sons on record within the prescribed limit, the prayer for bringing his youngest son on record was barred by time. It was held that in the absence of fraud or collusion, the two legal representatives, who were brought on record within the time, sufficiently represented the estate of the deceased and it was not necessary to ask for bringing the third legal representative on record. It was also observed that as the existence of the third legal representative had come to notice, he could be brought on the record even after the expiry of the period of limitation. The case was thus decided on the principle of sufficiency of representation of the estate of the deceased.

In *State of Punjab v. Nathu Ram* (AIR 1963 SC 89) (*supra*), the Government of Punjab acquired certain parcels of land belonging to two brothers, L and N, who refused to accept the compensation offered to them and applied to the Government to refer the dispute to Arbitration under the Punjab Land Acquisition (Defence of India) Rules, 1943 and an award was passed in favour of the brothers. The Government filed an appeal against the award to the High Court. During the

pendency of the appeal before the High Court, one of the brothers died and no application was made for bringing on record his legal representatives within the time limited by law. A preliminary objection was raised to the hearing of the appeal by the surviving brother, who claimed that the entire appeal had abated by reason of the legal representatives of the deceased's brother not having been brought on record in time. The learned Judges of the High Court accepted the contention and dismissed the entire appeal. The State of Punjab went up in appeal before the Supreme Court and the court held that in the case of a joint decree, the decree was indivisible and in such a case the appeal against one respondent alone cannot be proceeded with and would have to be dismissed as a result of abatement of the appeal. In that case, it was found that the brothers had made a Joint claim and got a joint decree and it was the decree which was joint and indivisible that was being challenged in appeal before the High Court. On the facts of that case, the appeal of the State was dismissed.

In *Ram Sarup v. Munshi* (AIR 1963 SC 553) one of the appellants died pending the appeal and his legal representatives were not brought on record. As the decree was a joint one and as part of the decree, had become final by reason of abatement, it was held that the entire appeal must be held to have abated. In both these cases the decrees were joint and they were passed in favour of two individuals and that was challenged in appeal before the High Court. It was common ground that the appeal against one of the joint decree-holders had abated owing to none of the legal representatives having been impleaded within the time, limited by law. There was none on the record to represent the estate of deceased respondent. The question whether an appeal should abate would always depend on the nature of the decree and the nature of the interest of the deceased in the property. If the decree is joint and indivisible, it would be apparent that the abatement would be total. It was precisely a question of this sort in the abovenamed two Supreme Court cases.

In the case before us, the suit was filed against Ganesh Narain and the decree was passed against the legal representatives of Ganesh Narain to the extent of the property coming into their hands. Thus, the facts of the case on hand are distinguishable from the facts of the case before their Lordships of the Supreme

Court. In the case on hand no plea of fraud or collusion between the parties has been taken. It cannot be said that the estate of the deceased Ganesh Narain was not represented in the absence of Brijlal's legal representatives being brought on record in time.

In *Union of India v. Shree Ram Bohra* (AIR 1965 SC 1531) Bilas Rai Bohra son of Bansidhar Bohra and Shri Ram Bohra son of Gannat Ram Bohra, brought a suit against the Union of India on behalf of the joint Hindu family. It was alleged that the trading firm was governed by Mitakshara School of Hindu Law of which joint family the plaintiffs were the Karta. The trial court decreed the suit. The Union of India appealed to the High Court of Patna. Subsequently, Bilas Rai Bohra died in July 24, 1957. On September 5, 1958 Union of India presented an application for substitution under Order 22. Rule 4 read with Order 22. Rule 11 C. p. C. for setting aside the abatement and condonation of delay. The High Court dismissed the application for setting aside the abatement of the appeal against Bilas Rai Bohra, as it was of the view 'that there had been gross negligence on the part of the appellant and ultimately the High Court held that as the decree, passed in favour of the joint family, could not be set aside against the legal representatives of Bilas Rai Bohra and in case the appeal was permitted to proceed against the joint family in the presence of other Karta Shri Ram Bohra. there might be occasion for the coming into existence of two inconsistent decrees. The High Court accordingly dismissed the appeal.

In an appeal before their Lordships of the Supreme Court, it was held that there could not be two Kartas in the joint Hindu family. Two persons may look after the affairs of the joint Hindu family on the 'basis of the members of the joint Hindu family clothing themselves with authority to represent the family and their power to represent would depend on the terms of the authority conferred on them by the members of the joint Hindu family. On the death of one of the representatives the Karta of the family, in accordance with the principles of Hindu Law, will automatically be the person entitled to represent the joint Hindu family till such time when the family again, decides to confer the authority to represent it. There is no material on record to indicate the terms and scope of the authority conferred on the two plaintiffs by the joint Hindu family. Their Lordships held that when the

decree in favour of the respondent was joint and indivisible, the appeal against the respondents other than the deceased respondent had abated. There can be no dispute about the ratio decidendi of the case relied upon by the learned counsel for the respondents because the decisions in those cases were rendered in their peculiar facts and circumstances. In one of those cases the decree was passed against the legal representatives to the extent of the property falling into their hands.

The learned single Judge has proceeded on the ground that the interest of Brijlal was not sufficiently represented by the heirs of Ramdhan, whereas the main question before the court was whether the interest of the estate of Ganesh Narain could be said to be amply represented by Shri Ramdhan or his legal representatives. The decree in case on hand was passed to the extent of the property of the deceased Ganesh Narain and no personal liability was created on Brijlal or Ramdhan. The court decreeing the suit had not passed the decree on the basis of pious obligation of the two sons of deceased Ganesh Narain. As the legal representatives of Ramdhan were already on record, it cannot be said that the interest of the estate of the deceased Ganesh Narain was not properly represented. The decision in *Daya Ram v. Shyam Sundari* (AIR 1965 SC 1049) was followed in *Dolai Maliko v. Krushna Chandra Patnaik* (AIR 1967 SC 49) and in *Mahabirprasad v. Jage Ram* (AIR 1971 SC 742). In that case a decree for rent was obtained by Mahabir Prasad, his mother Smt. Gunwanti Devi and his wife Smt. Saroj Devi. The executing court held that the decree was not executable and dismissed the execution application. Mahabir Prasad filed an appeal and impleaded Smt. Gunwanti Devi and Saroj Devi as party respondents. Smt. Saroj Devi died during the pendency of the appeal and her name was struck off on the application of Mahabir Prasad. The High Court dismissed the appeal, holding that it had abated as the heirs and legal representatives of Smt. Saroj Devi were not brought on the record within the period of limitation. Their Lordships of the Supreme Court once again examined the principles of sufficiency of representation in such cases and held that the decision of the High Court was not right.

9. The requirement of the law is that when a decree is passed against the estate of the deceased in the hands of his legal representatives, the question which needs

to be considered is whether the estate of the deceased stands sufficiently represented by the appellants who are already on record and if it is so and if the court comes to the conclusion that it stands sufficiently represented, the legal representatives might be on record in another capacity. The other heirs and legal representatives may be brought on record even after the expiry of period of limitation, and the proceedings will not abate.

10. In the result, the special appeal is allowed. The judgment and decree, passed by the learned single Judge in S. B. Appeal No. 74 of 1966 is set aside. The case is ordered to be registered afresh and listed before the learned single Judge who will decide the appeal on its merits after bringing the remaining heirs of the deceased Brijlal on record to complete the array of the parties. In the facts and circumstances of the case, the parties are left to bear their own costs of this Court.

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