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Court : Rajasthan

Decided On : Dec-10-1969

Reported in : 1969WLN560

Judge : P.N. Shinghal, J.

Appeal No. : S.B. Civil Regular Second Appeal No. 448 of 1961

Appellant : Manidevi and ors.

Respondent : Ambadan and ors.

Advocate for Def. : Mr. Rastogi

Advocate for Pet/Ap. : Mr. Jain

Judgement :

P.N. Shinghal, J.

1. This second appeal was filed initially by defendant Mahadev. He died thereafter and it is not dispute that his legal representatives Smt. Manidevi, Loonkaran. Mahaveer and Gitadevi have been brought on the record according to the law. Plaintiff-respondent Ambadan died on February 2, 1965, in the life-time of Mahadeo, and a great deal of controversy has been raised on the question whether his legal representatives have been brought on the record in time. The fate of the appeal therefore depends on the answar to the question whether it has

abated against the deceased Ambadan and cannot be continued in the circumstances of the case and must be dismissed as a whole.

2. To appreciate the controversy, I shall state the relevant facts bearing on the question of abatement and, as it happens, they are not in dispute.

3. The suit giving rise to this appeal was instituted by Ambadan, his brother Godudan and Ambadan's son Rughdan. They claimed that the suit house was their property by virtue of a joint 'patta' in their names and prayed for the grant of certain reliefs in respect of it. The suit was decreed in part by the trial court on September 20, 1960 and the appeals against the judgment and decree of that court were dismissed by the lower appellate court on June 2, 1961. This is why the defendant preferred the present appeal while the plaintiffs preferred a cross appeal (No. 585 of 1961). Plaintiff Ambadan however died on February 2, 1965. Defendant-appellant Mahadev was alive at that time, but he did not make an application to bring the legal representatives of deceased Ambadan on the record until July 10, 19o5. On the date, he made an application under Order 22 Rule 3 C.P.C. stating that Ambadan had died far away, at Golaghat, leaving five sons including plaintiff-respondent Rughdan, and a daughter Smt. Mehtab. It was therefore prayed that these legal representatives may be brought on the record in place of the deceased. The application was accompanied by an application under section 5 of the Limitation Act for the condonation of the delay 'in submitting the application for impleading the legal representatives of the deceased Ambadan.' It was stated in that application that Loonkaran, son of appellant Mahadev, had been served with a notice, along with a copy of an application under Order 22 Rule 3 C.P.C and copy of an affidavit, in respect of the plaintiff's cross-appeal No. 585. of 1961. It was admitted that it was stated in the documents which were served on Loonkaran that respondent Ambadan had died on February 2, 1965 at Golaghat. The appellant however stated that he became seriously ill 'after the marriage of his daughter on May 11, 1965' and remained in bed until July 8, 1965. The illness was stated to be acute asthma and heart palpitation and it was contended that the appellant's son did not think it proper to disclose the information about Ambadan's death to the appellant or to inform him about the service of the notice etc. Then it was stated that the appellant became a bit better after two days, and found the

notice, the application and the affidavit mentioned above with other letters, and learnt about Ambadan's death. This was why he could not go to Assam to ascertain the date of Ambadan's death or go to Jodhpur to file an affidavit in support of the application for bringing the legal representatives of Ambadan on the record. The appellant became a but better thereafter and the aforesaid application under Order 22 Rule 3 C.P.C. was therefore filed on July 10, 1965, along with the application under section 5 of the Limitation Act The facts which, therefore, emerge from the record, and in respect of which there is no controversy, are that respondent Ambadan died on February 2, 1965 and that no action was taken until July 10, 1965 to bring his legal representatives on the record.

4. It has however been argued by Mr. Jain, learned Counsel for the appellants, that the benefit of Section 5 of the Limitation Act should be given in the present case. But technically speaking, the application under Section 5 of the Limitation Act is not maintainable because it has been correlated to the application under Order 22 Rule 3 C.P.C. ignoring the fact that the appeal had abated as against Ambadan deceased on May 3, 1965 when the period of 90 days prescribed under Article 120 Schedule to the Limitation Act of 1963 expired. The only proper course, in that eventuality, was to make an application under Order 22 Rule 9 (2) C.P.C. for setting aside the abatement and a prayer could then be made for allowing the benefit of Section 5 of the Limitation Act for purposes of that application. However, I am inclined to take a lenient view of the defective wordings of the application which and was filed on July 10, 1965 as aforesaid and treating as an application which purports to be under Order 22 Rule 3 C.P.C. setting aside the abatement under Order 22(2) read with Rule 11 C.P.C. And I am glad to say that Mr. Rastogi, learned Counsel for the respondents, has not opposed this view. The question therefore is whether this is a fit case for condoning the delay under Section 5 of the Limitation Act.

5. It will be recalled in this connection that it has been admitted in the application, which has been filed under sections of the Limitation Act, that Loonkaran son of Mahadev was served on May 24, 1965 with a copy of notice along with a copy of the application under Order 22 Rule 3 C.P.C. and an affidavit, in cross-appeal No. 585 of 1961, giving the information that Ambadan had died on February 2, 1965

and containing the prayer that his legal representatives may be brought on the record in the cross-appeal. A persual of the process server's report shows that Loonkaran accepted service of the notice and the connected papers in the cross-appeal on behalf of his father Mahadev. As Ambadan had died on February 2, 1965, the period of 60 days for setting aside the abatement of the appeal as against him had not expired by then (May 24, 1965) as it was due to expire on July 2, 1962. There was there fore time enough for appellant Mahadev to make an application under Order 22 Rule 9(2) read with Rule 11 C.P.C , but he did not avail of that opportunity. The period of 60 days' limitation prescribed by Article 121 was therefore allowed to expire on July 2, 1965, and the application, which is being treated as the application for setting aside the abatement, was made only on July 10, 1965, several days after the expiry of period of limitation.

6. An effort has been made to secure an order for the condonation of this delay on the grounds that appellant Mahadev became seriously ill after the marriage of his daughter on May 11, 1965 and remained in bed until July 8, 1965. No medical certificate of illness has however been produced. It has been stated in the affidavit that Mahadev was suffering from acute asthma and heart palpitation and that his son Loonkaran did not therefore inform him about the death of respondent Ambadan or the fact that he had received the notice in the cross-appeal to that effect. But it is admitted that Ambadan was not a relation of Mahadev, and it is not claimed that there was any friendship between them. It is therefore a wholly unconvincing ground to urge that Loonkaran withheld the information about the death of Ambadan or the receipt of the notice in the cross-appeal from Mahadev because of his illness. The nature of the illness cannot also be said to be serious, but even if it is assumed that this was so, there was nothing to prevent Mahadev from directing his son Loonkaran to take the necessary action for the setting aside of the abatement of the present appeal as against Ambadan.

7. It will thus appear that no case has at all been made for condoning the delay in the making of the application for setting aside the abatement of the appeal against respondent Ambadan, and the application under section 5 of the Limitation Act is therefore rejected.

8. Faced with such an eventuality, it has been argued by Mr. J.K. Jain that as Ambadan's son Rughdan was already a respondent in this appeal, he sufficiently represented Ambadan's estate and that this court should take the view that there was no abatement of the appeal at all. The learned Counsel has supported his argument by a reference to Harakchand and Anr. v. Khetdan and Anr. ILR 1958 (8) Raj. 1091, Ram Charan v. Banshidhar and Ors. AIR 1942 All.358, and Mohammed Ata Hussain Khan and Ors. v. Hussain Ali Khan and Ors. AIR 1944 Oudh 139.

9. It appears to me however that this line of argument is also quite futile in the facts and circumstances of this case. As has been stated, the suit was filed by Ambadan, Godudan and Rughdan as co-owners of the property and not as members of a Hindu undivided family. It was decreed in part so that there was a joint decree in favour of the three plaintiffs, who were all arrayed as respondents in the appeal. The case therefore squarely fell within the purview of Order 22 Rule 4 read with Rule 11 C.P.C. So, as one of the three respondents, namely, Ambadan died and the right to appeal did not survive against the surviving respondent Godudan and Rughdan 'alone' because of the jointness of the decree in favour of all three of them, it was necessary for appellant Mahadev to make an application under Order 22 Rule 4 (1) C.P.C to bring the legal representatives of the deceased respondent on the record within the time limit prescribed by the law. It is admitted that the time limit for that purpose was 90 days under Article 120 of the Limitation Act, 1963 and it began to run from the date of Ambadan's death. It is also admitted that no application was made under Sub-rule (1) of the aforesaid Rule 4 within that time limit. Therefore by virtue of Sub-rule (3) of that rule the appeal abated as against the deceased respondent Ambadan.The wordings of the sub-rule clearly lead to this conclusion and this has been held to be so in Union of India v. Ram Charan : [1964]3SCR467 and Lile Sonar v. Jhagru Sahu AIR 1925 Pat. 123.

10 In such a situation the only course open to appellant Mahadev was to make an application under Order 22 Rule 9(2) read with Rule 11 C.P.C. for an order to set aside the abatement. Article 121 of the Limitation Act provides a period of 60 days from the date of the abatement for such an application. But it is again admitted that no such application was made within the period of 60 days. It is true that by virtue

of Sub-rule (3) of Rule 9 of Order 22 C.P.C. the provisions of Section 5 of the Limitation Act apply to an application under Sub-rule (2), but, for reasons already mentioned, that benefit is also not available to the appellants.

11. So when it is quite clear that the appeal abated against Ambadan under Order 22 Rule 4 (3) C.P.C. because no application was made at all under Sub-rule (1), and an application was not made under Rule 9(2) for an order to set aside the abatement within the period prescribed by law, there is no occasion at all for the argument that the doctrine of sufficient representation should be applied in this case.

12. I have gone thorugh the cases cited by Mr. Jain and they are quite distinguishable. Thus in Harak Chand's case ILR 1958 (8) Raj. 1091, Ladmal died during the pendency of the first appeal but he was survived by his two nephews Harakchand and Jeevraj. Harakchand was the elder brother and was on the record as the managing member of the joint Hindu family consisting of himself and Jeevraj. It was therefore held that he (Harakchand) substantially represented the interest of the joint Hindu family consisting of himself and his brother. In that case therefore it could not be said that the right to appeal did not survive against Harakchand 'alone' within the meaning of Order 2 Rule 4 C.P.C. Similarly, the fact in Ram Charan's case AIR 1942 All. 358 were different because even though the appellant died pending the appeal, one of his heirs was brought on the record as his representative and so it was held that he represented the entire estate which came into being on the death of the appellant. In the present case, on the other hand, no application has at all been made under Sub-rule (1) of Rule 4 or Sub-rule (2) of Rule 9 of Order 22 C.P.C.

13. I have also gone through the judgment in Mohammad Ata Hussain Khan v. Hussain Ali Khan and Ors. AIR 1944 Oudh. 139. In that case one of the defendants respondents died, but one of her legal representatives was already on the record as a respondent and it was held that the appeal did not abate for that reason. In reaching his conclusion their Lordships relied on Note 9 on Order 22 Rule 4 in Chitley's Commentary on the Code of Civil Procedure but, if I may say so with utmost respect, they did not perhaps notice that what was stated in the

commentary was that if one of the legal representatives of defendant is impleaded he sufficiently represents his estate so that the suit does not abate. It was not stated in the commentary that it was not necessary to implead any one at all and still the suit would be saved from abatement even in a case in which one of the defendants or respondents had died and the right to sue or appeal did not survive against the surviving defendant or defendants alone. In fact their Lordships did realise that' the bringing of one legal representative on the record will save, the suit from abatement', and there can be no doubt that this is the correct position of the law, as I understand it, even though it may be said that it was not fully applied to the case before their Lordships.

14. It has then been argued by Mr. Jain that it should not matter if one of the legal representatives of Ambadan was a married daughter for she could also be represented by his son Rughdan. The argument has been supported by reference to Dolai Malik and Ors. v Krishna Chandra Patnaik and Ors. AIR 1967 SC 49 I do not however see how such an argument can be of any avail to the appellants in the present case because the appeal had abated against Ambadan for the erason mentioned above and it will not mitigate the rig our of that inescapable conclusion to hold that the married daughter could be represented by her brother Rughdan if a proper application had been made according to the law.

15. The fact therefore remains that the appeal abated against Ambadan. The decree under appeal was a joint decree in favour of Ambadan, Godudan and Rughdan. The appeal against it could not proceed in the absence of the legal representatives of Ambadan. There is therefore no escape from the conclusion that the appeal must be dismissed as a whole. It is ordered accordingly; but in the circumstances of the case there will no orders as to the costs. Leave to appeal is prayed for, but is refused.

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