

Mohan Devi @ Mohini Devi (Smt.) Vs. Lrs of Himmat Lal Menaria

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Court : Rajasthan

Decided On : Sep-09-2004

Reported in : RLW2005(1)Raj270; 2005(1)WLC228

Judge : Prakash Tatia, J.

Acts : Code of Civil Procedure (CPC) - Order 7, Rule 11 - Order 22, Rules 4, 9 and 10; [Limitation Act, 1963](#) - Sections 5 and 14

Appeal No. : S.B. Civil Misc. Appeal No. 330 of 2004

Appellant : Mohan Devi @ Mohini Devi (Smt.)

Respondent : Lrs of Himmat Lal Menaria

Advocate for Def. : R.R. Nagori, Adv.

Advocate for Pet/Ap. : Arun Bhansali, Adv.

Disposition : Appeal dismissed

Judgement :

Prakash Tatia, J.

1. Heard learned counsel for the parties.

2. In these two appeals, the two orders, namely order dated 13th Sept., 2001 and 5th August, 2003 are under challenge. The plaintiff is seeking setting aside the abatement of his suit by moving applications and the court below refused to set aside the abatement of the suit and also refused to take on record the legal representatives of the deceased sole dependent. It will be necessary to narrate few facts before proceedings further.

3. The plaintiff filed the suit for specific performance of contract against the sole defendant. In that suit, the defendant submitted an application under Order 7 Rule 11 CPC on 4.12.1995. The said application was dismissed by the Trial Court vide order dated 6.2.97. The defendant preferred revision petition, which was registered as S.B. Civil Revision Petition No. 503/1997. This court while issuing notice on 28th May, 1997 stayed the further proceedings in the suit. On 23rd June, 1998, the sole defendant died. The revision petition was taken up by this court on 10th May, 2000 and was decided on merit and the revision petition was dismissed.

4. On 18th July, 2000, the plaintiff filed an application under Order 22 Rule 4 CPC in the Trial Court alongwith an application under Section 5 of the Limitation Act stating therein that the plaintiff had no knowledge of the death of the sole defendant till 9th July, 2000 and, therefore, after condoning the delay by exercising power under Section 5 of the Limitation Act, the legal representatives of the deceased Himmat Mal defendant may be taken on record.

5. The legal representatives of the defendant submitted reply to the application and raised objections including the objection about the knowledge of the plaintiff about the death of the sole defendant on the ground inter alia that in High Court, in the revision petition No. 503/1997 an application was submitted by the legal representatives of the defendant-petitioner Himmat Lal on 27.8.1998 and before that copy of the application was served upon the learned counsel for the plaintiff, who appeared in the High Court for the plaintiff. Therefore, the plaintiff got the knowledge of the death of the defendant before 27.8.1998 or at least on 27.8.1998.

6. The Trial Court vide order dated 13th Sept., 2001 after observing that even if it is presumed that the plaintiff got the knowledge of the death of the defendant on

9th July, 2000, still the suit stands abated because the plaintiff has not submitted the application under Order 22 Rule 9 CPC for setting aside the abatement, therefore, his application under Order 22 Rule 4 CPC is liable to be dismissed, hence, dismissed by the Trial Court.

7. That plaintiff being aggrieved against the order of the Trial Court dated 3rd Sept., 2001 preferred S.B. Civil Revision Petition No. 178/2002 before this court on 10.12.2001. The notices were ordered to be issued to the defendant, the legal representatives of the sole defendant. However, the said revision petition No. 178/2001 was dismissed by this Court by order dated 26th March, 2003 holding that the revision petition is not maintainable as the appeal lies against the order dated 13th Sept., 2001. The appellant in these facts and circumstances, preferred an appeal challenging the order dated 13th Sept., 2001 by filing S.B. Civil Misc. Appeal No. 2825/2003 (Defect), This misc. appeal was submitted before this court on 2nd April, 2003.

8. During the pendency of the Misc. Appeal No. 2825/2003 (Defect), it appears that for abandon caution the plaintiff submitted an another application before the Trial Court, which is filed under Order 22 Rule 9 and 10 CPC and under Order 22 Rule 4 CPC alongwith an application for condoning the delay under Section 5 and 14 of the Indian Limitation Act, The said applications too was dismissed by the Trial Court vide order dated 5th August, 2003. The Trial Court observed that there is no new fact on the basis of that the plaintiff can claim condonation of delay and the plaintiff cannot take benefit out of his own mistakes. The Trial Court also observed that the revision petition No. 178/2002 preferred by the plaintiff to challenge the order dated 13th Sept., 2001 has already been dismissed by the High Court and, therefore, the order dated 13th Sept., 2001 holding suit has abated has become final.

9. The plaintiff being aggrieved against this order dated 5th August, 2003 by which his subsequent applications under Order 22 Rule 9 and 10 and application under Order 22 Rule 4 CPC and application under Sections 5 and 14 of the Indian Limitation Act were dismissed, preferred this Misc. appeal No. 330/2003.

10. Learned counsel for the appellant pointed out that the record of the S.B. Revision Petition No. 503/1997 may be looked into because according to the defendant, an application for taking on record the legal representatives of the defendant was submitted in that revision petition and that fact went heavily against the plaintiff. The court below was very much influenced by that fact and reached to the conclusion that in view of the above fact, the plaintiff had not only knowledge of the death of the sole defendant, but had notice of the fact from the legal representatives of the defendant as required under Order 22 Rule 10A CPC.

11. Learned counsel for the appellant submitted that the court below committed serious illegality in rejecting the application filed by the appellant on 18th July, 2000 under Order 22 Rule 4 CPC and application under Section 5 of the Limitation Act vide order dated 13th Sept., 2001. The Trial Court should have considered the applications dated 18th July, 2000 itself as application for setting aside of the abatement also because the facts were very much mentioned in the application for setting aside of the abatement of the suit. It is submitted that in case that application is treated as application filed under Order 22 Rule 9 CPC and delay is condoned and the legal representatives are taken on record, the subsequent order passed by the Trial Court on plaintiff's application dated 5th August, 2003 will become of no consequence.

12. It is also submitted that if the argument of learned counsel for the non-petitioner defendant is accepted and it is held that since revision petition No. 503/1997 of the defendant, since was decided on merit after defendant's death but without formal order of the High Court to take on record the legal representatives of the defendant in revision petition then it may be presumed that the legal representatives of the defendant were taken on record (by deeming) as the revision petition has been decided by the High Court on merit after the death of the sole defendant and after filing of the power on behalf of the one of the legal representatives of the defendant, then in that situation, if legal representatives have already been taken on record in any of the proceedings in the suit or proceeding arising out of the suit including the revision petition then the suit of the plaintiff cannot abate and the legal representatives may be treated to had been taken on record in the suit also.

13. It is also submitted by learned counsel for the appellant that no application is available on record of the S.B. Civil Revision Petition No. 503/1997 for taking on record the legal representatives of the defendants, as alleged by the legal representatives of the defendant. Therefore, if any application for taking on record the legal representatives of defendant- petitioner (of that revision) was filed in the High Court, it may had defects including the defect of not giving copy of the said application to the opposite party, therefore, it was not tagged in the file of the revision petition by the High Court Office, therefore, it cannot be presumed that in fact, copy of the said application was given to the counsel of the plaintiff-appellant.

14. Learned counsel for the respondent while replying upon the judgment of the Hon'ble Apex Court delivered in the case of Keshhardeo Singhania v. Purushottamdas Bhiwanwala and Ors., AIR 1983 SC 354(2), submitted that even if it is a procedural law even then this cannot be excuse of by passing the procedure to cause any injustice to the party in whose favour the right has been accrued. The Hon'ble Apex Court in the said judgment held that excuse of lapse in compliance with the laws the avowed object of doing substantial justice to the parties may in many many cases lead to miscarriage of justice, Learned counsel for the respondent further submitted that the defendant categorically stated that he submitted an application before the High Court after the death of the sole defendant for bringing on record the legal representatives of the defendant. The said application was entered in the institution register of the High Court at S. No. 7972 on 27th August, 1998. Though no such application is available in the record of the revision petition No. 503/1997, but the Dy. Registrar (Judl.) certified that such application was filed. In view of the above and in view of the fact that the plaintiff's counsel, who appeared in the said revision petition No. 503/1997, did not choose to file any affidavit to rebut the fact of receipt of the copy of the application submitted by the defendant, therefore, the Trial Court was fully justified in holding that the plaintiff got the knowledge of the death of the defendant in the year 1998 itself and not in the year 2000.

15. Learned counsel for the appellant submitted that there is no proof available anywhere, either on record in the file of revision petition No. 503/1997 or in the office of the High Court evidencing delivery of copy of the said application to the

counsel for the defendant-plaintiff-non-petitioner in revision petition and legal representatives of the defendant did not choose to file any affidavit of his advocate, therefore, also there was no reason for the court below to presume that copy of the said application was delivered to the counsel for the appellant-plaintiff even if it is presumed that any such application was filed by the legal representatives of the defendant in the High Court.

16. I considered the submissions of learned counsel for the parties and also considered the reasons given by the court below.

17. First of all, the appeal No. 2825/2003 (defect) is filed beyond the period of limitation and is barred by 476 days. The condonation has been sought by the appellant-plaintiff on the plea that appellant was prosecuting the other proceedings in the competent court of law (before the High Court), bonafidely from 18th July, 2002 till the dismissal of the revision petition by this Court on 26th March, 2003. Immediately, after dismissal of the revision petition on the ground that revision is not maintainable by this Court, the plaintiff appellant submitted this Misc. Appeal on 2nd April, 2003 without any delay. It is also submitted that the revision petition was filed by the plaintiff through her advocate and, therefore, it was as per the legal advise, the plaintiff submitted revision petition.

18. The facts mentioned above sufficiently indicated that appellant was prosecuting the matter before the court of law and his earlier revision petition challenging the order dated 13th Sept., 2001 was dismissed by this court only on 26th March, 2003 and since that revision petition itself could have been converted into appeal, and the appellant preferred the appeal on 2nd April, 2003 within a period of one week from dismissal of appeal by this court and looking to the totality of the facts, I deem it proper to condone the delay. Therefore, the application under Section 5 of the Limitation Act for condonation of appeal is allowed and the delay in filing the appeal is condoned.

19. On merits of the case, it may suffice to say that even the Trial Court had not recorded specific finding that the plaintiff had knowledge of the death of the sole defendant from beginning, from the date of death of the defendant. The Trial Court observed that even if it is accepted that the plaintiff got the knowledge of the death

of the defendant only on 9.7.2000, as per the case of the plaintiff herself, even then since the plaintiff did not sought setting aside of abatement of suit by filing application under Order 22 Rule 9 CPC and no application under Section 5 of the Limitation Act for condonation of delay in filing application under Order 22 Rule 9 CPC has been filed, therefore, suit has already abated and legal representatives of defendant's cannot be taken on record.

20. A bare perusal of the record of S.B. Civil Revision Petition No. 503/1997, it is clear that there is no report of the office about the petitioner's submitting any application for taking on record the legal representatives of the petitioner. After 23rd June, 1998 the case was listed in court on 12th August, 1998 for the first time and, thereafter, it was listed in court several times upto 15th May, 2000. On 15th May, 2000 without there being any order of taking on record, the legal representatives of the petitioner sole defendant, the revision petition was decided in the presence of the learned counsels for the defendant-respondent as well as in the presence of the counsel for the non-petitioner plaintiff on merit. It appears that if any application was filed before this Court, that escaped the notice of both the learned counsels for the parties as neither the counsel for the non-petitioner plaintiff raised objection about the maintainability of the revision petition after the death of the sole petitioner nor learned counsel for the petitioner pointed out that the revision petition cannot proceed without taking on record the legal representatives of the sole petitioner. The revision petition No. 503/1997 was dismissed on 10th May, 2000. It appears that no objection was raised by the learned counsel for the defendant in the Trial Court at any time from 1998 about the proceeding with the suit by the Trial Court and no such objection was raised even after dismissal of revision petition by the High Court on 10.5.2000.

21. Assuming for the sake of the arguments that any application might have been submitted by the defendant before this court in his revision petition No. 503/1997 on 27.8.1998 for taking on record the legal representatives of the defendant-petitioner, but in peculiar facts of this case, it cannot be presumed that the copy of the application must have been delivered to the learned counsel for the plaintiff-non-petitioner as the said application is not on record of S.B. Civil Revision Petition No. 503/1997 nor there is any office note that such application was filed by

the petitioner. Without receipt of delivery of copy of the application from opposite counsel, it cannot be presumed that copy of the said application was given to opposite counsel, particularly when such application was not dealt with in the file of the revision petition. And further it cannot be presumed that said information must have gone to the plaintiff through her advocate, who was conducting the case in the High Court at Jodhpur and not at Udaipur where the suit proceedings were going on. Entry in institution register only proves filing of the application in the High Court only and not a proof of delivery of copy of said application to opposite counsel.

22. Not only this, but according to learned counsel for the appellant the time was sought by both the parties in the Trial Court for proceeding with the suit after dismissal of revision petition of the defendant on 10.5.2000, obvious reason may be that even counsel for the defendant at Udaipur even had no knowledge of the death of the defendant. In view of the above facts, there is no material on record that plaintiff had or got the knowledge of the death of the defendant from any application filed by the defendant's legal representatives in S.B. Civil Revision Petition No. 503/1997 or before 9.7.2000. Non-filing of affidavit of counsel for the plaintiff conducting revision in High Court is of no consequence because there is no iota of evidence available on record in support of delivery of copy of the said application to the counsel for the plaintiff requiring any rebuttal from plaintiff appellant. Apart from above facts, it is not the case of the legal representatives of the defendant that he himself delivered the copy to counsel for the plaintiff in High Court. Question of rebuttal comes after discharge of initial burden, which has not been discharged by the legal representatives of the defendant in this case.

23. In these facts and circumstances and in view of the judgment of the Hon'ble Apex Court delivered in the case of Mithailal Dalsangar Singh and Ors. v. Annabai Devram Kini and Ors., 2003(4) SCC 88 (SC), the Trial Court should have considered the application under Order 22 Rule 4 CPC filed on 18th July, 2000 as an application for setting aside the abatement. The Hon'ble Apex Court in the above case held as under:

'A prayer for brining the legal representatives on record, if allowed, would have the effect to setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for an is necessarily implied. Too technical or pedantic an approach in such cases is not called for.'

24. Therefore, at this stage, it may be again observed that the Hon'ble Apex Court in very many cases has laid down as law that in the matter of condonation of delay and particularly, when there is a question of abatement of the suit resulting into dismissal of the suit, resulting into rejection of claim without looking into the merit of the case, liberal view should be taken so as to advance the cause of justice. In this case, I find that in the peculiar facts of the case the revision petition filed by the defendant was pending before this Court and further proceedings in the suit was stayed by this court and it continued till the dismissal of the defendant's revision petition and during this period defendant died and when the defendant did not raise any objection against not taking steps by the plaintiff in consequence of the death of the defendant, the Trial Court should have exercised discretion in condoning the delay and by that the Trial Court could have avoided the delay of four years in the trial of the suit.

25. In view of the above, the S.B. Civil Appeal No. 2825/2003 (DRJ) is allowed. Office may for the purpose of record register this appeal as regular appeal by giving new regular number, but decided by this order itself. The appeal is allowed. The order dated 19th March, 2001 is liable to be set aside and hence, set aside. The application filed by the appellant plaintiff under Order 22 Rule 4 CPC is treated as a consolidated application under Order 22 Rule 4 CPC read with under Order 22 Rule 9 CPC and the application filed by the plaintiff under Section 5 of the Limitation Act alongwith the said application is allowed. Delay in filing the application for setting aside of the abatement as well as for not moving the application in time under Order 22 Rule 4 CPC is condoned: The applications are allowed and the abatement is set aside. The legal representatives of the defendant are taken on record. Now the Trial Court may proceed with the suit.

26. In view of the above reasons the S.B. Civil Misc. Appeal No. 330/2004 becomes infructuous. Hence, dismissed as having become infructuous.

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