

Vidhya Prakash Vs. Rani Dan

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Court : Rajasthan

Decided On : Aug-04-1987

Reported in : 1987(2)WLN763

Judge : Mohini Kapoor, J.

Appeal No. : S.B. Civil Revision Petition No. 329 of 1986

Appellant : Vidhya Prakash

Respondent : Rani Dan

Disposition : Petition allowed

Judgement :

Mohini Kapoor, J.

1. This revision petition has been preferred against the order dated 24-2-1986 passed by the District and Sessions Judge, Jaipur City, Jaipur condoning the delay in the substitution of legal representatives in an appeal filed by the non-petitioner. The learned District Judge has also held that the application which was moved for substitution of legal representatives could be treated as an application for setting aside the abatement.

2. The few facts may be mentioned in order to appreciate the legal point which arises before me. A suit for eviction was filed by one Gokul Devi against the non-

petitioner on the ground of personal necessity and this was decreed on 24-5-1985 by the Additional Civil Judge No. 4, Jaipur City. The non-petitioner preferred an appeal against this decree and during the pendency of this appeal, Gokul Devi died on 18-8-1985. The date of hearing in the appeal was 18-10-1985 and on that date the non-petitioner moved an application that Gokul Devi had died and that she had not left behind any children. A prayer was made that the decision of the court below be set-aside. On this very date the counsel for Gokul Devi moved an application stating that Gokul Devi had died on 18-8-1985 and that her legal representative was Vidhya Prakash. The non-petitioner, who was the appellant before the District Judge, did not take any action on this information within 90 days from the date of the death of Gokul Devi and on 17-12-1985 he moved an application that it was alleged by the other side that Gokul Devi had executed a will in favour of Vidhya Prakash which was not admitted and without prejudice to his rights the name of Vidhya Prakash be substituted in place of deceased Gokul Devi. A line was added that the delay in moving the application may be condoned. On this very date Vidhya Prakash, the present petitioner, moved an application that he was the legal representative of Gokul Devi by virtue of a will dated 23-12-197(sic) and this fact was within the knowledge of the non-petitioner who did not bring him on record within the time of 90 days allowed by law and as such the appeal stands abated and it should be ordered to have been abated.

3. The learned District Judge, first of all, held that as the non-petitioner had moved an application on 18-10-1985 that Gokul Devi had died and that her counsel had moved an application that Vidhya Prakash was the legal representative of Gokul Devi, therefore, the appeal does not abate. He further held that even if the appeal can be said to have abated then the application dated 17-12-1985 can be treated as an application for setting aside the abatement. For the delay in moving the application, a sum of Rs. 100/- was awarded by way of costs and the application was accepted.

4. The learned Counsel for the petitioner has challenged the order of the learned District Judge on the ground that an application for substitution of legal representatives cannot be treated as an application for setting aside the abatement and for condonation of delay in making the substitution and the court

below has exceeded its jurisdiction in doing so. It has also been pointed out that the non-petitioner all along had knowledge about the Will executed by Gokul Devi as she had stated about it in her statement before the trial Court and Vidhya Prakash had also been examined as a witness.

5. On the other hand, learned Counsel non-petitioner has contended that a suit in which the right to sue survives, does not abate and Vidhya Prakash has himself filed a suit for eviction which also goes to show that the right to sue survives. According to him, when the right to sue survives, the suit cannot abate. Besides this, it has been contended that there is no succession certificate or probate in favour of Vidhya Prakash in order to confirm his status of being a legal representative of deceased Gokul Devi.

6. The provisions of Order 22, CPC are very clear which make it obligatory on a party to bring about the substitution of the legal representatives of a deceased party. It is only on an application made on behalf of the party that the legal representatives of the deceased party are substituted. This substitution has to be done within a particular period which is 90 days and if no application for substitution is moved within this period then the suit or appeal shall abate. It is only when it is proved that the party was prevented by any sufficient cause from continuing with the suit or appeal, the court can set aside the abatement upon such terms as it deems fit. The facts in the present case go to show that on 18-8-1985 itself, it had been submitted by the present petitioner that he was the legal representative of Gokul Devi. On the basis of this declaration, the non-petitioner could have submitted an application for substitution within 90 days from the date of death of Gokul Devi. However, for no reason he sat quiet. He moved the application for substitution only when the prescribed period for moving such an application had expired and the appeal stood abated. On the basis of the evidence which had been led in the case, it could be said that the non-petitioner was aware of the claim of Gokul Devi that she had made a Will in favour of Vidhya Prakash. Thus, it was all the more necessary that the non-petitioner should have substituted the name of Vidhya Prakash in place of Gokul Devi as soon as he learnt about the later's death.

7. The facts. as discussed above, clearly go to show that the non-petitioner had knowledge about the death of Gokul Devi and also about the fact as to who could be her legal representative. Nothing has been shown that he was prevented by any sufficient cause from moving an application for substitution. In the case of *State of Gujarat v. Sayed Mohd. Saquir B Edress* : [1982]1SCR551 , it has been held that where no cause is shown for condonation of delay for setting aside the abatement of and the appeal is dismissed in view of the abatement then the delay in moving the application for bringing legal representatives on record cannot be condoned.

8. In *Dev Lal v. Paili* AIR 1951 Madhya Bharat 156, it has been held that application for substitution of legal representatives cannot be treated as an application for setting aside an abatement. In the facts of a given case, one application may be moved for both the purposes but there has to be mention of the abatement and grounds for getting it set aside. In *Sadassiva Rauji Taitonde and Ors. v. Jose Joaquim Ponseca* AIR 1976 Goa, Daman & Diu 11 it has been held that where there is no plea that the plaintiff was prevented by sufficient cause in moving the application for substitution of legal representative then the application cannot be treated as one for setting aside abatement. In *Durgalal v. Asharafilal (Deed.) and Ors.* AIR 1973 Rajasthan 332, it has been held that proceedings to bring legal representatives on record are distinct and separate from proceedings to set aside abatement.

9. The application for setting aside abatement requires mention in the application that the suit for appeal has abated and that on account of some sufficient reasons, the appellants were prevented from making the application for substitution of legal representatives of the deceased respondent within the prescribed time. The non-petitioner in his application has prayed that Vidhya Prakash be substituted in place of deceased Gokul Devi without prejudice to his rights. There is no prayer for setting aside abatement and at the same time no reasons have been given in the application that he was prevented by sufficient cause in moving this application within time. In absence of all these particulars this application cannot be treated as an application for setting aside the abatement of the appeals.

10. The fact that Vidhya Prakash has instituted a separate suit for the eviction of the non-petitioner has nothing to do with the abatement or otherwise of the appeal out of which this revision has arisen. In the present case, it can be said that legal representatives of deceased Gokul Devi were not brought on record within time and it has not been alleged that the non-petitioner was prevented by sufficient cause from moving the application within time and as such no grounds for setting aside the abatement have been made. The appeal automatically stood abated on the expiry of 90 days from the date of the death of Gokul Devi and the learned lower court has acted illegally in the exercise of its jurisdiction in holding that the appeal had not abated or that the application for substitution moved by the non-petitioner could be treated as an application for setting aside the abatement.

11. The revision petition is accepted and the order of the learned District Judge dated 24-2-1986 is set aside. The appeal preferred by the non-petitioner before the District Judge shall stand abated. The record of the court below be sent back.

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