

Dinanath Vs. Amar Nath and ors.

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Court : Himachal Pradesh

Decided On : Oct-14-1986

Reported in : AIR1987HP44

Judge : T.R. Handa, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rule 4, 4(1) and 4(3)

Appeal No. : Civil Revn. Petn. No. 179 of 1980

Appellant : Dinanath

Respondent : Amar Nath and ors.

Advocate for Def. : Arun Kumar Goel, Adv.

Advocate for Pet/Ap. : D.N. Sharma, Adv.

Disposition : Petition allowed

Judgement :

ORDER

T.R. Handa, J.

1. This revision petition is directed against the order dated 30th April, 1980, recorded by the Senior Sub-Judge, Hamirpur, disallowing an application of the petitioner-plaintiff made under Order 22, Rule 4, C.P.C. It appears that the

petitioner-plaintiff filed a suit for the recovery of Rs. 5,300/- against Shri Chet Ram, the predecessor-in interest of the respondents. The suit was filed on 3-2-1976. Shri Chet Ram, the original defendant, expired during the pendency of the suit on 18-8-1977. The factum of death of Shri Chet Ram was brought to the notice of the trial Court on 23rd Aug. 1977. On that day the trial court directed the petitioner-plaintiff to take steps under Order 22, Rule 4, C.P.C. for bringing on record the legal representatives of the deceased-defendant by 2-9-1977. No such steps having been taken by the petitioner-plaintiff till 2-9-1977, the trial Court adjourned the case to 4-10-1977 with the directions that an application under Order 22, Rule 4, C.P.C. be filed by that date. The petitioner-plaintiff, however, could not file the application under Order 22, Rule 4, C.P.C. by 4-10-1977. The trial Court on account of the failure on the part of the petitioner-plaintiff to move an application under Order 22, Rule 4, C.P.C. passed the following order on 4-10-1977 :-

'Present : Counsel for the parties.

No application under Order 22, Rule 4, C.P.C. filed but it is admitted that Chet Ram defendant has expired. The suit stands abated. File be consigned to the record room after completion.'

2. Thereafter the petitioner-plaintiff on 3rd Nov. 1977, made an application under Order 22, Rule 4, C.P.C. praying that the legal representatives of the deceased defendant as named in that application be brought on the record. It was specifically mentioned in that application that the original defendant, Shri Chet Ram, had expired on 18-8-1977. The application under Order 22, Rule 4, C.P.C. was thus filed within the statutory period of 90 days reckoned from the death of Shri Chet Ram. Notice of that application was issued to the proposed legal representatives of the deceased who put in appearance through their counsel on 26-4-1980. The case was then adjourned to 30th April, 1980, to enable the counsel for the parties to take instructions from their clients. On 30th April, 1980, however, the trial court proceeded to record the impugned order dismissing the application of the petitioner-plaintiff made under Order 22, Rule 4, C.P.C. on the ground that in view of the earlier order dated 4-10-1977 reproduced above, the application under Order 22, Rule 4, C.P.C was not maintainable.

3. I have heard the learned counsel for the parties and have also perused the relevant provisions of Order 22, Rule 4, C.P.C. I entertain no doubt that the impugned order of the learned trial court is totally unsustainable in law and must be quashed. It being not in dispute that the petitioner-plaintiff had made this application under Order 22, Rule 4(1), C.P.C. within the prescribed period, the trial court was duty bound to allow that application, implead the legal representatives of the deceased as a party and then to proceed with the suit in accordance with law. The language of Sub-rule (1) of Rule 4 of Order 22, C.P.C. is very clear on this point and admits of no doubt. It reads : --

'4(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.'

Sub-rule (3) of Rule 4 of Order 22 deals with the abatement of suit on account of the death of a defendant. It reads :--

'4(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant.'

4. A combined reading of the provisions of Sub-rule (1) and Sub-rule (3) of Rule 4 extracted above would show that on the death of the sole defendant, the plaintiff as a matter of right is entitled to apply for bringing on record the legal representatives of the deceased-defendant and such an application can be made within the period prescribed by law and which period is admittedly 90 days. It would, as a matter of course, follow that the Court is not competent to pass any effective order resulting in disposal of the suit till the expiry of the statutory period of 90 days unless, of course, it has already, on an application made under Sub-rule (1) of Rule 4, caused the legal representatives of the deceased defendant to be made a party to the suit.

Till the time an application under Rule 4(1) is made or till the expiry of the period prescribed for making such an application, whichever is earlier, the suit is

supposed to be in a State of suspense during which period no orders excepting of formal or procedural nature can be passed. An order like the one passed by the trial court on 4-10-1977 dismissing the suit as abated before the expiry of the statutory period of 90 days from the date of death of the sole defendant and before the plaintiff had filed his application under Order 22, Rule 4(1), C.P.C. was, therefore, a nullity which could not stand in the way of the plaintiff in making his application under Rule 4(1) of Order 22. The application of the plaintiff made under Order 22, Rule 4(1), C.P.C. should have been entertained and disposed of by the court as if the earlier order dated 4-10-1977 was not in existence.

5. Shri Goel, the learned counsel appearing for the respondents, argues that the order dated 4-10-1977 dismissing the suit as abated was an appealable order and no appeal having been filed against this order, the same had become final and binding on ; the parties and in its presence the trial court had no other course open but to dismiss the application of the plaintiff made under Order 22, Rule 4(1), C.P.C. This argument, in my view, is totally misconceived. If allowed to prevail, it would amount to encouraging violation of the mandatory provisions of Order 22, Rule 4(1), C.P.C. which as earlier observed, direct that on an application being made before it to that effect, the Court shall cause the legal representatives of the deceased defendant to be made a party and then to proceed with the suit. It will also frustrate the provisions of Sub-rule (3) of Rule 4 which provide that the suit shall abate as against the deceased defendant only when no application under Sub-rule (1) is made within the time limited by law.

Abatement of suit in terms of Sub-rule (3) is automatic and takes effect only when no application is made within the prescribed period for impleading the legal representatives of the deceased defendant in terms of Sub-rule (1). To put in other words, (he abatement cannot take effect before the expiry of the statutory period of 90 days reckoned from the death of the deceased defendant and any order made to the contrary by the Court would be in violation of the provisions of Sub-rule (3) and, therefore, a nullity. In any case, an order like the one passed by the trial court on 4-10-1977 could not deprive the plaintiff of his statutory right to apply under Sub-rule (1) of Rule 4 nor could the court refuse to discharge its duty enjoined on it by Sub-rule (1) under the shelter of such an order. Thus looking

from either angle the impugned order deserves to be quashed.

6. This revision petition is accordingly allowed, the impugned order is set aside and the application of the petitioner-plaintiff made under Order 22, Rule 4(1), C.P.C. is granted. The trial court is now directed to proceed with the suit after impleading the legal representatives of the deceased-defendant as named in the application of the plaintiff.

7. The parties through their counsel are directed to appear before the trial court on 13-11-1986.

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