

Sukhdev Singh Vs. Charanjit Singh and Others

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Court : Punjab and Haryana

Decided On : Aug-29-2011

Judge : Ram Chand Gupta

Appeal No. : Civil Revision No.1708 of 2011 (O&M)

Appellant : Sukhdev Singh

Respondent : Charanjit Singh and Others

Judgement :

Ram Chand Gupta, J.

Petitioner has invoked supervisory jurisdiction of this Court under Article 227 of the Constitution of India in both the aforementioned revision petitions for setting aside order dated 4.8.2010 and subsequent order dated 14.12.2010 passed by learned trial Court in a suit filed by respondent-plaintiff-Pritam Singh (since deceased) and represented by respondents No. 1 and 2 against present petitioner-defendant and Subhash Chander (since deceased), who is now represented by respondents No. 3 to 7.

2. I have heard learned counsel for the parties and have gone through the whole record carefully including the impugned orders passed by learned trial Court.

3. Briefly stated, Pritam Singh filed a suit for possession of the shop in dispute and for recovery of Rs. 5,40,000/- as mesne profit for the use and occupation of the

shop in dispute for three years preceding the institution of the suit, i.e., from 14.6.2002 to 1.6.2005 and for decree for mesne profit from the date of filing of the suit till delivery of the possession to the plaintiff.

4. During pendency of the suit Subhash Chander-defendant died on 30.11.2008. His legal representatives were already impleaded in Civil Revision No. 4158 of 2008, pending before this Court, which was decided vide order dated 12.7.2010. Hence, learned trial Court vide impugned order dated 4.8.2010 also impleaded legal representatives of Subhash Chander deceased in the suit as well. It was also ordered that application for impleading legal representatives of Pritam Singh was already on the file and notice of the said application was given to the defendants.

5. Application for bringing on record legal representatives of deceased-Pritam Singh was contested by Narinder Kumar, one of the legal representatives of Subhash Chander by taking the plea that as plaintiff died on 17.11.2008 and as the application was not filed within the prescribed period of 90 days, the suit stand abated.

6. Learned trial Court vide order dated 14.12.2010 allowed the application filed by applicants Chanranjit Singh and Tarlochan Singh for impleading them as legal representatives of deceased-plaintiff while dismissing the objections of the present petitioner-defendant by observing that if the right to sue survives then the suit cannot be held to have abated, irrespective of the fact as to when the application is filed in view of the amendment of this Court in Order 22 of the Code of Civil Procedure (hereinafter to be referred as the 'Code').

7. It has been vehemently contended by learned counsel for the petitioner that amendments made by this Court in Order 22 of the Code stood repealed by Section 32(1) of the Code of Civil Procedure (Amendment) Act, 1999, (Act No. 46 of 1999) and Section 16(1) of the Code of Civil Procedure (Amendment) Act, 2002 (Act No. 22 of 2002), and hence, it is contended that if the application for impleading legal representatives of deceased-plaintiff is not filed within stipulated period of 90 days from the death of the plaintiff, the suit automatically stand abated. It is further contended that if legal representatives of deceased-defendant are not brought on the record within stipulated period of 90 days, suit qua that

defendant also stand abated automatically and that thereafter no application for bringing on record legal representatives of deceased-plaintiff or deceased-defendant can be allowed. It is further contended that even no application was filed for bringing on record legal representatives of deceased-defendant No. 2-Subhash Chander and that legal representatives of Subhash Chander were brought on record only as his legal representatives were impleaded in the revision petition filed before this Court. He has also placed reliance upon **Ganpat Giri v. IInd Additional District Judge, Balia and others, A.I.R. 1986 Supreme Court 589**, and **Philomina Jose v. Federal Bank Ltd. and others (2006) 2 Supreme Court Cases 608**.

8. On the other hand it has been contended by learned counsel for the respondent-plaintiff that after amendment of Order 22 by this Court, legal representatives of deceased -plaintiff or deceased-defendant can be brought on record at any time during pendency of the suit if right to sue survives. It is further contended that Order 22 of the Code has not been amended by any of the amending Act by Parliament and hence, it cannot be said that amendment made by this Court stood repealed. On the point he has placed reliance upon a Full Bench judgment of this Court rendered in **Smt. Chand Kaur v. Jang Singh and others, (1978)80 P.L.R. 746**.

9. Short question to be decided in present revision petition is as to whether Sub Rule (3) of Rule 4 of Order 22 of the Code as substituted by this Court on March 25, 1975 and Sub Rule (2) of Rule 3 of Order 22 of the Code as substituted by this Court vide notification dated 21.2.1992 stood repealed by subsequent amending Act, i.e., by Section 32(1) of the Code of Civil Procedure (Amendment) Act, 1999, (Act No. 46 of 1999) and Section 16(1) of the Code of Civil Procedure (Amendment) Act, 2002 (Act No. 22 of 2002).

10. It is pertinent to reproduce the relevant provisions of Order 22 of the Code, which reads as under:-

"1. No abatement by party's death, if right to sue survives:-The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

2. Procedure where one of several plaintiffs or defendants dies and right to sue survives:- Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff:-(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. Procedure in case of death of one of several defendants or of sole defendant:- (1) Where one of two or more defendant 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.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(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) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where-

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

4-A. Procedure where there is no legal representative :- (1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit, and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a person representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court-

(a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person.

5. Determination of question as to legal representative:- Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.

6. No abatement by reason of death after hearing: Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as it had been pronounced before the death took place.

7. Suit not abated by marriage of female party:-(1) the marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

8. When plaintiff's insolvency bars suit:-(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) Procedure where assignee fails to continue suit, or give security:- Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

9. Effect of abatement or dismissal:- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule(2).

Explanation :- Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this order.

10. Procedure in case of assignment before final order in suit :- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of subrule (1).

10-A. Duty of pleader to communicate to Court death of a party:- Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

11. Application of Order to appeals:- In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

12. Application of Order to proceedings:- Nothing in rules 3,4 and 8 shall apply to proceedings in execution of a decree or order".

11. This Court vide notification dated 11.4.1975 amended Sub Rule (3) of Rule 4 and also inserted sub-Rules (4), (5) and (6) in Rule 4 of Order 22 of the Code, which read as under:-

"High Court Amendment- [Punjab, Haryana and Chandigarh]:- (i) In rule 4, sub rule (3) shall be substituted as follows:-

"(3)Where within the time limited by law no application is made under sub rule (1) the suit shall not abate as against the deceased-defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place."

(ii) In rule 4 the following shall be inserted as sub-rules (4), (5) and (6), namely:-

(4) If a decree has been passed against a deceased defendant a person claiming to be his legal representative may apply for setting aside the decree qua him and if it is proved that he was not aware of the suit or that he had not intentionally failed to make an application to bring himself on the record, the Court shall set aside the decree upon such terms as to costs or otherwise as it thinks fit.

(5) Before setting aside the decree under sub-rule (4) the Court must be satisfied prima facie that had the legal representative been on the record, a different result might have been reached in the suit.

(6) The provisions of section 5 of the Limitation Act, 1963 shall apply to applications under sub-rule (4)." -(11.4. 1975).

12. This Court further vide notification dated 21.2.1992 substituted sub- Rule(2) of Rule 3 of Order 22 of the Code and the substituted Rule reads as under:-

"Where within the time limited by law no application is made under sub-rule(1), the suit shall not abate as against the deceased plaintiff and the judgment may be pronounced notwithstanding his death which shall have the same effect as if it has been pronounced before the death took place, and the contract between the deceased and the pleader in that event shall continue to subsist".

13. By way of aforementioned amendments it was made clear by this Court that if legal representatives of the deceased are not brought on record within the prescribed period of limitation, the suit shall not abate for the said reason.

14. It is also pertinent to refer to Section 16 of the Amending Act 22 of 2002, which reads as follows:-

"16.Repeal and savings:-(1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or High Court before the commencement of this Act shall, except in so far as such amendment or provisions are consistent with the principal Act as amended by this Act, stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897-

(a) the provisions of section 102 of the principal Act as substituted by section 5 of this Act, shall not apply to or affect any appeal which had been admitted before the commencement of section 5; and every such appeal shall be disposed of as if section 5 had not come into force;

(b) the provisions of rules 5,15, 17 and 18 of Order 6 of the First Schedule as omitted or, as the case may be, inserted or substituted by section 16 of the Code of Civil Procedure (amendment) Act, 1999 and by section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and section 7 of this Act;

(c) the provisions of rule 1 of Order 20 of the First Schedule as amended by section 13 of this Act shall not apply to a case where the hearing of the case had concluded before the commencement of section 13 of this Act."

15. From the perusal of the aforesaid provision it is clear that only local amendments/provisions in the Code, which are inconsistent to the amendments made by the Amending Act of 2002 shall stand repealed. However, no changes have been effected in Order 22 of the Code by Amending Act 22 of 2002.

16. The question arose before this Court, after Code was amended by the Code of Civil Procedure (Amendment) Act 1976 as to whether amendment made by this Court in Sub Rule (3) of Rule 4 of Order 22 on March 25, 1975, is inconsistent with the provisions of the Code as amended by the Code of Civil Procedure Amendment Act 1976 and a Full Bench of this Court in Smt. Chand Kaur's case (supra) observed as under:-

"8. No doubt, Section 97(1) of the Amendment Act provides that any amendment made or any provision inserted in the Code by a High Court before commencement of the Act shall, if it is inconsistent with the amended Code, stand repealed. But if a rule or sub rule in Schedule of the Code was amended or substituted by a High Court before the Amendment Act, the amended or substituted rule does not stand automatically repealed by virtue of Section 97(1) on the reason that original rule or sub-rule as framed by the Legislature has not been amended by the Amendment Act. If it had been the intention of the Legislature, it would have stated so specifically. I am, therefore, unable to hold that subrule(3) to Rule 4 as framed by this Court stands repealed after the Amendment Act."

17. Provision similar to Section 97(1) of the Amendment Act 1976 has been made in subsequent amendments including Amending Act 22 of 2002 as reproduced above. As no change has been effected in Order 22 of the Code by Amending Act of 2002, it cannot be said that amendment made by this Court in Order 22 of the Code, as reproduced above, stand repealed.

18. Similar view was taken by this Court in **Bijender Singh v. Smt. Phool Kaur, 4 (2011-1)161 P.L.R. 493**, vide order dated 12.10.2010 passed in C.M. No. 10212-C of 2010 in R.S.A. No. 669 of 2010 by placing reliance upon a judgment rendered by Hon'ble Apex Court in **Kulwant Kaur v. Gurdial Singh Mann (dead) by LR's. A.I.R. (2001-2)128 P.L.R. 492 (S.C.):A.I.R. 2001 (S.C.) 1273** and a judgment of Full Bench of this Court in Smt. Chand Kaur's case (supra). Similar view was also taken by this Court in **Sat Pal Singh v. Chuhar Singh and others (2006-3)143 P.L.R. 766**, **Banta Singh v. Khajan Singh 2001(2) R.C.R. (Civil) 326**, and **Ram Sarup and others v. Dilbagh Singh (2003-3)133 P.L.R. 76**.

19. So far as Ganpat Giri's case (supra), on which reliance is placed by learned counsel for the petitioner-defendant, is concerned, it has been contended by learned counsel for the respondent-plaintiff that in that case it has not been held by Hon'ble Apex Court that amendments earlier made by the State Legislature or a High Court, which were inconsistent with the Code as amended by the Amending Act stood repealed irrespective of the fact as to whether the provision was amended or not amended. Rather it has been contended that it has been held that irrespective of the fact as to whether the relevant provision was amended or modified, the amendment made to the said provision of the Code either by State Legislature or by High Court, which is inconsistent with the said amended or modified provision shall stand repealed. It has further been contended that in the said case matter before Hon'ble Apex Court was regarding Order 21 Rule 72 of the Code, which though was not amended by the Amending Act and, however, new Rule 72A was inserted in which reference was made to sub Rules (2) and (3) of Rule 72 in sub Rule (3) of Rule 72A and hence amounts to modification of Order 21 Rule 72 by inserting new Rule 72A and hence, it was held that the amendment earlier made to the said provision by the High Court stood repealed. It is also contended that the same observations were repeated by Hon'ble Apex Court in

subsequent judgment rendered in Philomina Jose's case (supra). It is further contended that on the other hand the specific point has been decided by Full Bench of this Court in Chand Kaur's case (supra).

20. There is force in the argument of learned counsel for the respondent- plaintiff. A careful perusal of judgment passed by Hon'ble Apex Court in Ganpat Giri's case (supra) shows that it has not been observed by Hon'ble Apex Court that the earlier amendments of the High Court stand repealed irrespective of the fact whether the corresponding provision of the Code are amended or not amended and irrespective of the fact as to whether the said provision has been modified or not modified. Perusal of Section 16 of the Amending Act 2002, as reproduced above, which is similar to Section 97 of the Amendment Act, 1976, shows that those amendments which were made by State Legislature or High Court before commencement of the Amending Act has been repealed which are inconsistent with the provisions of the Act as amended by the Amending Act. There is no dispute that the relevant provisions of Order 22 of the Code which were amended by this Court were not amended by any of the subsequent Amending Acts passed by the Legislature.

21. Hence, there is no force in the argument of learned counsel for the petitioner that the aforementioned amendments made by this Court in Order 22 of the Code in exercise of powers under Section 122 of the Code stood repealed by subsequent Amending Acts of 1999 and 2002 by the Legislature.

22. Moreover in this case it has come on the record that the application for bringing on record legal representatives of deceased respondent-plaintiff- Pritam Singh was filed on 7.1.2009. Perusal of the application Ex.P3 shows that there is an order in the hand of learned Presiding Officer that the application be placed on the file. In the order dated 4.8.2010 as well it has been mentioned by learned trial Court that application for impleading legal representatives of deceased-plaintiff was already on the file and hence, notice was given to the defendants. Hence, argument of learned counsel for the petitioner that the application is ante dated cannot be accepted. Even if it is taken that the application was filed on 7.1.2009, as the plaintiff died on 17.11.2008, hence, the same has been filed within 90 days

from the date of death of plaintiff-Pritam Singh and hence, the same is within limitation.

23. Hence, in view of these facts, it cannot be said that the suit filed by respondent-plaintiff stood abated as application for bringing on record legal representatives of deceased-plaintiff was not filed within prescribed period of limitation of 90 days or that the application for bringing on record legal representatives of deceased -defendant (Subhash Chander) was also not filed within prescribed period of limitation. There is no dispute that right to sue survives to legal representatives of deceased-plaintiff and the right to sue also survives qua legal representatives of deceased-defendant (Subhash Chander). Hence, there is no limitation for bringing on record legal representatives of the deceased litigants.

24. For the reasons recorded above, I am of the view that no illegality or material irregularity has been committed by learned trial Court in passing the impugned order.

25. There is no merit in the present revision petitions. The same are, hereby, dismissed.

Petition dismissed.

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