

**(1984) 05 AHC CK 0022**

**In the Allahabad High Court**

**Case No :** C.M.A. No. 198 in Supreme Court Appeal No. 335 of 1980

Commissioner of Income Tax

APPELLANT

Vs

Chhedi Lal

RESPONDENT

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**Date of Decision :** 25-05-1984

**Acts Referred:**

Allahabad High Court Rules, 1952 — Rule 2, 26, 38A  
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 5  
Income Tax Act, 1961 — Section 261

**Citation :** (1984) 42 CTR 329 : (1987) 163 ITR 304

**Hon'ble Judges :** M.N. Shukla, Acting C.J.; B.D. Agarwal, J

**Bench :** Division Bench

**Advocate :** M. Katju, for the Appellant; Ram Niwas Singh and Ram Shanker Singh, for the Respondent

**Final Decision :** Disposed Of

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## **Judgement**

B.D. Agarwal, J.—In pursuance of notice u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the assessee, Chhedi Lal, filed his return. The Income Tax Officer was of opinion that the assessee had not disclosed certain income. The difference being in excess of 20%, the Inspecting Assistant Commissioner imposed penalty upon the assessee by order dated January 4, 1977. The assessee preferred an appeal against this order u/s 253 of the Act. On November 30, 1978, the Income Tax Appellate Tribunal set aside the order dated January 4, 1977, being of the view that the power of the Inspecting Assistant Commissioner to impose penalty had ceased with effect from April 1, 1976, on account of the amendment of Section 274 of the Act. The Commissioner of Income Tax applied to the Tribunal whereupon the Tribunal made a reference to this court u/s 256 on the question whether the Tribunal was correct in law in holding that the Inspecting Assistant Commissioner had no jurisdiction to pass the order of penalty after April 1, 1976. The reference was answered by this court on July 31, 1980, in the affirmative. On October 27, 1980, the

Commissioner of Income Tax filed a petition u/s 261 of the Act for certificate for leave to appeal to the Supreme Court.

2. The assessee, Chhedi Lal, it appears, died on March 11, 1977. The notice sent to him in connection with the leave petition was returned unserved. On November 23, 1981, the Commissioner of Income Tax applied for substitution of the widow and the son of the deceased as his legal representatives accompanied with an application u/s 5 of the Limitation Act, 1963, for the condonation of delay alleging that prior to August 12, 1981, when the notice was returned unserved, the Department was unaware of the factum of death. Smt. Chhedana, the widow of the deceased assessee, put in a counter-affidavit dated November 28, 1983, wherein she asserted that on February 15, 1971, her husband had executed a registered will in her favour and also that on September 20, 1978, she had put in an application before the Income Tax Appellate Tribunal intimating the death of the assessee who was the appellant and hence it is not correct for the Department to assert that they were not aware of the death.

3. The applications made by the petitioner for substitution and condonation of delay were disposed of by us on April 26, 1984. Counsel for Smt. Chhedana, the opposite party, could not be present on that occasion. On May 1, 1984, he applied for setting aside the ex parte order. Cause being sufficient, we recalled the order dated April 26, 1984, and have heard the learned counsel for the parties on merits.

4. Sri M. Katju, learned counsel for the Revenue, argued that in proceedings u/s 261 of the Act, Order XXII of the Code of Civil Procedure, 1908, is not applicable. The question of abatement, therefore, does not arise. The court has only to ensure that there is opportunity of hearing provided to the opposite party concerned. Sri Ram Shanker Singh, the learned counsel for the objector, contended in reply that there had to be an application for substitution in view of Rule 38A, Chapter VIII and, in the alternative, under Rule 26, Chapter XXIII of the Rules of the Court. Upon careful consideration, we find that this contention is devoid of merit.

5. Rule 38A Chapter, VIII of the Rules of the court reads as under :

"38-A. The provisions contained in Rules 1 to 6 and 9 of Order XXIII and in Order XXXII of the CPC shall, so far as may be and with necessary modifications and adaptations, apply to special appeals, writ petitions under Article 226 of the Constitution and Tax references (and revisions) failing under Chapters XI, XXII and XXVII of these rules)."

6. In accordance with this rule, the application of Order XXII, Rules 1 to 6 and 9 of the Code of Civil Procedure, 1908, is extended to special appeals, writ petitions under Article 226 of the Constitution, Tax references and certain categories of revisions. The petition before us for certificate for leave to appeal to the Supreme Court made u/s 261 of the Act does not fall under any of these classes. The reference made to this court u/s 256 stands disposed of already by

order dated July 31, 1980. The petition for leave to appeal to the Supreme Court was moved on October 27, 1980, subsequent to the order made on the reference. Our attention was drawn by the learned counsel for the Revenue to a decision of a Division Bench of this court in *Commr. of Income Tax, U.P. and C.P. and Berar, Lucknow Vs. I.D. Varshani*, . In that case, there was reference u/s 66(1) of the Indian Income Tax Act, 1922 (corresponding to Section 256 of the Act). The assessee died during the pendency of the reference. The legal representatives of the deceased assessee were not substituted. This court held that Order XXII of the Civil Procedure Code, 1908, has not been made applicable to a reference u/s 66 of the old Act. There was no provision either in the income tax Act or in the rules made there under for bringing their legal representatives on the record nor were there any rules providing for the abatement of the reference in case the legal representatives were not brought on the record within the certain period. It is noteworthy that this decision was given on November 11, 1952, while Rule 38A aforementioned was added by the notification dated August 1, 1964, published in the Gazette dated December 5, 1964. Rule 38A was thus not in the picture when that case was decided. If the question were now to arise, Rule 38A would need be given effect to, but even that is of no avail to the objector in the instant case for the reason that the proceedings pending before us is not on a reference u/s 256 of the Act. In *COMMISSIONER OF Income Tax, HYDERABAD Vs. GULAM HYDERKHAN (DECEASED) AND OTHERS.*, cited for the revenue also, the view taken by the High Court of Andhra Pradesh was that an application for reference u/s 66(1) of the old Act did not abate where the assessee is dead and the Commissioner at whose instance the reference was made, failed to apply to bring the legal representatives of the assessee on the record within 90 days. The court may, it was observed, allow the application to bring the legal representatives on the record even if it was filed more than 90 days after the death of the assessee.

7. In so far as Rule 26, Chapter XXIII, is concerned, it reads :

"26. Where any party to the petition dies before the certificate is granted the provisions contained in Rules 1 to 6 and 9 of Order XXII and Order XXXII of the Code shall, so far as may be and with necessary modifications and adaptations, apply.

Rule 2 of this chapter makes it amply clear that the petitions for certificate of fitness to appeal to the Supreme Court to which the chapter applies are those covered under Article s 132(1) 135(1) and 135 of the Constitution. This chapter does not extend to a petition for certificate to appeal to the Supreme Court u/s 261 of the Act. Section 261 is self-contained, providing that an appeal shall lie to the Supreme Court from any judgment of the High Court delivered on a reference made u/s 256 in any case which the High Court certifies to be a fit one for appeal to the Supreme Court. To such a petition, therefore, Order XXII is not made applicable. Section 131 of the 1961 Act (corresponding to Section 37 of the old Income Tax Act) provides only that the authorities specified therein shall have

the same power as are vested in a court under the CPC when trying a suit in respect of the discovery and inspection, enforcing the attendance of any person, including any officer of a banking company and examining him on oath, compelling the production of books of account and other documents and issuing commissions. This also does not include the provisions contained in Order XXII of the Civil Procedure Code. Further, Rule 26, quoted above, rests on the assumption that there is a party to the petition when it is presented and the death of that party occurs subsequent to the petition being filed. In the present case, as mentioned above, the assessee had died prior to the petition filed u/s 261 and for this reason also Rule 26 is not attracted.

8. The matter can be looked into from another angle also. Chhedi Lal, the assessee, died on March 11, 1977. The appeal filed by him before the Income Tax Appellate Tribunal against the order dated January 4, 1977, was pending. On September 20, 1978, the objector (the widow of Chhedi Lal, deceased) on her own showing put in an application before the Income Tax Appellate Tribunal intimating that her husband had died in the month of March, 1977, leaving herself besides a son and a daughter as the heirs. She has appended a copy of that application to the counter-affidavit filed in this court, vide Annexure CA-II. The appeal filed by her husband came to be decided in her favour on November 30, 1978. It is manifest thus that the objector, the legal representatives of the deceased assessee, had notice of the pending appeal; her husband died and naturally, the learned counsel on her behalf does not disown the benefit derived under that decision. The defence in subsequent proceeding is founded thereon. It was said that there had been no express order made on the application of the objector before the Tribunal. The substitution is in the circumstances to be assumed as made because the object behind the same is subserved and the objector had proceeded also on the footing thereof.

9. The object underlying Order XXII, Civil Procedure Code, is that the person concerned representing the estate of the deceased be informed of the proceedings so that there may be opportunity given to him to put forward his contention. In *N. Jayaram Reddy and Another Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool*, Hon''ble Desai, J. observed :

"The basic principle underlying Order 22, Rules 3 and 4 which on account of the provision contained in Order 22, Rule 11 apply to appeals, is indisputably a facet of natural justice or a limb of audi alteram partem rule. It is a fundamental rule of natural justice that a man has a right to be heard- audi alteram partem-- where a decision affecting him or his interest is to be recorded. It hurts one's sense of justice, fairness and reason that a decision one way or the other is recorded affecting a party without giving that party an opportunity of being heard. This rule embraces the whole notion of fair procedure and the rule requiring a hearing is of almost universal validity. It has made a serious inroad in administrative decisions. It should enjoy a top place in a judicial proceeding.

The first limb of this rule audi alteram partem is that a person must be given an

opportunity of being heard before a decision one way or the other affecting him is recorded. As a corollary to this rule, it is provided in the CPC that where a party to the proceeding dies pending the proceeding and the cause of action survives, the legal representatives of the deceased party should be brought on record which only means that such legal representatives must be afforded an opportunity of being heard before any liability is fastened upon them. It may be that the legal representatives in a given situation may be personally liable or the estate of the deceased in their hands would be liable and in either case, a decision one way or the other, adverse or favourable to them, cannot be recorded unless they are given an opportunity of being heard. Order XXII Rules 3 and 4 codify these procedural safeguards translating into statutory requirement one of the principles of natural justice."

10. In a very early decision in *Brij Inder Singh v. Lala Kanhai Ram* AIR 1917 PC 156, it was held that substitution of a deceased party's legal representatives in an interlocutory appeal arising from an order made in a suit would ensure for the benefit of the suit and no separate application for substitution in the suit need be made. It was in terms held that the introduction of a plaintiff or a defendant at one stage of the suit is an introduction for all stages and that though it was done in the course of an interlocutory application as to the production of books, the same would ensure for the benefit of the suit. The ratio of this decision was affirmed in *Rangubai Kom Shankar Jagtap Vs. Sunderabai Bhratar Sakharam Jedhe and Others*, , by the Supreme Court holding that if the legal representatives are brought on record within the prescribed time at one stage of the suit, it will ensure for the benefit of all the subsequent stages of the suit. In *N. Jayaram Reddy and Another Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool*, also one of the propositions laid by the Hon'ble Desai, J. was at p. 1406 :

"A substitution of legal representatives of the deceased party in an appeal or revision even against an interlocutory order would ensure for the subsequent stages of the suit on the footing that appeal is a continuation of a suit and introduction of a party at one stage of a suit would ensure for all subsequent stages of the suit."

11. Consequently, the objector in the instant case, having taken notice of the death of her husband at the appellate stage and sought herself to be impleaded and the appeal having thereafter been decided in favour of the assessee of which the objector has taken advantage, she cannot be allowed to say that the petition u/s 261 has abated because the substitution of the legal representatives was not made in this proceeding. The object behind is fulfilled and all that needs be done is to issue notice to her of this petition which has as well taken place.

12. The learned counsel for the objector has cited certain authorities which also we have perused but find that they are not relevant to the subject matter in controversy. In *Smt. Prempiari and Others Vs. Dukhi and Another*, , the appeal had been filed against a dead person and it was held that the provisions of Order

XXII, Civil Procedure Code, did not apply. If in such a case an application is made to substitute the legal heirs of the deceased who died prior to the institution of appeal, the appeal would be taken to have been filed on the date of the application. In the instant case, the substitution of the objector is deemed as explained above to have taken place already at the appellate stage before the Tribunal. The case, *Devi Prasad v. State of U.P.* [1984] All LJ 1275 relied on for the objector arose from the writ petition under Article 226 of the Constitution. The petitioner had died and the application to substitute the legal representatives had abated. It was held that Rule 38A of the Rules of the court read with Order XXII, Civil Procedure Code, applied. The same was the position in *Nand Kishore v. Deputy Director (Consolidation)* [1968] All LJ 1062. Section 262 of the Act extends the provisions of the CPC relating to the appeal to the Supreme Court to the case of appeals u/s 261 as they apply in the case of appeals from decrees of a High Court. This has reference obviously to the provisions contained under Sections 109 112 and Order XLV, Civil Procedure Code, which pertain to appeal to the Supreme Court. There exists no justification to seek to import Order XXII in a petition u/s 261 as in the present case.

13. The objector's learned counsel also made a mention of Section 151 of the CPC and urged that the limitation in view of Article 137 of the Limitation Act, 1963, is three years. This seems misconceived having no relevance for the purposes thereof. It does not appear how Section 151 avails the objector to defeat the contention of the petitioner in this behalf. The petitioner on his part is not required to take resort to Section 151 of the CPC for the obvious reason that at the appellate stage, the substitution of the objector is deemed to have been made already and no abatement arises in proceedings u/s 261 of the Act.

14. As mentioned above, the objector has asserted that the deceased assessee executed a will in her favour on February 15, 1971. She has also appended a copy of that will to her counter-affidavit. Despite time granted, rejoinder affidavit has not been filed to this counter-affidavit for the Revenue. There is no basis consequently to assume that the will relied upon by the objector is not genuine. In the result, the objector alone needs to be treated as representing the estate of the deceased assessee, Chhedi Lal, for the purposes of these proceedings.

15. We, therefore, permit the petitioner to bring on record Smt. Chhedana, the objector, as the legal representative of the deceased assessee and dispose of the applications accordingly. The petition for certificate for leave to appeal to the Supreme Court be listed for hearing in the week commencing on July 23, 1984,