

(2005) 07 J&K CK 0024
In the Jammu And Kashmir High Court
Case No : Civil Revision No. 125 Of 2004

Ghulam Hassan Wani

APPELLANT

Vs

Bashir Ahmad Wani

RESPONDENT

Date of Decision : 06-07-2005

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 22 Rule 2, Order 22 Rule 4, Order 22 Rule 5

Citation : (2005) JKJ 1 Supp : (2005) 2 SriLJ 510 : (2005) SriLJ 510

Hon'ble Judges : S.N.Jha, C.J

Bench : Single Bench

Advocate : Z.A.Qureshi, M.I.Qadiri, M.Abdul Qayoom, Advocates appearing for the Parties

Judgement

1. This Civil revision by the defendant is directed against the order of the Subordinate Judge, Handwara dated 7th July, 2004 in suit titled Bashir

Ahmad Wani v Mst. Sajida allowing the plaintiffs' application for substitution of the legal representatives of defendant no. 1 and rejecting the

application of the petitioner to dismiss the suit as having abated. The facts of the case so far as relevant for disposal of this civil revision are as

follows:

2. Respondent no. 1, Bashir Ahmad Wani, filed suit for declaration and injunction against Mst. Sajida Begum seeking declaration that he is the

owner of suit land by virtue of adoption by ShamasudDin Wani and his wife Mst. Sajida. Sajida Begum denied the plaintiff's case of adoption. She

further stated that she had executed an irrevocable deed cancelling the alleged adoption and another deed gifting part of the suit property to

Ghulam Hassan Wani, the petitioner herein. In the circumstances, the plaintiff

filed application for amendment of the plaint and also impleadment of the petitioner which was allowed vide order dated 29th August, 1998. The petitioner challenged the said order in civil revision no. 146/1998 in this Court. In the meantime, on 9th August, 1999, Sajida Begum had died issueless. Pursuant to order dated 23rd August, 1999 in CR no. 146/1998 the petitioner filed application for substitution of her legal representatives. By order dated 20th November, 2000 the application was allowed and Sayeeda Begum, Khatkija Begum, Habla Begum, Rafiq Begum and Haleema Begum were substituted as legal representatives of Sajida Begum. As, however, Mst. Sayeeda Begum had also died issueless in the meantime, rest of the aforesaid legal representatives of Sajida Begum alone were brought on record. I shall advert to the said order dated 20th November, 2000 again later in this judgment. It is relevant to mention here that earlier, on 31st January, 2000, the plaintiff, Bashir Ahmad Wani, too had filed application vide CMP no.3/2000 for substitution of said Haleema Begum besides himself as adopted son of Sajida Begum on which no order was passed. The civil revision finally was disposed of on 27th December, 2002. A learned Judge of this Court declined to interfere with the order impugned. As regards the death of Mst. Sajida, the learned Judge observed, ""what is its effect shall be dealt with by the trial court"". After the records of the case reached the trial court, on 24th March, 2003 application was filed by the plaintiff for substitution of the legal representatives i.e. Khatija Begum and others as legal representatives of Mst. Sajida. The petitioner filed objections opposing the prayer on the ground that the application for substitution was time barred and there was no application for condonation of delay. On 19th June, 2003 the court deleted the name of Mst. Sayeeda Begum but did not pass any further order. On 5th August, 2003 the defendantpetitioner filed application to dismiss the suit as having abated on account of nonsubstitution of legal representatives of Sajida. By the order impugned the court below rejected the said application of the petitioner and allowed the plaintiff's application for substitution. The court noticed that the legal representatives of Mst. Sajida had already been substituted by this Court in the civil revision, and observed that the only point for consideration was whether Mst. Khatija alone could be arrayed as legal representative of Mst. Sajida

or the remaining three i.e. Mst. Habla, Haleema and Rafiqah said to be stepsisters are also to be substituted alongwith Mst. Khatija. Observing that

for proper adjudication of the suit it was necessary to implead them also, the court allowed the prayer for substitution of all of them.

3. Mr. M. A. Qayoom submitted that the court committed error in relying on the order of substitution passed by this Court in the civil revision at

the instance of the defendant-petitioner. The application was filed by the petitioner pursuant to the court's order and it did not absolve the plaintiff of

his responsibility to seek substitution of the legal representatives in the trial court. In any view, the substitution was only for the purpose of civil

revision. Whereas substitution in an appeal may hold good in the trial court and it may not be necessary to substitute the legal representatives once

again, any such order in civil revision against an interlocutory order cannot be extended to cover the suit and, therefore, the order of substitution in

civil revision was of no avail to the plaintiff and the court below committed error in relying on it. Counsel on facts submitted that application for

substitution was time barred without an application for condonation of delay and, therefore, the suit having abated by passage of time, the legal

representatives of the deceased defendant could not be substituted and the suit should have been dismissed as abated. Lastly, the counsel

submitted that, in view of the stand of the defendant-petitioner that Mst. Habla, Haleema and Rafiqah were stepsisters and not real sisters like Mst.

Khatija, enquiry should have been held in terms of order XXII rule 5 of the Civil Procedure Code and without such enquiry they could not be

substituted.

4. On behalf of the plaintiff-respondent it was submitted that the records of the trial court had been called for by this Court in civil revision No.

146/1999 on 23rd August, 1999 and in the absence of the record the plaintiff could not have filed application for substitution in the trial court. It

was pointed out that the period of limitation for filing application for substitution being six months in the State of Jammu and Kashmir, the plaintiff

could file the application upto 9th February, 2000. The records, however, had been sent to the High Court on 23rd August, 1999. On 31st

January, 2000 he filed application in the High Court vide CMP no. 3/2000 on which unfortunately no order was passed. In the said application he

had prayed for substitution of the legal representatives ""in the civil suit"".

5. The relevant provisions contained in order XXII of the J and K Civil Procedure Code may be noticed as under:

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.

4. Procedure in case of death of one of several defendant or of sole defendant.

(1) Where 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 representatives of the deceased defendant to be made a party and

shall proceed with the suit.

(2)...

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

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 therefore, and the

Appellate Court may take the same into consideration in determining the question.

6. It would appear that under rule 2 of order XXII where there are number of defendants and one any of them dies, the Court is required to make

an entry to that effect in the record and suit proceeds against the surviving defendant or defendants ""where the right to sue survives against the

surviving defendant or defendants alone"". In terms of rule 4, where the right to

sue does not survive against the surviving defendant or defendants

alone, the Court on application made in that behalf, shall make the legal representatives of the deceased defendant party and proceed with the suit.

Where no application is made within the time limited by law for the purpose, however, the suit would abate as against the deceased defendant.

Rule 5 provides for determination of any dispute as to legal character of the person sought to be substituted as representative of deceased.

7. In the instant case, as seen above, the suit was instituted against Mst. Sajida Begum, but after she executed the deed of gift, the petitioner was

impleaded as codefendant. It is not clear if Mst. Sajida made a gift of her entire property or only part thereof in favour of the petitioner. If she

gifted her entire property, clearly, the right to sue would survive against the petitioner alone and there would be no question of abatement, and the

suit would proceed against him under rule 2 of order XXII of the Code. On the other hand, if the gift was only of part of the property, the question

of abatement may arise against other legal representatives of Mst. Sajida. In that case a question may arise whether the suit would abate as a

whole? In my opinion, even if the application dated 24th March, 2003 for substitution is held to be not maintainable as being time barred in the

absence of application for condonation of delay, Sajida Begum having parted with part of the property (assuming it to be so) in favour of the

petitioner, there cannot be abatement of the suit as far as petitioner is concerned who already figures as part v defendant in the suit. The foundation

of his claim being deed of gift with respect to specific property it would appear that the subject matter of dispute involved in the suit is divisible and,

therefore, there can at best be abatement of suit against other natural legal representatives of the deceased defendant i.e. Mst. Khatija and others.

No objection so far appears to have been raised by them.

8. At this stage I may dispose of the submission of Mr. Qayoom to the effect that in view of dispute about the legal character of Mst. Habla,

Haleema and Rafiq as heirs and legal representatives of Mst. Sajaida. As seen above, all three of them, besides Mst. Khatija (Sayeeda having

died), were brought on record in civil revision by none else than the petitioner himself. It is not understandable as to how he can challenge their

character as legal representatives of Mst. Sajida at this stage. The court below in

the impugned order has observed that in order to avoid multiplicity of dispute which may arise on account of their nonimpleadment / substitution visavis Mst. Khatija it would be appropriate to add them too as legal representatives of Sajida for proper and complete adjudication of the suit. I do not find any error in this part of the order to warrant interference. Rule 5 of Order XXII provides for determination of question as to whether any person is or is not the legal representative of deceased plaintiff or defendant, but such determination is only for the purpose of prosecuting / defending the suit. By itself the order is not conclusive of the true character or status of the person as legal representative of deceased plaintiff or deceased defendant. I thus do not find any merit in this submission of the counsel.

9. Adverting to the main issue again, as already observed above, if the gift of the property in favour of the petitioner was in respect of the entire property of Mst. Sajida Begum, there is no question of abatement of the suit. On the other hand, if the gift was only in respect of part of the property, question may arise as to whether the suit would abate against the legal representatives of Mst. Sajida e. Mst. Khatija and others. I am inclined to think, in the facts and circumstances, that there was no willful default on the part of the plaintiff. It is not in dispute that the records of the trial court were called for by this Court in CR no. 146/1998 on or about 23rd August, 1999. Mst. Sajida died on 9th August, 1999 and the plaintiff could file application for substitution of her legal representatives by 9th February, 2000, and no adverse inference can be drawn if he did not file any such application upto 23rd August, 1999 when records were sent to the High Court. The civil revision remained pending and was disposed of on 27th December, 2002 and records were sent back to the trial court only thereafter. On 24th March, 2003 i.e. soon after the plaintiff filed the application. Failure to file application in the trial court during the intervening period is thus well explained. As a matter of fact, he had filed application within period of limitation of six months in the civil revision in this Court seeking impleadment of Mst. Khatija and Mst. Haleema in place of Mst. Sajida. It is true that in the application the names of Mst. Khatija and other two were not mentioned but then that may be due to ignorance. Where the names of some heirs are omitted in the application

and only some of them are brought on record it cannot be said that the omission to mention their names in the application resulted in abatement of the suit. Of course, where decree has been passed and a party dies during pendency of the appeal, a question may arise as to whether the appeal is competent in the absence of the legal representatives of the deceased as it may result in conflicting decree. Such a question would not arise at the stage of suit.

10. No less important is the fact that the legal representatives had been substituted by this Court. It is true that appeal and revision do not stand on par, but where pursuant to order of superior court the legal heirs are already brought on record of the case, the trial court may find it difficult to ignore their presence. The submission that the substitution in civil revision by order dated 20th November, 2000 was only for the purpose of civil revision has not impressed me. The relevant part of the order runs as under:

On consideration upon hearing the counsel Mst. Syeeda Begum, Khatija Begum, Habla Begum, Rafiq Begum and Halema Begum shall be arrayed as legal representatives of deceased Mst. Sajda Begum (respondent No.2) for purpose of substitution of the legal heirs as necessary and proper parties to this revision petition".

The words "for purpose of in my opinion refer to "substitution" and not the revision petition. The words "revision petition" have to be read alongwith the words preceding them i.e. "as necessary and proper parties to this revision petition". So read, it cannot be said that substitution was only for the purpose of civil revision and no more. It is true that while disposing of the revision petition the Court observed "what is its effect shall be dealt with by the trial court" but the observation cannot be construed to mean that the court expressed any opinion on the scope of the order of substitution. The observation appears to be in response to some submission on behalf of the petitioner and all that it means is that the trial court shall consider the matter. The trial court considered the matter by the impugned order and allowed the prayer.

Thus considered from any angle, I do not think that the court below committed any error in allowing the prayer for substitution, and therefore rejection of the petitioner's application to dismiss the suit as abated cannot be said to be illegal to warrant interference by this Court.

11. In the result, the revision is dismissed but without any order as to costs.