

(1998) 11 MP CK 0011
In the Madhya Pradesh High Court
Case No : Writ Petition No. 2397 of 1986

Gyanoda Biswas and Others	Vs	APPELLANT
Kalipada Biswas and Others		RESPONDENT

Date of Decision : 30-11-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 9
Constitution of India, 1950 — Article 227

Citation : (1999) 2 MPLJ 42

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : P.R. Bhave, for the Appellant; T.C. Naik, Mamta Billore and Ravish Agrawal, Amicus Curiae, for the Respondent

Judgement

Dipak Misra, J.

Invoking the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India the defendants-petitioners have prayed for issue of writ of certiorari for quashment of the order dated 15-2-1985 passed by the learned Second Additional District Judge, Raigarh.

The facts which are essential for disposal of the present writ petition are that the non-applicants respondents filed civil suit No. 13-A/67 for possession of the land situate in Kh. No. 340 and 350 in Village Baisi Colony, measuring 7 acres. In the said suit Kalashashi Biswas, the husband of the petitioner No. 1 and father of the petitioner Nos. 2, 4, 6, 7 and 8 and a relative of other petitioners, was arrayed as the sole defendant. The said suit was decided in favour of the plaintiff by judgment and decree dated 20-7-1972 and possession was directed to be given to the plaintiff.

Assailing the aforesaid judgment and decree Kalashashi Biswas, the defendant therein, preferred an appeal forming the subject-matter of Civil Appeal No. 36-A/72 whereby the lower Appellate Court set aside the judgment and decree

passed by the Trial Court and remanded the matter for fresh trial. The aforesaid order of remand was impugned by the plaintiffs in M. A. No. 229/73 before this Court. During the pendency of the Misc. Appeal, Kalashashi Biswas expired on 10-10-1975. Steps were not taken for his substitution within time and after lapse of some time applications were filed to bring his legal representatives on record. It is worth-noting here that during the pendency of the said Misc. Appeal, Kalipada Biswas had moved an application under Order 32 Rule 12 of the CPC (hereinafter referred to as "the Code") read with Section 151 seeking permissions to continue the suit in his own name as he has attained majority during the pendency of the proceedings. As the application for substitution was opposed, this Court by order dated 5-12-1977 held that as no proper steps had been taken for bringing the legal representatives on record the appeal stood abated and accordingly dismissed the said appeal.

After dismissal of the said Misc. Appeal, the plaintiff moved an application on 4-1-1978 before the trial Court for bringing the legal representatives of Kalashashi Biswas on record in the suit. It was averred in the said application that he had not moved the application for substitution in the suit as the High Court had granted stay of further proceeding by its order dated 28-9-1977 and it stood vacated only when the High Court decided the appeal on 5-12-1977. The aforesaid application was combated by the contesting defendants. The trial Court after consideration of the application dismissed the same and held that the suit had abated as the legal representatives of the defendant had not been brought on record. Correcting the soundness of the said order the plaintiff preferred an appeal and the lower Appellate Court set aside the order on the ground that the trial Court had not applied its mind and decided the case solely on the basis of the order passed by the High Court in M. A. No. 229/93 dated 5-12-1977. Being aggrieved by the aforesaid order of remand the defendant preferred Civil Revision No. 177/80 before this Court wherein the order of the lower Appellate Court was set aside by holding that the lower Appellate Court had not properly adjudicated the appeal on merits and the matter was remanded to be reconsidered by the said Court. Thereafter, by the impugned order dated 15-2-1985 the lower Appellate Court allowed the appeal and directed the trial Court to bring the legal representatives of the defendant on record and proceed with the suit. The aforesaid order is the cause of grievance of the present petitioner.

Assailing the aforesaid order, Mr. P. R. Bhave, learned counsel for the petitioner has contended that this Court's order passed in M. A. No. 229/73 operates as res judicata as this Court had already held that the applications for setting aside the abatement and for substitution were time- barred and sufficient cause was not shown for allowing the same and on the face of such findings the trial Court had rightly not entertained the applications and the lower Appellate Court has no authority/jurisdiction to reconsider the matter. It is emphatically putforth by Mr. Bhave, that even if it is conceded that the Court had jurisdiction to deal with the matter the lower Appellate Court should have held that the steps for substitution

should have been taken while the suit was pending before the trial Court as grant of stay by the superior Court in regard to continuance of further proceeding of the suit does not create a bar for taking steps pertaining to substitution. It is strenuously urged by Mr. Bhawe, that the lower Appellate Court has not considered the sufficiency of reasons with regard to delay caused and on that score the order passed by him is vulnerable. Mr. Bhawe, in support of his submission has placed reliance on the decision rendered in the case of Madan Lal Agarwal v. Smt. Kamlesh Nigam 1975 MPLJ 240.

Controverting the aforesaid submissions Mr. T. C. Naik, learned counsel for the plaintiffs/non-applicants has submitted that the order passed by this Court in M.A. No. 229/73 does not operate as *res judicata* inasmuch as the Misc. Appeal stood abated as regards the challenge to the order of remand was concerned and that would not prohibit the plaintiff to file an application for substitution before the Court below. It is his further submission that the lower Appellate Court has considered the matter in proper perspective and in absence of any error of law or material irregularity this Court should not invoke its extra-ordinary jurisdiction to interfere with it.

It is apposite to state here that when the matter was heard this Court requested Mr. Ravish Agarwal to assist the Court so that the controversy could be adjudicated in a proper manner. Mr. T. C. Naik, learned senior counsel for the respondents consented to the same and in fact, co-operated. I record my appreciation for the co-operation extended by Mr. Naik in this regard and assistance rendered by Mr. Agrawal. Mr. Ravish Agrawal, learned counsel has submitted that by virtue of order of abatement passed in M.A. No. 229/73 this Court closed the *lis* relating to the challenge pertaining to the order of remand passed by the lower Appellate Court but that would not make the plaintiff non-suited and debar him to file an application for bringing the legal representatives of the defendant on record. He has also high-lighted that the order of stay passed by the superior Court does not create a bar to take appropriate steps for substitution but if a party under erroneous impression has not taken such steps that would come within the ambit and sphere of appreciation of the concept of sufficient cause and would not be a prohibition in entirety to shut the doors for entertaining the application for substitution. Mr. Agarwal has also submitted that in Civil revision No. 177/80/ this Court had remanded the matter to the lower Appellate Court and that order having gone unchallenged, operates as *res judicata* and confers jurisdiction on the lower Appellate Court to decide the controversy on merits. It is his submission that the order passed in Civil Revision is binding on this Court at this stage as has been held in the decisions rendered in the cases of Shayamacharan Raghubar Prasad v. Sheojee Bhai Jairam Chattri 1964 MPLJ 502 and M.P. Bhaya Vs. Ram Prakash Sharma, .

It is relevant to state here though initially Mr. Agrawal tried to advance a contention that the concept of Order 1, Rule 10 of the CPC may be attracted, later on, he abandoned the said submission.

To appreciate the factual scenario in proper perspective, it is essential to consider the effect and impact of the orders passed in M. A. No. 229/73 and Civil Revision No. 177/80. In the appeal whereby the order of remand was assailed, this Court found that there was no justification for allowing the time-barred applications for setting aside the abatement and substitution. It is to be remembered that the appeal was preferred against the order of remand and its scope has to be confined to that limited extent. If the order of remand would not have been challenged then the suit would have proceeded in its regular course. It was not an appeal preferred u/s 96 of the Civil Procedure Code. Assailment related squarely to the order of remand passed by the lower Appellate Court. If the appeal abated the Us in appeal come to an end and the controversy in appeal lost its capability of being adjudicated. In this background the order passed in civil revision No. 177/80 has to be appreciated. On a fair and objective reading of the order passed on 23-10- 1980, it appears that this Court took note of the fact that the applications for condonation of delay, setting aside abatement and substitution filed before this Court were rejected. The learned Single Judge also took note of the fact that the proceeding before the trial Court remained stayed during the pendency of the Misc. Appeal before this Court. The plaintiff who became a major in the year 1975 filed an application on 4-1-1978 before the trial Court for substitution of the legal representatives of the deceased-defendant, Kalashashi Biswas. It was pleaded that the plaintiff acquired knowledge of the pendency of the suit on 19-12-1997 and moved the application for substitution as he had become major. Though the trial Court considered the matter on merits it also added in its finding that in the light of High Court's order passed in Misc. Appeal the plaintiff was not entitled to substitute the names of legal representatives of the deceased Kalashashi Biswas. The lower Appellate Court set aside the order on the ground that the decision of the Trial Court was passed only on the basis of decision of the High Court in the Misc. Appeal and that approach was erroneous. Accordingly it set aside the order and remanded the case for decision on merits to the Trial Court. This was the subject-matter of the civil revision. It is apposite to refer to the relevant portion of the order passed in the civil revision. It reads as under:-

"2. I have gone through the order of the trial Court. A perusal of that order would show that the trial Court has decided the applications for substitution and for setting aside the abatement on their own merits. True it is that the trial Court has also observed that the application merits dismissal in view of its findings as also in the light of the decision of the High Court. I do not find anything in the order of the trial Court to say that it has decided the matter in accordance with the findings recorded by the High Court. Apparently, therefore, the lower Appellate Court has fallen into error in disposing of the appeal in the manner in which it has done and in not deciding it on merits. The impugned order, therefore, cannot be sustained.

The revision is allowed. The impugned order is set aside. The matter shall go back to the lower Appellate Court which shall adjudicate upon merits of the

application for substitution. The parties are directed to appear before the lower Appellate Court on 24-11-1980."

From the aforesaid order it is graphically clear that this Court had taken the view that by virtue of the order passed in the appeal, filing of application for substitution in the suit was not totally prohibited or barred. It is to be borne in mind that this Court was conscious of the order passed in the Misc. Appeal. It could have set aside the order passed by the Appellate Court and restored that of the trial Court. This Court directed the Appellate Court to adjudicate upon the merits of the application for substitution as the trial Court has decided the matter on merits also. Hence, the view of this Court, as is perceptible from the above quoted portion of the order, was that the matter could be dealt with by the trial Court. Thus, in effect this Court has interpreted the effect and impact of the order passed in Misc. Appeal which arose out of the order of remand of this suit and directed for reconsideration on merits. This order passed in the civil revision has not been challenged before the superior Court. The heart of the matter is whether the said order is final as regards this Court is concerned. In this context, I may profitably refer to the decision rendered in the case of Shayamacharan Raghubar Prasad (supra). In that case the learned Single Judge of this Court had finally decided the civil revision arising from an interlocutory matter. Eventually, in a different context the same was sought to be challenged before the Division Bench. The Division Bench after referring to the decision rendered in the case of Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , held that the Division Bench was bound by the decision of the learned Single Judge. This Court held thus :-

"The judgment of the Supreme Court in Satyadhan 's case (7), makes it clear that an interlocutory order is final as regards the Court making that order. But its correctness can be challenged in an appeal from the final decree or order even though no appeal had been filed against the interlocutory order either because none lay or because even though an appeal by none was filed. On the principles laid down by the Supreme Court in Satyadhan's case (1); there can be no doubt that the order of Bhargava, J. dated the 16th October, 1962 made in C. R. No. 385 of 1962, was final as regards this Court. Its correctness could not be challenged in this Court. It could be challenged only before the Supreme Court in an appeal from the final decree. It is important to note in Satyadhan's case (1), while holding that the landlords- appellants before them were not precluded from raising in the Supreme Court the question of the availability of Section 28 of the original Thika Tenancy Act to the tenants, the Supreme Court nowhere said in that decision that the view taken by the Calcutta High Court that the landlords could not, in the revision petition they filed, raised this question, which was res judicata between the parties as it had been decided in the revision petition filed earlier by the tenants, was erroneous." (Para 13).

Though the aforesaid observations were given in a different context the fact remains that findings recorded in a Civil Revision by the Single Judge, if go

unchallenged, have the binding effect on the Division Bench. In the revision the matter was remanded for re-adjudication on merits. This Court, at this stage, cannot be oblivious of the fact that the learned Single Judge who remanded the matter was conscious of the order passed in the Misc. Appeal and being aware of the situation had directed the matter to be re-adjudicated on merits. In effect, it has already been held that the plaintiff's application for substitution in the suit was maintainable. From the aforesaid discussion it becomes amply clear that the order passed in Misc. Appeal has to be restricted to the issue of remand and the order passed in the civil revision has to be treated to have binding effect at a later stage and is no more available to challenge. Therefore, the application for substitution required to be adjudicated on merits by the trial Court.

Now, I shall proceed to deal with the contention of Mr. Bhawe, relating to the illegality committed by the learned appellate Judge in allowing the substitution. He has drawn my attention to the decision rendered in the case of Madan Lal Agarwal (supra). In the said case it has been held that during the pendency of the revision application by the defendant if the High Court stays further proceedings in the trial Court, the Court below has the jurisdiction to pass orders on application under Order 22, Rules 3 and 4; Order 40, Rule 1; Order 38, Rule 5 of the CPC during the pendency of the stay order. I may profitably reproduce the said view :-

"During the pendency of a stay order passed by the appellate or the revisional Court, although the trial Court or the Court below may not have any jurisdiction to proceed with the trial of the suit on merits, it can certainly take such steps which are collateral or which may be protective or which would for the purpose of keeping the lis alive and all such steps, an application under Order 22, Rule 3 or 4 of the CPC or an application under Order 39, Rule 1 or Rule 2 or an application under Order 40, Rule 1, or an application under Order 38, Rule 5, would be maintainable in the trial Court in spite of such stay order."

The learned counsel placing heavy reliance on the aforesaid decision has canvassed that the plaintiff should have filed the application in spite of the order of stay passed by this Court in the Misc. Appeal. It is also not in dispute that the plaintiff had not approached the trial Court. The one of the pleas taken by the plaintiff is that as there was an order of stay and he was on an erroneous impression that no application for substitution could be moved. The learned Appellate Court has referred to the decision rendered in the case of Maqbul Alam and Others Vs. Jawwad Husain and Others, . True it is, in the said case the Court had opined that when the proceeding has been stayed by the superior Court it is not necessary to take steps to bring the legal heirs on record when the stay order is in continuance and such an application can be filed after the expiry of the order of stay. Taking note of that decision, the Appellate Court accepted the plea of the plaintiff and allowed the application and directed for bringing the legal representatives on record. While this Court has already taken a view in the case of Madanlal Agarwal (supra) the trial Court should not have relied on the decision

rendered by the Allahabad High Court. But the fact remains that he has accepted the plea in regard to delay. The aforesaid fact situation has to be appreciated from a different angle. The plea taken before the Appellate Court was that as there was an order of stay the steps for substitution were not taken. It is no doubt the Court is not bereft of jurisdiction to deal with such an application and the party is also not estopped to file an application for substitution. As the fact situation expositis the plea was taken that under an impression that till the stay order was in vogue the application could not be moved, it was not moved. The Appellate Court has held that the plaintiff could have done so only after the vacation of the order of stay. But on a perusal of the order, it appears that the petition was filed in a belated stage as there was an erroneous impression on the part of the plaintiff that he could not do so unless the stay order got vacated. Reliance on the decision of Allahabad High Court is not correct inasmuch as Division Bench decision of this Court is holding the field. At this juncture, I may hasten to state that in essence the plea of erroneous impression has been accepted. By virtue of the order passed by the Appellate Court permitting the substitution substantial justice has been done. It is to be borne in mind that the parties come to Court for adjudication of their disputes. No litigant would like that his Us should not be adjudicated and the controversy should not be put to rest for his own fault. He would not like to commit any error or conduct himself in such a negligent manner which would extinguish his rights for just adjudication before the Court. Simultaneously, a negligent and recalcitrant litigant cannot be shown leniency so that the litigation would continue ad infinitum or by his own conduct he would gain advantage over his adversary. A balance has to be struck. The striking of balance would depend upon facts and circumstances of each case. As in the case at hand, substantial property is involved and the plea of entertaining an erroneous impression cannot be totally brushed aside, I am of the considered view that the learned Appellate Judge has correctly exercised the discretion. In essence, substantial justice has been done.

The whole scenario can be viewed from a different perspective. I have already indicated that substantial justice has been done by allowing the application for substitution. The defendant has approached this Court for setting aside the order under Article 227 of the Constitution of India. The jurisdiction of this Court is to be exercised only to advance the cause of justice. The equitable jurisdiction conjoint with the power of use of discretion ought to be exercised with vigilance and sound judgment to further the cause of justice. In this context, I may profitably refer to the decision rendered in the case of Ganda Ram v. Sunder Lal AIR 1921 Lah 265, wherein it was held as under :-

"The High Court is not bound to interfere on the revision side even when there is a defect of jurisdiction unless failure of justice has directly resulted from such a defect."

In the case of Puttappa v. Maligamma AIR 1954 Mys 147, it was held that if the fact situation shows that the order of the Appellate Court is just and proper while

order passed by the trial Court is unjust the Court of revision is not bound to interfere merely on the ground that the Court of Appeal had no jurisdiction to sit in appeal over the order. Similar view has been taken in the case of Narayan Naik v. Sara Bewa (1965) 31 CLT 443. The aforesaid view was followed in the case of Bhubaneswar Misra and Others Vs. Sakuntala Devi and Others, , I may hasten to add that in the aforesaid decision the revisional Court did not exercise the jurisdiction to set aside the order passed in appeal without jurisdiction as substantial justice has been done. In the present case the Appellate Judge by accepting the plea of erroneous impression has allowed the substitution. By the said order, in the obtaining factual matrix, substantial justice has been done. Because of this fact situation, even there has been no detailed discussion in the order with regard to the sufficiency of cause, I am not inclined to exercise the jurisdiction of this Court to set aside the same. However, due to the belated approach of the plaintiff in the matter of substitution the defendant is facing protracted litigation. He has to be compensated. Therefore, while sustaining the order passed by the lower Appellate Court, I am inclined to direct that the substitution would become effective on payment of Rs. 5,000/- as costs to the contesting defendants. The aforesaid cost shall be paid within a period of two months from today. If the cost is deposited as directed, the suit shall be disposed of by end of June, 1999.

With the aforesaid modification in the order of the lower Appellate Court the writ petition stands disposed of. However, there shall be no order as to costs.