

(2019) 12 JH CK 0083
In the Jharkhand High Court
Case No : Writ Petition (C) No. -3447 Of 2019

Haider Ali

APPELLANT

Vs

Sayad Akbar Ali

RESPONDENT

Date of Decision : 05-12-2019

Acts Referred:

Limitation Act, 1963 — Section 5
Code Of Civil Procedure, 1908 — Section 153, Order 6 Rule 18, Order 22 Rules 3,
Order 22 Rules 3(2), Order 22 Rules 4, Order 22 Rules 4(3), Order 22 Rule 9

Citation : (2019) 12 JH CK 0083

Hon'ble Judges : Rajesh Shankar, J.

Bench : Single Bench

Advocate : Rohitashya Roy, Vibhor Mayank

Final Decision : Dismissed

Judgement

1. The present writ petition has been filed for quashing the order dated 24.06.2019 (Annexure-8 to the writ petition) passed by the District Judge-II, Deoghar in Civil Appeal No. 32 of 2017 whereby the said appellate court sent the lower court record back to the original court for correction in cause title of the plaint, judgment and decree as the judgment and decree were passed/prepared in the name of a dead person. Further prayer has been made to direct the original court to proceed with the suit afresh.
2. Heard the learned counsel for the petitioner and perused the contents of the writ petition.
3. The petitioner being the defendant, aggrieved by the judgment dated 28.08.2017 and decree dated 08.09.2017 passed/prepared by the Civil Judge (Sr. Division)-IV, Deoghar in Title (Eviction) Suit No. 23 of 2009, preferred an appeal being Civil Appeal No. 32 of 2017 before the Principal District

Judge, Deoghar. Learned District Judge-II, Deoghar while entertaining the said appeal, noticed that the name of plaintiff no. 1 was wrongly mentioned as Sayad Mehdi Hussain in the judgment and decree of the original court as he had already died during pendency of the said suit on 09.11.2011. It was also noticed by the appellate court that the original court vide order dated 18.05.2012 had allowed the substitution petition filed on behalf of the plaintiffs with a direction to substitute the heirs of late Sayad Mehdi Hussain in the cause title of the plaint, yet the same was not incorporated in the plaint and by mistake, the judgment and decree was prepared mentioning the name of plaintiff no. 1 as Sayad Mehdi Hussain. Accordingly, the learned appellate court sent back the lower court record to the original court for correction in the plaint, judgment and decree.

4. Learned counsel for the petitioner while relying on the provisions of Order VI Rule 18 of the Code of Civil Procedure (in short 'CPC') submits that if a party who has obtained an order for leave to amend does not amend accordingly within the time provided for the said purpose or if there is no time provided for the same by the court, the amendment is to be carried out within 14 days from the date of the order failing which the concerned party is not permitted to amend it subsequently and, therefore, the learned appellate court committed an error in remitting the lower court record back to the original court for suitable correction in the cause title of the plaint, judgment and decree. In support of his submission, learned counsel for the petitioner puts reliance on paragraph- 14 of the judgment rendered by the Hon'ble Supreme Court in the case of Gurnam Singh (dead) through legal representatives and Ors. Vs. Gurbahan Kaur (dead) by legal representatives reported in (2017) 13 SCC 414.

5. To appreciate the contention of the learned counsel for the petitioner, I have gone through the aforesaid judgment, the relevant paragraphs of which are quoted hereinbelow:-

'14. In a leading case of this Court in [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340,] the learned Judge Venkatarama Ayyar, J. speaking for the Bench in his distinctive style of writing laid down the following principle of law being fundamental in nature: (AIR p. 342, para 6)

'6. ' It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its

invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in

collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the

action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.â??

15. The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against

the dead persons? In our considered opinion, it is a nullity. The reasons are not far to seek.

16. It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no

steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved, to file an application

under Order 22 Rules 3 and 4 of the Code of Civil Procedure, 1908 (for short â?? the Codeâ?) for bringing their names on record in place of the dead

persons to enable them to continue the lis.

17. The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the

legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90

days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on

91st day, there is no appeal pending before the Court. It is â??dismissed as abatedâ??.

19. In the case at hand, both the aforementioned provisions came in operation because the appellant and the two respondents expired during the

pendency of the second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-

compliance with Rules 3(2) and 4(3) of Order 22 of the Code, therefore, came into operation resulting in dismissal of second appeal as abated on the

expiry of 90 days from 10-5-1994 i.e. on 10-8-1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood

already dismissed on 10-8-1994. Indeed, there was no pending appeal on and after 10-8-1994.

20. In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.

21. It is a fundamental principle of law laid down by this Court in [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340] that a decree passed by the court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree-holder. The reason is that the defect of this nature affects the very authority of the court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a court for or against a dead person is a nullity [N. Jayaram Reddy v. LAO, (1979) 3 SCC 57]8, [Ashok Transport Agency v. Awadhesh Kumar, (1998) 5 SCC 567] and [Amba Bai v. Gopal, (2001) 5 SCC 570]).

6. It would be evident from the aforesaid judgment that their Lordships after observing the fact that though the appellant and two of the respondents had already died during the pendency of the second appeal, no application was filed to bring on record their legal representatives as party in that case, held that the decree passed in second appeal by the High Court was in nullity and the same could be challenged at any stage of the proceeding.

7. However, the facts and circumstance of the present case is entirely different to that of the aforesaid case. In the present case, it appears from the impugned order that there were two plaintiffs in the said case and one of the plaintiffs died during the pendency of the suit and a substitution application was filed on behalf of the plaintiffs before the original court which was allowed by the original court with a direction to substitute the heirs

of the deceased plaintiff in the cause title of the plaint, however the said order was not complied by incorporating the name of the heirs in the cause

title of the plaint due to which, the judgment and decree was prepared in the name of a dead person. The appellate court having taken note of such

error/omission in the judgment/decreed of the trial court and while keeping the appeal pending, remitted the lower court record to the original court with

a direction to make necessary correction in the plaint, judgment and decree. Section 153 of the CPC specifically empowers the courts to amend any

defect or error in any proceeding in a suit and it mandates that all necessary amendments shall be made for the purpose of determining the real

question or issue raised by or depending on such proceeding.

8. I find no force in the argument of the learned counsel for the petitioner particularly in view of the fact that the appellant himself was not aware of

the said fact till the judgment was finally delivered in the suit and the decree was prepared. The said mistake in fact was noticed by the learned

appellate court while going through the record of the original court. Moreover, the memo of appeal, a copy of which has been annexed as Annexure-5

to the present writ petition, also does not disclose that the petitioner raised the said issue as one of the grounds while assailing the judgment and decree

passed by the original court. Hence, the petitioner cannot be permitted to take recourse of Order VI Rule 18 of CPC in the peculiar facts of the

present case. Hence, I find no error in the impugned order dated 24.06.2019 passed by the learned District Judge- II, Deoghar in Title Appeal No. 32

of 2017 in sending the lower court record back to the original court for suitable correction by adding the names of heirs of the plaintiff no. 1-late Sayad

Mehdi Hussain in the cause title of the plaint, judgment and decree while keeping the said appeal pending.

9. The writ petition being devoid of merit is accordingly dismissed.