
(2000) 01 AHC CK 0033
In the Allahabad High Court
Case No : C.M.W.P. No. 35836 of 1999

Jatav Panchayat Committee, Etawah and another	APPELLANT
Vs	
VIIth Additional District Judge, Etawah and others	RESPONDENT

Date of Decision : 13-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 22 Rule 10, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Article 120, 137, 5

Citation : AIR 2000 All 253 : (2000) 2 AWC 1162

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : R.K. Porwal, for the Appellant; K.N. Misra and S.C., for the Respondent

Judgement

D. K. Seth, J.—One Karan Singh had filed Original Suit No. 157 of 1986 in the court of learned civil Judge (Junior Division), Etawah. The said Karan Singh died on 1st December, 1995. One Ashok Bhaskar had filed an application to bring himself on record in the place and stead of the deceased plaintiff. The said application was filed on 18th March, 1996, which is a part of Annexure-3 to this writ petition. Subsequently another application was filed on 11th December, 1996 for amendment of the application for substitution to the extend that Swami Jatav Panchayat Committee Manhaiya Khayali Ram, City- and District Etawah may be incorporated in the said application. These applications were dismissed by an order dated 10th February, 1998 passed by the learned civil Judge (Junior Division), Etawah. A revision being Civil Revision No. 49 of 1998 was moved by the petitioner. By an order dated 24th February, 1999, the Additional District Judge VII Court, Etawah had dismissed the said civil revision. These two orders have since been challenged.

2. Mr. R. K. Porwal, learned counsel for the petitioner contends that since the application was an application under Order XXII, Rule 10 of the Code of Civil

Procedure, therefore, the question of abatement has no manner of relevance. Inasmuch as where substitution is to be made under Rules 3, 4 and 5 of Order XXII of the Code, in such cases abatement sets in on the expiry of 90 days, namely, after the expiry of limitation for substitution, which is prescribed under Article 120 of the Limitation Act as 90 days. Whereas, in case an application under Order XXII, Rule 10 of the Code, the limitation being prescribed under Article 137 of the Limitation Act, which is three years, the abatement can set in only after the expiry of the said period of three years and not before. Therefore, the petitioner was not required to apply for setting aside abatement. He also contends that even if abatement sets in after expiry of 90 days from the date of death, then also if the application is made within 60 days thereafter, namely within 150 days from the date of death, in that event it would not be a belated application requiring aid of Section 5 of the Limitation Act. Inasmuch as it is well within time to apply for setting aside abatement. Therefore, the petitioner was not required to file any application u/s 5 of the Limitation Act. The application was filed within 107 days from the date of death. Therefore, according to him both the Courts below having dismissed the application on the ground that it did not accompany any application u/s 5 of the Limitation Act nor an application for setting aside abatement is wholly perverse, illegal and cannot be sustained. Therefore, the said orders are liable to be set aside.

3. Mr. K. N. Misra, learned counsel for the opposite parties on the other hand contends that in the present case Order XXII, Rule 10 has no manner of application. According to him even if the petitioner claims by virtue of a Will, he is claiming as legal representative of the deceased and not by virtue of devolution of Interest. Therefore, the substitution was to be made under Order XXII, Rule 3 of the Code, for which limitation is 90 days, on the expiry whereof application for setting aside abatement was mandatory. He had also contended that the said 60 days after expiry of 90 days is prescribed for limitation for applying for abatement. According to him, there is a distinction between setting aside abatement and substitution. Limitation for substitution having expired after 90 days, the application for substitution is required to be accompanied by an application u/s 5 of the Limitation Act explaining the delay. He further contends that neither the application filed on 18th March, 1996 nor the application filed on 11th December, 1996 are supported by any affidavit. According to him, an application under Order XXII of the Code is to be supported by affidavit. Without an affidavit, the application cannot be entertained. Therefore, both the courts below were Justified in dismissing the application. He also contends that the impugned order of the revisional court was passed on 24th February, 1999 and the same is being challenged almost after six months. On these grounds, he prays that the writ petition be dismissed.

4. I have heard both the learned counsel at length.

5. So far as the question that this petition was moved after six months from the date of the impugned order, namely. 24th February, 1999 is concerned. I do not

find any substance in the submission of Mr. Mishra. This application has been titled as application under Article 227 of the Constitution of India for which no limitation is prescribed. Normally such an application can be made within a reasonable time. No limitation having been prescribed, the same cannot be dismissed on the ground of limitation if it is moved after 90 days from the date of the order after adjusting the time taken for obtaining certified copy. However, in the present case the delay is about six months. Even if there is any delay, the same cannot be said to be an unreasonable delay for not entertaining this application under Article 227 of the Constitution of India. Therefore, this contention of Mr. Mishra cannot be accepted.

6. On the facts as discussed, which are not disputed between the parties, it is apparent that the first application was filed on 18th March, 1996, which is about 107 days after the date of death, by one Sri Ashok Bhaskar. The said application which is part of Annexure-3 to this writ petition does not appear to have been affirmed by any affidavit. Prayers made appear to be cryptic. Mr. Ashok Bhaskar had claimed himself an heir to the deceased while making the said application. He did not disclose as to how he was related to the deceased.

7. Be that as it may. The initial application was purported to have been made as heir or legal representative, as the case may be. Thus, initial application was one under Order XXII, Rule 3 of the Code. Admittedly the said application was not accompanied by any application u/s 5 of the Limitation Act nor was it accompanied by any application for setting aside abatement.

8. So far as the question of filing an application u/s 5 of the Limitation Act is concerned, Article 120 of the Limitation Act provides that unless the application for substitution is made within 90 days from the date of death, the suit abates. Such abatement can be set aside within 60 days after the expiry of 90 days. Thus, an application made after 90 days from the date of death, is an application for substitution upon setting aside abatement. The prayer for abatement being made within the period of limitation, the substitution would be made only after setting aside the abatement, and, therefore, no application explaining the delay would be necessary if such application is made with a prayer for setting aside abatement within 150 days from the date of death. Thus, the contention of Mr. Misra with regard to the necessity of filing application u/s 5 of the Limitation Act, cannot be acceded to.

9. But at the same time, the said application cannot be maintained without the prayer for setting aside abatement. If such application for setting aside abatement is made after 150 days, in that event definitely an application u/s 5 of the Limitation Act would be necessary. Inasmuch as in the said case the period of limitation for setting aside abatement would also expire after expiry of 150 days from the date of death necessitating explanation of the delay and the condonation thereof by means of filing an application u/s 5 of the Limitation Act.

10. In the present case, it is not disputed that no prayer for setting aside

abatement was ever made. No such prayer was sought to be incorporated even through any application for amendment. In the application for amendment filed on 11th December, 1996, the prayer was made that Swamy Jatav Panchayat Committee, Manhalya Khyali Ram, city and district Etawah, represented by Sri Ashok Bhaskar, be substituted in the place and stead of the plaintiff. If it is said that Swamy Jatav Panchayat Committee would persue the suit, in that event the first application for substitution appears to have been made on 11th December, 1996, which is after the period of limitation for setting aside the abatement. Therefore, it should have been accompanied by an application u/s 5 of the Limitation Act as well as with a prayer for setting aside abatement.

11. The petitioner had been claiming by virtue of devolution of Interest by reason of execution of a Will by the deceased in favour of the said Swamy Jatav Panchayat Committee. The Will was alleged to have been executed on 11th November, 1995.

12. Order XXII, Rule 10 of the Code provides as follows :

"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."

The above provision provides that in other cases of an assignment, creation or devolution of any interest during the pendency of the suit, a person may be permitted to continue the suit or the suit may be continued against such person on whom interest devolves by reason of assignment, creation or devolution of interest. In order to attract this provision, the first condition that has to be satisfied is that such an assignment, creation or devolution of Interest had taken place during the pendency of the suit. Second condition is that it should be with respect to cases which are not covered under Order XXII, Rules 1, 2, inasmuch Rule 10 begins with the expression "in other cases". Thus such devolution has to be other than death. Evolution of interest by virtue of a Will is a devolution on account of death. Inasmuch as a Will does not become effective so long the executor is alive. The Will comes to life only on the death of the executor. Therefore, the devolution becomes effective on the death and not otherwise. The interest may devolve upon the beneficiary by virtue of a Will but the same is a devolution outside the scope and ambit of Rule 10 of Order XXII of the Code.

13. That apart by reason of the Will, the beneficiary is seeking to represent the interest of the deceased. Thus, he is a legal representative of the deceased on account of succeeding to the property by reason of the execution of the Will. Then again the initial application filed by Ashok Bhaskar was an application as heir of the deceased, which is definitely an application under Order XXII, Rule 3 of the Code. The said application having been made after the period of limitation of substitution, the abatement had set in. Without a prayer for setting aside abatement, the said application could not be maintained. Then again the said

application is neither verified nor supported by affidavit. All applications to be made under the provisions of the Code are either to be verified or to be supported by an affidavit.

14. In the present case in the absence of any verification, the said application cannot be treated to be an application for the purpose of substitution. An application for substitution is required to be supported by an affidavit. Thus, even if the application for amendment is supported by verification or affidavits still that it cannot remove the irregularity or illegality in the initial application filed. The amendment application, however, is not required to be supported by an affidavit, which can be verified. The amendment application appears to have been verified. That was not supported by an affidavit. If it was supported by an affidavit, it could have been contended by Mr. Porwal that the irregularity in the initial application is removed or corrected. But the same having not been affirmed on affidavit, the same argument cannot also be adopted by Mr. Porwal.

15. Thus, in the present case, the application cannot be treated to be an application within the meaning of Order XXII, Rule 10 of the Code as contended by Mr. Porwal.

16. Mr. Porwal had relied on the decision in the case of Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass (Deceased) through his Chela Shiam Dass, The said decision does not help Mr. Porwal in the facts and circumstances of the case. Inasmuch as in the said case, both the parties were claiming to represent Dera or its property as elected mahant. Therefore, there was an uncertainty about the person who would succeed on the death of a mahant since the mahant was subject to election. There a distinction has been made between holder of an office and a legal representative. In the said case mahant was an office. Therefore, the deceased was a predecessor in office and the persons sought to be substituted was a successor in office. Thus, a mahant was not claiming as a legal representative and as such he was governed by Order XXII, Rule 10 of the Code. It was so held in the said decision in paragraphs 9 and 10, which reads as follows :

"It was, however, contended on behalf of the respondent that there was no devolution of the interest in the subject-matter of the suit on the death of Som Dass, since there was no certainty as to the person who would be elected as mahant to succeed him. The argument was that it was uncertain on the death of Som Dass as to who would become the mahant by election, that it was only when a person succeeded to the mahantship on the death of a previous mahant by virtue of law or custom that there could be devolution of interest in the subject-matter of the suit and, therefore, Order XXII, Rule 10 would not be attracted. We see no force in this argument. We are of the view that devolution of the interest in the subject-matter of the suit took place when Shiam Dass was elected as mahant of the Dera after the death of Som Dass.

Som Dass was sued in his capacity as a person who claimed (though illegally

according to the appellant) as mahant of the Dera. Som Dass contended that he was lawfully appointed as mahant of the Dera. He never set up any claim which was adverse to the Dera or Its properties. The suit against Som Dass was not in his personal capacity but in his capacity as de facto mahant. In other words, the suit was for possession and management of the Dera and the properties appertaining to it by the appellant purporting to be the de jure mahant against Som Dass as de facto mahant. The fact that it was after Som Dass died that Shiama Dass was elected to be the mahant of the Dera can make no difference when we are dealing with the question whether the interest in the subject-matter of the suit devolved upon him. The subject-matter of the suit was the Interest of Som Dass in the Dera and its properties and it devolved upon Shiama Dass by virtue of his election as mahant subsequent to the death of Som Dass. And, as it was in a representative capacity that Som Dass was sued and as it was in the same representative capacity that the appeal was sought to be continued against Som Dass, Order XXII. Rule 10 will apply, see *Ratnam Pillai v. Nataraja Desikar*, AIR 1924 Mad 540 the Court held that a succeeding trustee of a trustee who filed a suit and thereafter died during its pendency was not legal representative of the predecessor in office. The Court said that where some of the trustee die or retire during the pendency of a suit and new persons are elected to fill their place, it is a case of devolution of interest during the pendency of a suit and the elected persons can be added as parties under Order XXII, Rule 10 notwithstanding that the period of limitation for timpleading them had expired."

17. Mr. Porwal had also relied on a decision in the case of *State of Uttar Pradesh Vs. Sheikh Asghar and Others*, . The said decision also docs not help Mr. Porwal in the facts and circumstances of the case. Inasmuch as in the said case, the plaintiff having died heirless, the property was escheated to the Government and the Government sought to enter in the record as plaintiff not as a legal representative but as a person upon whom the interest of the plaintiff devolved under Order XXII. Rule 10 of the Code. Thus, there also the State did not claim any interest as a legal representative. Whereas in the present case, Mr. Ashok Bhaskar had applied for substitution as heir of the deceased, namely, a legal representative. Swamy Jatav Panchayat Committee had also sought to come into the picture as a legal representative by reason of claiming interest through the Will to the property left by the deceased.

18. Mr. Porwal had also relied upon a decision in the case of *S. K. Masood alias Zafar and others v. Wahid Ahmad Ansari and others* 1997 AWC 100 . The said decision also does not help the petitioner in the facts and circumstances of the present case. In the said case, it was held that since the opposite party No. 2 was already on record and the defendant applicant was one of the co-tenant, therefore there was no question of abatement. In the said case the question as involved in the present case, was not Involved. In the said case the deceased was the tenant in respect of the property along with opposite party No. 2 and there was no pleading that there was splitting up for tenancy. On the other hand the tenancy was stated to be joint. Joint Interest was existing in the opposite

party No. 2 being one of the heirs and there being no conflict of interest between opposite party No. 2 and heirs of the deceased, it was held that there was no question of abatement. Then again the question of application of Article 137 in the said case was applied in the facts and circumstances that the application for substitution was made in revision. A distinction was made that Article 120 was applicable in respect of substitution in a suit or appeal. It did not Include revision. In the absence of specific provision, Article 120 could not be attracted for substitution in a revision, and, therefore, limitation would be governed under Article 137, being residuary Article. It was so held in the decision in the case of Chandradeo Pandey and Others Vs. Sukhdeo Rai and Others, , with the observations that the Legislature should amend the Limitation Act in order to remove the anomalies in the period of limitation in suits and appeals and in revisions in respect of substitution. But since the decision in the case of S. K. Masood (supra), there seems to have been no amendment in the Limitation Act. The attention of the Court was not drawn to any such amendment in the Limitation Act Incorporated pursuant to the observations made in the Full Bench decision in the case of Chandra Deo (supra). Therefore, the said decision is distinguishable and cannot be applied in the facts and circumstances of the case.

19. For all these reasons, this petition falls and is accordingly dismissed. No cost.