
(2004) 02 AHC CK 0078
In the Allahabad High Court
Case No : Civil Revision No. 521 of 1989

Kanhaiya Prasad Srivastava	Vs	APPELLANT
Smt. Santosh Kumari and Others		RESPONDENT

Date of Decision : 10-02-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, Order 22 Rule 4

Citation : AIR 2004 All 333 : (2004) 3 AWC 2097

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : M.M. Sahai, Arti Raje and Satyawan Srivastava, for the Appellant; L.P. Singh, K.S. Kushwaha, Deepak Kaushik, Tilakdhari Singh, Jagdish Lal and Rajesh Kumar, for the Respondent

Judgement

Tarun Agarwala, J.—The present civil revision arises out of an order and judgment dated 27.5.1989 passed by the District Judge, Ballia allowing the substitution application No. 4-Ka. The facts leading to the present revision is that Original Suit No. 85 of 1983 was filed by the plaintiff. Raj Kishore Prasad through next best friend Smt. Santosh Kumari for cancellation of sale deed executed in favour of the defendant Kanhaiya Prasad Srivastava. Before the trial court an application was filed by the plaintiff to contest the suit as an indigent person. The said application was allowed by the trial court against which the defendant Kanhaiya Prasad Srivastava filed a Civil Revision No. 204 of 1983. During the pendency of this revision the plaintiff died and the defendant moved a substitution application to implead the heirs of the plaintiff. The said substitution application was allowed by order dated 8.4.1985 and the heirs of the plaintiff Raj Kishore Prasad were impleaded in the Civil Revision No. 204 of 1985.

2. It may also be stated here that the plaintiff, while he was alive had also moved an application before the trial court for appointment of a receiver. This application was rejected by an order of the trial court dated 3.3.1984 against which the plaintiff filed Misc. Appeal No. 54 of 1984. In this Misc. Appeal, Smt.

Santosh Kumari filed an application for substituting her name in place of the plaintiff. This substitution application was rejected by order dated 16.1.1987 on the ground that the date of the death of the plaintiff was wrongly mentioned. Subsequently, Smt. Santosh Kumari filed an application under Order XXII, Rule 9, C.P.C. for setting aside the abatement, in the Misc. Appeal No. 54 of 1984, which was again rejected by an order dated 27.11.1987. It has also been stated that Smt. Santosh Kumari moved an application on 12.12.1984 for substituting the heirs of the plaintiff in Original Suit No. 85 of 1983, which was dismissed as not pressed on 23.9.1988. However, prior to the dismissal of the aforesaid application, another application No. 4A dated 24.11.1987 was moved praying therein that the name of the heirs of the plaintiff be substituted in Original Suit in view of the fact that the heirs have already been substituted in Civil Revision No. 204 of 1983. This application No. 4A was allowed by the impugned order dated 27.5.1989 against which the present Civil Revision has been filed before this Court.

3. Heard Sri M. M. Sahai, learned counsel for the defendant-revisionist and Sri L. P. Singh, learned counsel for the opposite parties. The counsel for the revisionist submitted that the order passed in Civil Revision No. 204 of 1983 substituting the heirs of the plaintiff cannot benefit the heirs of the plaintiff in Original Suit inasmuch as the revision is not a continuation of a suit. Further no application was made within the prescribed period before the trial court for substituting the heirs of the plaintiff and the suit abates by operation of law. It was further submitted that the application on behalf of the heirs in Misc. Appeal No. 54 of 1984 for impleadment had already been rejected and, therefore, the said order in Misc. Appeal will operate as *res judicata* in so far as any order being made on the substitution application in the Original Suit.

4. I have given my thoughtful consideration on the aforesaid arguments raised by the counsel for the revisionist. The arguments advanced by the learned counsel for the revisionist has no force and is liable to be rejected.

5. The Supreme Court in *Rangubai Kom Shankar Jagtap Vs. Sunderabai Bhratar Sakharam Jedhe and Others*, , has explained the provision of Order XXII of the CPC and held as follows :

"(9) Let us now consider the question of principle. A combined reading of Order XXII Rules 3, 4 and 11, of the CPC shows that the doctrine of abatement applies equally to a suit as well as to an appeal. In the application of the said Rules 3 and 4 to an appeal instead of "plaintiff" and "defendant", "appellant" and "respondent" have to be read in those rules. *Prima facie*, therefore, if a respondent dies and his legal representatives are not brought on record within the prescribed time, the appeal abates as against the respondent under Rule 4 read with Rule 11 of Order XXII of the Code of Civil Procedure. But there is another principle recognised by the Judicial Committee in the aforesaid decision, which softens the rigour of this rule. The said principle is that if the legal representatives are brought on record within the prescribed time at one stage of

the suit, it will enure for the benefit of all the subsequent stages of the suit. The application of this principle to different situations will help to answer the problem presented in the present case. (1) A filed a suit against B for the recovery of possession and mesne profits. After the issues were framed, B died. At the stage of an interlocutory application for production of documents, the legal representatives of B were brought on record within the time prescribed. The order bringing them on record would enure for the benefit of the entire suit. (2) The suit was decreed and an appeal was filed in the High Court and was pending therein. The defendant died and his legal representatives were brought on record. The suit was subsequently remanded to the trial court. The order bringing the legal representatives on record in the appeal would enure for the further stages of the suit. (3) An appeal was filed against an interlocutory order made in a suit. Pending the appeal the defendant died and his legal representatives were brought on record. The appeal was dismissed. The appeal being a continuation or a stage of the suit, the order bringing the legal representatives on record would enure for the subsequent stages of the suit. This would be so whether in the appeal the trial court's order was confirmed, modified or reversed. In the above 3 illustrations one fact is common, namely, the order bringing on record the legal representatives was made at one stage of the suit, be it in the suit or in an appeal against the interlocutory order or final order made in the suit, for an appeal is only a continuation of the suit. Whether the appellate order confirms that of the first Court, modifies or reverses it, it replaces or substitutes the order appealed against. It takes its place in the suit and becomes a part of it. It is as it were the suit was brought to the appellate court at one stage and the orders made therein were made in the suit itself. Therefore, that order enures for the subsequent stages of the suit.

(10) But the same legal position cannot be invoked in the reverse or converse situation. A suit is not a continuation of an appeal. An order made in a suit subsequent to the filing of an appeal at an earlier stage will move forward with the subsequent stages of the suit or appeals taken therefrom but it cannot be projected backwards into the appeal that has already been filed. It cannot possibly become an order in the appeal. Therefore, the order bringing the legal representatives of the 7th respondent on record in the final decree proceedings cannot enure for the benefit of the appeal filed against the preliminary decree. We, therefore, hold that the appeal abated so far as the 7th respondent was concerned."

6. From the aforesaid, it is clear that where an appeal has been filed against an interlocutory order made in a suit and during pendency of the appeal, a party dies and his legal representatives are brought on record, the order bringing the legal representatives on record would enure for the subsequent stages of the suit.

7. The question, which arises now, is whether the provision of Order XXII, C.P.C. would apply to revision proceedings or not? This question has already been answered by the Supreme Court in AIR 1979 SC 1393 at page 1406, the

Supreme Court held :

"(4) A substitution of legal representatives of the deceased party in an appeal or revision even against an interlocutory order would enure 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 enure for all subsequent stages of the suit."

8. Thus, in my view the order of substitution passed in Civil Revision No. 204 of 1983 would enure the benefit in Original Suit No. 85 of 1983. The application No. 4A was correctly allowed by the Court below. However, I find that while allowing the application No. 4A, the trial court also allowed the substitution application in Misc. Appeal No. 54 of 1984. This part of the impugned order of the trial court is totally without jurisdiction. The trial court cannot pass an order reversing or setting aside any order of the appellate court. Therefore, the order of substitution in Misc. Appeal No. 54 of 1984 passed by the trial court is wholly without jurisdiction.

9. In view of the aforesaid the revision succeeds in part. The order of the trial court is set aside to the extent of allowing the substitution application in Misc. Appeal No. 54 of 1984. The order of the trial court allowing the application No. 4A is confirmed and it is directed that substitution of the heirs of the plaintiff be made in Original Suit No. 85 of 1983. In view of the partial success, the parties are directed to bear the cost.

10. This Court further directs the trial court to expeditiously dispose of the suit within a period of one year from the date of the receipt of the certified copy of the judgment.