

(2012) 06 GUJ CK 0064

In the Gujarat High Court

Case No : Civil Revision Application No. 321 of 2011

Makvana Udaji Jehaji and Others

APPELLANT

Vs

Makvana Parthiji Punjaji and Others

RESPONDENT

Date of Decision : 14-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 1, Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 9

Citation : (2012) 53 GLR 2354

Hon'ble Judges : Mukesh R. Shah, J

Bench : Single Bench

Advocate : S.K. Patel, Nos. 1 - 2, 2-2-2, 2-2-3, 2-2-4, 2-2-5, 2-2-6 and 8, for the Appellant; Sneha A. Joshi, for Opponent Nos. 1-2-1, 1-2-2 and 1-2-3, for the Respondent

Judgement

Mukesh R. Shah, J.—Present Civil Revision Application under Sec. 115 of the CPC has been preferred by the petitioners herein-original defendants to quash and set aside the impugned order dated 29-8-2011 passed by the learned trial Court passed below Exh. 165 in Regular Civil Suit No. 78 of 2001 by which the learned trial Court has allowed the said application submitted by the heirs of the original plaintiff permitting them to be brought on record as heirs and legal representatives of original plaintiff-Punjaji Dhulaji Makwana. That one Punjaji Dhulaji Makwana instituted Regular Civil Suit No. 78 of 2001 against the petitioners-original defendants in the Court of Principal Senior Civil Judge, Modasa, who died on 14-10-2010 leaving behind him respondents herein as heirs and legal representatives. That no steps were taken by the respondents herein-heirs and legal representatives of original plaintiff permitting them to be brought on record as heirs and legal representatives of plaintiff within stipulated time i.e. within 90 days. However, the respondents herein submitted application at Exh. 165 on 30-6-2011 i.e. after a period of 90 days from the death of original plaintiff requesting and/or permitting them to be brought on record as heirs and legal representatives of the original plaintiff in aforesaid Regular Civil Suit No. 78

of 2011. That by impugned order, the learned Additional Civil Judge and J.M.F.C., Modasa has allowed the said application permitting the respondents herein to be brought on record as heirs and legal representatives of the original plaintiff in aforesaid Regular Civil Suit No. 78 of 2001 and original plaintiff is directed to carry out the necessary amendment accordingly. Being aggrieved and dissatisfied with the impugned order passed by the learned trial Court passed below Exh. 165 in Regular Civil Suit No. 78 of 2001 by which the learned trial Court has allowed the said application preferred by the heirs and legal representatives of the plaintiffs permitted them to be brought on record as heirs and legal representatives of the plaintiff in the aforesaid Civil Suit, the petitioners herein-original defendants have preferred the Civil Revision Application under Sec. 115 of the Code of Civil Procedure.

2. Shri S.K. Patel, learned Advocate for the petitioners-original defendants has vehemently submitted that the impugned order passed by the learned trial Court permitting the respondents herein to be brought on record as heirs and legal representatives of the original plaintiffs is absolutely illegal and without jurisdiction which deserves to be quashed and set aside.

2.1. Shri S.K. Patel, learned Advocate for the petitioners-original defendants has further submitted that in the present case admittedly the suit has been abated automatically as the heirs and legal representatives of the original plaintiff were not brought on record within a period of 90 days, and therefore, the suit has been abated and thereafter application Exh. 165 is moved by the heirs and legal representatives of the original plaintiff which in absence of any prayer to set aside the abatement by condoning the delay in preferring the application for bringing the heirs on record was not maintainable. It is further submitted that in the present case there is neither any application for setting aside abatement nor any prayer is made for condonation of delay by showing "sufficient cause", and therefore, the learned trial Court has materially erred in allowing the application Exh. 165.

2.2. It is further submitted by Shri S.K. Patel, learned Advocate for the petitioners-original defendants that the impugned order passed by the learned trial Court is without jurisdiction as there was no suit, when the impugned order was passed by the learned trial Court as no steps were taken to bring the heirs of original plaintiff on record within 90 days, the suit has been abated automatically. It is submitted that when suit has been abated unless the abatement is set aside Court cannot pass any order except to set aside an abatement on an application made by the legal heirs and representatives of the plaintiff. It is further submitted that as such the Court below could have entertained and exercised its power for passing impugned order only till 90th day of the death of plaintiff and on 91st day onward there was no suit pending with the learned trial Court because of the abatement by force of law.

2.3. It is further submitted that application for bringing the heirs and legal representatives of original plaintiff on record can be filed only when the suit is

alive i.e. within 90 days. It is further submitted by Shri S.K. Patel, learned Advocate for the petitioners-original defendants that permitting directly bringing legal heirs on record without setting aside abatement is not permissible in law and as such it amounts to circumventing the provisions of sub-rule (3) of Rule 9 of Order 22 of the Code of Civil Procedure. It is submitted that by adopting such procedure and on passing such an order it amounts to making redundant the provisions of Order 22, rule 1 of the CPC and Arts. 120 and 121 of the Limitation Act. It is further submitted that if the provisions of Order 22, Rule 9(3) of the CPC is permitted to be ignored there will be no abatement of the suit and its effect would be that the party can file an application for bringing the legal heirs on record at any time meaning thereby there would be no finality to the proceedings. In support of his above submissions, Shri S.K. Patel, learned Advocate for the petitioners-original defendants has heavily relied upon the decision of the Division Bench of the Andhra Pradesh High Court in the case of Morasa Anjaiah Vs. Kondragunte Venkateswarlu (died) and others, . He has also relied upon the decision of the Division Bench of Patna High Court in the case of Jamuna Rai, reported in AIR 1961 Patna 178 by submitting that as held by the Division Bench of the Patna High Court, legal heirs cannot be brought on record under Order 1, Rule 10 by circumventing the provisions of Order 22, rule 1 of the Code of Civil Procedure. He has also relied upon the decision of the Hon"ble Supreme Court in the case of Union of India (UOI) Vs. Ram Charan and Others, taking view that, when the suit is abated the concern party has to move an application for setting aside abatement by showing sufficient cause by which he was prevented from bringing legal heirs on record in time. It is further submitted that as held by the Hon"ble Supreme Court in the aforesaid decision the Court has no inherent power to add legal heirs to do substantiate justice to the party under Sec. 151 of the CPC by circumventing the specific provisions of Order 22, Rule 9 of the Code of Civil Procedure. It is submitted that as held by the Hon"ble Supreme Court in the said decision, referring Rules 3 and 4 of Order 22 that the application for setting aside the abatement is necessary for setting aside abatement and also for bringing legal heirs within time allowed by law. It is further submitted that as held by the Hon"ble Supreme Court in the aforesaid decision it would be the plaintiff who will move such application, as by abatement of the suit, the defendant stands to gain.

2.4. Shri S.K. Patel, learned Advocate for the petitioners-original defendants has also relied upon the decision of the Hon"ble Supreme Court in the case of Bhagwan Swaroop and Others Vs. Mool Chand and Others, by submitting that the Hon"ble Supreme Court has observed that, when specific provision is made as provided in Order 22 of the Code of Civil Procedure, it may not be appropriate to resort to the general provisions of CPC to bring legal heirs on record. It is submitted that it is further observed by the Hon"ble Supreme Court in the said decision that valuable right accrues to the other party, and such a right is not to be ignored or interfered with lightly in the name of doing substantial justice to the party, as depriving a party of a lawful right created in the interest of

administration of justice in absence of good grounds results in injustice to the other party. It is further submitted that as held in the said decision that the party guilty of negligence must suffer the consequences.

2.5. Relying upon the decisions of the Hon'ble Supreme Court in the case of Balwant Singh (Dead) Vs. Jagdish Singh and Others, ; in the case of Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs. and Others, ; in the case of State of Gujarat Vs. Sayed Mohd. Baquir El Edross, ; in the case of P.K. Ramachandran Vs. State of Kerala and Another, as well as in the case of Madan Naik (Dead) by Legal Representatives and Others Vs. Hansubala Devi and Others, , it is submitted that law of limitation has to be applied with all its rigour and unless strong case is made out to condone the delay and sufficient cause has been shown delay is not required to be condoned under the guise of doing substantial justice and/or taking liberal view. By making above submissions and relying upon the above decisions, it is requested to allow the present Civil Revision Application.

3. Present Civil Revision Application is opposed by Ms. Sneha Joshi, learned Advocate for the respondents-original plaintiffs. It is submitted by Ms. Joshi, learned Advocate for the respondents-original plaintiff that as the heirs of the plaintiffs were not aware of the legal aspect, and therefore, they could not make application for bringing the heirs of original plaintiffs on record within the stipulated time of 90 days. It is submitted that as such there is no delay in preferring the application for bringing the heirs of original plaintiffs on record. It is submitted that after the death of the original plaintiffs, the respondents herein-original heirs of the original plaintiff were busy in the ritual work and they could not make the application within the stipulated time. It is submitted that considering the aforesaid facts and circumstances of the case when the learned trial Court has exercised the discretion and has allowed the application submitted by the heirs of the original plaintiff permitting them to be brought on record as heirs and legal representatives of the original plaintiff, it cannot be said that the learned trial Court has committed any error and/or illegality which calls for interference of this Court in exercise of powers under Sec. 115 of the Code of Civil Procedure. Ms. Joshi, learned Advocate for the respondents herein-original plaintiff has relied upon the unreported decision of this Court in Civil Revision Application No. 22 of 2010 in support of her prayer to dismiss the present Civil Revision Application by submitting that as held by this Court in the aforesaid decision on allowing the application permitting the plaintiff to bring the heirs of co-defendant on record, the abatement is automatically set aside.

3.1. Ms. Joshi, learned Advocate for the respondents herein-original plaintiffs has also relied upon the decisions of the Hon'ble Supreme Court in the case of Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others, as well as in the case of Ratna alias Ratnavati (Smt) Vs. Syndicate Bank and Others, as well as in the case of Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs. and Others, , Ms. Joshi, learned Advocate for

the respondents has also relied upon the decision of the Hon''ble Supreme Court in the case of Parimal Vs. Veena @ Bharti, on "sufficient cause". By making above submissions and relying upon the above decisions, it is requested to dismiss the present Civil Revision Application.

4. Heard the learned Advocates for the respective parties at length. At the outset, it is required to be noted and it is an admitted position that the sole plaintiff has died on 14-12-2010 and considering the provisions of Order 22 read with Limitation Act application preferred for bringing the heirs of sole plaintiff was required to be made within the period of 90 days from the date of death of sole plaintiff. It is an admitted position that the application for bringing the heirs of the sole plaintiff was not made by the heirs within a period of 90 days and same has been made by submitting the application Exh. 165 on 30-6-2011 i.e. after a period of limitation i.e. 90 days. It is also an admitted position that while submitting the application Exh. 165 the heirs and legal representatives of sole plaintiff has neither prayed for setting aside the abatement nor submitted any application to condone the delay in bringing the heirs of plaintiff on record and/or in submitting the application for setting aside abatement and straightway an application was submitted permitting them to be brought on record as heirs and legal representatives of sole plaintiff. Therefore, the short question which is posed for consideration of this Court is whether in case where the application for bringing the heirs of sole plaintiff is made after the prescribed period of limitation, i.e. after a period of 90 days from the date of death of sole plaintiff, whether such an application permitting the heirs to be brought on record as heirs and legal representatives of original sole plaintiff, without submitting an application for setting aside the abatement and/or without submitting any application and/or praying to condone the delay in preferring such an application would be maintainable or not?

5. As held by the Hon''ble Supreme Court in the case of Madan Naik (Dead) by Legal Representatives and Others Vs. Hansubala Devi and Others, no specific order for abatement of proceedings under one or other provisions of Order 22 is envisaged and the abatement takes place on its own force by passage of time. It is further observed by the Hon''ble Supreme Court in the said decision that in fact, a specific order is necessary under Order 22, Rule 9 of the CPC for setting aside the abatement. Under the circumstances as no steps were taken within a period of limitation to bring the heirs and legal representatives of original plaintiffs on record the suit stood automatically dismissed as having been abated, and therefore, unless and until any application is submitted by the heirs of sole plaintiff requesting to set aside the abatement with a further prayer to condone the delay in submitting the application and the Court is satisfied that a "sufficient cause" has been shown to condone the delay, the Court may condone the delay in submitting the application for bringing the heirs on record as well as the Court set aside the abatement by permitting the heirs of the plaintiff to be brought on record. In the present case, as stated above, neither any application for setting aside the abatement was submitted by the heirs of the sole plaintiff nor any

application to condone the delay has been submitted, and therefore, the impugned order passed by the learned trial Court passed below Exh. 165 straightway permitting the heirs of the original plaintiff to be brought on record is without jurisdiction and/or such application itself which was submitted in a suit which stood dismissed as having been abated automatically was not maintainable.

6. Considering the aforesaid facts and circumstances of the case, the decisions cited by the learned Advocates for the respective parties with respect to sufficient cause are not required to be considered as such, no such application to condone the delay has been made by the respondents herein original heirs and legal representatives of the original plaintiffs. Under the circumstances, the said question is kept open.

7. Now, so far as reliance placed upon the decision of this Court in Civil Revision Application No. 22 of 2010 is concerned, on facts the said decision would not be applicable and/or of any assistance to the respondents herein. In the aforesaid case, one of the defendants died and it was found that estate was represented by other respondents and in fact there was already prayer to condone the delay and permit the plaintiff to bring the heirs of original defendant No. 2 on record and the suit was for declaration and permanent injunction.

8. In view of the above and for the reasons stated above, the impugned order passed by the learned trial Court passed below Exh. 165 permitting the respondents-original applicants-heirs and legal representatives of the original plaintiff on record of the suit as heirs and legal representatives of the original plaintiff in absence of any prayer to set aside the abatement cannot be sustained and same deserves to be quashed and set aside. In view of the above and for the reasons stated above, present Civil Revision Application succeeds and the impugned order dated 29-8-2011 passed by the learned trial Court passed below Exh. 165 in Regular Civil Suit No. 78 of 2001 is hereby quashed and set aside. However, it is observed that it will be open for the respondents herein-original applicants-heirs and legal representatives of the original plaintiff to submit an appropriate application for setting aside the abatement with a prayer to condone the delay and if Court is satisfied that a sufficient cause has been shown in submitting the application to bring the heir and legal representatives on record, the Court may consider the same in accordance with law and on merits, for which this Court has not expressed anything on merits. Rule is made absolute to the aforesaid extent. No costs.