

(1996) 10 PAT CK 0013

In the Patna High Court

Case No : Civil Revision No. 339 of 1996 (R)

Manbhul Oraon and Others

APPELLANT

Vs

Gangadhar Oraon and Others

RESPONDENT

Date of Decision : 08-10-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 3, Order 22 Rule 4, Order 6 Rule 17, 115

Citation : (1997) 1 PLJR 389

Hon'ble Judges : S.K. Chattopadhyaya, J

Bench : Single Bench

Advocate : M.K. Laik, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Chattopadhyaya, J.—The revisionists are the Plaintiffs, who have impugned the order dated 9.5.96 passed in T.S. No. 56/93, by and under which the learned court below has refused the prayer of the Petitioners to be added as Plaintiffs in place of deceased-Plaintiffs No. 13.

2. The suit was filed for declaration of Plaintiffs' title, confirmation of possession and for permanent injunction in respect of the suit lands. Uncontroverted fact is that the Plaintiff No. 13, Baidyanath Oraon died some time in July, 1994. No step for substitution of the heirs and legal representatives of the said Plaintiff was ever taken either by the Petitioners or by any party to the suit, as a result of which partial abatement of suit to the extent of share of said Baidyanath Oraon was passed by the court below. This order was not challenged by the Petitioners before the higher court. On 11.3.96, however, a petition under Order 1, Rule 10 CPC was filed on behalf of the Petitioners praying therein to add the names of Petitioners as parties to the suit in place of deceased-Baidyanath Oraon. Subsequently, on 21.3.96 Anr. petition was filed by the Petitioners under Order 6, Rule 17 CPC praying therein to amend the plaint. Opposite parties--Defendants filed a rejoinder to the aforesaid petitions on 11.4.96. By the impugned order,

the learned court below has refused the prayer of the Petitioners for adding them as parties under Order 1 Rule 10, inter alia, holding that the provisions under Order 1, Rule 10 cannot be invoked by the Petitioners under the circumstances.

3. Mr. Laik, learned Counsel appearing on behalf of the Petitioners, vehemently urged that only because instead of filing any petition under Order 22 Rule 4, the Petitioners filed petition under Order 1 Rule 10, the court below could not have dismissed the same as not maintainable. According to the learned Counsel, wrong levelling of a petition cannot be said to be a defect going to the root of jurisdiction of the trial court to add the Petitioners as Plaintiffs in place of late Baidyanath Oraon. In support of his contention, Mr. Laik has relied on a decision in the case of Bhagwan Swaroop and Others Vs. Mool Chand and Others, .

4. Where one of two or more Plaintiffs dies and the right to sue does not survive to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit. This principle of substitution of heir and legal representative of a deceased-Plaintiff has been laid down under Order XXII Rule 3 Code of Civil Procedure. However, Sub-clause (2) of Rule 3 prescribes limitation of 90 days from the date of death for filing such an application.

5. Thus, it is clear that within 90 days from the date of death a substitution petition has to be filed and if there is some delay in filing the same, prayer for condonation and for setting aside abatement, if any, is to be made by the interested parties.

6. In the instant case, admittedly the Plaintiff No. 13, Baidyanath Oraon died some time in 1994 but no petition under Order XXII Rule 3 was ever filed by the Petitioners. Thus, it appears that when limitation for filing substitution petition had expired, the Petitioners, in order to circumvent the provisions for substitution, filed a petition for adding them as parties under Order I, Rule 10.

7. Order I Rule 10 CPC reads as follows:

Suit in name of wrong Plaintiff.--(1) Where a suit has been instituted in the name of the wrong person as Plaintiff or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks just...

8. The underlined principle of Rule 10 is to save honest and bona fide Plaintiffs from being non-suited on a technical ground subject to however, some limitations on the power, namely, institution should have been under a genuine mistake and secondly that a valuable right acquired by the Defendants should not be defeated.

9. I have noticed above that the Petitioners being son, daughters and wife of late

Baidyanath Oraon, did not take any step for substituting their names after the death of said Baidyanath Oraon in 1994 and as such order of partial abatement was passed by the court below. In such circumstances, in my opinion, the Petitioners filing an application under Order I Rule 10 was misconceived.

10. In the case of Bhagwan Swaroop (supra) the original Defendant No. 1, Ganesh Narain Mathur having died on 10.2.1977, the original Defendant No. 2 filed an application informing the court that as heirs and legal representatives of Ganesh Narain Mathur having not been substituted, the appeal abates as a whole. Before any order could be passed on such petition, Bhagwan Swaroop and Ors. moved an application on September 4, 1981 under Order 22 Rule 4 CPC for substitution. Similarly, before disposal of the application one Prabhu Narain claiming to be the son of Ganesh moved an application under Order 1 Rule 10 praying therein that he and Ors. mentioned in the application be impleaded as heirs and legal representatives of deceased-Ganesh. A division Bench of the Rajasthan High Court rejected the said application by observing that the provisions of Order 1 Rule 10 cannot over-ride specific provisions of Order XXII. Against that order of rejection, Appellant Bhagwan Swaroop and Ors. moved the Supreme Court.

11. Hon"ble Mr. Justice D.A. Desai (as His Lordship then was) observed in paragraph 4 as follows:

It is true that it was incumbent upon the Appellant to implead the heirs and legal representatives of deceased Respondent No. 1 in time. It is equally true that the Appellants were negligent in moving the proper application. We would not question the finding of the High Court that Appellant Nos. 2, 3 and 4 knew about the death of the deceased Respondent No. 1 This being a suit for partition of joint family property, parties are closely interrelated and it is reasonable to believe that at least some of the Appellants must have attended the funeral of deceased Respondent No. 1, as contended on behalf of the contesting Respondent No. 2. There is some force in the contention that when a specific provision is made as provided in Order 22 Rule 4, a resort to the general provision like Order I, Rule 10 may not be appropriate. But the laws of procedure are devised for advancing justice and not impeding the same. In Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, this Court observed that a CPC is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. This was reaffirmed in Kalipada Das alias Mahanto and Others Vs. Bimal Krishna Sen Gupta (Dead) by Lrs., .

The appeal was allowed by holding that in a suit for partition, the possession of the Plaintiffs and Defendants can be interchangeable. His Lordship observed that if the application had been granted, the appeal could have been disposed of in the presence of all the parties. The difficulty High Court experienced in granting the application disclosed a hyper technical approach which if carried to end may result in miscarriage of Justice. His Lordship noticed that heirs and legal

representatives of deceased Respondent No. 1 could have contended that the appeal against them has abated and their share has become unassailable but that was not their case rather they want to be impleaded and substituted as heirs and legal representatives of deceased Respondent No. 1. They had no grievance about the delay in bringing them on record.

A.N. Sen (as His Lordship then was) however, concurring with Justice Desai in allowing the appeal, has observed that the Appellant had full knowledge of the death of the Respondent who was a near relation of the Appellant. The application made by the heirs of the deceased for substitution under Order 1, Rule 10 of the CPC in His Lordship's view, was indeed misconceived and has been rightly held to be so by the High Court.

It is further observed that;

To my mind, it cannot be said that the High Court had acted improperly or illegally in the facts and circumstances of this case in refusing to set aside be abatement. I have my doubts as to whether it is proper for this Court to interfere with such orders passed by the High Court.

His Lordship did not propose to press his doubt to the point of dissent and considering peculiar facts and circumstances of that case that the appeal was from a preliminary decree in a partition suit in which the heirs and legal representatives of the deceased Respondent had also made an application, though misconceived, for being substituted and brought on record, concurred with the ultimate finding of Hon"ble Justice Desai and allowed the appeal.

12. In my view, the facts and circumstances of the present case is entirely different from the case before the Supreme Court. In the case before the Superme Court as because petitions under Order XXII and under Order 1 Rule 10 were filed and as because it was an appeal in a partition suit, their Lordships, while observing that the Division Bench of the Rajasthan High Court was not wrong in passing the impugned order, allowed the appeal on the facts and circumstances of the case. On the contrary, in the instant case, the Petitioners being nearest heirs and legal representatives of the deceased Plaintiff No. 13, Baidyanath Oraon, did not file any application under Order XXII Rule 3 within the prescribed period and as such, order of partial abatement of the suit was passed, which remain unchallenged. Under these circumstances, in my considered opinion, petition under Order 1 Rule 10 filed by the Petitioners was not warranted inasmuch as specific provisions under Order XXII Rule 3 cannot be circumvented by resort to the provisions of Order 1 Rule 10. In my view, the impugned order dated 9.5.96 passed by the learned Court below cannot be interfered with u/s 115 Code of Civil Procedure.

13. I find no merit in this application and the same is dismissed.