
(2002) 02 RAJ CK 0030

In the Rajasthan High Court

Case No : Civil Revision Petition No. 1665 of 1997

Manohari Lal

APPELLANT

Vs

Suraj Mal and Others

RESPONDENT

Date of Decision : 07-02-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1963 — Section 5

Citation : (2003) 3 WLN 110

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.K. Keshote, J.—Heard learned counsel for the parties, perused the memo of revision petition and the impugned order.

2. Learned counsel for the defendant-respondent Mr. J.P. Goyal raises preliminary objection re-maintainability of revision petition. His submission is that the impugned order is appealable. Under the impugned order the application filed by plaintiff for setting aside the abatement of the suit has been dismissed and against that order appeal lies before the District Judge. The reference has been made in support of his contention to Order 43 Rule 1, CPC.

3. Learned counsel for the plaintiff-petitioner in contra submitted that under the impugned order the application filed by plaintiff-petitioner under Order 22 Rules 4 & 9 CPC read with Section 5 of the Limitation Act has been decided and that order is not appealable and the remedy is only of filing the revision petition.

4. To appreciate the rival contentions of learned counsel for parties and to decide the point re-maintainability of revision petition the facts of the case are to be briefly stated.

5. The plaintiff-petitioner filed a suit for partition of Joint Hindu Property in the Court of Additional Civil Judge (Jr. Dn.) Hindaun City. One of the defendant to

suit Vishnu Kumar died on 4.4.1996 leaving behind his legal representatives. This fact came to knowledge of the plaintiff petitioner on 13.5.1996. The plaintiff-petitioner sought time to file application of bringing on record the legal representatives of the deceased defendant Vishnu Kumar and the case was adjourned to 8.7.1996. Before that date, on 28.5.1996 the plaintiff-petitioner filed an application under Order 22 Rules 4 & 9 CPC read with Section 5 of the Limitation Act. The averments made in the application were supported by affidavit. The application was contested by other defendants. Under order dated 6.8.1997 the application came to be rejected. Hence this revision petition.

6. It is not in dispute that the defendant Vishnu Kumar died on 4.4.1996. Learned counsel for the plaintiff-petitioner does not dispute that it was the application under Order 22 Rules 4 & 9 CPC read with Section 5 of Limitation Act. In the facts of this case, I am satisfied that the application u/s 5 of Limitation Act was not required. The application under Order 22 Rule 4 CPC is filed beyond 24 days of the prescribed limitation. But the limitation for filing application under Order 22 Rule 9 CPC is 60 days from the date of abatement of suit. It is no more res integra that abatement of suit is automatic. The application under Order 22 Rules 3 & 4 CPC, as the case may be, is not filed within 90 days from the date of death of party concerned. An application for setting aside abatement is to be filed within limitation, as what it is provided under Order 22 Rule 9, CPC. However, in case where the application under Order 22 Rule 9 CPC is not filed within the limitation prescribed for it, the same can only be condoned u/s 5 of Limitation Act. In view of these undisputed facts of the case and legal position, there was no necessity in this case for filing the application by plaintiff-petitioner u/s 5 of Limitation Act. In the application though reference has been made to Section 5 of Limitation Act but it cannot be construed an application under that provision. The application was filed under Order 22 Rules 4 & 9 CPC and the same has been dismissed. This is a case where the trial Court has declined to set aside abatement and held that the suit is abated. Bare perusal of this order leaves no doubt, that the application filed by plaintiff-petitioner under Order 22 Rules 4 & 9 CPC has been rejected. The impugned order is appealable, but still the plaintiff-petitioner has chosen to file the revision petition. The revision petition u/s 115 CPC is maintainable in a case where against the impugned order no appeal is provided in the CPC. Here in this case against the impugned order the appeal is provided and reference may have to Order 43 Rule 1(k), CPC. The objection raised by learned counsel for defendants respondents re-maintainability of the revision petition deserves acceptance and the same is accepted.

7. As a result of acceptance of the objection of learned counsel for defendants-respondents re maintainability of the revision petition the same is dismissed only on this ground.

8. However, in case the plaintiff-petitioner files the appeal against the impugned order within a period of 15 days from the date of receipt of certified copy of this order, it is expected that the appellate Court shall consider the application if filed

u/s 5 of Limitation Act sympathetically and having justice oriented approach.