
(1981) 07 SHI CK 0002
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 11 of 1979

Nisapati

APPELLANT

Vs

Smt. Gyatri and Others

RESPONDENT

Date of Decision : 10-07-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 5

Citation : AIR 1982 HP 8 : (1981) ShimLC 347

Hon'ble Judges : T.R. Handa, J

Bench : Single Bench

Advocate : Kedar Ishwar, for the Appellant;

Final Decision : Dismissed

Judgement

T.R. Handa, J.—The petitioner has come up in revision against the order dated 21-12-1978 recorded by the Additional District Judge, Mandi on an application purporting to have been made under Order XXII, Rule 4 read with Section 151 of the CPC on behalf of the respondents.

2. The facts which have given rise to this revision petition are not very much in dispute. The present petitioner Nisapatti brought a suit in the Court of Subordinate Judge, Mandi against his brother Lekh Raj and his mother Smt. Achhri for a declaration that certain property as detailed in the suit was ancestral in nature in which all the three parties named above had equal share and that the same was liable for partition in accordance with such shares. Shri Lekh Raj the brother of the petitioner contested the suit claiming that he was the exclusive owner of the property in question as it was his self acquired property. Smt. Achhri the mother of the petitioner did not contest. Shri Lekh Raj expired during the pendency of the suit and the present respondents were impleaded as his legal representatives. The suit was ultimately decreed in favour of the petitioner-plaintiff.

3. The respondents then preferred an appeal against the judgment and decree of

the trial Court which was assigned for disposal of the Addl. District Judge, Mandi. During the pendency of that appeal Smt. Achhri the mother of the petitioner and who had been impleaded as respondent No. 2 in the appeal expired. After the death of Smt. Achhri, the respondents who were the appellants before the Additional District Judge made an application purporting to be under Order XXII, Rule 4 read with Section 151, C.P.C. praying that the name of Smt. Achhri respondent be struck off from the appeal in order to proceed further with the case. It was alleged by the respondents in their application that Smt. Achhri respondent had left no other heir except the parties to the litigation and as such her name needed to be struck off.

4. In reply to that application the present petitioner while admitting the factum of death of Smt. Achhri contended that vide her Will dated 9-5-1978, the deceased had bequeathed all her properties in his favour who alone was, therefore, competent to represent the estate of the deceased. The petitioner accordingly prayed that after determining the question in accordance with the provisions of Order XXII, Rule 5, C.P.C. as to who was the legal heir of Smt. Achhri, the application be rejected to the extent that the present respondents were not the legal heirs of the deceased.

5. The learned Additional District Judge vide his impugned order accepted the application of the respondents by ordering that the name of Smt. Achhri deceased be removed from the array of the respondents in appeal. While disposing of the said application the learned Additional District Judge further observed that the question as to whether the present petitioner Nissapatti had become exclusive heir and legal representative of Smt. Achhri by virtue of the Will in his favour, was left open and in case the appeal was dismissed, this petitioner would have a right to claim the share of Smt. Achhri in the suit property on the basis of the Will in his favour by instituting a separate suit.

6. The respondents did not appear in spite of service and hence this revision petition was heard ex parte. Shri Kedar Ishwar, the learned counsel for the petitioner argued that once rival contentions had been put forward before the learned Additional District Judge by the parties with respect to their claims of being treated as legal representatives of Smt. Achhri deceased, it was imperative upon the learned Additional District Judge to have decided such contentions one way or the other in terms of the requirements of Order XXII, Rule 5, the provisions of which were mandatory. By not deciding and leaving this question open the learned Additional District Judge has refused to exercise jurisdiction vested in him under Order XXII, Rule 5, C.P.C. and for that reason his order was liable to be quashed by this Court in exercise of its revisional powers. In the alternative his plea was that the learned Additional District Judge by passing the impugned order had exercised his jurisdiction with material irregularity inasmuch as he did not observe the mandatory provisions of Order XXII, Rule 5, C.P.C. He cited a number of authorities in support of his contention that the provisions of Order XXII, Rule 5, C.P.C. are mandatory and that whenever a question arises as

to whether any person is or is not the legal representative of the deceased party, the Court is duty bound to determine such question.

7. I have no dispute with regard to the legal proposition propounded on behalf of the petitioner that the provisions of Order XXII, Rule 5 of the Civil P. C. are mandatory and that whenever a dispute arises before the Court as to who is the legal representative of the deceased party, the Court is under an obligation to determine that question. On a close study of the scheme and the relevant provisions of Order XXII of the CPC in the light of the admitted facts of this case I am, however, of the opinion that neither the provisions of Rule 4 nor those of Rule 5 of Order XXII could be attracted in this case and if, therefore, the learned Additional District Judge refused to decide the question if the petitioner was the exclusive heir of the deceased under her Will, he cannot be said to have failed or refused to exercise a jurisdiction vested in him nor can he be said to have exercised such jurisdiction illegally or with material irregularity.

8. In certain suits/appeals the right to sue may not survive on the death of a party and in such cases the death by itself would put the suit to an end which shall have to be dismissed as not maintainable after the death.

9. In other cases where the right to sue survives the death will not by itself put the suit to an end (Order XXII, Rule 1). In such cases, the questions would arise as to what steps be taken by the interested party to continue with the suit/appeal after the death of a party and what consequences would follow if no such steps are taken. The answer to these questions would be found in the provisions of Order XXH of the Code.

10. Rule 2 of Order XXII provides that where there are more than one plaintiff or more than one defendant and any of them dies, the suit shall continue to proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants without the necessity of taking any additional step provided the right to sue survives in favour of the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone. The only requirement of this rule is that an entry shall be made on the record with respect to the factum of death of the deceased and this duty has been enjoined upon the Court and not on the parties.

11. There may, however, be cases where in the case of a sole plaintiff, the right to sue survives on his death or in the case of more than one plaintiff, the right to sue on the death of one of them, does not survive to the surviving plaintiff or plaintiffs alone. In such cases an application has to be made to the Court for bringing on record the legal representatives of the deceased plaintiff and the suit would not proceed till such legal representatives are actually impleaded. If no such application is made within the prescribed period, the suit shall abate (Order XXII, Rule 3).

12. Again there may be cases where the sole defendant dies and the right to sue survives or where one of the two or more defendants dies and the right to sue

does not survive against the surviving defendant or defendants alone. In such cases also an application has to be made for bringing on record the legal representatives of the deceased defendant and the suit shall remain in suspense till such legal representatives are actually impleaded. If no such application is made within the prescribed period, the suit shall abate as against the deceased defendant (Order XXII, Rule 4).

13. A joint reading of the provisions of Rules 2, 3 and 4 of Order XXII of the Code would show that the necessity of making an application for bringing on record the legal representatives of a deceased party would arise only in such suits where the sole plaintiff or sole defendant dies and the right to sue survives or in cases where one of the two or more plaintiffs or one of the two or more defendants dies and the right to sue does not survive to the surviving plaintiff/plaintiffs alone or against the surviving defendant/defendants alone. No application for bringing on record the legal representatives of a deceased party would be necessary nor the Court would be required to implead any legal representative of the deceased where there are more than one plaintiff or more than one defendant and on the death of any of them the right to sue survives in favour of the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone.

14. Now Order XXII, Rule 5, C.P.C. enjoins that where a question arises as to whether any person is or is not a legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. Obviously this rule would be attracted only when the case involves the appointment of a legal representative or legal representatives on the death of a plaintiff or a defendant. When a case does not involve the appointment of a legal representative, no such question whether a particular person is or is not a legal representative of a deceased party, can arise. As earlier observed the necessity of impleading the legal representatives of a deceased party would arise only where the provisions of Order XXII, Rule 3 or Order XXII, Rule 4 are attracted and no such necessity would arise where the case is covered by the provisions of Order XXII, Rule 2, C. P. C. In other words the provisions of Order XXII, Rule 5, C.P.C. would not be attracted to a case which is covered by the provisions of Order XXII, Rule 2, C.P.C. and where on the death of a deceased party the suit can continue at the instance of the surviving plaintiff/plaintiffs alone or against the surviving defendant/ defendants alone without impleading any third person as a legal representative of the deceased.

15. In the instant case it appears to be an admitted position that the appeal after the death of Smt. Achhri respondent, could continue against the surviving respondents and that there was no necessity of impleading any third party as legal representative of Smt. Achhri deceased. In other words the parties agree that the appeal could continue against the surviving respondent alone as it is nobody's case that the appeal has abated for not impleading the legal representatives of the deceased. The respondents also in their application which

purports to have been made under Order XXH, Rule 4, Civil P.C. had nowhere prayed that any third person be impleaded as legal representative of the deceased Smt. Achhri. Their simple prayer was that the name of Smt. Achhri deceased be deleted from the array of the respondents and the appeal continued thereafter. The application of the respondents though if bears the label of Order XXH, Rule 4, C.P.C. was in fact and in law an application under Order XXH, Rule 2, C.P.C. Thus when no legal representative was required to be impleaded on the death of Smt. Achhri, there could be no question of any dispute arising between the parties inter se as to whether the petitioner was the exclusive heir or the sole legal representative of the deceased. It may be observed that a party who is already on the record of the suit in one capacity or the other need not be impleaded as legal representative of any other party to the suit who dies during the pendency of the suit. The claim of the petitioner that he should be recorded as the sole legal representative of the deceased would not fall within the ambit of Order XXH, Rule 2. C. P. C. or under any other provision of Order XXII and is thus misconceived. The order recorded by the learned Additional District Judge that the name of Smt. Achhri deceased be struck off from the array of the respondents was, therefore, the only proper order which could have been passed in the circumstances of the case.

16. This revision petition is thus without merit and is dismissed.