
(2006) 02 P&H CK 0041

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 3905 of 2003 and Second Appeal from Order No. 44 of 2003

Pargat Singh and Others

APPELLANT

Vs

Nachhattar Singh

RESPONDENT

Date of Decision : 01-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 4, Order 6 Rule 17
Limitation Act, 1963 — Section 5

Citation : (2006) 144 PLR 504 : (2006) 3 RCR(Civil) 783

Hon'ble Judges : Satish Kumar Mittal, J

Bench : Single Bench

Advocate : Arun Palli, for the Appellant; J.S. Cheema, for the Respondent

Final Decision : Allowed

Judgement

Satish Kumar Mittal, J.—This order shall dispose of Civil Revision No. 3905 of 2003 and S.A.O. No. 44 of 2003, which are arising from the same suit between the parties, though against two different orders.

2. The instant Civil Revision has been filed by Pargat Singh and others, against the order dated 22.3.2003 whereby the application tiled by the petitioner for amendment of the grounds of appeal and for impleading the legal representatives of Daroga Singh as co-appellants has been dismissed. The S.A.O. has been filed against the order dated 8.5.2003 passed by the Additional District Judge, Fatehgarh Sahib vide which the appeal preferred by the appellant Pargat Singh against the judgment and decree dated 26.11.1999 has been dismissed being abated.

3. The brief facts, which are relevant vis-a-vis the questions involved for consideration in the aforesaid two cases, are that the petitioner Pargat Singh along with his brother Daroga Singh filed the instant suit for declaration, possession and permanent injunction against their brother Nachhattar Singh with a prayer that the plaintiffs were the joint owners along with the defendant to the

extent of 1/3rd share each in the suit property and the entries made in the jamabandis for the year 1981-82 and 1986-87 and even subsequent thereto reflecting the position to the contrary, were wholly illegal and null and void, and thus liable to be corrected. A prayer for a decree for possession and for injunction restraining the defendant from alienating the suit land was also made.

4. The defendant Nachhattar Singh contested the said suit. He denied the claim of the plaintiffs being joint owners to the extent of 1/3rd share each with him in the suit land and claimed that in fact he was the exclusive owner in possession of the suit property by virtue of a sale deed. The trial Court dismissed the suit of the plaintiffs vide judgment and decree dated 26.11.1999. It was held that as per the judgment and decree dated 22.10.1977 (Ex. P-16 and P-17) inter se between the parties, the plaintiffs were to be held the joint owners to the extent of 1/3rd share, however the said judgment and decree could not be taken into consideration as in the present case the plaintiffs were not claiming the ownership to the extent of 1/3rd share on the basis of the said decree. But they were claiming the suit land independently. Thus, the said evidence on record could not be taken into consideration being beyond pleadings.

5. Against the above-said judgment and decree dated, an appeal was filed by Pargat Singh. It is pertinent to mention here that Daroga Singh, co-plaintiff had died on 21.11.1999 and on the basis of the registered Will No. 62 dated 25.5.1994, the appellant Pargat Singh filed the said appeal on his behalf as well as on behalf of deceased Daroga Singh through his legal representatives. The certified copies of the said Will as well as death certificate of Daroga Singh were annexed with the grounds of appeal. It is mentioned here that actually the aforesaid registered Will dated 25.5.1994 was executed by Daroga Singh not in favour of appellant Pargat Singh, but in favour of his two grandsons, namely, Surinder Singh and Gurmail Singh.

6. During the pendency of the appeal, when the aforesaid mistake came to the notice of petitioner Pargat Singh, he along with Surinder Singh and Gurmail Singh filed an application for amendment of the grounds of appeal and for impleading Surinder Singh and Gurmail Singh as legal representatives of appellant Daroga Singh. The said application was dismissed by the Appellate Court vide impugned order while observing as under:

...The original appeal was filed by Daroga Singh deceased through his legal representative, Pargat Singh. Now by the proposed amendment in the grounds of appeal and in the title of the appeal applicants Gurmail Singh and Surinder Singh want to be added in the array of applicants. If the proposed amendment to add Surinder Singh and Gurmail Singh as appellants is allowed it will be beyond limitation. Because their appeal will be treated to be instituted from the date when they are ordered to be impleaded as appellant and as per the authority of our Hon'ble High Court reported in 1998 (3) L.R.J. 32, the application filed for amendment after more than two years from the date of filing of the appeal can't be allowed. Because applicants Gurmail Singh and Surinder Singh have not

explained the delay in their application to the satisfaction of this Court. Furthermore, as per the law laid down by the Hon''ble Supreme Court of India reported in 1996-/ C.C. Cases 467 "Civil Procedure Code, 1908 Order 6 Rule 17 Amendment of plaint. The relief sought time barred amendment can't be allowed. Furthermore, as per the authority of our Hon''ble Court reported in 1990 (1) R C R 391, amendment at appellate stage is not to be allowed as a matter of course.

7. Against the aforesaid order, the Civil Revision has been filed.

8. After passing of the aforesaid order, the respondent-Nachhattar Singh filed an application for dismissing the appeal of the petitioner Pargat Singh as being abated. The prayer was made that since the judgment and decree dated 26.11.1999, whereby the suit filed by the deceased Daroga Singh and Pargat Singh was dismissed, was a joint decree and since Daroga Singh died during the pendency of the suit, and neither he nor any of his legal representative filed any appeal against the said decree, therefore, same became final against Daroga Singh as well as his legal representatives. Since the said decree was a joint decree, even the appeal preferred by Pargat Singh could not be proceeded further and the same was also liable to be dismissed having been abated. On the said application, the appeal of the petitioners was dismissed being abated by the Additional District Judge, Fatehgarh Sahib vide impugned order dated 8.5.2003.

9. Against the aforesaid order, S.A.O. No. 44 of 2003, has been filed by Pargat Singh.

10. Shri Arun Palli, learned Counsel for the petitioners/appellant submitted that the first Appellate Court has completely lost sight of the fact that petitioner Pargat Singh had preferred the appeal against the judgment and decree dated 26.11.1999 not only on his behalf but also on behalf of the Daroga Singh deceased through his legal representatives. He mentioned in the grounds of appeal that the said Daroga Singh by virtue of a registered will dated 25.5.1994 bequeathed his interests in Pargat Singh, therefore, he claimed himself to be legal representative of the deceased. However, the said mistake was committed inadvertently or on account of accidental slip on the part of the counsel in the Courts below, as the copy of the will was annexed with the grounds of appeal, which clearly indicates that Daroga Singh executed the will in favour of Surinder Singh and Gurmail Singh, sons of Badan Singh. The learned Counsel submits that there could not be any reason for mentioning the wrong names of the legal representatives of deceased Daroga Singh as the mistake committed was a purely an inadvertent mistake, and when the said mistake came to the notice of petitioner Pargat Singh, he immediately moved an application for amendment of the grounds of appeal as well as for impleading Surinder Singh and Gurmail Singh as legal representatives of deceased Daroga Singh being appellants. Learned Counsel submitted that the Appellate Court has dismissed the said application only on the ground that time barred amendment cannot be allowed. He further submitted that while making such observation, the first Appellate

Court has completely ignored the difference between a time barred suit and a time barred appeal. A time barred amendment of the plaint cannot be allowed, if by the time the cause of action in the amended suit became time barred. But an amendment in the grounds of appeal can be allowed or a party can be permitted to file a time barred appeal, if sufficient cause for delay in filing the appeal is explained as Section 5 of the Limitation Act will be applicable in such situation. The learned Counsel submitted that while dismissing the application on the ground of limitation, the first Appellate Court has relied upon a decision of the Hon"ble Apex Court in Muni Lal v. The Oriental Fire and General Insurance Co. Ltd. and Anr. 1996 (1) C.C.C. 467 (S.C.), which pertains to the amendment of the plaint and wherein it was held that the amendment of the plaint cannot be permitted if the amended suit becomes time barred during the pendency of the proceedings. Learned Counsel submitted that the said case is not applicable at all in the facts of present case, where the amendment of the grounds of appeal was sought. In this regard, learned Counsel for the petitioners relied upon a decision of this Court in The New India Assurance Co. Ltd., Chandigarh Vs. Smt. Charanjit Kaur and Others, , wherein it was held that where a party to the original proceedings has not been made a party in the appeal, the Appellate Court can rectify the mistake as bona fide even after expiry of limitation.

11. Counsel for the petitioner further relied upon a decision of the Calcutta High Court in I.T.C. Limited Vs. M.M.P. Lines Pvt. Ltd. and Others, , wherein it was held that it is well known that there is no limitation as such for application for amendment. But in granting an application for amendment if there is any question of the introduction of any cause of action, which would be barred by lapse of time if a new suit was instituted on that cause of action, that is a factor which the Court should take into consideration in allowing such amendment application. But the limitation as such is not the only deciding and guiding factor. The learned Counsel submitted that in this case if the amendment in the grounds of appeal is allowed and if the correct legal representatives of deceased Daroga Singh are permitted to be impleaded then it cannot be said that it introduced any cause of action which would be barred by the lapse of time.

12. The learned Counsel while further relying upon a decision of the Hon"ble Ape Court in Pankaja and Anr. v. Yellappa (D) by Lrs. and Ors. 2004 (3) C.C.C. 401, submitted that in spite of delay and laches, the amendment can be allowed if facts of the case so permit, as dominant purpose of allowing amendment is to minimise the litigation. Therefore, learned Counsel submitted that while declining the application for amendment filed by the petitioners vide order dated 22.3.2003, the trial Court has committed patent illegality, which resulted into grave injustice, therefore, the said order is liable to be set aside.

13. While arguing against the order of dismissal of the appeal being abated, learned Counsel for the petitioners/appellant submitted that the first Appellate Court has completely ignored the fact that appellant Pargat Singh along with Daroga Singh had filed the instant suit claiming themselves to be joint owners

along with defendant Nachhattar Singh to the extent of 1/3rd share each in the suit property. Both the plaintiffs were claiming and pursuing their independent and individual interest in the suit property. He further submitted that even petitioner Pargat Singh could have maintained his suit independently and claimed only 1/3rd share qua him. While referring to the Full Bench decision of this Court in Ajmer Singh Vs. Shamsher Singh and Others, , the learned Counsel submitted that even one of the co-sharer can maintain the suit against a third person in respect of the entire property without impleading the other co-sharers. Learned Counsel further submitted that the first Appellate Court has dismissed the appeal of the appellant Pargat Singh being abated on the ground that if the appeal filed by him is allowed, then it will amount to conflicting judgments as judgment and decree under appeal against Daroga Singh and his legal representatives has become final, as no appeal was filed by them. The learned Counsel submitted that the first Appellate Court has completely ignored the provisions of Order 41 Rule 4 C.P.C., which provide that where there are more plaintiffs or more defendants than one in a suit, any one of the plaintiffs or the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be. While referring to the decision of Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others, , the learned Counsel submitted that where each one of the plaintiffs could have filed a suit for his share, mere fact that all of them joined together as plaintiffs and filed one suit does not mean that if for one reason or other suit of one of them fails or abates the suit of the others fail or abate. The learned Counsel submitted that in the present case the decree is in substance the combination of several decrees in favour of several plaintiffs. If in an appeal against the decree one of the plaintiffs is not added as a respondent, it only means that the decree in his favour cannot be set aside or modified even if the appeal succeeds against other plaintiffs in respect of their interest. The learned Counsel submitted that in view of this legal position, even if the legal representatives of deceased Daroga Singh did not file any appeal against the judgment and decree dated 26.11.1999 passed by the trial Court, even then the appeal filed by petitioner Pargat Singh could not have been dismissed as abated as the petitioner Pargat Singh in the instant case was claiming his 1/3rd share in the property. The learned Counsel also placed reliance upon another judgment of the Hon'ble Apex Court in Lal Chand (Dead) by Lrs. and Others Vs. Radha Krishan, .

14. On the other hand, learned Counsel for the respondent submitted that the first Appellate Court has rightly dismissed the application filed by the petitioners for amendment of the grounds of appeal and for impleading the correct legal representatives of deceased Daroga Singh. The said application was hopelessly time barred. The applicants-petitioners could not sufficiently explain the delay. The learned Counsel submitted that allowing of such amendment at a belated stage is not permissible as it will bring the time barred claim within limitation. In support of his contention, he relied upon the judgment in Muni Lal's case

(supra), which was relied upon by the first Appellate Court.

15. After hearing the counsel for the parties and going through the impugned order, I am of the opinion that the revision petition as well as the appeal deserve to be allowed. The material facts of this case have not been disputed. In the suit, both the plaintiffs are claiming 1/3rd share each in the suit property. The case of the plaintiffs is that the plaintiffs and defendant Nachhattar Singh, who are the real brothers, are joint owners of the suit land to the extent of 1/3rd share each. The suit of the plaintiffs was dismissed by the trial Court on the ground that the plaintiffs were claiming ownership to the extent of 1/3rd share in the suit land on the basis of the revenue record but during the trial they based their claim on the basis of a decree dated 22.10.1977 passed inter se between the parties. The said judgment and decree was not taken into consideration as beyond pleadings. It is also admitted fact that just five days prior to the date of pronouncement of the judgment and decree dated 26.11.1999, co-plaintiff Daroga Singh died. It is also not disputed that an appeal was filed within limitation on behalf of both the plaintiffs. The plaintiff Daroga Singh was impleaded through his legal representatives. Though Pargat Singh has been mentioned as the legal representative of deceased Daroga Singh on the basis of the registered will dated 25.5.1994, copy of which was also annexed, but as per the will, Pargat Singh bequeathed his share in the suit property in favour of Surinder Singh and Gurmail Singh. So, there was a mistake. Counsel for the petitioners submits that the said mistake was bonafide and inadvertent. In my opinion no person will deliberately make such a mistake when the facts are apparent in the will, copy of which was annexed at the time of filing of the appeal. In my opinion, the said mistake cannot be said to be a gross negligence. Some times, the litigants hand over the papers to the Advocates and mistakes are being committed in the office of the Advocates. Deliberately no such mistake is made. Even an Advocate will not make such mistake deliberately. Thus, I am of the opinion that the mistake made at the time of filing of the appeal was not intentional or mala fide. Now in that situation a question arises whether such mistake can be permitted to be corrected by amending the correct persons as legal representatives of the deceased. The first Appellate Court has dismissed the said application of the petitioners only on the ground that if the said application is allowed, it will be beyond limitation because their appeal will be treated to be instituted from the date when they are ordered to be impleaded as appellants, therefore, the application for amendment cannot be allowed after more than two years of the date of filing of the appeal. In this regard, the first Appellate Court has relied upon a decision of the Hon"ble Apex Court in Muni Lal's case (supra).

16. In my opinion, this reasoning given by the first Appellate Court is not sustainable. The first Appellate Court has failed to take into consideration that there is difference between a time barred suit and a time barred appeal. The delay in filing a time barred suit cannot be condoned under the Limitation Act whereas the delay in filing the appeal can be condoned u/s 5 of the Limitation Act, if sufficient cause for causing the delay is explained. No limitation has been

provided for filing an application for amendment of the pleadings, but in granting an application for amendment, if there is any question of the introduction of any cause of action, which would be barred by lapse of time if a new suit was instituted, on that cause of action, the Court should take into consideration the said fact while allowing such amendment application. But the limitation as such is not the only deciding and guiding factor.

17. In *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, the Hon''ble Apex Court has held that "it is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice." Thus, if by allowing the amendment, a time barred claim in a suit comes within limitation, such amendment is generally not permissible but in case of amendment of the grounds of appeal for impleading one of the party to the judgment, which was not impleaded due to mistake, is entirely different. If a party is impleaded as an appellant if originally it was not impleaded or incorrectly impleaded, it can be taken as late filing of the appeal by the said person, and if there is any delay in filing the appeal, the same can be condoned in exercise of the powers vested u/s 5 of the Limitation Act.

18. This Court in *The New India Assurance Co. Ltd., Chandigarh v. Smt. Charanjit Kaur's case* (supra), has clearly held that if a party to the original proceedings is not impleaded in appeal on account of bona fide or honest mistake, the Appellate Court has ample power to rectify the mistake. The first Appellate Court while rejecting the application of the petitioners has relied upon a decision of the Hon''ble Apex Court in *Muni Lal's case* (supra), which pertains to the amendment of the plaint, wherein it has been he''d that the amendment of the plaint cannot be permitted after the suit was barred by limitation during the pendency of the proceedings. In my opinion, the said judgment of the Hon''ble Apex Court and the other judgment cited by the counsel for the respondent i.e. *Radhika Devi v. Bajrangi Singh* 1996 (2) C.C.C. 244 (S.C.), are not applicable in the fact and circumstances of the case of the plaintiff which bring the time barred suit within limitation if the amendment is allowed. Thus, in my opinion, the impugned order dated 22.3.2003 passed by the Additional District Judge rejecting the application of the petitioner Pargat Singh is not sustainable. If this order is set aside and the application filed by Pargat Singh is allowed, then the order of dismissal of the appeal filed by Pargat Singh being abated has to be set aside and the S.A.O. filed by the petitioners also deserves to be allowed.

19. Even on merits, the impugned order dated 8.5.2003 dismissing the appeal of Pargat Singh being abated is not sustainable. In view of the aforesaid undisputed facts in this case, the petitioner Pargat Singh and his brother Daroga Singh had filed the instant suit claiming themselves to be the joint owners along with defendant Nachhattar Singh to the extent of 1/3rd share in the suit property.

Both the appellants were claiming their independent and individual interest in the suit property. Even one of the plaintiffs could have maintained the suit qua his 1/3rd share in the suit property. In the facts of the case, it cannot be said that the interests of both the plaintiffs were joint and inseparable. The first Appellate Court has committed grave illegality -while dismissing the appeal of the appellant Pargat Singh being abated on the ground that if the appeal preferred by him is to be allowed then it will be taken as conflicting judgments as no appeal was filed by the co-plaintiff Daroga Singh. This reasoning of the first Appellate Court is totally contrary to the settled legal position as well as to the provisions of Order 41 Rule 4 C.P.C. The Hon''ble Apex Court in Harihar, Prasad Singh's case (supra), has held as under:

Where each one of the plaintiffs could have filed a suit for his share, mere fact that all of them joined together as plaintiffs and filed one suit does not mean that if for one reason or other the suit of one of them fails or abates the suit of the others fails or abates. The decree is in substance the combination of several decrees in favour of several plaintiffs. If in an appeal against the decree one of the plaintiffs is not added as a respondent, it only means that the decree in his favour cannot be set aside or modified even if the appeal succeeds against other plaintiffs in respect of their interest. There would in that case be no conflict between the decrees as the decree is a combination of many decrees.

20. In the instant case also, the suit filed by the plaintiffs was for their individual 1/3rd share and if they had filed one suit jointly and if one of the person or other of the suit dies, the suit of the other persons will not abate. Each plaintiff has his independent right and each plaintiff, whose suit has been dismissed, is entitled to maintain separate appeal. It is not necessary for both the plaintiffs to file the appeal jointly. They can file separate appeals.

21. In view of the above, the civil revision as well as SAO are allowed and both the impugned orders dated 22.3.2003 and 8.5.2003 are set aside, and the Appellate Court is directed to decide the appeal in accordance with law. Since it is an old case, the Appellate Court is directed to decide the appeal expeditiously preferably within a period of six months.