

(2004) 03 SHI CK 0005
In the High Court Of Himachal Pradesh
Case No : F.A.O. (Ord) No. 169 of 2003

Punjab National Bank and Another

APPELLANT

Vs

Smt. Govind Kaur and Others

RESPONDENT

Date of Decision : 12-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10A , Order 22 Rule 10A, Order 22 Rule 11, Order 22 Rule 11, Order 22 Rule 3
Limitation Act, 1963 — Section 5

Citation : (2004) 1 ShimLC 414

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : Lalit Sharma, for the Appellant; Suneet Goel, for the Respondents 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

R.L. Khurana, J.—The Appellants, hereinafter referred to as the Defendants, have preferred the present appeal under clause (k) of Rule 1, Order 43, Code of Civil Procedure, against the order dated 25.11.2002 of the learned Additional District Judge, Mandi, refusing to set aside the abatement of the appeal, being Civil Appeal No. 79 of 1996, consequent upon the death of sole Plaintiff-Respondent, Narender Singh.

2. Briefly stated, the facts of the case giving rise to the present appeal are these. A decree for the recovery of Rs. 80,392 with cost was passed by the learned Sub Judge Ist Class, Joginder Nagar in Civil Suit No. 65 of 1992 in favour of the Plaintiff and against the Defendants on 5.2.1994. The Defendants feeling aggrieved by the judgment and decree dated 5.2.1994 preferred an appeal. Such appeal came to be registered as Civil Appeal No. 79 of 1996 on the files of the learned Additional District Judge, Mandi, on 16.12.1996.

3. During the pendency of the appeal, the sole Plaintiff Narender Singh died on 23.9.2000. Intimation qua the death of the deceased Plaintiff was given to the

Court as required under Order 22 Rule 10-A CPC on 15.6.2001. Consequent upon such intimation the Defendants on 26.6.2001 moved two applications, one under Order 22 Rules 23, 9 and 11 CPC for setting aside the abatement of the appeal and for bringing on record the legal representatives of the deceased Plaintiff, and Anr. u/s 5, Limitation Act, 1963, for condonation of the delay in making the application for setting aside the abatement. It was averred in both these applications that the Defendants were not aware of the death of the Plaintiff and they came to know about the death of the Plaintiff for the first time on 15.6.2001 when intimation in this regard was given by the learned Counsel for the Plaintiff.

4. The proposed legal representatives of the deceased Plaintiff while resisting the applications pleaded that the Defendants were fully aware about the death of the Plaintiff and on their failure to bring on record the legal representatives within the stipulated period, the appeal stood abated and that there were no sufficient grounds either to condone the delay or to set aside the abatement.

5. On the pleadings of the parties, issues were framed. Parties led their evidence. The learned Additional District Judge, on consideration of the evidence coming on the record, came to the conclusion that the Defendants had the knowledge of the death of the Plaintiff much prior to 15.6.2001 and inspite of such knowledge they failed to bring on record the legal representatives of the deceased Plaintiff. Holding that there were no sufficient grounds either to condone the delay or to set aside the allotment, the learned Additional District Judge vide the impugned order dismissed both the applications.

6. Learned Counsel for the parties have been heard and record of the learned Additional District Judge has been perused.

7. At the very out-set it may be stated that the learned Court below has taken a very strict and narrow view in the matter. Admittedly, the deceased Plaintiff had died at Chandigarh on 23.9.2000. The factum of death was intimated by his counsel to the Court on 15.6.2001. The Defendants were informed about the death of the Plaintiff by their counsel on the same day. Thereafter the Defendants ascertained about the legal representatives of the deceased and moved the application for setting aside the abatement and for bringing on record the legal representatives of the deceased on 26.6.2001, that is, eleven days after coming to know about the death of the deceased.

8. The record shows that between 23.9.2000 and 15.6.2001 the appeal was listed before the Court for hearing twice, that is on 3.12.2000 and 23.2.2001. On none of these days intimation about the death of the Plaintiff was given by his counsel. This was so since the learned Counsel himself appeared to be ignorant of the death of the Plaintiff.

9. Recently, the Supreme Court has laid down in *Ram Nath Sao v. Gobardhan Sao* AIR 2002 SC 1201, what should be the approach of the Courts in dealing with the application under Order 22, Rule 9 of CPC and Section 5 of the Limitation Act, 1963. The Supreme Court after referring to the earlier decisions

on this point has held:

The expression 'sufficient cause' within the meaning of Section 5 of the Act or Order 22, Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to party. In a particular case whether explanation furnished would constitute 'sufficient cause' or not will be dependant upon facts of each case. There cannot be a strait jacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the Court should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in vogue of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However by taking a pedantic and hyper-technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, Courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

10. Again in *S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others*, it has been held:

Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the other similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.

11. After observing that as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly, on

the other hand, the prayer for setting aside an abatement and dismissal consequent upon abatement, have to be considered liberally, the Hon'ble Supreme Court in *Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others*, has held that the Courts have to adopt a justice oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking indulgence of the Court. (Emphasis supplied)

In *O.P. Kathpalia Vs. Lakhmir Singh (Dead) and Others*, the original landlord Petitioner had died on 9.4.1978 during the pendency of the appeal before the Hon'ble Supreme Court. Intimation about death of the original landlord/Petitioner was given by the counsel on 2.3.1984. The petition for substitution of legal representatives came to be made within three weeks from the date of intimation. The Hon'ble Supreme Court came to the conclusion that there was good and sufficient reason for condoning the delay and granting substitution of the legal representatives. It was held that under Rule 10-A of Order 22, Code of Civil Procedure, a duty is cast on the pleader appearing for the deceased party to give intimation of the same to the opposite party and that since such duty was discharged on 2.3.1984, that is, six years after the death, and promptly within three weeks the Petitioner for substitution was filed, a sufficient case for condonation of the delay in seeking substitution was made out.

12. In the present case also, though the deceased Plaintiff had died on 23.9.2000, intimation qua his death was given only on 15.6.2001 by his counsel and the requisite application for setting aside the abatement and substitution of his legal representatives came to be made on 26.6.2001, that is, just eleven days after the intimation about the death of the Plaintiff was given. It is not the case of the Proposed legal representatives that there has been gross negligence or deliberate inaction or something akin to misconduct on the part of the Defendants thereby disentitling them from seeking the setting aside of abatement.

13. Though it has been averred by the proposed legal representatives that the Defendants were in the know of the death of the Plaintiff inasmuch as their officers had come to condole the death, one of the legal representative while appearing as RW 1 neither could name such officers nor could give their designations. Similarly, though RW 1 has stated that the legal representatives immediately after the death of the deceased had approached the Defendants for the transfer of the bank account of the deceased in their names, the best available evidence in the form of the application alleged to have been made by them, has not been brought on record. Nor it was ever suggested to AW 1 during the course of cross-examination that any such application was made and if so, when.

14. Applying the principles laid down by the Hon'ble Supreme Court to the facts of the present case, the only irresistible conclusion is that the Defendants have

been able to make out a sufficient case for the condonation of delay, setting aside of the abatement and substitution of legal representatives.

15. Resultantly, the present appeal is allowed. The impugned order dated 25.11.2002 of the learned Additional District Judge, Mandi, is set aside.

Both the applications made by the Defendants under Order 22, Rules 3, 9 and 11 as well as u/s 5, Limitation Act, 1963 are allowed. The delay is condoned and the abatement of the appeal is set aside. The legal representatives, namely, Smt. Govind Kaur (widow), S/Shri Inder Singh and Surjeet Singh (sons), and Smt. Kuljeet Kaur (daughter) of the deceased are impleaded and substituted as Respondents in the appeal.

16. Parties through their counsel are directed to appear before the learned Additional District Judge, Mandi, on 5.4.2004. The record be returned forthwith so as to reach the learned Court below well before the date fixed.