
(1997) 07 MP CK 0065
In the Madhya Pradesh High Court
Case No : L.P.A. No. 17 of 1989

Punjab National Bank

APPELLANT

Vs

Firm Ramkishan Ramgopal and Others

RESPONDENT

Date of Decision : 10-07-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 30 Rule 4, Order 30 Rule 4(1), 115

Citation : (1998) 1 MPLJ 478

Hon'ble Judges : A.K. Mathur, C.J.; Dipak Misra, J

Bench : Division Bench

Advocate : J.P. Sanghi, for the Appellant; Anil Khare, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, J.

In this appeal under Clause 10 of the Letters Patent, Punjab National Bank, the appellant herein, calls in question the validity of the order dated 25-4-1989 passed by a learned Single Judge of this Court in F. A. No. 178/82.

The appellant as plaintiff instituted Civil Suit No. 10-B/76 in the Court of District Judge, Hoshangabad for recovery of a certain sum from the defendants therein. As the said suit was decided against the plaintiff the aforesaid first Appeal was preferred in this Court. It is pertinent to state here that the suit was filed against two firms, namely, M/s Ramkishan Ramgopal and M/s Shah Ashok Kumar and Co. No partners were arrayed as defendants. During the pendency of the First Appeal, three partners of the respondent No. 1 Firm, namely, Firm Ramkishan - Ramgopal expired. This fact was intimated by the learned counsel for the respondent No. 1 as required under Order 22, Rule 10-A of the Code of Civil Procedure. It is the admitted position that the respondent No. 1 Firm is a registered partnership firm. This intimation was given on 17-2-1987. Thereafter the appellant filed applications for condonation of delay and setting aside

abatement, and substitution of legal representatives of the said partners. This Court by the impugned order observed that reason indicated in the petition for condonation of delay was vague and accordingly rejected all the three applications and directed for final hearing of the appeal. The said order is the cause of grievance of the appellant in this appeal.

Mr. J. P. Sanghi learned counsel for the appellant has submitted that the learned Single Judge has committed illegality by not taking into consideration that the appellant was a nationalised bank and it has its difficulties in making inquiries and finding out the legal representatives of the deceased partners.. His further submission is that the view taken by the learned Single Judge in not entertaining the application is an epitome of technical torture, and as the order substantially affects the interest of the appellant this Court should set aside the impugned order and permit the appellant to bring the legal heirs on record so that the controversy between the parties can be appropriately adjudicated.

Mr. Anil Khare learned counsel appearing for the respondents has raised a preliminary objection that the Letters Patent Appeal is not maintainable against the impugned order as by that order the appeal has not been finally disposed of, and therefore, it would not attract the jurisdiction of this Court as envisaged under Clause 10 of the Letters Patent.

To appreciate the rival submission raised at the Bar it is necessary to reproduce the relevant portion of the impugned order which reads as under:-

"In the opinion of this Court, it reflects the casualness of the manner in which the so-called investigation has been done. Under the circumstances LA. No. 8439/87 for condoning delay is dismissed. Because of the aforesaid, I. A. No. 8439/87 is held by barred by limitation and dismissed. In the absence of legal representatives, I. A. No. 8440/87 for setting aside abatement could not be considered. It is also accordingly dismissed.

Office is directed to certify the appeal for Final Hearing, as early as possible."

From the tenor of the aforesaid order it is quite clear that the appeal is pending for adjudication. It is also admitted in the memorandum of this appeal that appeal is pending. The question that falls for consideration is that whether by the impugned order the rights of the parties have been finally adjudicated and whether the said order would come within the concept of judgment as used in Clause 10 of the Letters Patent. Mr. Sanghi in his written note of submission has referred to the decisions in the cases of Madan Naik (Dead) by Legal Representatives and Others Vs. Hansubala Devi and Others, and Arjun v. Balwant AIR 1954 M.p. 45. He has also submitted that as the First Appeal has abated against the respondent No. 1, the appeal is deemed to have been dismissed and completely disposed of against the deceased partner, and therefore, it has conclusively determined the rights of the parties, hence the appeal is maintainable. He also referred us to the decisions rendered in the cases of Baddula Lakshmaiah v. Sri Anjaneya Swami Temple 1996 MPLJ 1074 (SC) and

Oriental Insurance Co. Ltd. v. Smt. Saraswati Bai 1995 MPLJ 291 (FB), 1995 MPLJ 11 (FB).

We may at the very outset state that the decision rendered in the case of Madan Naik and Baddula Lakshmaiah (supra) do not render any assistance to the appellant. As far as the judgment rendered in the case of Oriental Insurance Co. Ltd. (supra) the Court has held that the word "Judgment" used in Clause 10 of the Letters Patent means a decision in an action whether final, preliminary or interlocutory which decides either wholly or partially, but conclusively in so far as the Court is concerned.

There is no dispute over the proposition of law that Letters Patent provides for intra Court appeal. If the First Appeal in question would have been decided by the impugned order there would have been no difficulty in entertaining the appeal against the same. If the First Appeal would have been disposed of finally adjudicating the rights of the parties and judgment and decree would have come into existence the appeal would have been maintainable under Clause 10 of the Letters Patent. By the impugned order the learned Single Judge has refused to allow substitution of legal representatives in respect of respondent No. 1. The appeal has been permitted to continue against the other defendants-respondents. The Court has not passed any order that the appeal has abated as a whole. Mr. Sanghi learned counsel for the appellant has submitted that as the appeal has abated as a whole the present appeal is maintainable. To demonstrate the same he has canvassed that the legal heirs of the three partners of the respondent No. 1 having not been brought on record the appeal abates against the firm and thereby the First Appeal automatically abates against the other respondents also. In this context we may refer to the factual matrix which clearly exposit that one of the partners of the defendant No. 1 firm is alive and other defendants are still on record as respondents and the learned Single Judge has not passed the order that appeal has abated in entirety.

Quite apart from the above, we may also refer to Order 30, Rule 4 of the CPC which reads as under:-

"Rule 4 Right of suit on death of Partner. - (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such person dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have -

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against survivor or survivors."

Reading the aforesaid Rule in its proper perspective it is abundantly clear that as

far as the suit against a partnership firm is concerned the legal representatives of deceased partners need not be impleaded as parties. In the instant case as cause title indicates that suit was instituted against the firm. In this regard we may refer to the decision rendered in the case of the Upper India Cable Co. v. Bal Kishan AIR 1984 SC 1381, wherein the Apex Court has expressed in the following terms:-

"Now the question is where the suit is instituted against the firm and partners are impleaded as proper parties, in the event of death of a partner so sued, would the suit or appeal, as the case may be, abate if heirs and legal representatives of the deceased partner are not substituted within the prescribed period of limitation. There is a two- fold answer to this question Order XXX, Rule 4 provides that notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons are sued in the name of the firm under the enabling provisions of Order XXX, and any such person dies whether before the institution of suit or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. Secondly death of a proper party would have no impact on the suit more so where on death of a partner the partnership may stand dissolved or heirs do not desire to join the firm. Both these aspects were overlooked by the High Court."

Further, at paragraph 11 of the said decision, their Lordships expressed as follows:

"Therefore, the question to be answered is whether on the death of two of the proper or formal parties impleaded in their capacity as partners by the plaintiff along with the firm, in absence of substitution of heirs and legal representatives the appeal abates? The answer is in the negative."

Recently the Apex Court in the case of Anokhe Lal Vs. Radhamohan Bansal and others, has held thus:

"What sub-rule (1) of Rule 4 in Order 30 of the Code provides is that it is not mandatory to join the legal representative of a deceased partner as a party in the said suit."

From the aforesaid it is quite clear that the suit would not abate if the suit has been brought in the name of firm and in the present case that being the position the suit would not abate. It is well settled in law that a suit includes an appeal, and, therefore, the principles enjoined under Order 30, Rule 4 of the Code would also be applicable in appeal.

From the aforesaid it is clear as day that the appeal has not abated because of presence of other respondents as well as the principles of Order 30, Rule 4 governing the field. That apart, there is no order by the learned Single Judge that appeal abates as a whole. It is settled in law that if the suit or appeal would abate completely and it cannot proceed the order passed thereby would have the affect of a decree as defined u/s 2(2) of the Code of Civil Procedure. If the suit is

dismissed against all adversaries because of non-substitution there is no iota of doubt that an appeal would lie. Ordinarily when an application for substitution is rejected a revision lies. In the case at hand, the impugned order cannot be regarded as a judgment, as it does not put an end to the controversy in issue and there is no impediment for continuance of appeal.

From the discussion made above we are of the considered view that the order passed by the learned Single Judge does not have the status of a judgment as contemplated under Clause 10 of the Letters Patent, more so, in view of the principles laid down under Order 30, Rule 4, CPC and accordingly we accept the preliminary objection raised by the learned counsel for the respondents and held that the Letters Patent Appeal is not maintainable.

In the ultimate result, the appeal fails and is accordingly dismissed. However, in the peculiar facts and circumstances of the case there shall be no order as to costs.