

(1978) 11 PAT CK 0012
In the Patna High Court
Case No : Civil Revision No. 802 of 1978

Rajnath Sahgal and Others	Vs	APPELLANT
Shiva Prasad Sinha and Others		RESPONDENT

Date of Decision : 28-11-1978

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 97(2)
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4(4)

Citation : AIR 1979 Patna 239

Hon'ble Judges : Hari Lal Agrawal, J; B.P. Jha, J

Bench : Division Bench

Advocate : K.D. Chatterjee, R.S. Pradhan and Nilima Thakur, for the Appellant;
Awadh Kishore Prasad and Binod Kumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Jha, J.—In a civil revision petition, these petitioners (defendants 12 to 14) have challenged the validity of the order dated 29th March, 1978 passed by the First Subordinate, Judge, Arrah, in Title suit No. 46 of 1977. By virtue of this order, the learned Subordinate Judge was pleased to set aside the abatement and exempted the plaintiffs from substituting the legal heirs of defendants 1 and 10. It is this order which is under challenge before this court.

2. The plaintiffs filed the suit for a declaration that the sale deed dated 15th May, 1972 executed by defendants 1 to 7 in favour of defendants 12 to 14 is void and inoperative so far as the plaintiffs and defendants 8 to 11 are concerned. The common ancestor of the original plaintiffs and defendants 1 to 7 and defendants 8 to 11 was Bhagwan Prasad. He died leaving behind three sons, namely, Mahesh Prasad, Bishwanath Prasad and Mahadeo Prasad. The original plaintiffs belonged to the branch of Bishwanath Prasad, whereas defendants 1 to 7 belonged to the branch of Mahesh Prasad, and defendants 8 to 11 belonged to the branch of Mahadeo Prasad. By virtue of the sale deed dated 15th May, 1972, defendants 1 to 7 sold the suit properties to defendants 12 to 14. The case of the plaintiffs and

defendants 8 to 11 was that defendants 1 to 7 had no right to sell the share of the plaintiffs and defendants 8 to 11. The suit was originally filed before the Subordinate Judge at Varanasi. By the order of the Supreme Court, the present suit was transferred from Varanasi to the court of the Subordinate Judge at Arrah.

3. In the present case, the admitted position is that defendant No. 1 Dr. Vishnu Shankar died on 5th August, 1975, and Satyanarain Prasad (defendant No. 10) died on 6th January, 1975. It is also an admitted position that the original plaintiffs did not file any application for substitution within 90 days of the date of death of defendants 1 and 10. Defendant No. 11 Sri S. P. Sinha filed an application for substituting the heirs of Dr. Vishnu Shankar on 29th November, 1975, and this application was filed within 150 days, that is, within statutory period for setting aside abatement.

4. By the order dated 3rd February, 1978, defendant No. 11 Sri S. P. Singh was transposed as a plaintiff. On 13th March, 1978, the transposed plaintiff Sri S. P. Singh filed an application to set aside the abatement and to substitute the heirs of defendant No. 10. Defendant No. 11 (the transposed plaintiff) also filed an application to exempt the plaintiffs from the necessity of substituting the legal representatives of the deceased defendants. Defendant No. 10 Satyanarain Prasad died on 6th January, 1975. The original plaintiffs had filed an application for substitution on 28th April, 1975, but later on the petition for substitution was not pressed.

5. On these facts, the trial court set aside the abatement and also exempted, the plaintiffs from substituting the , legal representatives of the deceased defendants under Order 22, Rule 4 (4) of the Civil P. C.

6. The short point for consideration in this civil revision petition is: Whether the court has power to exempt the plaintiffs from the necessity of substituting the legal representatives in a case where the suit abated on account of non-filing of any substitution petition within ninety days of the date of death of the deceased defendant?

7. In the present case, the admitted position is that no application for substitution was filed within ninety days from the date of death of defendants 1 and 10. On 13th March, 1978, an application was filed by the transposed plaintiff, S. P. Singh, for setting aside abatement and for exempting the plaintiffs from the necessity of substituting the legal representatives of the deceased defendants. Learned counsel for the petitioners contends that the provisions of Order 22, Rule 4 (4) of the Civil P. C. apply before the suit has abated and not after that. In this connection, he relies on two decisions, namely, in Nani Gopal Mukherjee Vs. Panchanan Mukherjee, and in Lakshmi Charan Panda and Another Vs. Satyabadi Behera and Others, By virtue of the High Court amendment, the Calcutta, Orissa and Karnataka High Courts had already added an identical provision as Sub-rule (4) of Order 22, Rule 4. In these two decisions, the Calcutta and Orissa High Courts were of opinion that the court's power to

dispense with the substitution under Order 22, Rule 4 (4) can be exercised only before an abatement takes place and not thereafter. In other words, they are rather of opinion that once the suit abates, the court has no power to exempt the plaintiff from the necessity of substituting the legal representatives. They are thus of opinion that the stage for dispensing with the substitution arises before the stage of abatement. In other words, they are of opinion that once the suit abates, no application under Order 22, Rule 4 (4) of the Civil P. C. is maintainable.

8. I respectfully disagree with the opinion expressed by these two High Courts. By virtue of the CPC (Amendment) Act, 1976, Sub-rule (4) of Order 22, Rule 4 has been substituted. The intention of the legislature was to check delay in disposing of the suits. It is for this reason that this provision was amended. The plaintiff can move for dispensing with the substitution of the legal heirs in these circumstances, namely (1) if the deceased defendant had failed to file a written statement, or (2) who, having filed it, had failed to appear and contest the suit at the hearing. In those two circumstances, the plaintiff can move an application for dispensing with the necessity of substituting the legal heirs of the deceased defendants and "the court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of" the deceased defendant, and the court shall be entitled to pronounce the judgment as if it has been pronounced before the death took place. In my opinion, the wordings of Sub-rule (4) of Order 22, Rule 4 are wide enough to include the case even after abatement. The words occurring in Sub-rule (4) "whenever it thinks fit" give the jurisdiction to the court to dispense with the substitution at any time before the delivery of the judgment. The intention of the legislature is that the technical difficulty of the abatement should be a bar to the court in pronouncing the judgment and to check the delay in disposing of the suits. In this view of the matter, I hold that the legislature has put no restriction or limitation on the court in dispensing with the substitution of the legal heirs of the deceased defendants. In this connection Section 97 (2) (r) of the Civil P. C. (Amendment) Act, 1976 is relevant, and it runs as follows: "(r) the provisions of Rule 4 of Order XXII of the first Schedule, as substituted by Section 73 of this Act, shall not apply to any order of abatement made before the commencement of the said Section 73;"

By virtue of Section 97 (2) (r), the only limitation put in giving effect to Sub-rule (4) of Order 22, Rule 4 is that if an order of abatement has already been recorded by the Judge in the case, then the provision of Sub-rule (4) of Order 22, Rule 4 of the Civil P. C. will not be applicable.

9. In my opinion, the legislature has put two conditions while applying the provisions of Order 22, Rule 4 (4), and they are -- (1) that the provision will apply in a case where a defendant has failed to file a written statement, or he having filed it, has failed to appear and contest the suit at the hearing, (2) that this provision will apply where no order of abatement has been recorded in the case.

If the abatement order has been recorded by the court, then the provisions of Order 22, Rule 4 (4) shall not apply. If the aforesaid conditions are fulfilled, the court can apply provisions of Order 22, Rule 4 (4) at any time before delivery of judgment.

In the present case, the admitted position is that defendants 1 and 10 had not filed the written statement. They also did not appear to contest the suit. It is also an admitted position that an abatement order in respect of the death of defendants 1 and 10 had not been recorded by the trial Judge. In the present case, these conditions have been satisfied and, as such, the court was justified in law in dispensing with substituting the legal heirs of defendants 1 and 10 under Sub-rule (4) Order 22, Rule 4 of the Civil P. C.

10. There is another aspect of the matter and that is this :-- The Calcutta High Court and Orissa High Court were of opinion that the stage of passing the order under Order 22, Rule 4 (4) is the stage when the abatement has not taken place. These High Courts have not considered the stage of setting aside- the abatement if the plaintiff applies for setting aside abatement as well as files an application under Sub-rule (4) of Order 22, Rule 4. While setting aside the abatement order, the Court is entitled to pass the order under Sub-rule (4) of Order 22, Rule 4 of the Civil P. C. If the court can set aside the abatement order, the court has authority in law to set aside the order of abatement after condoning the delay. This aspect of the matter was not at all examined by those two decisions. Shri K. D. Chatterji, appearing on behalf of the petitioners, concedes that the court can dispense with the substitution after setting aside abatement. In this view of the matter also, we are unable to accept the correctness of the decisions of the Calcutta and Orissa High Courts. In the present case, the court below set aside the abatement and dispensed with the substitution of the heirs of deceased defendants 1 and 10.

11. The Karnataka High Court in S.A. Rahim and Another Vs. Rajamma and Others, has supported the view taken by me. I, therefore, accept the view of the Karnataka High Court and respectfully disagree with the opinion of the Calcutta and Orissa High Courts. Agreeing with the view of the Karnataka High Court, we hold that the court can dispense with the substitution of the heirs under Order 22, Rule 4 (4) even without setting aside abatement at any stage of the suit.

12. The court below has set aside the abatement and held that the petition for setting aside abatement which was filed on 13th March, 1978 was within time as it has been filed within the statutory period. The court below was of opinion that as defendant No. 11 was transposed as a plaintiff on 3rd February, 1978, and as such the transposed plaintiff filed the application for setting aside abatement on 13th March, 1978 which was within the statutory period. We agree with the opinion of the trial judge. Learned counsel for the petitioners also did not seriously challenge the validity of the order in connection with setting aside abatement on account of the death of defendants 1 and 10.

12-A. I am unable to interfere with the impugned order in revision for the simple reason that the court below exercised the discretion which was vested in it by law.

13. In the result, the petition is dismissed. The parties will bear their own costs.

Hari Lal Agrawal, J.

14. I have had the advantage of perusing the judgment of my learned brother B. P. Jha. While agreeing with him that this application must be dismissed, I would like to give my own views also as the questions that have fallen for consideration are of some importance and of first impression.

15. On the facts of the case, precisely stated in the judgment of my learned Brother, two questions of law arise for consideration in this case. Firstly, as to whether the Sub-rule (4) added to Rule 4 of Order 22 of the Civil P. C. by the Civil P. C. (Amendment) Act, 1976 (Act 104 of 1976) (hereinafter referred to as "the Amending Act"), will apply to this suit; and secondly, if it applies, then whether the exemption contemplated by this provision could be granted to the plaintiff as more than 90 days had elapsed from the death of the defendants concerned when the application was made.

16. From the facts of the case which have been already stated in the judgment of my learned Brother it would appear that while the suit was pending at Varanasi, Satyanarain Prasad (defendant No. 10) had died on 6-1-1975 and Dr. Bishnu Shekhar (defendant No. 1) on 5-8-1975. Both these defendants had not entered appearance in the suit although they had been served with the summonses and had left behind several legal representatives. Defendant No. 11 had also filed there an application on 26-4-75 for his transposition as a plaintiff. No order, however, was passed on that application by that court and the application remained pending until 3-2-1978 when the Subordinate Judge, Arrah allowed the application and defendant No. 11 was accordingly transposed to the category of the plaintiffs.

17. During the pendency of the aforesaid transposition application, the original plaintiffs and defendants Nos. 12 to 14 had filed a compromise petition. But this petition also remained pending as the suit had become defective on account of the death of the defendants mentioned above.

18. No step having been taken by the plaintiffs for substituting the heirs and legal representatives of the said defendants Nos. 1 and 10, defendants 12 to 14 filed an application on 10-8-1977 for dismissal of the suit on the ground of abatement. They made a further prayer that the transposition application of defendant No. 11 should be considered only after the abatement matter was decided. Soon thereafter defendant No. 9 also made an application for his transposition as a plaintiff. Both the applications for transposition were, however, allowed by the learned Subordinate Judge on 3-2-1978 in spite of the protests made on behalf of the contesting defendants Nos. 12 to 14 as already indicated

above.

19. After defendant No. 11 was transposed as a plaintiff, he made an application on 13-3-1978 for setting aside the abatement of the suit as against the heirs of defendant No. 10. He filed another application praying for an exemption from taking any steps for substitution in pursuance of the amended Rule 4 of Order 22 of the Civil P. C. by the Amending Act which came into force on 1-5-1978.

20. The learned Subordinate Judge by the impugned order allowed the prayer of the substituted plaintiff for exemption from substituting the legal representatives of the deceased defendants. He, however, also allowed the substitution petition after setting aside the abatement.

21. In this application we are not concerned with the correctness of the second part of the order setting aside the abatement of the suit inasmuch as this part of the order in my view is apparently innocuous in view of his order granting exemption to the transposed plaintiff from taking any step for substitution itself.

22. Be that as it may, Mr. K. D. Chatterji, learned counsel appearing for the petitioners, has strenuously challenged the order of the learned Subordinate Judge granting exemption to the plaintiff from the necessity of substituting the legal representatives of the defendants on the ground that inasmuch as the abatement had already set in when the sub-rule had been brought on the statute book, the power conferred by Sub-rule (4) could not be exercised. It may be mentioned that similar provisions had already been made by different High Courts in India under their amending powers. I will refer to those amendments and the decisions of some of those High Courts hereinafter.

23. By the Amending Act the following sub-rule has been added :--

"4. xx xx xx xx xx xx (4) The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) xx xx xx xx xx xx" Mr. K. D. Chatterji contended that although the amendment was in nature a procedural law and would have retrospective application, -- applicable even to the pending proceedings including the suit in question, it can be made applicable only from the stage the suit had reached and could not be applied to confer new rights or undo the rights already accrued to any of the parties to a suit when it came into force.

24. Law is not in doubt that amended law relating to procedure operates retrospectively, but this only means that pending cases although instituted under the old Act but still pending are governed by the new procedure under the amended law. It does not, however, mean that the part of the old procedure

already applied and concluded before the amendment came into force, becomes bad or can be reopened under the new procedure after the amendment, as that would make an ex post facto the procedure legal, when applied and concluded, illegal by subsequent law. Such a consequence is not permitted unless, of course, the statute expressly or by compelling implication provides. In *Ajit Kumar Palit Vs. The State*, it was clearly laid down that where the amendment is only of procedure, even pending cases are governed by the amended law, but only in respect of those stages of procedure that remained to be applied after the amendment comes into force. Mr. Chat-terji argued that as on the death of a party to a suit the abatement takes place automatically after the period of limitation if no application for substitution is made in case the right to sue does not survive, as in the case before us, the question of granting exemption to the plaintiff from taking steps for substituting the legal representatives of the deceased defendants did not arise.

25. This is the crux of the issue. Whereas it is no doubt true that on the death of any party to the suit the abatement automatically sets in on the expiry of the period of limitation, if no application is made nonetheless, the court has been empowered under Rule 9 (2) of Order 22 of the Code, on sufficient cause being shown, to set aside the abatement. It is thus obvious that notwithstanding the notional abatement of the suit, the court has got the power to set aside the same. This takes us to the consideration of the provisions of "repeal and savings" contained in Section 97 of the Amending Act. Sub-secs. (2) and (3) of this section read as follows :--

"97 (1) xx xx xx (2) Notwithstanding that the provisions of this Act have come into force or the repeal under Sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897--

xx xx xx xx xx xx (r) the provisions of Rule 4 of Order XXII of the First Schedule, as substituted by Section 73 of this Act, shall not apply to any order of abatement made before the commencement of the said Section 73;

xx xx xx xx xx xX (3) Save as otherwise provided in Sub-section (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right. or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement."

26. From a perusal of the relevant Clause (r) extracted above, it will appear that the said provision is "not to apply if any order of abatement has been made before the commencement" of Section 73 of the Amending Act. I have deliberately underlined the relevant expressions in the provision to emphasise my point of view. Section 97 (2) (r) of the Amending Act makes the amended

Rule 4 of Order 22 applicable to all such cases where no order of abatement has been made (recorded) by a court. Therefore, once an order of abatement is recorded, only then this new provision will not apply. In the case before us we have seen that no express order of abatement was recorded by the court although a petition was filed by the defendants to that effect. In my opinion, the provisions of Sub-rule (4) are not intended to be made applicable in a case where there might have been a deemed abatement of a suit simply by efflux of time prescribed for making an application as contemplated under) Rule 3 (2) or Rule 4 (3) of Order 22 of the Code, unless an order to that effect is expressly recorded by the court.

By the provisions contained in Rule 9 of Order 22, an application for setting aside an abatement can be made long after the abatement might have set-in in a case, and the court, if satisfied, that there is sufficient cause for making the application at a late stage, may set aside the abatement. If the court does not accept the sufficiency of the cause for the delay it may reject the application and record an express order of abatement. In my considered view, the expression in Clause(r) to the effect that the words "any order of abatement" have been deliberately used by the Parliament to make the amended provisions of Rule 4 applicable to all such cases where although the deemed abatement might have taken place on the mere expiry of the period of limitation prescribed for making an application from the death of a party, but the court has not recorded any express order of abatement. If the Parliament would have intended that the provisions of Sub-rule (4) would not apply where, on the expiry of the period of limitation, the deemed abatement had taken place, then the language employed in Clause (r) of Section 97 (2) of the Amending Act should have been different and would not have used the expression therein "making of any order".

27. I would accordingly hold that Sub-rule (4) inserted by Section 73 of the Amending Act will have application to all pending proceedings in which no order of abatement was expressly recorded by that time.

28. Having recorded my answer to the first question, I proceed to consider the second question, namely, the time within which the court can grant the exemption. I have already said earlier that some of the High Courts had made similar amendments to Rule 4 of Order 22. Those High Courts are Assam, Andhra Pradesh, Calcutta, Madras, Karnataka and Orissa. I may quote the sub-rule as framed by the Calcutta High Court which reads as follows and is almost similar to the central rule:

"(4) The court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

The rule adopted by the Orissa and Karnataka High Courts is almost exactly similar. A few cases also arose in some of these High Courts which have been cited at the Bar. The view of the Calcutta High Court right from the case of Sree Sankari Prasad Singh Deo v. Kanai Lal Roy ((1948) 52 Cal WN 599) up to Annapurna Debi Vs. Sm. Harsundari Dassi and Others, has been the same. In the case of Nani Gopal Mukherjee Vs. Panchanan Mukherjee, and in Lakshmi Charan Panda and Another Vs. Satyabadi Behera and Others, the Calcutta and Orissa High Courts respectively took the view that the power to grant exemption under Sub-rule (4) of Rule 4 must be exercised before the deemed abatement takes place. The Orissa High Court has also relied on the abovementioned decision of the Calcutta High Court and has similarly interpreted the expression "whenever the court thinks fit." to mean in the context that the power must be exercised within 90 days from the date of death and before the abatement takes place. It has further observed that within the period of 90 days two courses are open to the party -- either to file an application for substitution or to file an application praying for invoking the court's power for exempting him from the necessity of substituting the legal representatives concerned. Strong reliance was placed on the above decisions by Mr. K. D. Chatter ji.

29. The Karnataka High Court in the case of S.A. Rahim and Another Vs. Rajamma and Others, , however, has taken a different view and has held that the power of exemption contained in Sub-rule (4) can be exercised by the court "whenever it thinks fit" before the disposal of the suit. In the case before the Karnataka High Court the application for exemption, filed after two years of the death of the fifth defendant, from the necessity of substituting his legal representatives who had not entered appearance in the suit, was allowed by the trial court and this order was upheld. If the view of the Calcutta and the Orissa High Courts are accepted then the amending provision cannot enure to the benefit of the present plaintiffs inasmuch as the deemed abatement had already set in much before Sub-rule (4) was inserted and in that case the application of the transposed plaintiff filed on 13-3-1978 claiming exemption from taking steps for substitution was apparently not maintainable.

30. However, with due deference to the learned Judge of the Calcutta and Orissa High Courts who decided the above cases, I find myself unable to reconcile with the view taken by them in the matter and feel inclined to take the view that the amendment has liberalised the provision to a very large extent in the case of dormant defendants, inasmuch as Sub-rule (4) of Rule 4" of Order 22 is intended to apply to all such cases where even the deemed abatement might have taken place, i.e., the period of 90 days might have expired from the death of a party, but no express order in that regard is recorded. Taking the narrower view, in my opinion, would cause violence to the wider amplitude indicated by the Parliament by using the expression "whenever it thinks fit", and will frustrate the object of the amendment to a very large extent. I would also seek support for this view from the answer given by me to the first question, i.e., the provision is to apply to all cases where an order of abatement has not been expressly recorded.

Taking any other view of the question will render my decision inconsistent.

31. The inevitable result that follows from the above discussions is that no error of jurisdiction has been committed by the learned Subordinate Judge in allowing the application of the transposed plaintiff for granting exemption from taking steps for substitution of the legal representatives. I would accordingly dismiss this application.