

(2015) 10 AHC CK 0157

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 1328 of 2006

Ram Shankar

APPELLANT

Vs

Addl. Sess. Judge and Others

RESPONDENT

Date of Decision : 16-10-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 137, 137(1), 138

Citation : (2016) 93 ALLCC 72

Hon'ble Judges : Ramesh Sinha, J.

Bench : Single Bench

Advocate : U.K. Mishra, A.K. Mishra, Ashok Trivedi, Manu Mishra and Sanjay Kumar Mishra, for the Appellant; Arvind Srivastava and Prashant Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Sinha, J.—The present writ petition along with writ petition No. 35 of 2006 (Ram Lakhan Vs. Additional District & Sessions Judge, Kanpur Nagar and others) was dismissed by this Court on 6.4.2012 as none had appeared on behalf of the petitioner to press the writ petition. Thereafter, a recall application was moved on behalf of the petitioner which was also rejected by this Court vide order dated 16.4.2012.

2. It appears that one of the legal heir of the petitioner had filed a SLP before the Apex Court and the matter was remanded back to this Court by the Apex court vide order dated 11.2.2013 to decide the matter afresh in accordance with law by passing a reasoned order within a period of three months.

3. Earlier, the matter was listed before the different Benches of this Court and in pursuance of the judicial order dated 29.7.2013 the matter was nominated to this Bench by Hon"ble the the Chief Justice vide order dated 2.8.2013 and it came up before this Court for the first time on 13.8.2013, but on one count or the other, i.e., sometimes due to lawyers" strike or on the adjournment sought

by the learned counsel for the parties, the matter could not be decided and on 17.10.2014 and 14.7.2015 it was again listed before the different Benches. As the roaster changed, the matter came up before this Court on 23.7.2015 and the connected CrI. Misc. Writ Petition No. 35 of 2006 (Ram Lakhan Vs. Additional District & Sessions Judge, Kanpur Nagar and others) was not printed in the cause list with the present petition, hence it was directed to be listed in the next cause list after fresh nomination from Hon"ble the Chief Justice. The same was nominated to this Bench by Hon"ble the Chief Justice vide order dated 30.7.2015 for deciding the matter along with Criminal Misc. Writ Petition No. 35 of 2006, hence, the matter came up before this Court after fresh nomination on 7.8.2015, on which date Sri Ashok Trivedi, learned counsel for the petitioner had sent an illness slip, hence the matter was directed to be listed in the next cause list peremptorily. Both the matters were listed on 14.8.2015 on which date the learned counsel for the parties were heard and further on 20.8.2015 the learned Counsel for the parties filed their written arguments and after hearing the learned counsel for the parties, the judgment was reserved on 20.8.2015.

4. Since the sole petitioner has died, hence separate orders are being passed by this Court in both the two petitions.

5. Heard Sri Ashok Trivedi, learned counsel for the petitioner, Sri Arvind Srivastava and Sri Prashant Kumar Singh, learned counsel for opp. party No. 4 and learned AGA for the State.

6. This writ petition has been filed by the petitioner challenging the impugned orders dated 4.2.2005 passed by the S.D.M. (Sadar), Kanpur Nagar, under Section 133 Cr.P.C. and also the impugned order dated 19.12.2005 passed by the Additional Sessions Judge, Court No. 7, Kanpur Nagar which has been dismissed by the lower revisional Court affirming the order of the S.D.M. (Sadar), Kanpur Nagar.

7. It has been pointed out by the learned counsel for the petitioner that the sole petitioner-Ram Shankar son of Late Asha Prasad has expired on 21.6.2009 and legal heirs of the deceased Ram Shankar filed a substitution application dated 15.3.2010 and a subsequent specific affidavit on 9.11.2013 has been filed by one of the legal heir, namely, Vinod Kumar (son of the deceased petitioner Ram Shankar) informing about the death of his father, i.e., sole petitioner, during the pendency of the writ petition.

8. Sri Arvind Srivastava, learned counsel for respondent No. 4, namely, Nand Kishore, son of Vidya Sagar has submitted that as the substitution application has been filed by the legal heirs of the deceased on 15.3.2010 in the present writ petition, hence learned counsel for the petitioner be asked whether the legal heirs of the sole petitioner, who had filed the substitution application, are interested in pressing the substitution application or not, to which learned counsel for the petitioner Sri Ashok Trivedi has not been able to reply the said contention of learned counsel for the respondent No. 4 and has submitted that

the subsequent affidavit dated 9.11.2013 which has been filed by one of the legal heirs, namely, Vinod Kumar of the sole petitioner may be taken into account and may be replaced with the substitution application dated 15.3.2010 and the present petition may be decided by this Court. In other words, the learned counsel for the petitioner does not press the substitution application filed by the legal heirs of the petitioner.

9. Sri Ashok Trivedi, learned counsel for the petitioner submitted that the present proceedings have been initiated under Section 133 Cr.P.C. on an application dated 1.9.2003 filed by respondent No. 4 against the petitioner-Ram Shanker (since deceased) and his brother Ram Lakhan, who were living separately in their own houses with their respective families and were not on speaking terms at all as some civil litigation regarding landed property were also going on between them. He further submitted that the impugned orders passed by the learned Magistrate under Section 133 Cr.P.C. against the sole petitioner and his brother Ram Lakhan was not passed by the learned Magistrate following the procedure required under Section 137 Cr.P.C., hence, the same was illegal and against which a criminal revision was filed by the petitioner and his brother Ram Lakhan which too was dismissed by the lower revisional Court, hence, they filed the present writ petition challenging the same.

10. He further submitted that as the sole petitioner has died, hence the proceedings under Section 133 Cr.P.C. against him abates as the order passed there-under is an order against an individual, therefore, when that individual dies, then the order under Section 133 Cr.P.C. and subsequent orders must consider spent.

11. In support of his contention learned counsel for the petitioner has placed reliance upon a judgment of this Court in the case of Bohray Jugul Kishore Vs. Emperor, in which this court has held that in view of Section 140(2) Cr.P.C. person, against whom order under Chapter-10 of Criminal Procedure Code was passed, dies, the order ceases to have further effect and the learned Magistrate would not entitle to act under Section 140(2) Cr.P.C

12. He further submitted that as the sole petitioner has died, hence any order passed against him by the learned Magistrate ceases its effect and if the said order is to be executed against the legal heirs, then the learned Magistrate has to pass fresh order against them.

13. Per contra, learned counsel for respondent No. 4 has vehemently opposed the aforesaid argument advanced by the learned counsel for the petitioner and submitted that admittedly the sole petitioner has expired and writ petition cannot be perused by a dead person as the heirs of the deceased have only informed the Court about the death of the petitioner and not pressed their substitution application, therefore, it is absolutely clear that the writ petition on behalf of dead person is not maintainable nor can any order be passed in the present writ petition except its dismissal as there is no one to press the writ petition. He

submitted that the plea raised by the learned counsel for the petitioner that proceeding abates is not at all correct as the proceedings do not abate as the writ petition is in continuation of the proceeding before the learned Magistrate, therefore, on the death of the petitioner the proceedings does not abate.

14. He argued that the aforesaid submission of the learned counsel for the petitioner is not legally sustainable as the proceedings under Article 226 of the Constitution of India are not like appellate proceeding.

15. In support of his contention, learned counsel for respondent No. 4 has placed reliance of judgment of the Apex court in the case of Harinagar Sugar Mills Ltd. Vs. State of Bihar and Others, and has drawn the attention of this Court towards para-10 of the said judgment, which reads as follow:-

"Para-10. The revision preferred against the order of dismissal of appeal was already dismissed and the pendency of the writ petition against the orders passed in revision would be of no relevance as writ proceedings are not continuation of the suit or appeal."

16. He also placed reliance of the judgment of the Apex Court in the case of Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh, and has drawn the attention of this Court towards the para-28 of the said judgment, which reads as follow:-

"para-28. Before we consider the matter further to find out the scope and extent of revisional jurisdiction under the above three Rent Control Acts, a quick observation about the "appellate jurisdiction" and "revisional jurisdiction" is necessary. Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceedings, as the case may be. The power of the appellate court is coextensive with that of the trial court. Ordinarily, appellate jurisdiction involves rehearing on facts and law but such jurisdiction may be limited by the statute itself that provides for the appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a full-fledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of Revisional Court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the Tribunal/appellate authority, the decision of the Revisional Court is the operative decision in law. In our view, as regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction."

17. He has further placed reliance of another judgment of the Apex Court in the case of Amba Bai and Others Vs. Gopal and Others, and drawn attention of this Court towards paragraph Nos. 8 & 9 of the said judgment, which runs as under:

"para-8 When the second appeal had abated and the legal representative of the appellant were not brought on record, the decree which was passed by the first appellate court be acquire finality.

..... The High Court had held that the decree of the appellate court was a nullity and the respondent did not file any appeal against that part of the decree, the result was that the preliminary decree became final."

"para-9. In Bibi Rahmani Khatoon and Others Vs. Harkoo Gope and Others,

"10. The concept of abatement is known to civil law. If a party to a proceeding either in the trial court or any appeal or revision dies and the right to sue survives or a claim has to be answered, the heirs and legal representatives of the deceased party would have to be substituted and failure to do so would result in abatement of proceedings. Now if the party to a suit dies and the abatement takes place, the suit would abate. If a party to an appeal or revision dies and either the appeal or revision abates, it will have no impact on the judgment, decree or order against which the appeal or revision is preferred. In fact, such judgment, decree or order under appeal or revision would become final."

18. He therefore vehemently argued that the order passed by the learned Magistrate does not automatically comes to an end and the proceeding does not abate as there is no merger of the writ proceedings and the proceedings before the learned Magistrate.

19. He argued that the proceeding under Section 133 Cr.P.C. are quasi civil nature particularly, in view of Section 142(2) and 143 Cr.P.C., therefore the said proceeding will not abate. The petitioner contested the case before the learned Magistrate and also before the lower revisional Court but he did not comply with the order/direction given in the order. The learned Magistrate is fully competent to carry out the direction given in the order irrespective of the death of the petitioner. Hence, the writ petition deserves to be dismissed.

20. Considered the submissions advanced by the learned counsel for the parties and perused the record.

21. Admittedly, the petitioner has died on 21.6.2009 during the pendency of the writ petition. From a perusal of the provision contained under Section 133(1) Cr.P.C., it is apparent that a conditional order is passed against a particular person who is called upon by the learned Magistrate to remove the obstruction or nuisance from any public place and for which a necessary procedure is prescribed under Section 137(1) & (2) Cr.P.C. on the appearance before the learned Magistrate of a person against whom order was made questioning him as to whether he denies the existence of any public right in respect of the public pathway and further an inquiry is to be conducted in the matter by the learned Magistrate before proceeding under Section 138 Cr.P.C. against him.

22. In the instant case, from the record it appears that the petitioner did not appear before the learned Magistrate concerned though notices were served

upon him, but it reflects from the impugned order that his brother, namely, Ram Lakhan has only filed his objection before the Magistrate, hence, the present proceedings against him stands abated which cannot be drawn against the legal heirs of the petitioner and if the said obstruction or public nuisance is being caused by the legal heirs of the petitioner, then notices has to be issued to them by the learned Magistrate giving them opportunity for removal of the same. The case law cited by the learned counsel for the petitioner, i.e. Bohray Jugal Kishore (Supra) of this Court squarely covers the case of the petitioner and the case laws which have been cited by the learned counsel for respondent No. 4 are not applicable as they are distinguishable from the facts and circumstances of the present case. Hence, the present writ petition stands dismissed on the ground that the person making it has died.

23. It is made clear that the legal heirs of the petitioner are not in any manner bound by the order made against the deceased petitioner nor can the learned Magistrate can take any steps against them in pursuance of the said order. It will be open for the learned Magistrate to pass fresh orders against the legal heirs of the petitioner in accordance with law.

24. In view of the foregoing discussions, the present writ petition stands dismissed.