

(1979) 06 BOM CK 0015

In the Bombay High Court

Case No : Civil Revision Application No. 570 of 1977

Ratanlal Hanumanbax Sharma and Another

APPELLANT

Vs

Narendra Manilal Shah and Another

RESPONDENT

Date of Decision : 30-06-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, Order 9 Rule 13

Citation : AIR 1980 Bom 135 : (1979) MhLj 737

Hon'ble Judges : Ginwala, J

Bench : Single Bench

Advocate : P.B. Gadkari, for the Appellant; M.S. Deshpande, for the Respondent

Judgement

1. This case is a good example to show how omission on the part of those concerned in the Courts to pass appropriate orders at the appropriate time creates confusion in the proceedings. The facts leading to the present revision application shortly stated are as follows:--

The non-applicants had obtained a decree for possession of certain Immovable property and for future mesne profits against one Hanumanbax, who was the father of the present applicants, in Civil Suit No. 321 of 1966. This decree was confirmed ultimately by this Court in second appeal. The non-applicants filed Darkhast being Regular Darkhast No. 84 of 1970 for execution of the decree in so far as the possession of the suit property was concerned and got possession in or about 1971. They then applied for determination of the mesne profits and this application was numbered as Miscellaneous Judicial Case No. 4 of 1972. Notice of this application was issued to the judgment-debtor, viz. Hanumanbax, but is said to have been returned with the endorsement that Hanumanbax had refused to take it and hence it was fixed on the door of his residence. In view of this endorsement of the bailiff the Court proceeded ex parte against Hanumanbax and ultimately - passed a decree for future mesne profits on 28th April 1972 directing the said Hanumanbax to pay Rs. 2,805/- to the non-applicants. On 31st Oct. 1972 Hanumanbax filed an application purporting to be under Rule 13 of

Order 9 of the CPC (hereinafter referred to as "the Code") to set aside the order which was passed in M.J.C. No. 4 of 1972 on 28th April 1972 determining future mesne profits. This application, though purported to have been by Hanumanbax, was signed by applicant No. 1 herein as the constituted attorney of Hanumanbax, Applicant No. 1 appears to have filed this application personally without the aid of the counsel. On 2nd Nov. 1972 the Court directed show cause notice to be issued to the non-applicants in respect of this application. This notice was made returnable on 5th Dec. 1972. It appears to have been served on the non-applicants on 30th Nov. 1972 but was not returned to the Court concerned before 5th Dec. 1972. Ultimately the non-applicants appeared in those proceedings on 29th January 1973 and the case was posted to 21st February 1973 to enable them to file their reply to the said application. However, in the meanwhile Hanumanbax expired on 28th Dec. 1972. Applicant No. 1 presented an application on 21st February 1973 purporting to be under Order 22, Rule 3 of the Code stating that Hanumanbax had expired on 28th Dec. 1972 leaving behind him the present two applicants as his heirs. By this application applicant No. 1 requested the Court to join himself as applicant in place of Hanumanbax and to implead applicant No. 2 as non-applicant No. 3 in that case. This application was supported by an affidavit which appears to have been sworn on the same day, i.e., on 21st Feb. 1973. In the margin of this application there is an endorsement, "issue notice to show cause" and this endorsement is also dated 21st Feb. 1973 but it is not signed by the presiding officer of the Court. The result, therefore, was that there was no effective order of the Court on this application. The endorsement appears to have been made by the ministerial officer of the Court with a view to obtain signature of the Judge concerned. The Roznama for 21st Feb. 1973, however, makes a mention of this application and contains a direction to issue a show cause notice and further a direction for the process fee" to be paid in time and the case was supposed to have been posted to 29th March 1973 for this purpose. Now thereafter the case is purported to have been posted to 12th June 1973, 12th July 1973 and 2nd August 1973. The roznamas for 29th March 1973, 12th June 1973 and 12th July 1973 state that notices had not been received back and hence they were awaited. Now at this stage it is pertinent to note that the roznamas for 21st February 1973, 29th March 1973, 12th June 1973 and 12th July 1973 have not been signed by the presiding officer of the Court. For the matter of that I may also mention that the earlier two roznamas, viz., those "for 9th January 1973 and 29th January 1973 have also not been signed by the presiding officer of the Court. Now what is interesting to note is that a show cause notice was issued to the non-applicants on 13th June 1973 making it returnable on 12th July 1973. But surprisingly this notice was for showing cause against the application made under Order 9, Rule 13 of the Code, a copy of which is said to have been annexed to this notice. This notice appears to have been served on the non-applicants on 6th July 1973. It is not clear why the second show cause notice in respect of the said application had been issued. Now on 2nd August 1973 the non-applicants filed their reply to the application for setting aside the ex parte order. The case was then posted for

evidence and ultimately after several adjournments on one count or the other, oral evidence of present applicant No. 1 and one Manilal was recorded on 13th February 1976. Arguments were heard on 21st February 1976 and the Court passed its order on 27th February 1976 dismissing the application for setting aside the ex parte order in M. J. C. No. 4 of 1972 holding that no sufficient cause had been shown for the absence of Hanumanbux on the date of hearing of that case and that the application for setting aside the ex parte order was barred by time. It is pertinent to note at this stage that till Miscellaneous Judicial Case No. 113 of 1972 was disposed of finally by this order, no order was passed on the application made by applicant No. 1 for substitution of legal representatives of Hanumanbux made on 21st February 1973 and consequently the title of the , application in , M. J- C. No. 113 1972 was not amended and the name of Hanumanbux continued to appear as the applicant. The result, therefore, was that the final order was passed against Hanumanbux who admittedly was no more on the date when it was passed.

2. Against the abovesaid order in M. J. C. No. 113 of 1972 the present applicants preferred an appeal to the District Court being Miscellaneous Civil Appeal No. 22 of 1976. By this appeal the applicants challenged the order of the lower Court on merits. However, the appeal memo was subsequently amended and a ground was added to the effect that the impugned order was nullity as it had been passed against a dead person since the legal representatives of Hanumanbux had not been brought on record till it was passed. The learned Joint Judge who heard this appeal raised two points for determination, viz., whether the appeal was tenable and whether the service of the notice on Hanumanbux in M.. J. C. No. 4 of 1972 was proper. On the first count he held that the appeal was not maintainable. He reiterated the facts which I have narrated above with regard to the application under Order 22, Rule 3 and observed that the said application must be deemed to have , been rejected since it had not been specifically granted by the trial Court. Having taken this view, the learned Joint Judge further held that the proceedings under Order 9, Rule 13 of the Code must be taken to have abated after the lapse of the prescribed period from 28th Dec. 1972 when Hanumanbux had died. According to the learned Joint Judge, the question of setting aside that abatement was never raised and hence the appellants, i.e. the present two applicants, could not be deemed to be parties in their own rights to the proceedings of Miscellaneous Judicial Case No. 113 of 1972 and the proceedings subsequent to the alleged abatement would be without jurisdiction and hence the appellants would not be entitled to prefer an appeal against that order. It is for these reasons that the learned appellate Judge held that the appeal was not maintainable. On merits also the learned appellate Judge held against the appellants but we are not concerned with that finding at this stage. In the view which he took, the learned appellate Judge dismissed the appeal and it is against this order that the present revision application has been filed.

3. Mr. Gadkari, the learned counsel for the applicants submits that the view taken by the learned appellate Judge with regard to the application under Order 22,

Rule 3 was entirely incorrect and cannot be supported by any reason. He submitted that the learned appellate Judge expected the applicants to press the Court to pass order on the said application. According to Mr. Gadkari, the only duty on the part of the legal representatives was to make an application for being joined as party and all subsequent acts were left to the Court and if the Court had not passed any further orders on the application disposing it of in one way or the other, no fault could be found with the applicants and no blame can be laid on him and he cannot be penalised for the omission on the part of the Court to pass appropriate orders on the said application at appropriate time. Mr. Gadkari submits that since the trial Court had not passed any order on the said application it cannot be presumed to have been rejected as has been held by the learned appellate Judge and it must be presumed to be pending for all this time and if that is so, all the proceedings in the matter after the presentation of that application would be nullity and without jurisdiction and consequently the impugned order would also be bad and in these circumstances the learned appellate Judge should have directed the trial Court to proceed from the stage when the application under Order 22, Rule 3 of the Code had been presented by applicant No. 1.

4. The view taken by the learned appellate Judge that Miscellaneous Judicial Case No. 113 of 1973 stood abated after the lapse of the prescribed time from 28th Dec. 1972, cannot at all be supported. So also his view, that usual rule of law is that the prayer which is not specifically granted must be deemed to have been rejected and viewed in this context the application under Order 22, Rule 3 must be deemed to have been rejected, Is also not, to say the least, correct. It would be better to reproduce the particular words of the learned appellate Judge as to what he has to say in this connection.

"As already stated above, the application under Order 22, Rule 3, Civil P. C, does not appear to have been placed before the Judge at any time and no orders were ever sought on that application. No action appears to have been taken on that application even for the purposes of securing appearance of appellant No. 2, who was sought to be joined in the proceeding as a non-applicant. Thus, appellant No, 1, who had preferred that application, had neglected his own application to bring the L. Rs. of the deceased on record. As notice of that application does not appear to have been ever served on the respondent, they had never filed any written statement concerning that application. It appears from the roznama that the matter was never mentioned before the Judge for seeking any sort of orders. When the deposition of appellant No. 1 was recorded, there were references in the deposition to the father of appellant No. 1, but it was never stated explicitly that he had died. As already stated above, the reasoning given by the learned Judge for the impugned order, shows that the Judge laboured under the impression that Hanumanbax was still alive and his son managed the affairs only because of old age of Hanumanbax. When the impugned order came to be passed on such a background, it could hardly be said that application under Order 22. Rule 3, Civil P. C. stood impliedly granted. The usual rule of law b that

the prayer, which is not specifically granted, must be deemed to have been rejected. If viewed In this context, the application under Order 22, Rule 8 must be deemed to have been rejected In that event, the proceeding under Order 9, Rule 13, CM! P. C. must be deemed to have abated after the lapse of the prescribed period from 28-12-1972. the date of death of Hanumanbax (as reported in the application under Order 22. Rule 3). No question of setting aside that abatement ever arose nor is any relief in that respect sought in this appeal. Therefore, the present appellants cannot be deemed to be the parties in their own right to the proceeding in M. J. C. No. 113/72. If the matter stood abated as far back as In 1973. the subsequent proceeding and the impugned order in M. J. C. No. 113/72 would be without Jurisdiction and, therefore, the appellants would not be entitled to prefer any appeal against the impugned order. Thus, speaking very strictly, the appeal would not be maintainable. Accordingly, my negative finding on point No. 1."

From what has been extracted above it would appear that the learned appellate Judge was himself labouring under the impression that after having made application under Order 22, Rule 3, the duty of applicant No. 1 was not over and it was further obligatory on his part to have obtained the order of the Court on this application. The reasoning which has been adopted by the learned Judge In the portion extracted above is based on erroneous assumption of law and cannot at all be supported. The learned appellate Judge appears to have over-looked the provisions contained in Order 22 Rule 3 of the Code. Now under that Rule, when a plaintiff or applicant dies, all that the person desirous of proceeding with the matter has to do is to make an application to bring to the notice of the Court as to who Is the legal representative of the deceased and thereupon it is the function of the Court to join such legal representatives as party in the matter and proceed with the suit. It would, therefore, appear that once an application has been made under the said Rule, by a legal representative, it is for the Court to take necessary further steps to join legal representatives of the deceased in the matter and it is not at all the function of the applicant to see that the Court passed order on that application. If the Court omits to do for one reason or the other, the suit would be taken to be pending and by no stretch of imagination it could be said that it stands abated simply because the Court is negligent in not passing any order on such an application. To say that an application should be taken to have been rejected simply because the Court has not passed any order upon it is against all principles of law. The rule which has been enunciated by the learned appellate Judge might hold good in a case where several prayers are made in an application and while passing order on that application only a few of them are dealt with and allowed and nothing is stated about the rest. In such a situation it may be said that the Court should be taken to have rejected the remaining prayers by Implication, But surely this rule could never apply to a case where the Court has not so much as looked at the application much less passed any order on it. If the rule which has been propounded by the learned appellate Judge were to be followed, the litigants would be placed in a very awkward and

serious situation. As in the present case, application may be made by a party and may never be brought to the notice of the Court and consequently no order may be passed by it and yet it would be open to the other side to say that the application has been rejected since no order has been passed by the Court thereon. In short, therefore, the learned appellate Judge was entirely wrong in saying that the application under Order 22, Rule 3 should be deemed to have been rejected because the trial Court had not passed any orders on it. Further corollary which the learned appellate Judge has resorted to, viz., that since the application under Order 22, Rule 3 of the Code should be deemed to have been rejected, the application under Order 9, R. 13 would stand abated after the prescribed period from 28th Dec. 1972 cannot hold water. If the application under Order 22, Rule 3 has been made in time, and in the present case there is no dispute that this application had been made in time, and if it is not finally disposed of, it cannot be said that the proceedings abated after the lapse of the prescribed period from the death of the party. If no order is passed on this application, the proceeding would be pending till it is passed and the Court would have to proceed after bringing the legal representatives on record which is a duty cast upon it under Order 22, Rule 3 of the Code. In this connection reference may be had to a decision of the Full Bench of the Mysore High Court in Abdul Wahab v. Rama Krishniah (AIR 1954 Mys 65), and also to Happy Valley Tea Co. and Another Vs. Darshan Lal, and Stella Pereira Blazue Pereira Vs. Adima Abdul Latheef,

5. In the present case since no order had been passed on the application made by applicant No. 1, under Order 22, Rule 3 of the Code till the case was decided by the trial Court and since the legal representatives of deceased Hanumanbax had not been Joined in the said case, final order passed by the Court would obviously be nullity. As a matter of fact all the proceedings which the Court took after the said application was made and without deciding it would have been without jurisdiction as in that case the matter would be proceeded in the absence of the applicant who was admittedly dead. There is, therefore, no difficulty in holding that the final order which had been passed in M. J. C. No. 113 of 1972 was non est and could not be binding on the applicants.

6. If that order is a nullity, it logically follows that M. J. C. No. 113 of 1972 is still pending and has to be disposed of in accordance with law. Now this can be done only by the trial Court proceeding from the stage when the application under Order 22, Rule 3 of the Code was filed by applicant No. 1. As I have said above, it is wrong to hold that this case has abated because no order had been passed on the said application. The result, therefore, is that the matter must go back to the trial Court with a direction that it should admit the said case to its original number and proceed with it from the stage when the application under Order 22, Rule 3 of the Code had been filed by applicant No. 1.

7. In the result, the revision application is allowed and the orders passed by the two Courts below are hereby set aside and Miscellaneous Judicial Case No. 113 of

1972 is remitted to the trial Court with a direction to readmit it to its original number and to proceed with it from the stage when application under Order 22, Rule 3 of the Code had been filed by applicant No. 1 on 21st Feb. 1973. In the circumstances of the case there shall be no order as to costs.

8. Revision allowed.