
(1981) 07 BOM CK 0015

In the Bombay High Court

Case No : Civil Revision Application No. 1049 of 1980

Shaukatali Isimdar

APPELLANT

Vs

Smt. Nargesh Dhanjishaw Jassoomani

RESPONDENT

Date of Decision : 30-07-1981

Acts Referred:

Limitation Act, 1963 — Section 5, 8

Citation : (1982) 84 BOMLR 238 : (1982) MhLj 305

Hon'ble Judges : S.K. Desai, J

Bench : Single Bench

Judgement

S.K. Desai, J.—This revision application is preferred against the order of the learned Judge of the City Civil Court passed on the plaintiffs' notice of motion in Suit No. 4411 of 1964, As an interesting point arises for decision, a few facts necessary for properly appreciating the same may be indicated.

2. One Dhanjishaw as the sole plaintiff filed Suit No. 4411 of 1964 in the Bombay City Civil Court at Bombay and sought orders in respect of land as per plan Ex. A to the plaint. A decree was sought against the two defendants to the suit Shaukatali Isimdar and Mohomad Ishaque and the plaintiff wanted them to hand over possession of the said land after removing certain structures standing thereon. Mesne profits and interlocutory orders were also sought. The first defendant thereafter filed his written statement in February 1965 inter alia putting the plaintiff to the strict proof of his ownership. It was further contended that the second defendant to the suit claimed ownership of the suit land by adverse possession and had given tenancies of portions thereof to several persons including the first defendant. The first defendant claims to be occupying an area of 42" X 90 and paying rent of Rs. 30 per month to the second defendant. It would appear that some time thereafter the original plaintiff died and his three heirs were substituted as plaintiffs 1 to 3, In addition plaintiff No. 4 who is alleged to have purchased the property from those three heirs was also joined as a co-plaintiff. In January 1977 an additional written statement was filed

by the first defendant. It was contended in para. 5 thereof that the second defendant had expired in or about 1968 leaving behind him surviving his legal heirs and representatives. It was accordingly submitted in para. 5 and 6 of the said written statement that the suit had abated against the second defendant since his heirs and legal representatives were not brought on record, It was submitted further that the plaintiff was not entitled to proceed only against defendant No. 1, since the right to sue did not survive as against defendant No. 1 only. Accordingly it was submitted that the plaintiff's suit should be dismissed with costs.

3. It may be mentioned that the original second defendant has not been served personally but by substituted service. The endorsement of the bailiff was "refused and pasted". At no stage did he appear in the suit nor did he file any written statement.

4. Now despite the additional written statement of the first defendant in which a contention has been raised that the second defendant had expired and despite the fact that the endorsement by the bailiff "refused" postulates an attempt to serve a living person, the plaintiffs persisted in contending that the second defendant was a non-existent person. Thus they chose, whether of their own volition or on legal advice, to ignore the additional written statement. However, it appears that in March 1980 the first defendant desired to rely on certain additional documents and for that purpose an order was obtained from the trial Court on April 1, 1980 permitting the defendants to disclose certain additional documents. One of these documents was the death certificate pertaining to the second defendant being certificate No, 2468 of 1977 issued by the Bombay Municipal Corporation and dated October 31, 1977. We are not concerned with the other documents which were sought to be discovered and relied upon at the trial. It may be stated that before that stage the trial had already commenced and plaintiffs' witness No. 1 had been examined on February 8, 1980, His cross-examination started on February 26, 1980 and concluded on March 9, 1980. Thereafter plaintiffs' witness No. 2 was also examined and his examination and cross-examination were concluded on March 7, 1980 and March 18, 1980 respectively. Even on March 18, 1980 plaintiffs' witness No. 2 who is plaintiff No. 2 himself maintained that Mohmed Ishaque, the second defendant, did not exist at all.

5. It would appear that after the order dated April 9, 1980 taking the supplementary affidavit on file was made, it was realised on behalf of the plaintiffs that their stand as to the non-existence of the second defendant was not at all proper. If according to the death certificate which was a public document, the second defendant had expired sometime in 1977, it was clear that the periods of 90 days and 60 days prescribed in respect of applications under Order XXII Rule 4 Sub-rule 1 and Order XXII Rule 4 Sub-rule 5 were over. Hence an application was made under Order XXII Rule 4, Sub-rule 4 which was newly added to the Code in 1976 and it is this application which, was being dealt

with by the impugned order. This order was passed on a notice of motion which was taken out by the plaintiffs in which the plaintiffs sought the following four prayers:

(a) That the delay in making this application be condoned and abatement set aside.

(b) That plaintiffs may be exempted from the necessity of substituting the legal representatives of the defendant No. 2.

(c) That the Hon'ble Court may be pleased to pass a decree in favour of the plaintiffs and against defendant No. 2 in the absence of the person representing the estate of the 2nd defendant since deceased.

(d) In the alternative this Hon'ble Court be pleased to order appointment of an officer of this Honourable Court or such other person at this Honourable Court a may think fit to represent the 2nd defendant for the purpose of this suit and pass a decree in favour of the plaintiff as prayed and against the officer or the person appointed as above.

This notice of motion has been made absolute in terms of prayers (b) and (c) by the impugned order and it is the competence of the Court to pass such an order at that stage which is the principal ground of attack in the revision application. It may be mentioned before dealing with the legal submissions as to the competence of the Court that the plaintiffs have also taken out a chamber summons for bringing the heirs of the second defendant on record after condonation of delay and for setting aside the abatement of the suit. In the chamber summons the heirs have been served. According to Mr. Shah the heirs are actively opposing the order sought for in the said chamber summons and have filed their affidavit showing cause. The chamber summons has been kept pending till the notice of motion was disposed of. As in the notice of motion the reliefs sought for by the plaintiffs have been granted, it will become unnecessary for the trial Court to consider the chamber summons further but this is provided the order on the motion is confirmed in this revision.

6. It may be pointed out that as far as this High Court is concerned, prior to 1976 there was no Sub-rule in Order XXII Rule 4, comparable to the present Sub-rule 4. However, similar sub-rules had been introduced in the Code by necessary High Court amendments in Madras, Andhra Pradesh, Assam, Calcutta and Orissa. Hence the earliest judgments of Courts below dealing with comparable provisions are to be found from decisions of High Courts in these States. However, before advertent to these decisions the present sub-rule may be set out. I intend to set out the entire Rule 4 as the decisions of certain High Courts have turned on the frame of the rule and particularly of Sub-rule 3 and 4. Order XXII Rule 4 after the amendment of the Code in 1976 reads as follows:

XXII. 4(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole

defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit,

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant.

(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 judgement 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) Where-

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963, and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963, for setting aside the abatement and also for the admission of that application u/s 8 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.

7. As stated earlier, a similar sub-rule had been introduced as far as the High Court of Calcutta was concerned by the High Court amendment of the Code. As far as the Calcutta High Court is concerned, it has right from 1948 taken the consistent view that the power to grant exemption under Sub-rule 4 of Rule 4 must be exercised before the deemed abatement takes place. The earliest of the Calcutta cases is *Sree Sankari Prasad Singh Deo v. Kanai Lal Roy* 52 C. W.N. 599. To the same effect is a decision of the Division Bench of that Court in *Nani Gopal Mukherjee v. Panchanan Mukherjee* ILR (1956) Cal. 348 : 59 C. W.N. 599 . The same view is reiterated in *Annapurna Debi Vs. Sm. Harsundari Dassi and Others*, .

8. I may refer to *Nani Gopal Mukherjee's* case (supra). In the said case *Das Gupta J.* speaking for the Bench expressed the view that there was no escape from the position that in a case where no application had been made for substitution under Sub-rule (1) and nor order for exemption has been made under the provisions of Sub-rule (4) the suit shall abate. According to the learned

Judges once the suit had abated there was nothing before the Court as far as the deceased defendant is concerned in which any order whether for exemption under Sub-rule (4) or any order can possibly be passed. In other words, the Division Bench rejected the interpretation of the words "whenever it sees fit" to mean "at any time before the entire suit has been disposed of" ILR 1956 Cal. 348.

9. To the same effect is the view of the Orissa High Court. This view is disclosed in *Lakshmi Charan Panda and Another Vs. Satyabadi Behera and Others*, The decision is by a single Judge, Misra, J. As the facts disclosed in para. 6 of the report indicate, the learned single Judge of the Orissa High Court was concerned with a somewhat different situation inasmuch as the deceased respondent to the appeal had contested the suit but had chosen to be ex parte at the first appellate stage and had died during the pendency of the second appeal. The learned Judge, however, had occasion to consider Sub-rule (4) of Order XXII, Rule 4 (as introduced by amendment in Orissa) and whilst so doing has expressed his concurrence with the view of the Division Bench of the Calcutta High Court in *Nam Gopal Mukherjee's case* (supra). According to Misra, J. once abatement had taken place the discretion given to the Court to invoke the provisions of Sub-rule (4) cannot be exercised. According to the learned Judge the words "whenever the Court thinks fit" in the context must be deemed to mean when the Court thinks fit within 90 days from the date of death and before abatement takes place. According to Misra J. within that period of 90 days two courses are open to the plaintiff. The first is to file an application for substitution. The second alternative is to file an application praying for invocation of the Court's power for exempting the plaintiff from the necessity of substituting the legal representatives of the deceased defendant. According to Misra, J. if the words whenever the Court thinks fit" were to be given a wider meaning, than the one which appealed to him, Sub-rule (4) would have been incorporated under Order XXII, Rule 9 and not under Order XXII, Rule 4.

10. The High Courts of Madras, Karnataka and Patna have chosen to differ from the interpretation of Sub-rule 4 which commended itself to the Calcutta and Orissa High Courts. In *Velappan Pillai Vs. Parappan Panickar and Others*, a single Judge of the Madras High Court, Natesan, J. was called upon to consider the provisions contained in Sub-rule (4) of Order XXII, Rule 4 and he expressly differed from the Calcutta and Orissa High Courts choosing to follow earlier decisions of the High Courts of Andhra Pradesh and Madras. In the view of Natesan, J. the Calcutta and the Orissa decisions which have been referred to earlier had not put sufficient emphasis on the words "whenever it sees fit" occurring in Sub-rule 4. Natesan, J. was unable to agree with the reasoning of the Division Bench of the Calcutta High Court which was also based upon the sequence of events contemplated under Order XXII, Rule 4. It was contended before Natesan, J. that the Calcutta and the Orissa High Courts had erred in reading the two provisions viz. Sub-rules 3 and 4 separately and in ignoring the proper impact of the wide words "whenever it sees fit". According to Natesan, J.

the view taken by these two High Courts was also to limit the "force of the expression "except as hereinafter provided" occurring in Sub-rule 3 as also to diminish the very wide impact of the words "whenever it sees fit" occurring in Sub-rule 4. Natesan, J, also considered why Order XXII was amended and referred to the recommendation of the Civil Justices Committee. Natesan, J. referred to earlier judgments of the Madras and the Andhra Pradesh High Court which had taken a view of Sub-rule 4 contrary to the one which commended itself to the Calcutta and the Orissa High Courts.

11. A single Judge of the Karnataka High Court Malimath, J., in S.A. Rahim and Another Vs. Rajamma and Others, also dissented from the Calcutta and Orissa view. According to him, having regard to the language of Sub-rule 4 which clearly provided that the power of exemption under Sub-rule 4 can be exercised by the Court whenever it thinks fit, no limitation on the power of the Court in the matter of granting exemption can be inferred. According to Malimath, J. the Court is empowered by the express language of the sub-rule to exercise the power of exemption whenever it thinks fit to any time before the disposal of the suit. According to the learned Judge of the Karnataka High Court, once an exemption is granted under Sub-rule (4), a legal fiction is introduced to the effect that though the judgment is pronounced after the death of the deceased defendant the same shall be deemed to have been pronounced before his death. The last of the several authorities to which my attention was drawn by the learned advocate appearing for the respective parties was a decision of a Division Bench of the Patna High Court in Rajnath Sahgal and Others Vs. Shiva Prasad Sinha and Others, . Both the learned Judges constituting the Division Bench, B.P. Jha and Hari Lal Agrawal, JJ., have given separate but concurring judgments. According to B.P. Jha, J. the legislature had put two conditions while applying the provisions of Sub-rule 4 of Order XXII, Rule 4. These were: (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, and (2) that this provision will apply where no order of abatement has been recorded in the case. According to B.P. Jha, J, the Calcutta and the Orissa High Courts have chosen to ignore the provisions contained in Order XXII for setting aside the abatement of a suit. If an abatement could be set aside then there was nothing to prevent the Court passing an exemption order under Sub-rule (4) of Order XXII at any time. In other words, according to the Patna High Court, the deemed abatement of a suit was not sacrosanct and once this position was realised, the fallacy underlying the Calcutta and Orissa views stands revealed. The other Judge constituting the Division Bench of the Patna High Court H.L. Agrawal, J. carried out a comprehensive survey of the authorities including the few referred to earlier and chose to dissent expressly from the Calcutta and Orissa High Courts, According to Agrawal, J. the introduction of Sub-rule 4 has liberalised the provision to a very large extent in the case of a dormant defendant and, therefore, to take a narrower view of the provisions as taken by the Calcutta and Orissa High Courts would cause violence to the wider amplitude

indicated by the Parliament by using the expression "whenever it thinks fit" in the sub-rule. Such a view, according to Agrawal, J., would also frustrate the object of the amendment to a very large extent.

12. No direct decision of the Bombay High Court has been brought to my attention.

13. In my opinion, the learned Judges of the Calcutta and Orissa High Courts are not right in taking the narrower view of the provisions contained in Sub-rule (4) and the fallacies underlying their approach have been succinctly brought out by Natesan, J. in Velappan Pillai's case (supra) and the Division Bench of the Patna High Court in Rajnath Sahgal's case (supra).

14. In 1976 the Parliament amended the CPC in order to remedy a particular mischief. If the amendment was to be read down in the manner which commended itself to the Calcutta and the Orissa High Courts, then the very object of parliamentary legislation will stand frustrated. The words "whenever it thinks fit" occurring in the sub-rule are words of the widest amplitude. Apparently they do not envisage a time limit and there is no warrant for reading a time limit for the application of Sub-rule (4) by the sequence in which the sub-rules occur. With respect, what the Calcutta and the Orissa High Courts have done must be regarded as artificial straining of the language, ignoring the normal meaning of the words and choosing a restrictive interpretation in preference to the normal wider one. There does not appear to be any rational sanction for adopting this course. It is not shown how or why the strained interpretation put on these words is to be preferred to the ordinary common-sense interpretation. Again, it is not as if abatement of a suit by the expiry of the period contemplated for bringing the heirs on record is final. The Code itself provides for making an application for setting aside such abatement. I am not concerned in this case with an order of abatement having been made specifically by the Court after the period for bringing the heirs on record had expired. The Code provides for abatement of suits but the Code itself provides further that such abatements could be set aside on an application made by the plaintiff. Where such provision exists it would not be possible nor proper to give finality to such deemed abatement and take away the effect of the very wide words used in Sub-rule (4).

15. In the result, the interpretation put on sub-rule by the Madras, Karnataka and Patna High Courts appears to me to be the correct interpretation and, I, concurring with the said High Courts express my dissent from the limited view of Sub-rule 4 which commended itself to the Calcutta and the Orissa High Courts.

16. Mr. Suresh appearing on behalf of the revision-petitioner submitted that even if it were to be held that the Court had the power in law to grant exemption under Sub-rule (4) the Court was in error in making the order sought for by the plaintiffs. In other words, according to him the plaintiffs by their conduct had disentitled themselves from seeking discretionary relief from the Court. Undoubtedly the provisions of Sub-rule (4) of Order XXII, Rule 4 confer a

discretion on the Court. It is open to the Court to grant exemption. In appropriate circumstances the Court may refuse the plaintiff's application for such exemption. It was submitted by Mr. Suresh that the plaintiffs had so conducted themselves in this litigation that the exemption application must be regarded as mala fide. Alternatively it was urged that there was no case made out for the plaintiffs for exercise of the discretionary powers of the Court in their favour.

17. In connection with this branch of the argument Mr. Suresh referred me to the observations to be found in *Lakshmanan Chettiar v. Chidambaram Chettiar* AIR [1935] Mad. 236. It was observed by the Division Bench of the Madras High Court that the power given by Sub-rule (4) as introduced by the Madras High Court in the Code for the State of Madras was discretionary. It was observed further that it would be rarely exercised in case of a single respondent.

18. In the course of the affidavit filed before the trial Court various contentions and arguments dealing with this aspect of the matter have been brought out. It was submitted that the plaintiffs ought to have become aware of the existence of the 2nd defendant at least when the 1st defendant filed the additional written statement and that their persistence in contending that he was a non-existent person even while their evidence was being recorded, disentitled them from the reliefs sought for in the notice of motion. In the affidavit reference was also made to the chamber commons taken out for bringing the heirs on record. Various other items of prejudice have been referred in this affidavit.

19. It will appear from a perusal of the impugned order that all these contentions have been taken into account by the trial Court before it found in favour of the plaintiffs and chose to pass an order in terms of prayers (b) and (c) of the notice of motion. If the trial Court did not possess the jurisdiction to grant exemption at the stage when it was sought, then certainly the High Court can - indeed it must - interfere in its revisional jurisdiction. The question is if the competence and the power of the trial Court are upheld, whether it would be proper to interfere with the exercise of the discretion of the trial Court when it chose to accept the plaintiffs' application and grant them reliefs in terms of prayers (b) and (c) of the notice of motion. In my opinion, such interference would have been proper and necessary had I been convinced that the trial Court did not at that stage possess the competence to grant exemption. However, having accepted the competence of the trial Court, then, in my opinion, interference with the exercise of discretionary powers conferred on the Court under Sub-rule (4) would be warranted only if the decision were to be perverse or capricious. I am unable to say that the decision of the trial Court granting exemption by making orders in terms of prayers (b) and (c) of the notice of motion can be characterised as perverse or capricious. If that be my conclusion, then interference with such order under the revisional jurisdiction of the High Court would be improper. In my opinion, the fact that the plaintiffs have taken out a chamber summons can make no difference on either of the points urged before me by Mr. Suresh. The

only fault which I can find with the order on the notice of motion was the somewhat extraordinary order that parties were directed to bear their own costs. Ordinarily the plaintiffs should have been made to pay the costs of the notice of motion. However, this also is not such an order which calls for correction in the revisional jurisdiction of the High Court. It will be sufficient if I express my disagreement with the order of costs made on the notice of motion by the trial Court.

20. In the result, the rule will stand discharged. As however the legal position was not free from doubt and since the High Courts referred to earlier have taken divergent views and have taken different stands on the proper interpretation of Sub-rule (4) of Order XXII, Rule 4 I think parties should be asked to bear their own costs of the civil revision petition. There will be an order accordingly. The stay granted will stand vacated. The trial Court will proceed with the suit expeditiously. It is unnecessary in my opinion for the trial Court now to consider the plaintiffs' chamber summons for bringing the heirs on record further in view of the order made on the notice of motion which order is hereby confirmed.

21. Mr. Suresh has one further clarification to seek. Prayer (c) of the notice of motion which has been granted can be read to suggest that the trial against the second defendant ought to be separated and a decree forthwith passed against him. That will not be a proper reading of the prayer or of the order of the trial Court. A decree against the second defendant, although he is dead, can be passed and must be passed only after the trial is fully complete after recording the entire evidence of the plaintiffs as also the evidence led on behalf of the first defendant. If prayer (e) is clarified in this manner, as I do, then there is no warrant for any apprehension on part of the first defendant viz. that an ex parte decree will be forthwith passed against the second defendant, which will prejudice the defence of the first defendant.