

(1997) 05 AHC CK 0059

In the Allahabad High Court

Case No : Civil Revision No. 194 of 1995

S.K. Masood alias Zafar and Others

APPELLANT

Vs

Wahid Ahmad Ansari and Another

RESPONDENT

Date of Decision : 14-05-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 15 Rule 5, Order 22 Rule 9(2), Order 22 Rule 9(3), Order 41 Rule 4, 148
Limitation Act, 1963 — Article 120, 121, 137, 5
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 — Section 30

Citation : (1997) AWC 101 Supp

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : S.A. Khan, for the Appellant; M.S. Haq, for the Respondent

Judgement

D.K. Seth, J.—The opposite party No. 2 on 12.12.1996 filed an application for dismissal of the revisional application on account of death of opposite party No. 1. The opposite party No. 1 died on 6th November, 1996, which is not disputed by the Defendant applicants. The Defendant applicants on the other hand filed an application for substitution on 4.4.1997 seeking to substitute the heirs of the deceased Plaintiff opposite party No. 1. Two applications namely application dated 12.12.1996 for dismissal of the revisional application and the application dated 4.4.1997 for substitution were taken up for hearing.

2. Sri M. S. Haq, learned Counsel appearing on behalf of opposite party No. 2 contended that the application for substitution filed on 4.4.1997 cannot be entertained since the same has been filed after expiry of "90" days without any application u/s 5 of Indian Limitation Act for condonation of delay. Sri M.C. Tewari, learned Counsel for the Defendant-applicants contends that since one of the heir of the deceased namely the opposite party No. 2 is already on record and represents the joint interest of the heirs, therefore there is no scope of abatement of the proceedings. In support he relies on the decision in the case of

Mahabir Prasad Vs. Jage Ram and Others, , Secondly, he contends that limitation of "90" days for substitution would not apply in a revision before the High Court. In view of decision in the case of Chandradeo Pandey and Others Vs. Sukhdeo Rai and Others, . the limitation would be governed under Article 137 of the Schedule to the Limitation Act, which is three years and, therefore, no application u/s 5 of Indian Limitation Act, would be necessary.

3. Admittedly, the suit is a suit for eviction of the Defendant-applicants who are three in number. The said three Defendant-applicants were alleged to be the tenant under the Plaintiff opposite parties. No case of splitting of tenancy or splitting up of interest of the landlord have been pleaded. Both the interest in the property have been pleaded to be joint while tenancy has also not been pleaded to be separate. The heirs sought to be substituted are also interested jointly in the property. All the heirs jointly inherited the interest of the deceased and, therefore, there is no splitting up of interest of any of the heirs in respect to the suit property. Such joint interest is also existing in the opposite party No. 2 who is one of the heirs of the deceased. Amongst the heirs, one is also minor for whom, the mother namely opposite party No. 2 had prayed for appointment of herself as guardian of the minors.

4. In the case of Mahabir Prasad (supra) it is held, the fact that the person jointly interested in the decree has been made a party-Respondent and on his death his heirs have not been brought on the record, does not per se divest the appellate court of his jurisdiction to pass decree in appeal under Order XLI, Rule 4 of the Code of Civil Procedure. The jurisdiction of the appellate court under Order XLI, Rule 4 of the Code is open when the other persons who are parties to the proceeding before the subordinate court and against whom a decree proceeded on a ground which was common to the Appellant and to those other persons are either not impleaded as parties to the appeal or has been impleaded as Respondents. Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be scribed by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate.

5. In the facts and circumstances of the present case the ratio decided in the case of Mahabir Prasad (supra) is attracted in full force. Inasmuch as the heir opposite party No. 1 who was the co-Plaintiff is already on record. The opposite party No. 2. is also one of the heir of the deceased opposite party No. 1 and is also representing interest of the minor heir of the said deceased. The opposite party No. 2 is also interested jointly along with other heirs of the opposite party No. 1. The interest having not been splitted up the opposite party No. 2 represents the whole interest and there is no conflict of interest between opposite party No. 2 and the heirs of the deceased. In that view of the matter in

the present case there is no question of abatement even in absence of heirs of the deceased inasmuch as the opposite party No. 2 is representing the interest of other heirs. Over and above in a suit for eviction where there are more than one landlord having joint interest one of the co-landlord, is entitled to the carriage of the proceeding even all alone. If one of the co-landlord can carry on the proceeding even when other co-owner do not join him and he may very well proceed with the suit itself, in revision in absence of the other heirs of the deceased it cannot be said that though such person is the opposite party, the revisional application filed by other side abates.

6. The learned Counsel for the Petitioner contends that even then the present case being a revision the limitation for making an application for substitution is governed under Article 137 and not under Article 120.

7. An examination of Article 120 shows that it had used the expression Plaintiff, Defendant" and "Appellant", "Respondent" in its first column. Inasmuch as the use of those expressions are significant and/or indicative of the Legislative intent that this Article is attracted only in case of applications in a suit or appeal. A revision is not an original proceeding. Therefore, Article 120 is not attracted. It was so held in Harbans Lal Gupta Vs. Sain Dass and Others, , following the decision in Chandradeo Pandey (supra) and deriving support from similar view taken by the High Courts of Delhi, Rajasthan and Andhra Pradesh in judgments reported in AIR 1972 Del 253 : AIR 1979 Raj 179 : Depatla Ammannamma Vs. D. Ramireddy and Others, . In Surat and sons v. Bhargunath (1989) I CCC 111 (All), on similar analogy a view was taken that Article 120 cannot be attracted to a miscellaneous proceedings which will come under Article 137.

8. Then again Full Bench in the case of Chandradeo Pandey (supra) has laid down that an application for substitution of the heirs of the deceased in revision is in effect an application u/s 151 and as such limitation therefore would be governed under Article 137 of the Limitation Act, being residuary Article. The period of limitation under Article 137 is three years, In view of the ratio decided by the Full Bench, by which I am bound, the contention of the learned Counsel for the opposite parties cannot be sustained.

9. The Full Bench had also observed that there was need to amend the rule of this Court so as to prescribe uniformity for the period of limitation in substitution. Sri Haq, has not been able to enlighten me as to whether any rule has been so framed in terms of the observation made by the Full Bench. Sri M. C. Tewari on the other hand vehemently contends that no such rule have been prescribed to bring uniformity in terms of the judgment of the Full Bench. My attention has not been drawn to any such enactment or change in the rule.

10. Article 120 of the Limitation Act prescribes limitation of 90 days from the date of death for making the legal representative of a deceased Plaintiff or Appellant or a deceased Defendant or Respondent, party under the Code of Civil Procedure. On the expiry of the said 90 days from the date of death if no

substitution is effected the suit or the appeal abates automatically, see Balram and Others Vs. IIIrd Additional District Judge and Another, and Dip Narain v. Lachman (1925) 23 ALJ 232; such abatement is required to be set aside (Order XXII, Rule 9(2), Code of Civil Procedure) vide Ram Pratap v. Lalchand (1904) CWN 369. The period of limitation for setting aside abatement as provided in Article 121 is 60 days from the date of abatement. The abatement can be set aside even after expiry of 150 days by obtaining enlargement of time showing sufficient cause taking aid of Section 5 of the Limitation Act, see Mohammad Abdul v. Secretary of State ILR (1914) 36 All 235; Sarat Chandra v. Maihar Stone and Lime Co. Ltd. ILR (1921) 49 Cal 62. In other words, abatement is automatic after the 90 days prescribed by Article 120 have expired, and unless the abatement is set aside on an application prescribed within 60 days (Article 121) or a period further extended in virtue of Section 5 of Limitation Act (Order XXII, Rule 9 (3), C.P.C), the suit or appeal is dead, see Churya v. Banerwar ILR (1928) 48 All 334. To put in a more simple form, if substitution is not effected on the expiry of 90 days the resultant automatic abatement takes place. The abatement is subject to set aside without the aid of Section 5 of the Limitation Act if applied within 60 days from the date of abatement viz; 150 days from the date of death.

11. In the present case the death took place on 6.11.1996. The limitation 90 days expired on or around 6.2.1997. Whereas application for substitution had been made on 4.4.1997, which is not only within three years but also before expiry of 150 days.

12. In that view of the matter the application for substitution is allowed and the heirs mentioned in the said application be brought on record and the cause title be corrected accordingly. The application dated 12.12.1996 filed by the opposite party No. 2 is dismissed. The opposite party No. 2 may be appointed as guardian for opposite party No. 1/11 Rahman Ahmad (minor).

13. At this stage Mr. Haq submits that he has instruction to appear on behalf of all the substituted heirs and he represents the interest of the substituted heirs as well. He thereupon submits that since the original proceeding is very old namely of the year 1973 and the opposite parties are suffering greatly, therefore, the matter may be treated as ready and be taken up for hearing. The learned Counsel for the Petitioners has no objection to the hearing of the case on merit. By consent of the parties the matter is treated as ready and as on day's list, Both the learned Counsel for the parties had addressed the court extensively on merit of the case.

14. Sri Tewari assailed the order dated 7.3.1995 passed in Original Suit No. 22 of 1993 by the Additional District Judge IX-Court. Allahabad/ Judge Small Causes Court on the ground that since in the written statement the Petitioner No. 1 had pointed out that he is not a tenant, therefore, striking out of defence under Order XV, Rule 5 of the U.P. Amendment of CPC cannot be attracted. According to him Rule 5, Order XV of the Code is attracted only against the tenant. According to him the Defendant Petitioner No. 1 was never a tenant in respect of the suit

property under the Plaintiff-Respondent. Therefore, his defence is not liable to be struck off under Rule 5, Order XV of the Code. Though, however, he does not dispute the relationship of landlord and tenant as between the Plaintiff-Respondents and the Defendant-applicants No. 2 and 3. His further contention is that security of a sum of rupees sixty thousand is lying in deposit with the Plaintiff-opposite parties, therefore, there is no question of deposit of any further amount and by reason of such deposit Order XV, Rule 5 is not attracted. Furthermore he contends that it is only the admitted amount that is to be deposited and not the disputed amount. In the present case according to him the Defendant-applicant No. 1 not being tenant the amount is disputed and as such provision of Rule 5 is not attracted. His last contention was that as and when relationship is disputed until the decision with regard to relationship is established, the provisions of Order XV, Rule 5 cannot be attracted. According to him it is attracted only when the dispute is decided and relationship of landlord and tenant is established between the parties.

15. Sri Haq on the other hand opposes the said submission on the ground that an objection was filed by the Defendant Petitioner No. 1. jointly along with Defendant Petitioner Nos. 2 and 3. Presently the revisional application is also filed jointly by all the Defendants. The case made out and the objection was that a sum of Rs. 60,000 is lying in deposit. It has not been pointed out that the said sum was deposited by the Defendant applicants No. 2 and 3 and by the Defendant applicant No. 1, He contends further that in view of the Proviso to Order XV, Rule 5 of the Code whether the amount is disputed or not the deposit is mandatory and in default the consequences provided therein is definite to visit the Defendant-applicants. The expression used in the rule does not postulate the decision on the question of relationship. The question of relationship can be raised only when the amount is deposited. The deposit of amount is prerequisite for deciding the suit for eviction. Unless the precondition is fulfilled there is no scope for raising any defence. The defence is available only after compliance of the said rule.

16. In order to appreciate the situation, it is necessary to refer to Order XV, Rule 5 of the Code as amended in Uttar Pradesh. Rub 5 was introduced by U.P. Act No. 35 of 1972 which runs as under:

5. Striking of defence on non deposit of admitted rent, etc.--(1) In any suit by a lessor for the eviction of a lessee from any immovable property after the determination of his lease, and for the recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease, or of compensation for the use or occupation thereof, whether instituted before or after the commencement of the Uttar Pradesh Civil Laws Amendment Act, 1972, the Defendant shall at or before the first hearing of the suit, (or in the case of a suit instituted before the commencement of the said Act, the first hearing after such commencement) deposit the entire amount of rent, or compensation for use and occupation admitted by him to be due and thereafter throughout the

continuance of the suit, deposit regularly the amount of monthly rent or compensation for use and occupation, due at the rate admitted by him and in the event of any default in this regard, the court may, unless after considering any representation made by him in that behalf if allows him further time on security being furnished for the amount, refuse to entertain any defence or, as the case may be, strike off his defence:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the court may require the Plaintiff to furnish the security for such sum before he is allowed to withdraw the same.

Rule 5 was inserted by U.P. Act No. 37 of 1972 and the proviso to Rule 5 was introduced by U.P. Act No. 57 of 1976.

17. Under the said provision the entire amount of rent or compensation for use and occupation admitted to be due was to be deposited. Therefore, in case of dispute Rule 5 would not be attracted. The said provision also contemplates extension of time in case of default and only on failure to apply for extension upon furnishing security for the amount, the defence was to be struck off.

18. The above rule was substituted by Notification dated 10.2.1981 with effect from 3.10.1981. The present Rule 5 is coined in the following expression:

5. Striking of defence on failure to deposit admitted rent. etc.--(1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the Defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of Sub-rule (2) strike off his defence.

Explanation 1.--The expression "first hearing" means the date for filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned the last of the dates mentioned.

Explanation 2.--The expression entire amount admitted by him to be due" means the entire gross amount, whether as rent or compensation for use and occupation calculated at the admitted rate of rent, for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account (and the amount, if any, paid to the lessor acknowledged by the lessor in writing signed by him) and the amount, if any deposited in any court u/s 30 of the U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972.

Explanation 3.--

(1) The expression monthly amount due means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account.

(2) Before making an order for striking off defence, the Court may consider any representation made by the Defendant in that behalf provided such representation is made within 10 days, of the first hearing or of the expiry of the week referred to in Sub-section (1) as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the Plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the Plaintiff disputing the correctness of the amount deposited.

19. There is a marked difference in between the two provisions with regard to the applicability and scope of the said Rule. The Defendant-applicants are liable to deposit entire amount admitted by him to be due together with interest thereon at the rate of nine percent per annum and whether or not he admits any amount to be due, he shall throughout the continuance of the suit regularly deposit the monthly amount due within a week from the date of its accrual. In the event of default in making deposit either of the amount or both, as the case may be, the defence is to be struck off subject to Sub-rule (2). Sub-rule (2) provides for making a representation within ten days of first hearing or of the expiry of the week referred to in Sub-section (1). If such a representation is made the court has to consider the same before striking off the defence.

20. The impugned order has been translated in English by Sri Tewari. I have perused the same. It does not appear from the said order that any dispute was raised about the amount due. On the other hand, it was contended that a sum of rupees sixty thousand was in deposit from which the amount can be adjusted. The other dispute was that the Defendant applicant No. 1 was not a tenant. Therefore, he is not liable to pay admitted amount or the current rent. Learned court below had disbelieved the case and had found that the Defendant applicants did not comply with the provision of Rule 5 of Order XV of the Code. In the course of argument, Sri Tewari has not argued anything so as to support the ease of the Defendant-Petitioners No. 2 and 3. He has concentrated only on one point argument with regard to Defendant applicant No. 1 and since all the Defendant applicants have joined together and have not pleaded splitting up on the tenancy, the defence cannot be split up.

21. A plain reading of Rule 5, as it stands today divides the range of comprehension into two parts, (i) admitted arrears to be due and, (ii) current dues. Now the liability is to deposit the arrears admitted. Irrespective of admission, it casts the liability of depositing current dues month by month. In default of either of the deposit, the defence is liable to be struck off.

22. In order to avoid the applicability of Rule 5 the Defendant-applicants have been given right under Sub-rule (2) to make a representation within the period prescribed under the said sub-rule. The provision is a complete Code in itself providing for remedy towards avoidance of attraction of Rule 5 by making a representation. Now the time is crucial one. The Defendants-applicants are required to make up their mind as to what stand they would take. If he disputes the amount or relationship, in order to avoid attraction of Rule 5, he has to make a representation within the time prescribed and if he wants not to deposit the arrears. In the present case, no steps have been taken. Only when the Plaintiff-Respondents have applied for striking off the defence, the Defendants-applicants had filed objection to that extent, making out a different case, denying their liability. The same has also been included in the written statement.

23. Admittedly, Rule 5 is mandatory because of the nature of the expression used therein. The court while striking out defence has to exercise its discretion judiciously. In case the provision is not complied with, evil consequences would visit the Defendants-applicants, The court has no alternative in ease of non-compliance of Rule 5 by the Defendants-applicants but to strike off the defence.

24. But there may be cases where Defendants-applicants may not be tenant and may not be liable to pay rent or arrears. In such event, the question is to be decided by the court before striking out defence for which Sub-rule (2) has been provided under which such objection may be raised, but within the time provided. The limitation has been specifically provided in Sub-rule (2) itself as within ten days and no provision has been incorporated empowering the court to extend the time. The period having been fixed by the Legislature and it is not being a period to be fixed by the court, the same is not subject to extension u/s 148 of the Code. The period of ten days is, therefore, mandatory as well. Since specific provision has been provided, the Defendants-applicants are to take resort to the same. In case the Defendants-applicants failed to take shelter of Sub-rule (2), in that event, the court cannot help the Defendant-applicants even though such objection is raised either in the written statement or after the application for striking out of defence is made. Specific provision that has been provided cannot be circumvented by raising the dispute in the objection or in the written statement. Be that as it may, the defence raised in written statement cannot be entertained since the same is the defence, which is liable to be struck off by reason of Rule 5. Therefore, the same cannot come to the aid of the Defendant-applicants even if raised in the written statement. Similarly, defence to the objection to the application striking out of the defence cannot be entertained since such question can be considered by the court provided the representation is made within time prescribed in Sub-rule (2).

25. But then even if the defence is struck off, the Plaintiff Respondent has to succeed on the basis of the case made out in the plaint and proved before the court, though such defence is not available to the Defendants-applicants, but yet it is the duty of the court to see that the Plaintiff has been able to prove his case

for establishing that there is relationship of the landlord and the tenant between the parties. In the present case, the Defendant-Petitioner No. 1 is not claiming to be tenant and, therefore, he is not opposing eviction. The question is only with regard to his liability to pay arrears or current rent. The court has to determine the amount payable as arrears of rent prior to the date of first hearing and the rate of rent and current amount due and payable. The Plaintiff cannot be allowed to reap an undue harvest. The defence as contemplated is to be confined to the defence with regard to eviction, but ascertainment of mesne profit can very well be defended by the parties either on the question of quantum or the period or right or question of liability to pay by one or the other or inter se Defendant-applicants.

26. Therefore, I do not find any reason to interfere with the order impugned for striking out the defence but in view of my observation made above, the striking of defence would not disentitle the Defendant-applicants to adduce evidence with regard to determination of quantum or period or right or interest or arrears or liability to pay inter se Defendants-applicants. The Defendant-applicant No. 1 may also adduce evidence to prove that he having not been a tenant is not liable to pay rent which is the liability of Defendant-applicants No. 2 and 3 exclusively.

27. In the facts and circumstances of the case, the revisional application is, therefore, disposed of in the light of the observation made above with a direction that the learned trial court shall dispose of the Original Suit No. 22 of the 1993 as early as possible preferably within a period of six months from the date a certified copy of this order is produced before the court below. The lawyers representing the respective parties assured that they will not take unnecessary adjournment and shall be co-operative in the matter for early disposal of the proceeding. The learned trial court shall decide the suit in the light of observations made in this judgment to the extent indicated hereinabove.

28. There will be, however, no order as to costs.