

(2003) 02 BOM CK 0045

In the Bombay High Court

Case No : Civil Writ Petition No. 6327 of 2002

Smt. Harjit Kaur Kuljitsingh Kohli

APPELLANT

Vs

Mrs. Padmavati J. Sethia, Tejinder Singh Baldev Singh Kohli,
Manjit Singh Baldev Singh Kohli, Mrs. Rani Kaur Burji and
Surendra Kaur Ratra

RESPONDENT

Date of Decision : 03-02-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10A, Order 22 Rule 11, Order 22 Rule 4, Order 22 Rule 4(1), Order 22 Rule 4(3)

Citation : (2003) 2 ALLMR 461 : (2003) 4 BomCR 567 : (2003) 3 CivCC 453 : (2003) 2 MhLj 894

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : S.S. Kulkarni, for the Appellant; G.S. Godbole, for the Respondent

Final Decision : Dismissed

Judgement

R.M.S. Khandeparkar, J.—Heard learned advocates for the petitioner and the respondent No. 1. The petitioner challenges the order dated 15th October 2001 passed by the lower appellate Court to the extent it rejects the application (Exhibit 26) filed by the petitioner on 23rd July 1999 during pendency of the appeal for deletion of her name from the appeal memo on the ground that the suit filed against original defendant Khuljitsingh had abated as the respondent/plaintiff had not filed an application to bring the legal representatives of deceased Khuljitsingh on record not filed an application to bring the legal representatives of deceased Khuljitsingh on record within prescribed period. Though the impugned order dismissed the appeal filed by the petitioner and other appellants, along with the said application (Exhibit-26), on merits, the challenge is restricted to the order in relation to the said application (Exhibit-26), as this Court had already dismissed another Writ Petition filed by other respondents being Writ Petition No. 5588 of 2002 on 9th October 2002 thereby confirming the order of eviction against the legal representatives of original

defendant Khuljitsingh.

2. Drawing attention to the order dated 5th January 1995 which was passed by the trial Court during pendency of the suit on an application filed by the plaintiff seeking to bring the legal representatives of deceased Khuljitsingh on record, and placing reliance on the decision of Gujarat High Court in the matter of State of Gujarat Vs. Chandramani Shanker Jadhavlal Sanghvi and Others, , it was sought to be contended that the respondent/plaintiff having failed to bring the legal heirs of deceased Khuljitsingh on record within the prescribed time, the suit had already abated and, this is apparent from the cause title of the decree which discloses the name of Khuljitsingh as the defendant even though he had already expired before disposal of the suit. Attention was also drawn to Order VI Rule 18 of the CPC to contend that on account of failure on the part of respondent/plaintiff to secure favourable order on his application to bring the legal representatives on record and, thereafter to bring those legal representatives on record by amending the cause title within specified period, the suit had already abated and, the lower appellate Court had no jurisdiction to cure the said defect in the suit while disposing the appeal.

3. The lower appellate Court in the impugned order has observed that the respondent/plaintiff had in, fact, filed an application (Exhibit-105) on 16th August 1993 to bring on record the legal representatives of deceased Khuljitsingh within the time limit prescribed by law. However, the trial Court failed to pass a formal order directing the legal representatives to be brought on record as it being a ministerial act and that the petitioner along with other legal representatives had participated in the proceedings before the trial Court as well as had filed the appeal by impleading themselves as the appellants. The objection which is sought to be raised under Order XXII, Rule 4 of the CPC is clearly of a technical nature and, therefore, had dismissed the said application.

4. There is no dispute that Order VI Rule 18 of the CPC provides that if a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the court. It may be pointed out, at the out set, that Rule 18 is part of Order VI which is in relation to the "pleadings generally" and, therefore, it will not be strictly applicable to the matters pertaining to death of the parties to the suit and for bringing the legal representatives on record, as the said subject is exclusively dealt with under Order XXII of the Code of Civil Procedure.

5. Rule 1 of Order XXII of the CPC provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. The Rule 4 of Order XXII of the CPC prescribes that where a defendant dies, on an application made by the plaintiff, the Court shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. It

cannot be disputed that such an application has to be filed within the time limit prescribed by law; otherwise the suit would stand abated against the deceased defendant. A clear provision is to be found to the effect in Sub-rule (3) of Rule 4. Obviously in case of failure to bring the legal representative on record within prescribed time, the suit having abated, the plaintiff will have to seek the remedy of setting aside abatement in accordance with the provisions of law.

6. In the case in hand, it is not in dispute that during pendency of the suit and before expiry of period of limitation i.e. 90 days from the date of death of Khuljitsingh, the application (Exhibit-105) was filed by the respondent/plaintiff in the suit to bring the legal representatives of deceased Khuljitsingh on record. It is also not in dispute that the legal representatives of deceased Khuljitsingh were properly identified in the said application. Even addresses of those legal representatives were disclosed and, consequent thereto the trial Court had passed an order dated 5th January 1995 directing issuance of notices to the said legal representatives. At the same time, it is also a matter of record that the cause title of the suit remained without being altered disclosing the names of the legal representatives in place of deceased Khuljitsingh as well as that the petitioner and other legal representatives of Khuljitsingh in their capacity as the legal representatives of deceased Khuljitsingh filed an appeal against the decree of eviction and, only during pendency of the said appeal, an attempt was made by the petitioner to contend that the suit had already abated and, therefore, her name should be deleted from the record.

7. As already seen above, Rule 4 of Order XXII of the Code of Civil Procedure, in fact, enjoins a duty upon Court to "cause the legal representative of the deceased defendant to be made a party" on an application having been filed by the plaintiff within the time limit prescribed by law to bring the legal representative of the deceased defendant on record. It has been further clarified in para 96 of the Civil Manual and, Sub-para 2 of para 96 thereof provides thus

"It shall be the responsibility of the plaintiff to bring on record the correct legal representative of the deceased defendant within the prescribed period of limitation, in the circumstances mentioned in Sub-rule (1) of Rule 4 of Order XXII, by making an application upon affidavit proposing the name of the Legal Representative of the deceased defendant to be brought on record."

Further sub-para (3) thereof provides thus:-

"If the application is made within the prescribed period of limitation, the Court shall order, without issuing previously any notice to the proposed legal representative, that the plaint be amended by adding the legal representative as a party to the suit in place of the deceased defendant and that summons in No. 6 referred to above be issued to him. It shall be open to the legal representative so added as a party to dispute his character as a legal representative when he is served with a summons in Form No. 6 referred to above, and the Court shall decide the dispute under Rule 5 of Order XXII."

8. Law on the point, therefore, clearly discloses that the obligation cast upon the plaintiff to bring the legal representative on record is in the form of filing an application disclosing the correct identity of the legal representative of the deceased defendant with their addresses within the prescribed period of limitation from the date of death of the deceased defendant. Once such an application is filed, it is for the Court to order issuance of notice to the legal representative, so disclosed in such application, in Form No. 6 under Appendix-8 to the Code of Civil Procedure. If the legal representative, who receives such notice, wants to dispute his character as legal representative of the deceased defendant, he has to raise necessary dispute in that regard immediately on receipt of the said notice and cannot wait to raise such dispute at his sweet-will in the proceedings. Sub-para (3) of para 96 of the Civil Manual is very clear in that regard. In fact even Sub-rule 1 of Rule 4 of Order XXII also reveals the same, wherein it is provided that "the Court, on an application made on that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit." In other words, once the application is filed by the plaintiff giving details about the legal representative of the deceased defendant within specified period of limitation, unless the legal representative, served with the notice under Form No. 6, raises dispute about his character as the legal representative of the deceased defendant or any other objection which can entitle the legal representative to avoid himself to be brought on record as legal representative of the deceased defendant, the Court "shall proceed" with the suit. Hence once the application with necessary details regarding the legal representative is filed by the plaintiff within prescribed period of limitation and, while acting on such application, the notices are ordered to be issued in Form No. 6 by the Court, the question of abatement of the suit cannot arise merely because there is failure to alter the cause title of the suit. To take any other view would be encouraging technical pleas being entertained to non-suit the plaintiff for no fault on his part and will also amount to ignoring settled law that the procedure is meant to assist the Court to arrive at a just and proper decision in relation to the dispute between the parties. The rules of procedure are not meant to create undue hardship to the parties. The Apex Court in *Ganesh Trading Co. Vs. Moji Ram*, has clearly held that a procedural law is to facilitate and not to obstruct the course of substantive justice.

9. The Gujarat High Court in *Chandramani*'s case has held that:-

"When an appeal is, therefore, pending the Appellate Court is concerned with the question whether the appeal abates or not either as a whole or in part. The Appellate Court, for the purpose of interlocutory orders, is not concerned with abatement of a suit. The question of abatement of a suit may be argued in appeal and may form the subject matter of the judgment in appeal, but an Appellate Court cannot pass interlocutory orders regarding the abatement of a suit or regarding substitution of the legal representatives of the deceased plaintiff or the defendant. In an order during the pendency of appeal, the Appellate Court can order that the heirs of a deceased appellant or a deceased respondent can

be added. But it cannot order that the heirs of the deceased plaintiff or the deceased defendant be added."

Further it also held thus:-

"The Appellate Court can pass orders under Order 22, C.P.Code, only if one of the parties to the appeal dies after the suit has been decided and during the pendency of the appeal. The Appellate Court cannot pass orders under Order, C.P.Code in respect of a party who had died during the pendency of the suit. The same view has been taken in Amarsangji Indrasangji Vs. Desai Umed, and Mrs. Gladys Coutts Vs. Dharkhan Singh and Others, ."

It is to be noted that in a case before the Gujarat High Court, defendant No. 3 therein had expired on 30th October 1958 but the said fact was not noticed either by the trial Court or by the counsel and, the decree was passed on 7th January 1959. An appeal was filed against the decree and in the course of appeal, an application was filed on 31st March 1960 for bringing the heirs of deceased defendant No. 3 on record and, simultaneously another application was filed on behalf of defendant Nos. 1 and 2 to the effect that the suit had abated and that the Court should declare that the suit had abated. Referring to Rule 11 of Order 22, Code of Civil Procedure, which provides that "in the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an "appellant", the word "defendant" a "respondent", and the word "suit" and "appeal", the Gujarat High Court had drawn above quoted conclusions.

10. As regards the decision of the Division Bench of this Court in Amarsangji Indrasangji Vs. Desai Umed, which was relied upon by the Gujarat High Court in Chandramani's case, the facts therein were that the sole respondent therein, who was the appellant in lower appellate Court, and the defendant in the trial court had expired during. Pendency of appeal before the lower appellate Court and, without the knowledge of his death, the lower appellate Court had disposed of the appeal. It was during pendency of the second appeal that it was revealed to the appellant that the defendant therein had already expired during pendency of the appeal before the lower appellate Court, without any steps being taken to bring the legal representatives on record within the prescribed time and in those circumstances of case and, referring to Order 22, Rules 9(2) & 11 it was observed as under:

"In the events which have happened, the lower appellate Court had really no jurisdiction to hear the appeals as there was no appellant before it."

11. Apparently both the decisions are clearly distinguishable on facts. In both the cases, no steps were taken to bring the legal representatives of the deceased party on record within the prescribed period of limitation and as such the suit and the appeal respectively had already abated. That is not the case in the matter in hand. Herein, the respondent had taken prompt steps to bring the legal representatives of the deceased defendant on record within the period of limitation. The ratio of a decision has to be understood bearing in mind the facts

of the case and the point for determination which arise and the decision of the court on those points in the given set of facts. The law on this point is well settled by the decision of the Apex Court in Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, . Both the decisions referred to above are of no help in the case in hand. In the case before the Gujarat High Court no steps were taken at all by the plaintiff to bring the legal representatives of the deceased defendant on record within the period of limitation during pendency of the suit. In the case before the Division Bench of this Court no steps were taken by the legal representative of the appellant to bring themselves on record within the period of limitation during the pendency of appeal before the first appellate court. That is not the case in hand. Herein, the plaintiff had done whatever the was required to do under the provisions of law. In fact it was necessary for the trial Court to order the alteration to the cause title pursuant to the application filed by the respondent/plaintiff within prescribed period for bringing the legal representatives of deceased Khuljitsingh on record.

12. There is yet another point to be considered while referring to the decision in Chandramani's case. The decision was delivered prior to 1976's amendment to the Code of Civil Procedure. With enforcement of 1976's amendment to the Code of Civil Procedure, once a party to the suit expires, a duty is cast upon the lawyer representing the such party, to communicate the fact of death to the opposite party in terms of provisions contain in Rule 10A of Order XXII of the Code of Civil Procedure. It is nobody's case that there was compliance of this rule in the case in hand by the advocate appearing for the deceased defendant even though admittedly defendant No. 3 expired on 20.5.1993, i.e. after the enforcement of 1976 amendment to the Code of Civil Procedure. Unless this primary obligation is discharged and it is established with cogent evidence that the opposite party had sufficient opportunity to know and, had, in fact, knowledge of the death of the defendant, the plea of abatement of the suit at the instance of party having failed to comply with the obligation mentioned under Rule 10A of Order XXII of the CPC cannot be entertained. Nobody can be allowed to reap benefit of his own lapse and to non-suit the plaintiff.

13. It is also sought to be argued that the appellate court has no jurisdiction to set aside the abatement, which has already occurred during the pendency of the suit, and therefore the lower appellate court could not have allowed the petitioner to be impleaded as party to the appeal. The argument is misconceived in the facts of the case. First of all, it is to be noted that there was no abatement of the suit in hand. The procedure for bringing the legal representatives of the deceased defendant on record, as already stated above, is as prescribed in Rule 4 of Order XXII of the Code of Civil Procedure. In fact, the expression "bringing legal representative on record" is not to be found in Rule 4 of Order XXII but has been used in para 96(2) of Civil Manual. However, Rule 4 of Order XXII as well as Para 96(2) prescribes the procedure for bringing the legal representatives of deceased defendant on record by way of an application made in that behalf giving details about the legal representative. The procedure prescribed under

both the provisions of law does not speak of any alterations to be carried out in cause title by the plaintiff without any order to that effect by the court nor the law prescribes any time limit for carrying out such alterations or changes. The duty cast upon the plaintiff for the purpose of bringing the legal representative of the deceased defendant is restricted to the filing of the application giving details of the legal representatives, within the period of limitation.

14. Once such an application is filed within the prescribed period of limitation, any delay on the part of the court to pass an order either for issuance of notices to the legal representatives disclosed in the application or to order the alteration in the cause title of the suit, will not and cannot result in abatement of the suit. Inaction on the part of the court, in spite of prompt action on the part of the plaintiff as regards his obligation under Order XXII Rule 4 of the CPC read with Para 96 of the Civil Manual, cannot non-suit the plaintiff. In the case in hand, the respondent plaintiff had filed the application to bring the legal representatives of the deceased defendant No. 3 within the prescribed period of limitation. There was no abatement of the suit. Hence there was no question of setting aside abatement of the suit by the lower appellate court. The observation about the petitioner being brought on record in place of deceased defendant No. 3, made in the impugned order, cannot be construed as setting aside of abatement as there was no abatement at all.

15. In the case in hand, it is also apparent that the petitioner having failed to secure favourable order on merits and, having realized weakness of her case, the objection about abatement of suit is sought to be raised. It is nothing but a desperate attempt to non-suit the respondent/plaintiff on the basis of technicalities as rightly observed by the lower appellate Court. However, it is to be observed that the order directing the bring the legal representatives on record is not a ministerial act as is sought to be observed by the lower appellate Court. It has to be a judicial order and, no judicial order can be termed as a ministerial act, though giving effect to such judicial order, may at times be a ministerial act. The decision which is required by the Court on an application filed by the plaintiff seeking legal representatives of the deceased defendant to be brought on record has to be decided on application of mind and, after ascertaining whether the said application is within the prescribed period or not the whether it satisfies the requirements of Order XXII of the Code of Civil Procedure.

16. It was also sought to be contended that there was no specific order allowing the application filed by the plaintiff to bring the legal representatives of deceased defendant on record. As already pointed out above, the provisions of law containing in Rule 4 Order XXII of the CPC as well as the provisions of Para 96 of the Civil Manual are to the effect that pursuant to the application being filed by the plaintiff to bring the legal representatives of the deceased defendant on record within the prescribed period, and giving all the necessary details about the legal heirs and representatives including their addresses, the court is left with no alternative than to issue notices in Form No. 6 of Appendix-B to CPC to

such legal representatives and, on service of such notices, if such legal representatives want to raise any objection as regards their character of being legal representatives of the deceased defendant, they have to raise the same immediately there upon in order to enable the Court to hold enquiry under Order XXII Rule 5 of the Code of Civil Procedure. In other words, in case no dispute is raised pursuant to the receipt of such notice in Form No. 6, Appendix-B to the CPC by the legal representatives of the deceased defendant, what remains to be done is only the ministerial work of carrying out the alteration in the cause title to the suit. As already seen above, on the application being filed Exhibit 105 in the suit, the trial Court had passed the order for issuance of notices to the legal representatives of the deceased defendant No. 3 on 5th January 1995. It is nobody's case that on receipt of such notices, the petitioner or any other legal representative of deceased defendant No. 3 had sought to dispute their character of being the legal representatives of the deceased defendant. Apparently no further order was required to bring the legal representatives on record and, only ministerial act of carrying out the alteration to the cause tile was required to be ordered by the trial court in terms of para 96(3) of Civil Court Manual. Hence the contention of absence of order under Rule 4 of Order XXII of the CPC has also to be rejected.

17. In the result, therefore, for the reasons mentioned above, the petition fails and it is rejected.

18. All concerned to act on ordinary copy of this order duly authenticated by the Sheristedar of this Court.