
(2012) 05 AHC CK 0300
In the Allahabad High Court
Case No : C.M.W.P. No. 32814 of 2002

Smt. Shanti Devi	Vs	APPELLANT
Dy. Director of Consolidation and Others		RESPONDENT

Date of Decision : 16-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, Order 22 Rule 5, 2(ii)

Citation : (2013) 1 AWC 328

Hon'ble Judges : Ran Vijai Singh, J

Bench : Single Bench

Advocate : M.A. Qadeer, Shamim Ahmad, Anees Ahmad, R.P.S. Chauhan, R.R. Khan, V.M. Zaidi, S.M.G. Asgar, S.C. Sinha and A.K. Tripathi, for the Appellant; Anupam, Kulshrestha, Brijesh Yadav, K. Srivastava and C.S.C., for the Respondent

Judgement

Re: Civil Misc. Substitution Applications No. 287860 of 2008 and 322897 of 2009 are taken up for orders.

Ran Vijai Singh, J.—Both the applicants claim themselves to be legal heir and representative of sole petitioner late Shanti Devi. The applicant of Substitution Application No. 287860 of 2008 claim himself to be sole surviving heir of late Shanti Devi whereas the applicant in Substitution Application No. 322897 of 2009 claim herself to be daughter of late Shanti Devi. Both sides dispute status of each other and their relation to late Shanti Devi, Sri M. A. Qadeer learned senior counsel assisted by Sri Shamim Ahmad appears in Substitution Application No. 287860 of 2008 whereas Sri V. M. Zaidi, learned senior counsel assisted by Sri S.M.G. Asgar, appears in Substitution Application No. 322897 of 2009.

2. It is not in dispute that late Shanti Devi had filed writ petition and she has passed away. In both the applications, the applications praying for condonation of delay in filing the substitution application have been allowed, Both the applications have been filed under Order XXII, Rule 3 of the Code of Civil Procedure.

Heard learned counsel for the parties.

3. For deciding the rival claim for substitution, the language used under Rule 3 and Rule 5 of Order XXII of CPC are required to be examined, which are reproduced herein under:

Procedure in case of death of one of several plaintiff's or of sole plaintiff.--(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

5. Determination of question as to legal representative.--Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

[Provided that where such question arises before an appellate court, that Court may. before determining the question. direct any subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefor, and the appellate court may take the same into consideration in determining the question.]

4. The words used "shall proceed with the suit" in Order XXII, Rule 3 is if read with Rule 5 then it will mean to carry on the" proceeding up till it reaches to its logical end. To my mind the scope of substitution application is limited one, i.e., to prosecute the suits/proceedings and the order passed on the substitution application is not binding on the court which will examine the genuineness of the documents claiming right over the property in dispute.

The view taken by me is supported by numerous decisions of this Court as well as of other High Courts. In the case of Jagdish Vs. District Judge, Gorakhpur and others, this Court has observed that:

The scope and ambit of Order XXII is related to the carriage of the proceedings to the extent who is to carry on the proceedings. It does not determine the rights of the parties or even persons claiming as legal representatives, The definition of legal representative as defined in Section 2(ii) of the CPC includes a person who inter-meddles with the estate of the deceased. Thus, it is only a proceeding for ascertaining as to who is the legal representative eligible to continue the lis. The scope of enquiry under. Order XXII cannot surpass the purpose and object for which Order XXII is prescribed. It cannot be stretched to the extent of determining the Us between the parties on merits by deciding title. Thus, the provision of Rule 5 of Order XXII relating to determination of the question as to legal representative is confined only to the extent of determining the legal representative for the purpose of carriage of the proceeding and representing the lis or the estate even though he may be a inter-meddler. It does not determine

the rights of the parties. Even if it is so determined, the same would be wholly outside the scope of final determination in the suit where the question is involved. The question remains open to be decided in appropriate proceeding either in the suit itself or in a separate suit or proceeding as the case may be. The substitution does not preclude the parties to establish their respective right during the course of hearing of the suit, there it could be so permitted within its scope and ambit, on materials to be produced by adducing evidence oral or documentary. Even if a legal representative is excluded still then he has a right to apply for being added as a party to a proceeding if he is so advised depending on the facts and circumstances of the case.

5. The Madras High Court has also taken a same view in the case of Krishnakumar Vs. N. Goverdhana Naidu and Another, while dealing the scope of Order XXII, Rule 5 which reads as under:

An adjudication in the course of proceeding to substitute legal representatives does not make the legal representative heirs as such. The finding should be construed to have given only for the prosecution of the proceeding. It is not a decision on merits. It cannot operate as *res judicata*.

The same view has been reiterated in the case of Muniappa Nadar and Others Vs. K.V. Doraipandi Nadar and Another,

6. The Full Bench decision of the Punjab High Court in the case of Mohinder Kaur and Another Vs. Piara Singh and Others, have also taken the same view that the decision in a proceeding under Order XXII, Rule 5 of the Code does not operate as *res judicata*. A similar view has been taken by the Himachal Pradesh High Court in the case of Nisapati Vs. Smt. Gyatri and Others,

7. The Rajasthan High Court has also taken the same view in the case of Kalu Ram Vs. Charan Singh and Another, where it has been observed:

that the enquiry into right to heirship is not the determining factor in deciding whether a person is or is not legal representative for the purpose of proceeding before the Court. What is required to be considered is whether the person claiming to represent the estate of the deceased for the purpose of *lis* has sufficient interest in carrying on litigation and is not an imposter. In case, of rival claimants, it may also be necessary to decide that out of the rival claimants, who really is the person entitled to represent the estate for the purpose of a particular proceedings. Even that determination does not result in determination of *inter se* right to succeed to the property of the deceased and that right has to be established in independent proceedings in accordance with law. In the said case, in a suit for specific performance of contract of sale transferor died leaving his widow who too dies during the proceeding. One stranger on the strength of an unprobated Will sought to be impleaded in the suit. He was allowed to be substituted in place of the widow.

8. This Court in the Substitution Application No. 42063 of 2008 in Second Appeal

No. (282) of 2002, Smt. Pramila Devi v. Rajendra Prasad and others, decided on 10.9.2008 has also taken the same view. In this case since the sole petitioner has died and both the applicants namely Sri Om Prakash and Smt. Abha Sharma have filed substitution application to prosecute the petition, therefore, both substitution applications are allowed, Let Sri Om Prakash and Smt. Abha Sharma be substituted in place of sole petitioner in the array of parties by the office within three weeks.

List this case in second week of July, 2012.